**DOCKET NO.** 580734

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|---|---|---|
| IN RE FOR BIG KID'S ONLY<br>D/B/A SPORTS BAR<br>PERMIT NOS. MB-268240, LB-268241 &<br>PE-268242 | §<br>§<br>§<br>§<br>§ | BEFORE THE<br><br>TEXAS ALCOHOLIC |
| NUECES COUNTY, TEXAS<br>(SOAH DOCKET NO. 458-99-0104) | §<br>§ | BEVERAGE COMMISSION |

**ORDER**

**CAME ON FOR CONSIDERATION** this 20th day of September 1999, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Edel P. Ruiseco. The hearing convened on March 5, 1999 and adjourned March 5, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 29, 1999. 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 **CONDUCT SURETY BOND** should **NOT BE FORFEITED.**

**This Order will become final and enforceable on <u>October 11, 1999,</u>** 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 20th day of September 1999.

On Behalf of the Administrator,

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/smy

The Honorable Edel P. Ruiseco
Administrative Law Judge
State Office of Administrative Hearings
1225 Agnes Street, Ste. 102
Corpus Chrsiti TX 78401
**VIA FACSIMILE (512) 884-5427 and**
**REGULAR MAIL**

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

Allen Yaffe
**ATTORNEY FOR RESPONDENT**
618 south Staples
Corpus Christi TX 77463-3067
**CERTIFIED MAIL/RRR NO. P 473 037 529**

Dewey Brackin
**ATTORNEY FOR PETITIONER**
TABC Legal Section

Licensing Division
Corpus Christi District Office

**INTER-OFFICE COMMUNICATION**
**TEXAS ALCOHOLIC BEVERAGE COMMISSION**

September 16, 1999

**TO:** Gayle Gordon, Director of Legal

**FROM:** Randy Yarbrough, Assistant Administrator

**SUBJECT:** Docket No. 458-99-0104
TABC Case No. 580734
For Big Kid's Only d/b/a Safari Sports Bar
Mixed Beverage Permit (MB-268240), Mixed Beverage Late Hours Permit (LB-268241), Beverage Cartage Permit (PE-268242)
Nueces County, Texas

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I have read the attached record of the above referenced case and find the following:

Based on the record, I concur with the finding of the Administrative Law Judge that the Conduct Surety Bond issued for this location should not be forfeited. Please prepare an **ORDER** adopting the Proposal for Decision recommendation that the Conduct Surety Bond should **NOT BE FORFEITED.**

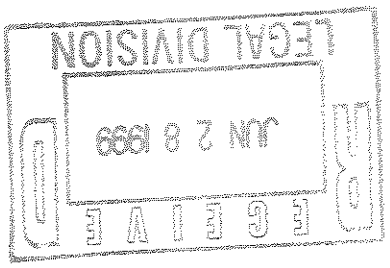
Please make a copy of this decision and submit it along with the order to the respective parties.

Randy Yarbrough

RY

# State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge




June 24, 1999

**VIA CERTIFIED MAIL**
**P 906 424 091**

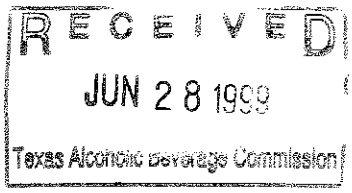
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

**RE: Docket No. 458-99-0104; Texas Alcoholic Beverage Commission vs. For Big Kids Only, INC. d/b/a Safari Sports Bar (TABC Case No. 580734)**

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 Andrew Del Cueto attorney for Texas Alcoholic Beverage Commission, and to Allen Yaffe, attorney for For Big Kids Only d/b/a Safari Sports Bar. This proposal for decision disagrees with the Staff's recommendations and recommends that the Respondent's conduct surety bond not 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,

Edel P. Ruiseco
Administrative Law Judge

EPR:mar
Enclosure
xc: Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearing - **FACSIMILE, 512-475-4994**
Andrew Del Cueto, Staff Attorney, Texas Alcoholic Beverage Commission -
**Certified Mail No. P 906 424 092 Return Receipt Requested**
Allen Yaffe, Attorney at Law, 618 South Staples, Corpus Christi Texas 77463-3067
**CERTIFIED MAIL NO. P 906 424 095, RETURN RECEIPT REQUESTED**

1225 Agnes Street, Suite 102 ◆ Corpus Christi, Texas 78401
(512) 884-5023 Fax (512) 884-5427

DOCKET NO. 458-99-0104

| | | |
|---|---|---|
| TEXAS ALCOHOLIC BEVERAGE COMMISSION | § | BEFORE THE STATE OFFICE |
| | § | |
| | § | |
| VS. | § | OF |
| | § | |
| | § | |
| FOR BIG KIDS ONLY, INC. | § | ADMINISTRATIVE HEARINGS |

## PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Commission) initiated this action seeking forfeiture of the conduct surety bond posted by Linda Sue Robinson (Respondent), President, For Big Kids Only, Inc., d/b/a Safari Sports Bar. Respondent posted a conduct surety bond on July 22, 1996, in compliance with Section 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 disagrees with the Staff's recommendation and recommends that the Respondent's conduct surety bond not 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.

