

DOCKET NO. 588949

IN RE D'ANTRO INC.	§	BEFORE THE
D/B/A OBSERVATORY	§	
PERMIT NOS. MB436683, LB436684	§	
	§	TEXAS ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1393)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 17th day of August 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jonathan A. Kaplan. The hearing convened on June 22, 2000 and adjourned June 22, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 26, 2000. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

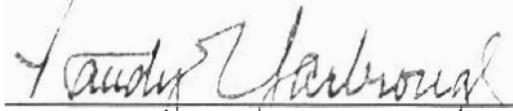
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

This Order will become final and enforceable on September 7, 2000, unless a Motion for Rehearing is filed **before** that date

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 17th day of August, 2000.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Randy Yarbrough", is written over a light gray rectangular background.

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Jonathan A. Kaplan
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (210) 308-6854

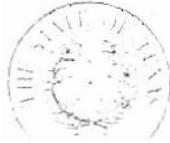
Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

D'Antro, Inc.
d/b/a Observatory
RESPONDENT
13307 San Pedro 'A'
San Antonio, Texas 78216-2063
Certified Mail No. Z 473 042 895

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
San Antonio District Office

State Office of Administrative Hearings



JUL 31 2000 ✓

Shelia Bailey Taylor
Chief Administrative Law Judge

July 28, 2000



Doyme Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

RE: Docket No. 458-00-1393; Texas Alcoholic Beverage Commission vs.
D'Antro, Inc., d/b/a Observatory (TABC Case No. 588949)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Christopher Burnett, attorney for Texas Alcoholic Beverage Commission, and to D'Antro, Inc., d/b/a Observatory. For reasons discussed in the proposal, I recommend that Respondent's conduct surety bond should be forfeited to the State.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

Jonathan A. Kaplan
Administrative Law Judge

JAK:msw
Enclosure

xc: Holly Wise, Docket Clerk, State Office of Administrative Hearing - **FACSIMILE**,
512-475-4994
Christopher Burnett, Staff Attorney, Texas Alcoholic Beverage Commission -
D'Antro, Inc., d/b/a Observatory -

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

D'ANTRO, INC.
D/B/A OBSERVATORY
PERMIT NO. MB-436683, LB436684

BEXAR COUNTY, TEXAS
(TABC CASE NO. 588949)

§ BEFORE THE STATE OFFICE
§
§
§ OF
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§ ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff and Commission) initiated this action seeking forfeiture of the conduct surety assignment of a Certificate of Deposit posted by D'Antro, Inc., (Respondent) d/b/a Observatory. Respondent assigned a Certificate of Deposit in the amount of \$5000 for conduct surety¹ on October 25, 1999, in compliance with the TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13 (Vernon 1995 and Supp. 2000). The Staff recommended that the assigned Certificate of Deposit be forfeited because the Respondent had committed three violations of the Commission's rules and regulations since September 1, 1995. The Respondent did not attend the hearing. The undersigned Administrative Law Judge (ALJ) agrees with the Staff's recommendation that Respondent's conduct surety assignment be forfeited.

I. Jurisdiction, Notice, and Procedural History

The hearing in this matter convened on June 22, 2000, before State Office of Administrative Hearings (SOAH) ALJ Jonathan Kaplan, at the SOAH's offices in San Antonio, Bexar County, Texas. The Staff was represented by Staff Attorney, Christopher Burnett, who appeared and announced ready. The Respondent did not appear and was represented at the hearing, therefore the hearing proceeded on a default basis, pursuant to 1 TEX. ADMIN. CODE § 155.55. Because the hearing proceeded on a default basis, Staff's factual allegations are deemed admitted as true, and the ALJ incorporated those allegations into the Findings of Fact and Conclusions of Law.

The Commission and SOAH have jurisdiction over this matter as reflected in the Conclusions of Law. The notice of intention to institute enforcement action and the notice of the hearing met the notice requirements imposed by statute and by rule as set forth in the Findings of Fact and Conclusions of Law.

¹ Respondent provided a conduct surety assignment, a \$5000 certificate of deposit numbered 2173964-40, from the International Bank of Commerce. Exhibit 1.

II. Background

On August 27, 1998, the Texas Alcoholic Beverage Commission (the Commission) issued a Mixed Beverage Permit No. MB-436683 and a Mixed Beverage Late Hours permit No. LB-436684, to Respondent for the premises known as Observatory at 13307 San Pedro "A", San Antonio, Bexar County, Texas. On October 25, 1999, Respondent, as applicant for a Mixed Beverage permit, assigned a Certificate of Deposit for Observatory for \$5,000.00 as required by the TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13.

The Respondent committed three violations of the Commission's rules and regulations since September 1, 1995. The violations occurred on October 23, 1998, June 4, 1999 and August 6, 1999. The Respondent signed an "Agreement and Waiver of Hearing" regarding these violations on December 10, 1998, July 1, 1999, and October 29, 1999, respectively. The December 10, 1998 agreement contained the following language:

My name is Raul Guerra. I am the permittee. I neither admit or deny that the violations stated above have occurred and do hereby waive my right to a hearing. I understand that the primary CLP stated above as well as all associated licenses or permits will be suspended/cancelled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of \$1050.00 must be received by the final due date stated on the administrative order. I am aware that this agreement may be rejected by the Administrator of the Texas Alcoholic Beverage Commission at which time the licensee or permittee will be granted a hearing on the matters in question. *The signing of this waiver may result in the forfeiture of any related conduct surety bond.*

(emphasis added in italics).

The July 1, 1999 agreement contained the following language:

My name is Raul Eduardo Guerra. I am the permittee. I neither admit or deny that the violations stated above have occurred and do hereby waive my right to a hearing. I understand that the primary CLP stated above as well as all associated licenses or permits will be suspended/cancelled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of \$750.00 must be received by the final due date stated on the administrative order. I am aware that this agreement may be rejected by the Administrator of the Texas Alcoholic Beverage Commission at which time the licensee or permittee will be granted a hearing on the matters in question. *The signing of this waiver may result in the forfeiture of any related conduct surety bond.*

(emphasis added in italics).

The October 29, 1999 agreement contained the following language:

My name is Michael Shaw. I am an officer of the corporation. I neither admit or deny that the violations stated above have occurred and do hereby waive my right to a hearing. I understand that the primary CLP stated above as well as all associated licenses or permits will be suspended/cancelled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of \$1500.00 must be received by the final due date stated on the administrative order. I am aware that this agreement may be rejected by the Administrator of the Texas Alcoholic Beverage Commission at which time the licensee or permittee will be granted a hearing on the matters in question. *The signing of this waiver may result in the forfeiture of any related conduct surety bond.*

(emphasis added in italics).

In lieu of the cash civil penalties noted above, the Respondent was offered seven days suspension for the violation which occurred on October 23, 1998, five days suspension for the violation which occurred on June 4, 1999 and ten days suspension for the violations which occurred on August 6, 1999.

As a result of these waiver agreements, the Commission Administrator entered Orders on December 14, 1998, July 5, 1999, and November 4, 2000, respectively. The Orders adjudicated that the violations acknowledged by Respondent in the waiver agreements had occurred. The Orders further provided that Respondent's permit(s) would be suspended unless Respondent paid a civil penalty in the amount indicated above for each occurrence.

III. Applicable Law

The Commission may revoke a license or permit, or deny renewal of a license or permit, if the holder violates a provision of the rules or regulations of the Commission, in accordance with TEX. ALCO. BEV. CODE ANN. §6.01 (Vernon 1995) and 61.71 (Vernon 1995 and Supp. 2000). Additionally, the Commission may seek forfeiture of a conduct surety assignment when a license or permit has been cancelled, or where there has been a final adjudication that the licensee or permittee has committed three violations of the TEX. ALCO. BEV. CODE ANN. since September 1, 1995, in accordance with 16 TEX. ADMIN. CODE § 33.24(j) (1999).

When posting a conduct surety assignment, the assignment form specifies on its face that the permit or license holder must agree to "conform with the Texas Alcoholic Beverage Code and rules of the Commission." In signing the form, the permittee is also put on notice that if he "violates a law of the state relating to alcoholic beverages or a rule of the commission, the amount of the certificate of deposit shall be paid to the state," subject to certain conditions. See TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13.

IV. Proposed Findings of Fact

On October 25, 1999, D'Antro Inc., (Respondent) posted a conduct surety assignment of a Certificate of Deposit for Observatory located at 13307 San Pedro "A", San Antonio, Bexar County, Texas, for \$5,000.00. The Texas Alcoholic Beverage Commission (the Commission) issued a Mixed Beverage Permit No. MB-436683 and a Mixed Beverage Late Hours permit No. LB-436684 to Respondent on August 27, 1998.

2. On August 27, 1999, the Commission renewed both of the Respondent's permits.
3. On May 30, 2000, the staff for the Commission (Staff) mailed notice of hearing to the Respondent via certified mail, return receipt requested no. Z 473 040 240, to Respondent's mailing address at 13307 San Pedro "A", San Antonio, Texas 78216. A green receipt was not included with Petitioner's exhibits, but the envelope apparently was not returned.
4. The notice of hearing contained a statement of the date, time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. The notice of hearing also contained the following language in capital letters in 10-point or larger boldface type: If a party fails to appear at the hearing, the factual allegations in the notice of hearing will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default.
6. The hearing was convened on June 22, 2000, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. The Respondent did not appear at the hearing. Christopher Burnett, Attorney for the Petitioner, represented the Staff. The ALJ closed the record that same day.
7. On December 10, 1998, July 1, 1999, and October 29, 1999, the Respondent signed an "Agreements and Waivers of Hearings" regarding the above referenced violations of the TEX. ALCO. BEV. CODE ANN. By signing each waiver agreement, Respondent declared and acknowledged that certain violations had been committed on October 23, 1998, June 4, 1999 and August 6, 1999, respectively, and that his permit would be suspended or cancelled by the Commission unless he paid a specified civil penalty for each occurrence.
8. The Commission Administrator entered three separate orders on December 14, 1998, July 5, 1999, and November 4, 2000, finding Respondent had committed three violations of the Commission's rules and regulations.
9. Respondent committed three violations of the Commission's rules and regulations which resulted in three final adjudications of these violations since September 1, 1995.

V. Proposed Conclusions of Law

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.35, 25.04, 11.11, and 61.71 (Vernon 1995 and Supp. 2000) and 16 TEX. ADMIN. CODE (TAC) § 33.24 (1999).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a Proposal for Decision containing Findings of Fact and Conclusions of Law pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43 (Vernon 1995 and Supp. 2000) and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000).
3. Proper and timely notice of the hearing was effected on Permittee pursuant to Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000), and 1 TAC ch. 155 (1999).
4. Respondent holds permit No. MB-436683 and permit No. LB-436684, and posted a conduct security assignment of a certificate of deposit in accordance with the requirements set forth in 16 TAC § 33.24 and TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13 (Vernon 1995 & Supp. 2000).
5. Respondent committed three violations of the Commission's rules and regulations, in accordance with 16 TAC § 33.24(j).
6. Respondent violated 16 TAC § 33.24 (1999) and TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13, by violating a Commission rule and a law of the State of Texas relating to alcoholic beverages while holding Mixed Beverage permit No. MB-436683 and Mixed Beverage Late Hours permit No. LB-436684, issued by the Commission, and Respondent's conduct surety assignment of the Certificate of Deposit should be forfeited to the State.

SIGNED and entered this 26 day of July, 2000.



JONATHAN KAPLAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS