

DOCKET NO. 594869

IN RE KENNON BRIAN CARRION	§	BEFORE THE
D/B/A CLUB UNITY	§	
PERMIT NOS. MB451425	§	
	§	TEXAS ALCOHOLIC
	§	
TAYLOR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-3576)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 26th day of November 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Monica M. Branch. The hearing convened and adjourned on October 5, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 30, 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.

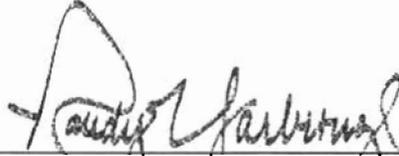
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of **\$5,000.00** be **FORFEITED**.

This Order will become final and enforceable on December 17, 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 26th day of November 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Monica M. Branch
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

Kennon Brian Carrion
d/b/a Club Unity
RESPONDENT
5220 Hartford #608
Abilene, Texas 79605
CERTIFIED MAIL NO. 7000 1530 0003 1929 0149

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Abilene District Office

DOCKET NO. 458-01-3576

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

v.

KENNON BRIAN CARRION
D/B/A CLUB UNITY
TAYLOR COUNTY, TEXAS

§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this forfeiture action against Kennon Brian Carrion d/b/a Club Unity (Respondent). Petitioner sought forfeiture of Respondent's conduct surety bond, alleging Respondent had three or more adjudicated violations of the Texas Alcoholic Beverage Code (Code). For reasons discussed in this proposal, the Administrative Law Judge (ALJ) recommends forfeiture of the conduct surety bond.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.11(b)(2) (Vernon 2001) and 16 TEX. ADMIN. CODE § 33.24 (Vernon 2001). The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2001). There were no contested issues of notice or jurisdiction in this proceeding.

On July 27, 2001, Petitioner issued its Notice of Hearing, directed to Respondent, Kennon Brian Carrion d/b/a Club Unity, at Respondent's address of record, 259 Chapel Hill Road #33, Abilene, Texas 79605. Respondent stated that he did not receive Petitioner's Notice of Hearing, however, he did not object to lack of notice. On October 5, 2001, a hearing convened before ALJ Monica Branch (SOAH) at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent appeared pro se and by telephone. Evidence was received from both parties on that date. The record was closed on October 5, 2001.

LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized under § 11.11(b)(2) of the Code to forfeit the amount of a conduct surety bond on final adjudication that the permittee violated a provision of the Code. Pursuant to 16 TEX. ADMIN. CODE § 33.24, as grounds for forfeiture, the permittee must have been "finally adjudicated" to have committed three violations of the Code since September 1, 1995. TABC must notify the permittee, in writing, of its intent to seek forfeiture of the bond. The permittee may request a hearing on whether the criteria for forfeiture of the bond have been satisfied. The hearing is required to be conducted in accordance with the Administrative Procedure Act.

EVIDENCE AND PARTIES' CONTENTIONS

Petitioner alleged that Respondent is the holder of a Mixed Beverage Permit issued by TABC. Respondent did not dispute this allegation. Permit records contained in TABC Exhibit Two establish that a Mixed Beverage Permit, Permit Number MB-451425, was issued to Kennon Brian Carrion d/b/a Club Unity, 721 S. 1st, Abilene, Taylor County, Texas, on May 14, 1999.

In reference to the issued permit, Petitioner alleged that Respondent posted a conduct surety bond. Again, Respondent did not dispute this allegation. TABC Exhibit Two contains a certified copy of Texas Alcoholic Beverage Commission Conduct Surety Bond Number XTM03413, dated April 20, 1999. The bond was executed by Kennon B. Carrion d/b/a Club Unity, as Principal, and First Indemnity of America Insurance Company, 8150 Brookriver, Suite S-303, Dallas, Texas, as Surety. The bond is in the amount of five thousand dollars, and is payable to the State of Texas.