On March 5, 1999, Edel P. Ruiseco, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings (SOAH), convened a public hearing at the Hearing Facility of the State Office of Administrative Hearings, Corpus Christi, Texas. Respondent appeared in person and was represented by Alan L. Yaffe, Esq. Andrew del Cueto, Assistant Attorney General, appeared in person to represent the Staff. Evidence and argument were heard. At the conclusion of the hearing the record was left open for the parties to submit briefs. The record was closed on May 19, 1999.

### II. Conduct Surety Bond

On August 12, 1996, the Commission issued a *Mixed Beverage Permit MB268240, Mixed Beverage Late Hours Permit LB268241, and Beverage Cartage Permit PE268242*, to Respondent for the premises known as the Safari Sports Bar, 4528 Weber Road, Corpus Christi, Nueces County, Texas. On July 22, 1996, Respondent executed a conduct surety bond in the amount of $5,000.00, as required by Sections 11.11 and 61.13 of the Code.

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

On May 21, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding two violations of the Code. The waiver agreement stated that on May 10, 1998, Respondent was intoxicated on the licensed premises. The agreement contained the following language:

> My name is Linda Sue Robinson, I am 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 wi" 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 $2,250.00 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 June 2, 1998. The Order stated Respondent violated the Code as stated in the agreement and waiver of hearing. The Order further provided that Respondent's licenses were suspended for 15 days unless Respondent paid $2,250.00 as a civil penalty.

On July 16, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. The waiver agreement stated that on July 10, 1998, Respondent was in possession of Distilled Spirits Without Local Distributor Stamp. The agreement contained the following language:

> My name is Linda Sue Robinson, I am 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 July 23, 1998. The Order stated Respondent violated the Code as stated in the agreement and waiver of hearing. The Order further provided that Respondent's licenses were suspended for five days unless Respondent paid $750.00 as a civil penalty.

## IV. Forfeiture of Conduct Surety Bond

The Commission may revoke a license or permit, or deny renewal of a license or permit, if the holder violates a provision of the Code or a rule of the commission. TEX. ALCO. BEV. CODE Sections 6.01 AND 61.71. Section 33.24(j) of the Rules, 16 Texas Administrative Code, 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.

## V. Analysis

1. Petitioner's Position: The Commission alleges that Respondent has committed three or more violations of the Alcoholic Beverage Code, and because of such violations the permittee's conduct surety bond should be forfeited.

2. Respondent's Position: Respondent contends that only two violations occurred, and that the third violation upon which the Commission bases its forfeiture request was represented to Respondent to have been "dropped", or dismissed, without a finding of a violation having occurred.

3. Exhibits: The Commission filed Exhibit 1, which was admitted, except for pages 5 -7 (the history of violations by Respondent), which are included only as an offer of proof. Page one of Exhibit 1 was the affidavit; pages 2-4 were the permits; pages 8-9 were the Commission's Order of July 23, 1998 and the Agreement and Waiver of Hearing regarding the violation of July 10, 1998; pages 10-11 were the Commission's Order of June 2, 1998, and the Agreement and Waiver of Hearing dated May 21, 1998 regarding the violations alleged to have occurred on May 10, 1998; pages 12-14 were the conduct surety bond application, approval and bond itself; pages 15-16 were the September 4, 1998, letter from the Commission to Respondent notifying them of the Commission's intent to seek forfeiture of Respondent's conduct surety bond. Exhibit 2 consisted of blank forms pertaining to the application for a conduct surety bond.

Respondent offered two exhibits: a Rule 11 Agreement (Exhibit 3), and its prehearing statement (Exhibit 4). The prehearing statement contended that the Commission unfairly attempted to forfeit a bond, after it was agreed that Respondent did not admit a violation occurred (see Agreement and Waiver Order).

4. Testimony of Petitioner's Witness

Lt. Joel Moreno, District Supervisor for the Commission, testified that during the incidents involving this case he was in Laredo-McAllen-Houston areas. He advised that each office had the same policy regarding settlements with alleged violators. He admitted he had no personal knowledge of violations in this case, and further said that, "for good customer relations", respondents who are accused of two violations, are usually allowed to pay one penalty, but both violations would be of record.

Lt. Moreno further testified that they have about 1600 permits, and the Commission does not explain the agreement and waiver order to each permittee. In the cross-examination, Lt. Moreno, confirmed that he had no personal recollection of the May, 1998, violations, but remembered that he had not explained the two violations, nor did he recall the criminal charge being dropped. When asked whether or not he was the person who wrote "dropped" alongside one of the violations, on the September 23, 1998, inter-office memo (Exhibit 1, pages 15 and 16, which included a copy of the September 4, 1999 letter), he responded "no". However, he admitted that the memo was in his file and he did not believe that Respondent had access to it. He further could not explain why the letter and memo tended to confirm that the Respondent's version that the violation was dismissed, except to offer that the case could have been dismissed by the Austin office.

5. Testimony of Respondent's Witness

Respondent, Linda Sue Robinson, testified that she reached agreement with the TABC agent Chris Champion (confirmed by the September 23, 1998 memo), that one violation would be dropped, and she just had to pay a fine - which she did. She further testified that she did not write "dropped" on the September 4, 1998, (request for hearing letter) which she signed. She argued that dropping the case was consistent with her agreement with the Commission. The pertinent part of the letter and memo stated:

Relevant violations:

| | | |
|---|---|---|
| 05-10-98 | Intoxicated Permit./Lic./Employee on the Premises | ***DROPPED*** |
| 05-10-98 | Place or Manner, Misc. | ***- Civil Fine Pd.*** |
| 08-09-98 | Sale to Intoxicated Person | ***- Pending ✓*** |
| 07-10-98 | Poss of Distilled Spirit w/o Local Dist. Stamp | ***Civil Fine Pd.*** |

## PROPOSED FINDINGS OF FACT

1. On August 12, 1996, The Texas Alcoholic Beverage Commission (Commission) issued a *Mixed Beverage Permit, MB-268240, Mixed Beverage Late Hours Permit, LB-268241, and Beverage Cartage Permit, PE-268242*, to Respondent for the premises known as Safari Sports Bar, 4528 Weber Road, Corpus Christi, Nueces County, Texas.

2. On July 22, 1996, Respondent executed a conduct surety bond for Safari Sports Bar for $5,000 as required by Sections 11.11 and 61.13 of the Texas Alcoholic Beverage Code (the Code).

3. Respondent received proper and timely notice of the hearing from the Staff for the Commission (the Staff) in a notice of hearing, dated September 4, 1998.

4. The hearing was convened on March 5, 1999.

5. On May 10, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding two violations of the Code.

6. On May 10, 1998, Respondent acknowledged that her primary license and related licenses would be suspended or canceled by the Commission unless she paid a civil penalty, and Respondent paid such fine.

7. On June 2, 1998, the Commission entered an order finding Respondent had committed two violations of the Code consistent with Finding of Fact No. 5.

8. On July 16, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code.

9. On July 16, 1998, Respondent acknowledged that her primary license and related licenses would be suspended or canceled by the Commission unless she paid a civil penalty, and Respondent paid such fine.

10. On July 23, 1998, the Commission entered an order finding Respondent had committed one violation of the Code consistent with Finding of Fact No. 8.

11. On September 4, 1998, the Commission noted in its notice to Respondent that one of the violations of May 10, 1998, had been "dropped", and confirmed this in the Inter-Office Communication to SOAH requesting that a hearing be set, dated September 23, 1999. A copy of the September 4, 1998 letter was included as an attachment.

12. No evidence of the alleged violation of August 9, 1998 (Sale to Intoxicated Person) was presented. Therefore, Respondent did not violate the Code on August 9, 1998.

13. The Commission agreed to drop one of the violations (Intoxicated Permittee on the Premises) contained in the May 10, 1998, Agreement and Waiver of Hearing referred to in Findings of Fact Nos. 5-7, as evidenced by Commission's Exhibit No. 1, and the testimony of the Respondent.

14. Respondent has not committed three violations of the Code, 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 1998)

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. Section 2001.051 (Vernon 1998)

3. As referenced in Finding of Fact Nos. 3 and 4, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. Section 2001.051 (Vernon 1998)

4. Based upon Findings of Fact Nos. 1 and 2, Respondent hold permits as follows: *Mixed Beverage Permit, MB-268240, Mixed Beverage Late Hours Permit, LB-268241, and Beverage Cartage Permit, PE-268242,* 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. Sections 11.11 and 61.13 (Vernon 1998).

5. Based upon Findings of Fact Nos. 5-14, Respondent did not violate 16 TEX. ADMIN. CODE §33.24 and TEX. ALCO. BEV. CODE. Sections 11.11 and 61.13 (Vernon 1998).

6. Based on Findings of Fact Nos. 12-14, and Conclusion of Law No. 5, the conduct surety bond executed by Respondent should not be forfeited to the State.

SIGNED this 24th day of June, 1999.

Edel P. Ruiseco, ALJ, Corpus Christi
State Office of Administrative Hearings