

DOCKET NO. 590246

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	ALCOHOLIC
MANUEL ALFREDO CUETO	§	
D/B/A EL CHIHUAHUENSE	§	
PERMIT NO. BE-314696 & BL-314697	§	
POTTER COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-2658)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 19th of November, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened and adjourned on September 25, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 16, 2001. 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.

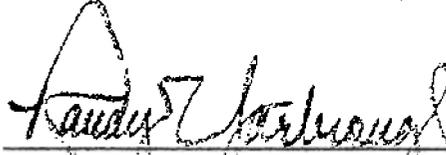
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Renewal Application of Manuel Alfredo Cueto, d/b/a El Chihuahuense, for a Beer Retailer's On-Premise License and a Retail Dealer's On-Premise Late Hours License be **DENIED**.

This Order will become final and enforceable on December 10, 2001, 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 19th day of November, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Timothy G. Pirtle
ATTORNEY FOR RESPONDENT
P.O. Box 10186
Amarillo, Texas 79116-0186
VIA FACSIMILE: (806) 374-2620 AND
BY CERTIFIED MAIL NO. 7000 1530 0003 1927 5832

Administrative Law Judge B. L. Phillips
State Office of Administrative Hearings - Lubbock
VIA FACSIMILE: (806) 792-0149

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Lubbock District Office
Licensing Division



TEXAS ALCOHOLIC BEVERAGE COMMISSION

Post Office Box 13127, Austin, Texas 78711-3127 (512) 206-3333

Rolando Garza, Administrator

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November 13, 2001

Mr. Randy Yarbrough
Assistant Administrator
Texas Alcoholic Beverage Commission
P. O. Box 13127
Austin, Texas 78711-3127

Re: Docket No. 590246
TABC v. Manuel Alfredo Cueto
d/b/a 590246

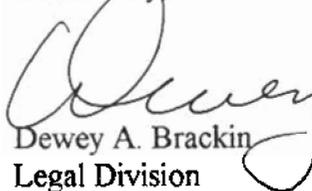
Dear Mr. Yarbrough:

Please find enclosed a Proposal for Decision and exhibits in the above-referenced cause. No exceptions to the Proposal have been filed.

After your review, please inform this office of your decision. We will then draft an Order conforming with your judgment.

Thank you for your attention to this matter.

Yours truly,


Dewey A. Brackin
Legal Division

DAB/yt

*Adopt PFD
Deny Renewal
Randy Yarbrough
11-13-2001*

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Allan Shivers, Jr., Chairman
Austin

John T. Steen, Jr., Member
San Antonio

Gail Madden, Member
Dallas

DOCKET NO. 458-01-2658

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
VS.	§	OF
	§	
MANUEL ALFREDO CUETO	§	
D/B/A EL CHIHUAHUENSE	§	
LICENSE NOS. BE314696, BL314697	§	
POTTER COUNTY, TEXAS	§	
(TABC CASE NO. 590246)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff or Commission) initiated this action against Manuel Alfredo Cueto d/b/a El Chihuahuense (Respondent) for allegedly making a false statement or misrepresentation on an original or renewal application and because two years have not elapsed since the termination of the Respondent's deferred adjudication and probation for a controlled substance offense. Staff recommended that Respondent's renewal application be denied. The Administrative Law Judge (ALJ) agrees with the Staff's recommendation that Respondent's renewal application be denied.

I. Jurisdiction, Notice, and Procedural History

The hearing on this matter convened on September 25, 2001, before ALJ B. L. Phillips, at the offices of the State Office of Administrative Hearings in Lubbock, Lubbock County, Texas. Staff was represented by Dewey Brackin, Assistant Attorney General, who appeared by telephone. Respondent was represented by Timothy G. Pirtle, Attorney, who also appeared by telephone. The record closed that same day.

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute enforcement action and 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.

II. Discussion

A. Evidence.

The Staff offered into evidence four exhibits. Exhibit number 1 is the Respondent's permit and license history. Exhibits two and three are the renewal applications that Respondent submitted to the Commission, with the first dated January 24, 2001 and the second January 25, 2001. The final exhibit is an Order Deferring Adjudication And Placing Defendant On Community Supervision, dated October 4, 1999. No testimony was offered in this case, and Respondent did not offer any evidence.

B. Analysis.

Texas Alcoholic Beverage Code (the Code) § 61.71(a)(4) states that the Commission may cancel an original or renewal retail dealer's on- or off-premise license if it is found that the licensee made a false statement or a misrepresentation in his original application or a renewal application. Exhibit two is the first renewal application filed by the Respondent with the Commission on January 24, 2001. On that application, Respondent was required to answer the question "Has any person named in question 5 or his or her spouse been finally convicted or received deferred adjudication for any of the following offenses?" That list includes any felony offense and any offense involving controlled substances as defined in Texas Controlled Substances Act or dangerous drugs. Respondent marked the answer to this question "No". On January 25, 2001, Respondent filed a second renewal application with the Commission. On that application, Respondent marked "Yes" in response to the above question and marked the block for "any offense involving controlled substances as defined in Texas Controlled Substances Act or dangerous drugs." An attachment to that application explained that Respondent had, on October 4, 1999, received deferred adjudication and two years probation for the offense of possession of a controlled substance. Exhibit four indicates that Respondent on October 4, 1999 pleaded guilty to a state jail felony and received deferred adjudication for the charge and two years of community supervision.