Petitioner alleged that Respondent was finally adjudicated of three violations of the Code since September 1, 1995, subjecting the conduct surety bond to forfeiture. Although Respondent disputed the underlying violations, he did not dispute that pursuant to waiver agreements, Petitioner had entered findings that the violations occurred. TABC Exhibit Two contains an Agreement and Waiver of Hearing, signed by Respondent on December 28, 1999, regarding one violation of the Code alleged to have occurred on September 24, 1999. The exhibit also contains an Agreement and Waiver of Hearing, signed by Respondent on December 20, 2000, regarding a second violation of the Code alleged to have occurred on November 19, 2000. Further, the exhibit contains an Agreement and Waiver of Hearing, signed by Respondent on March 30, 2001, regarding a third violation of the Code alleged to have occurred on December 2, 2000. In each document, the language appearing above Respondent's signature states, in pertinent part, that "I [Respondent] neither admit nor deny that the violations stated above have occurred and do hereby waive my right to a hearing...The signing of this waiver may result in the forfeiture of any related conduct surety bond." TABC Exhibit Two contains an Order, executed by TABC Assistant Administrator Randy Yarbrough on January 3, 2000, which adopts the Agreement and Waiver of Hearing signed on December 28, 1999. The Order reads, in pertinent part, as follows:

...[i]t is found that the respondent, the above said licensee or permittee, has waived hearing on said matter, has agreed that the violation of law did occur, and does accept the penalty which is assessed below. The agreed violations are as stated in the agreement and waiver of hearing. It is therefore ordered that the agreement and waiver of hearing be adopted and that the penalty designated below be imposed...

The exhibit also contains an Order, executed by TABC Assistant Administrator Randy Yarbrough on January 3, 2001, which adopts the Agreement and Waiver of Hearing signed on December 20, 2000. Further, the exhibit contains an Order, executed by TABC Assistant Administrator Randy Yarbrough on April 4, 2001, which adopts the Agreement and Waiver of Hearing signed on March 30, 2001. These Orders state that "[t]he Commission further finds that respondent violated those sections of the code as stated in the agreement and waiver of hearing."

Petitioner next offered evidence of its compliance with the notice requirements of 16 TEX. ADMIN. CODE § 33.24 (Vernon 2001). Respondent did not dispute Petitioner's compliance with the notice requirement. TABC Exhibit Two contains a letter dated May 10, 2001, addressed to Kennon Brian Carrion d/b/a Club Unity, stating that "we [TABC] are notifying you of our intention to seek forfeiture of the full amount of your conduct surety bond." The second page of the letter contains Respondent's signature, indicating his desire for a hearing to determine if the bond should be forfeited.

Finally, Petitioner offered evidence of matters deemed admitted by Respondent, pursuant to 16 TEX. ADMIN. CODE § 155.31(d)(2) (Vernon 2001). TABC Exhibit Three contains requests for admissions served on Respondent at his address of record on July 27, 2001. Respondent indicated that he had not received the requests for admissions, and therefore, had not filed a response. Nonetheless, Respondent did not request a withdrawal of the deemed admissions, and indicated that he did not object to the matters deemed admitted. The matters deemed admitted are as follows:

1. Kennon Brian Carrion d/b/a Club Unity, Respondent, is the holder of a mixed beverage permit, MB451425, issued by the Petitioner, the Texas Alcoholic Beverage Commission, for the licensed premises known as Club Unity, located at 721 South First, Abilene, Taylor County, Texas 79602-1601.
2. The permits referenced in request 1 are currently in effect and were in effect on all dates relevant to the supplemental or amended Notice of Hearing.
3. The State Office of Administrative Hearings has jurisdiction over this matter.
4. Petitioner has jurisdiction over this matter.
5. Respondent received adequate notice of this hearing.

6. By order of the Commission, the above listed permits and/or licenses were cancelled, or the Respondent was found to have committed three violations of the Texas Alcoholic Beverage Code or Texas Alcoholic Beverage Commission Rules since September 1, 1995. The cancellation or violations have been finally adjudicated. Pursuant to § 11.11 and/or 61.13 of the Texas Alcoholic Beverage Code and § 33.24 of the Texas Alcoholic Beverage Commission Rules, Respondent has forfeited the full amount of the conduct surety bond.

ANALYSIS

It is clear from the evidence, and undisputed, that Respondent holds a Mixed Beverage Permit, that Respondent has posted a conduct surety bond in relation to the permit, and that Respondent received notice and requested a hearing regarding the proposed bond forfeiture. The only remaining issue to be determined is whether Respondent was finally adjudicated to have committed three violations of the Code since September 1, 1995.

Regarding the violations alleged to have occurred on November 19, 2000 and December 2, 2000, TABC Assistant Administrator Randy Yarbrough issued Orders which contained specific findings that Respondent had committed the violations. Regarding the violation alleged to have occurred on September 24, 1999, the Order issued by TABC Assistant Administrator Randy Yarbrough assessed a penalty but did not contain a specific finding that Respondent committed the violation. However, the existence of three adjudicated violations of the Texas Alcoholic Beverage Code or Texas Alcoholic Beverage Commission Rules since September 1, 1995 is a matter deemed admitted by Respondent. As such, the ALJ finds that Respondent was finally adjudicated to have committed three violations of the Code since September 1, 1995.

RECOMMENDATION

The ALJ recommends that Texas Alcoholic Beverage Commission Conduct Surety Bond Number XTM03413, dated April 20, 1999, in the amount of five thousand dollars, should be forfeited.

PROPOSED FINDINGS OF FACT

1. Respondent, Kennon Brian Carrion d/b/a Club Unity, holds a Mixed Beverage Permit, MB-451425, issued by the Texas Alcoholic Beverage Commission (TABC) on May 14, 1999, for the premises located at 721 S. 1st, Abilene, Taylor County, Texas.
2. Respondent has posted Texas Alcoholic Beverage Commission Conduct Surety Bond Number XTM03413, dated April 20, 1999. The bond was executed by Kennon B. Carrion d/b/a Club Unity, as Principal, and First Indemnity of America Insurance Company, 8150 Brookriver, Suite S-303, Dallas, Texas, as Surety. The bond is in the amount of five thousand dollars, and is payable to the

State of Texas.

3. Respondent was finally adjudicated of three violations of the Code since September 1, 1995, as evidenced by Orders issued by TABC Assistant Administrator Randy Yarbrough on January 3, 2000, January 3, 2001, and April 4, 2001, and as evidenced by Respondent's deemed admission.
4. Petitioner sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond by letter dated May 10, 2001.
5. Respondent requested a hearing to determine if the conduct surety bond should be forfeited.
6. On July 27, 2001, Petitioner issued its Notice of Hearing, directed to Kennon Brian Carrion d/b/a Club Unity, 259 Chapel Hill Road #33, Abilene, Texas 79605, Respondent's address of record.
7. On October 5, 2001, a hearing convened before ALJ Monica Branch, SOAH, at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by TABC Staff Attorney Timothy Griffith. Respondent appeared pro se and by telephone.
8. Respondent did not contest notice or jurisdiction.

PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.11(b)(2) (Vernon 2001) and 16 TEX. ADMIN. CODE § 33.24 (Vernon 2001).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2001).
3. The notice requirements of the Administrative Procedure Act were adequately satisfied. Respondent waived any objection to notice.
4. Based upon the Proposed Findings of Fact and TEX. ALCO. BEV. CODE ANN. § 11.11(b)(2) (Vernon 2001) and 16 TEX. ADMIN. CODE § 33.24 (Vernon 2001), Texas Alcoholic Beverage Commission Conduct Surety Bond Number XTM03413, dated April 20, 1999, in the amount of five thousand dollars, should be forfeited.

SIGNED on this the 30th day of October, 2001.

Monica Branch

MONICA BRANCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS