

**DOCKET NO. 594562**

IN RE: YOU AND I RESTAURANT	§	BEFORE THE TEXAS
& CLUB	§	
D/B/A YOU AND I RESTAURANT &	§	
CLUB	§	ALCOHOLIC
PERMIT NOS. N449983, NL449984,	§	
PE449985	§	
	§	
BELL COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-3427)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 7th day of January, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan Moon Shinder. The hearing convened on October 31, 2001, and adjourned on October 31, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 27, 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.

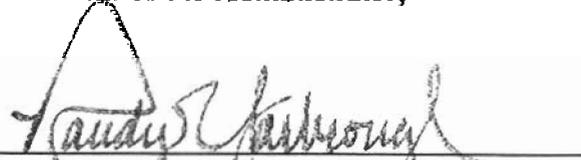
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**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

**This Order will become final and enforceable on January 28, 2002**, 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 7<sup>th</sup> day of January, 2002.

On Behalf of the Administrator,

A handwritten signature in cursive script, appearing to read "Randy Yarbrough", written over a horizontal line.

Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Suzan Moon Shinder  
Administrative Law Judge  
State Office of Administrative Hearings  
VIA FACSIMILE (254) 750-9380

D. Bruce Cochran  
ATTORNEY FOR RESPONDENT  
315 North 8<sup>th</sup> St  
Killeen, Tx. 76541  
VIA FACSIMILE (254) 628-8889  
& VIA REGULAR MAIL

You and I Restaurant & Club  
RESPONDENT  
2324 John Rd.  
Killeen, Texas 76543  
VIA CERTIFIED MAIL 7000 1530 0003 1929 1016

Gayle Gordon  
ATTORNEY FOR PETITIONER  
TABC Legal Section

Licensing Division  
Waco District Office

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

November 27, 2001

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

U.S. MAIL DELIVERY

**RE: Docket No. 458-01-3427; Texas Alcoholic Beverage Commission vs. You and I Restaurant & Club (TABC Case No. 594562)**

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 Gayle Gordon, attorney for Texas Alcoholic Beverage Commission, and to D. Bruce Cochran, attorney for Respondent, You and I Restaurant & Club. The Proposal for Decision recommends that Respondent's conduct surety bond be forfeited.

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,

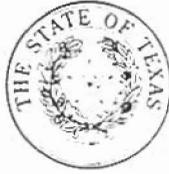
A handwritten signature in black ink, appearing to read "Suzan Moon Shinder", is located below the "Sincerely," text.

Suzan Moon Shinder.  
Administrative Law Judge

Enclosure

xc: Holly Wise, Docket Clerk, State Office of Administrative Hearing -FAX (512) 475-4994  
Gayle Gordon, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Ste. 160, Austin, Texas 78731 -U.S. MAIL  
D. Bruce Cochran, Esq., 315 North 8<sup>th</sup> Street, Killeen, Texas 76541 -U.S. Mail

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

## SERVICE LIST

AGENCY: Texas Alcoholic Beverage Commission, Legal Division

CASE: You And I Restaurant & Club

DOCKET NUMBER: 458-01-3427

AGENCY CASE NO: TABC #59462

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RE: Proposal for Decision

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### AGENCY ADMINISTRATOR

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

BY:            Facsimile  
  X   Regular Mail  
           CMRR

### AGENCY COUNSEL

Gayle Gordon  
Agency Counsel  
Texas Alcoholic Beverage Commission, Legal Division  
5806 Mesa Drive, Suite 160  
Austin, Texas 78731  
Telephone No: 512-206-3490  
Fax No: 512-206-3498

BY:            Facsimile  
  X   Regular Mail  
           CMRR

### COUNSEL FOR RESPONDENT

D. Bruce Cochran, Esq.  
315 North 8<sup>th</sup> Street  
Killeen, Texas 76541  
Telephone No: 254-628-8887  
Fax No: 254-628-8889