Code §109.532 (b)(1) provides that the Commission may deny the renewal of a license or permit for an applicant if the Commission determines that a previous criminal conviction or deferred adjudication indicates that the applicant is not qualified or suitable for a license or permit. TABC Rule 33.1(a) states that a deferred adjudication for any felony offense or any controlled substances offense may indicate that the applicant is not qualified or suitable to hold a permit or license under Code § 109.532(b)(1) and may be grounds for denial unless two years have elapsed since the termination of the probation served by the applicant. Exhibit four indicates that

the termination of Respondent's probation would not occur until October 4, 2001; therefore, the two year period after termination had not even begun until after the date of the hearing.

Respondent's attorney argued that the record shows that Respondent was already penalized for the same offense as that for which he received probation and that therefore he should not be penalized again for the same offense. However, a careful review of the record indicates that this is not the case. Respondent argued that the Agreement and Waiver of Hearing dated January 19, 2000, which is part of Petitioner's Exhibit number one, demonstrates that Respondent agreed to a suspension or fine for the offense of possession of cocaine on the licensed premises (emphasis added) on April 28, 1999. However, Petitioner's exhibit number three, the Renewal Application dated January 25, 2000, which was signed and submitted by Respondent to the Commission, clearly states that the offense for which he received probation "did not occur inside the property where my wine and beer license was being used."

Respondent further argued that the failure to indicate on the Renewal Application dated January 24, 2000 that he had received deferred adjudication was an oversight on his part which was corrected in the Renewal Application dated January 25, 2000. It seems very unlikely that Respondent could have failed to remember that he was on deferred adjudication for possession of a controlled substance. The Order Deferring Adjudication is dated October 4, 1999 and the first Renewal Application was submitted a mere three and a half months later.

The ALJ agrees that the Commission has proved that Respondent is not qualified or suitable for a license because more than two years have not elapsed since the termination of Respondent's probation and that Respondent made a false statement on the renewal application dated January 24, 2001, and therefore Respondent's renewal application should be denied.

III. Proposed Findings of Fact

1. On January 26, 1996, the Texas Alcoholic Beverage Commission (the Commission) issued a Beer Retailer's On-Premise License BE-314696 and a Beer Dealer's On-Premise Late Hours License BL-314697 to Respondent for premises known as El Chihuahuense, 7908 Triangle Drive, Amarillo, Potter County, Texas.
2. Respondent received proper and timely notice of the hearing from the staff for the Commission (Staff) in a notice of hearing dated September 10, 2001. The notice was properly sent to Respondent at his address of record.

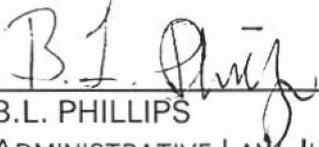
3. The notice of hearing contained a statement of the time, place and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular section of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. The hearing was convened on September 25, 2001, at the offices of the State Office of Administrative Hearings in Lubbock, Lubbock County, Texas. Timothy G. Pirtle, Attorney, appeared by telephone on behalf of Respondent. Dewey Brackin, Assistant Attorney General, represented Staff and also appeared by telephone.
5. On January 24, 2001, Respondent signed and filed with the Commission a Renewal Application for Beer Retailer's On Premise License BE-314696 and Retail Dealer's On-Premise Late Hours License BL-314696.
6. On that Renewal Application, Respondent denied that he had received deferred adjudication for any felony offense or any offense involving controlled substances as defined in Texas Controlled Substances Act or dangerous drugs.
7. On January 25, 2001 Respondent signed and filed with the Commission a second Renewal Application for the same licenses and admitted that he had received deferred adjudication on October 4, 1999 for the offense of possession of a controlled substance.
8. On October 4, 1999, Respondent pleaded guilty to the offense of possession of a controlled substance and received two years probation and an Order Deferring Adjudication.
9. More than two years have not elapsed since the termination of Respondent's probation.

IV. Conclusions of Law

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.35 and 61.71.
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this proceeding and to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. ch. 2003.

3. Service of proper and timely notice of hearing was effected upon Respondent pursuant to TEX. GOV'T CODE ANN. ch. 2001.
4. Based on Findings of Fact Nos. 5-8, Respondent violated TEXAS ALCOHOLIC BEVERAGE CODE § 61.71(a)(4).
5. Based on Finding of Fact Nos. 8-9, Respondent is not qualified or suitable for a license or permit pursuant to TEX. ALCO. BEV. CODE ANN. §109.532 (b)(1).
6. Based on the foregoing, denial of Respondent's Renewal Application for Beer Retailer's On Premise License BE-314696 and Retail Dealer's On-Premise Late Hours License BL-314696 is warranted.

SIGNED this 16th day of October, 2001.



B.L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS