DOCKET NO. 458-99-0095

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
vs.	§	
	§	OF
JANET MCLEAN	§	
D/B/A POP A TOP	§	
PERMIT NO. BG-418636	§	
LIMESTONE COUNTY, TEXAS	§	
(TABC CASE NO. 580512)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage (Commission) initiated this action seeking forfeiture of the conduct surety bond posted by Janet McLean (Respondent) d/b/a Pop A Top. Respondent posted a conduct surety bond on the 18th day of September, 1997, in compliance with Sections 11.11 of the Texas Alcoholic Beverage Code (the Code). The Commission's Staff (the Staff) recommended that the bond be forfeited because Respondent had committed three violations of the Code since September 1, 1995. This proposal for decision agrees with the Staff's recommendation that Respondent's conduct surety bond be forfeited.

I. Jurisdiction, Notice, and Procedural History

There are no contested issues of jurisdiction or notice in the proceeding. Therefore, those matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

On February 10, 1999, Suzan M. Shinder, Administrative Law Judge for the State Office of Administrative Hearings (SOAH), convened a public hearing at the Hearing Facility of the State Office of Administrative Hearings, Waco, Texas. Respondent, appeared in person and was represented by Bobby Reed, Esq.,who made his first appearance in this matter at the hearing on the merits this date. Clyde Burleson, Assistant Attorney General, appeared in person to represent the Staff. Evidence and argument were heard. At the conclusion of the hearing the record was closed.

II. Conduct Surety Bond

On September 24, 1997, the Commission issued a Wine and Beer Retailer's Permit, BG-418636, to Respondent for the premises known as Pop A Top at FM 1365, north side, 1.2 miles east city limits, Mexia, Limestone County, Texas.

On September 18, 1997, Respondent, executed a conduct surety bond for Pop A Top in the amount of $5,000 as required by Section 11.11 of the Code.

III. Events Leading to the Request to Forfeit Respondent's Conduct Surety Bond

On April 22, 1998, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 578561, regarding three violations of the Code. The waiver agreement stated that on March 28, 1998, Respondent sold an alcoholic beverage to a minor, had an intoxicated employee on the licensed premises, and had an employee that possessed an unauthorized alcoholic beverage on the licensed premises, in violation of Sections 106.13, 11.61(b)(13), 11.61(b)(15), and 25.09 of the Code, respectively. The agreement contained the following language:

> My name is Janet McLean. I am the permittee. 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 $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.

As a result of this waiver agreement, the Commission Administrator entered an Order on May 4, 1998. The Order stated that the violations, as stated, did occur. Further, the Order adopted the above described waiver of hearing and assessed the penalty of suspension of Respondent's permit for a period of ten days beginning on June 3, 1998, unless the permittee paid a civil penalty in the amount of $1,500.00 on or before May 20, 1998.

IV. Forfeiture of Conduct Surety Bond

The Commission may revoke or suspend a permit, if the holder violates a provision of the Code or a rule of the Commission. TEX. ALCO. BEV. CODE Section 6.01. "Permittee" means a person who is the holder of a permit provided for in the Code, or an agent, servant, or employee of that person. TEX. ALCO. BEV. CODE Section 1.04(11). TEX. ADMIN. CODE §33.24(j) governs forfeiture of a conduct surety bond, and provides that the Commission may seek forfeiture when a license or permit has been canceled, or where there has been a final adjudication that the licensee or permittee has committed three violations of the Code since September 1,1995.

When posting a conduct surety bond, the permit or license holder must agree not to violate a Texas law relating to alcoholic beverages, or a Commission rule. The holder must also agree that the amount of the bond shall be paid to the state if the permit is revoked, or, on final adjudication, that the holder violated a provision of the Code. The Commission's rule at TEX. ADMIN. CODE §33.24 also applies and requires forfeiture upon cancellation, or upon final adjudication determining a holder has committed three violations of the Code since September 1, 1995.

PROPOSED FINDINGS OF FACT

1. On September 24, 1997, the Commission issued a Wine and Beer Retailer's Permit, BG-418636, to Respondent for the premises known as Pop A Top at FM 1365 North Side, 1.2 miles east city limits, Mexia, Limestone County, Texas. On September 18, 1997, Respondent executed a conduct surety bond for Pop a Top for $5,000 as required by Section 11.11 of the Code. By the terms of this bond, it became effective on the date of the issuance of the permit, which was September 24, 1997.

2. The hearing was convened on February 10, 1999, at the Hearings Facility of the State Office of Administrative Hearings, 4201 Lake Shore Drive, Village Green Center, Suite F, Waco, Texas. Respondent appeared in person and was represented by counsel, Bobby Reed. Clyde Burleson, Assistant Attorney General, appeared in person to represent the Staff. Evidence and argument were heard, and the record was closed at the conclusion of the hearing.

3. Both parties stipulated that Respondent received proper and timely notice of the hearing.

4. On September 18, 1997, Respondent, executed a conduct surety bond to Respondent doing business as Pop a Top for $5,000 as required by Section 11.11 of the Code. By the terms of this bond, it became effective on the date of the issuance of Respondent's Wine and Beer Retailer's Permit, which was September 24, 1997.

5. On April 22, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding three violations of the Code. By signing the waiver agreement, Respondent did not deny that: on March 28, 1998, Respondent sold an alcoholic beverage to a minor in violation of Section 106.13 of the Code; on March 28, 1998, Respondent had an intoxicated employee on the licensed premises, in violation of Section 11.61(b)(13) of the Code; and, on March 28, 1998, Respondent had an employee in possession of an unauthorized alcoholic beverage on the licensed premises, in violation of Section 11.61(b)(15) and Section 25.09 of the Code. Respondent waived her right to a hearing to contest these violations of the Code and acknowledged that her permit would be suspended or canceled by the Commission unless she paid a civil penalty. By her signature, she further acknowledged that the forfeiture of any related conduct surety bond could result.

6. On May 4, 1998, the Commission Administrator entered an order finding Respondent had committed three violations of the Code consistent with Respondent's admissions found in Findings of Fact No. 5.

7. Respondent has committed at least three violations of the Code and had at least three final adjudications regarding these violations since September 1, 1995.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Subchapter B of Chapter 5, of the TEX. ALCO. BEV. CODE (Vernon 1995).

2. The State Office of Administrative Hearings has jurisdiction over the 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., Sections 2003.021(b) and 2003.042(6) (Vernon 1998).

3. As referenced in Findings of Fact Nos. 2 and 3, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN Sections 2001.051 and 2001.052 (Vernon 1998).

4. Based upon Findings of Fact Nos. 1 and 4, Respondent holds Wine and Beer Retailer's Permit no. BG-418636 and posted a conduct surety bond in accordance with the requirements set forth in 16 TEX. ADMIN. CODE §33.24 and TEX. ALCO. BEV. CODE Section 11.11 (Vernon 1995 and Vernon Supp. 1998).

5. Based upon Findings of Fact Nos. 5-7, Respondent violated 16 TEX. ADMIN. CODE §33.24 and TEX. ALCO. BEV. CODE Section 11.11 by violating a Commission rule and law of the State of Texas relating to alcoholic beverages while holding a Wine and Beer Retailer's Permit no. BG-418636, issued by the Commission, having three violations of the Code since September 1995.

6. Based on Finding of Fact No. 5-7, the conduct surety bond executed by Respondent should be forfeited to the State.

SIGNED and entered this 15th day of March, 1999.

Mikal J. Borland

for SUZAN MOON SHINDER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEAIRNGS

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