BY:            Facsimile  
  X   Regular Mail  
           CMRR

cc: Holly Wise, Docket Clerk, SOAH, Fax 512-475-4994

**DOCKET NO. 458-01-3427**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
<b>YOU AND I RESTAURANT &amp; CLUB PERMIT NOS. N449983, NL449984, AND PE449985 BELL COUNTY, TEXAS (TABC CASE NO. 594562)</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (the Commission) requested forfeiture of the conduct surety bond posted by You and I Restaurant & Club (Respondent). The Commission alleged that Respondent's permits were canceled for cause, effective April 28, 2001, justifying the forfeiture of Respondent's conduct surety bond pursuant to §11.11 of the TEX. ALCO. BEV. CODE ANN. (the Code) and 16 TEX. ADMIN. CODE (Rules) §33.24(j)(1). Respondent argued that its permits were voluntarily canceled pursuant to 16 TEX. ADMIN. CODE (Rules) §33.24(k)(3), and therefore its conduct surety bond was not subject to forfeiture. The Administrative Law Judge (ALJ) recommends Respondent's conduct surety bond be forfeited.

**I. PROCEDURAL HISTORY, NOTICE, JURISDICTION, AND EVIDENCE**

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing was held on October 31, 2001, before ALJ, Suzan Shinder, in the hearings facility of the State Office of Administrative Hearings, in Waco, Texas. The record was closed at the conclusion of the hearing that day. The Commission was represented by Gayle Gordon. Respondent was present by its president, Aecha Ellis, and was represented by D. Bruce Cochran, Esq. Both parties appeared by speaker phone. Copies of Respondent's Private Club Registration Permit, Private Club Late Hours Permit, and Beverage Cartage Permit; the Inquiry By CLP History; the Waiver Order in Docket No. 593422; the Agreement and Waiver of Hearing; Respondent's Assignment (For Conduct Surety Purposes Only); Respondent's Time Certificate Of Deposit; and the Commission's letter to Respondent notifying Respondent of their intent to seek forfeiture of Respondent's conduct surety bond and Respondent's right to a hearing, were admitted as Commission's Exhibit No. 1. Official notice was taken of Pre-Trial Order No. 2, Commission's Notice Of Hearing, and Commission's Amended Prehearing Statement. The Commission called no witnesses. Respondent called one witness, Aecha Ellis, who was only occasionally assisted by an interpreter, Sun Cochran.

## II. CONDUCT SURETY BOND

Private Club Registration Permit, N-449983, Private Club Late Hours Permit, NL-449984, and Beverage Cartage Permit, PE-449985, were issued to an unincorporated association of persons doing business as You and I Restaurant & Club, 511 West Rancier Avenue, Killeen, Bell County, Texas, by the Texas Alcoholic Beverage Commission, on the 9<sup>th</sup> day of June, 1999, and were Canceled for Cause on the 28<sup>th</sup> day of April, 2001. Section 11.11 of the Code and §33.24 of the Rules require the holder of such permits to file with the Commission a conduct surety bond in the amount of \$5,000 unless the permittee meets certain exceptions not applicable here.

On May 19, 1999, Respondent executed a conduct surety bond for You and I Restaurant & Club in the amount of \$5000, as evidenced by the Assignment (For Conduct Surety Purposes Only), and by the Certificate of Deposit in the amount of \$5000, numbered 213051, as required by §11.11 of the Code.

## III. DISCUSSION

The basis for the forfeiture of a conduct surety bond is set out in §11.11 of the Code and in §33.24(j) of the Rules. According to §11.11 of the Code, the permittee must agree on the face of the bond that the amount of the bond will be paid to the state if the permits are revoked or on final adjudication that the holder violated a provision of the Code. Rule §33.24(j) requires three violations of the Code after September 1, 1995, or cancellation of a permit, before the Staff seeks to forfeit the conduct surety bond.

On February 26, 2001, Respondent, by its president Aecha Ellis, signed an "Agreement and Waiver of Hearing," for holder You and I Restaurant & Club, with a "primary CLP" of N-449983. In this agreement, Respondent waived its right to a hearing to contest the Commission's assertion that on May 15, 2000, Respondent was responsible for "Subterfuge/Application for the Benefit of Another (Licensing)," in violation of the Code, accepting a Cancellation for Cause of its permits, effective April 28, 2001. The agreement contained the following language:

My name is Aecha Ellis, I am president of SSOC. I neither admit nor 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/ canceled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of \$0 must be received by the final due date state 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.

As a result of this waiver agreement, the Commission Administrator entered a Waiver Order on March 8, 2001. This order stated that Respondent waived a hearing on the violation addressed in the above Agreement and Waiver of Hearing; the violation of law did occur; Respondent accepted

the penalty assessed; and the penalty imposed, in accordance with the agreed waiver, was that Respondent's permits were Canceled for Cause effective April 28, 2001.

It was Respondent's position that Respondent's permits were voluntarily canceled and the Conduct Surety Bond should be released, pursuant to Rule §33.24(k)(3). This section states:

Upon expiration of the license or permit, its voluntary cancellation, or upon the applicant's subsequent approval for exemption from the surety requirement, the licensee or permittee may request the release and return of the security supporting their license or permit.

A voluntary waiver of the right to a hearing on a Code violation is not equivalent to a voluntary cancellation. Therefore, Rule §33.24(k)(3) is not applicable in this case.

#### IV. FINDINGS OF FACT

1. Private Club Registration Permit, N-449983, Private Club Late Hours Permit, NL-449984, and Beverage Cartage Permit, PE-449985, were issued to an unincorporated association of persons, doing business as You and I Restaurant & Club, 511 West Rancier Avenue, Killeen, Bell County, Texas, by the Texas Alcoholic Beverage Commission, on the 9<sup>th</sup> day of June, 1999, and were Canceled for Cause on the 28<sup>th</sup> day of April, 2001.
2. Respondent received proper and timely notice from the Texas Alcoholic Beverage Commission's (the Commission's) Notice Of Hearing on July 6, 2001; in the Administrative Law Judge's (ALJ's) Pre-Trial Order No. 2 on October 16, 2001; and in the Commission's Amended Prehearing Statement on October 12, 2001.
3. The hearing was convened on October 31, 2001. The Commission and Respondent both appeared by speaker-phone. Both parties participated in the hearing, and the record closed the same day.
4. Respondent obtained and filed with the Commission a \$5,000 conduct surety bond, under §11.11 of the Code, effective on May 19, 1999.
5. On February 26, 2001, Respondent, by its president Aecha Ellis, signed an "Agreement and Waiver of Hearing," for holder You and I Restaurant & Club, with a "primary CLP" of - 449983.
6. By signing the waiver agreement described in Finding of Fact No. 5, Respondent waived its right to a hearing to contest the Commission's assertion that on May 15, 2000, Respondent was responsible for "Subterfuge/Application for the Benefit of Another (Licensing)," in violation of the Code, accepting a Cancellation for Cause of its permits, effective April 28, 2001.
7. As a result of this waiver agreement, the Commission Administrator entered a Waiver Order on March 8, 2001. This order stated that Respondent waived a hearing on the violation addressed in the above Agreement and Waiver of Hearing; that the violation of law did

occur; that Respondent accepted the penalty assessed; and that the penalty imposed, in accordance with the agreed waiver, was that Respondent's permits were Canceled for Cause effective April 28, 2001.

8. Respondent did not appeal the Commission's order described in Finding of Fact No. 7.

### V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was provided has required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. A voluntary waiver of the right to a hearing on a Code violation is not equivalent to a voluntary cancellation. Therefore, 16 TEX. ADMIN. CODE §33.24(k)(3) is not applicable in this case.
5. Pursuant to 16 TEX. ADMIN. CODE §33.24(j), a conduct surety bond, as permitted by TEX. ALCO. BEV. CODE ANN. §11.11, may be forfeited when a permit is canceled, or when there is a final adjudication that the permittee has committed three violations of the Code, since September 1, 1995.
6. Based upon Finding of Fact Nos. 4-8, and Conclusion of Law No. 5, Respondent's conduct surety bond should be forfeited.

SIGNED and entered this 27th day of November, 2001.



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SUZAN MOON SHINDER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS