

DOCKET NO. 582621

N RE DAVID MARCELINO ONATE	§	BEFORE THE
D/B/A HIS & HERS PLACE	§	
PERMIT NO. BG-415238	§	
	§	TEXAS ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-1556)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 14th day of April 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge James Kuvet. The hearing convened on October 19, 1999 and adjourned October 19, 1999. Ruth Casarez, Administrative Law Judge, made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 3, 2000. 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 May 5, 2000, 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 14th day of April,
2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Ruth Casarez
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (210) 308-6854

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

David Marcelino Onate
d/b/a His & Hers Place
RESPONDENT
P. O. Box 240152
San Antonio, TX 78224
CERTIFIED MAIL NO. Z 473 040 540

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
San Antonio District Office



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

March 29, 2000

TO: Gayle Gordon, Director of Legal

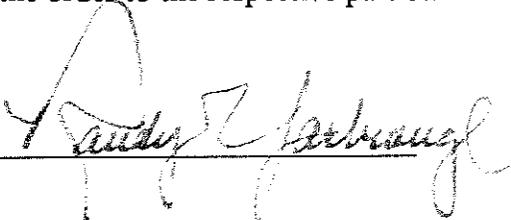
FROM: Randy Yarbrough, Assistant Administrator

SUBJECT: Docket No. 458-99-2479 TABC Case No. 585983
 Docket No. 458-99-2310 TABC Case No. 583351
 Docket No. 458-99-1556 TABC Case No. 582621
 Docket No. 458-99-1548 TABC Case No. 576568

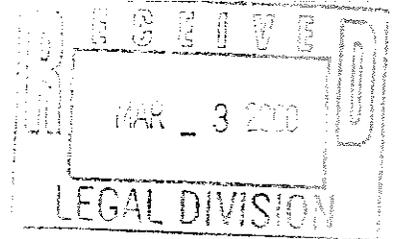
I have read the attached record of the above referenced cases and find the following:

Based on the record, I concur with the finding of the Administrative Law Judge that the Conduct Surety Bonds issued for these locations should be forfeited. Please prepare an **ORDER** adopting the Proposals for Decision recommendations that the Conduct Surety Bonds should be **FORFEITED**.

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



RY



TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

V.

OF

DAVID MARCELINO ONATE
D/B/A HIS & HERS PLACE
PERMIT NO. BG-415238
BEXAR COUNTY, TEXAS
(TABC CASE NO. 582621)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff or Commission) initiated this action seeking forfeiture of the conduct surety bond posted by David Marcelino Onate d/b/a His & Hers Place (Respondent). Respondent renewed a conduct surety bond¹ on July 9, 1998, in compliance with Sections 11.11 and 61.13 of the Texas Alcoholic Beverage Code (the Code). Staff recommended that the bond be forfeited because Respondent had committed three violations of the Code since September 1, 1995. Respondent appeared on his own behalf at the hearing. The undersigned Administrative Law Judge (ALJ) who reviewed the tape recording of proceedings and the evidence presented agrees with Staff's recommendation that Respondent's conduct surety bond be forfeited.

I. Jurisdiction, Notice, and Procedural History

The hearing in this matter convened on October 19, 1999, before ALJ James Kuvet at the offices of the State Office of Administrative Hearings, 1015 Jackson Keller, Suite 102B in San Antonio, Bexar County, Texas. Staff was represented by Dewey Brackin, Assistant Attorney General. The Respondent appeared *pro se* at the hearing, but did not dispute the allegations presented by Staff; his only defense was that he was never informed that three violations of the Code would result in forfeiture of the bond. Respondent stipulated that the Commission has jurisdiction to bring this action and also that he received proper notice of the hearing and of the Commission's intent to institute forfeiture proceedings.

II. Conduct Surety Bond

On July 9, 1997, the Commission issued a *Wine and Beer Permit No. BG-415238*, to Respondent for the premises known as His & Hers Place, San Antonio, Bexar County, Texas. On June 6, 1997, Respondent, as applicant for a beer and wine permit, posted a conduct surety bond for

¹Respondent provided a conduct surety bond, Bond Number XTL 00290, from First Indemnity of America Insurance Company. The Bond provided that it becomes effective on the date of the issuance of the "above permit or license by the Texas Alcoholic Beverage Commission and shall remain in full force and effect until cancelled, and thereafter provided, or until such permit or license and succeeding renewal of the permit or license have expired." Exhibit 1.

& Hers Place for \$5,000 as required by Sections 11.11 and 61.13 of the Code. The bond has continued in effect as required by the Code.

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

On October 7, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. The waiver agreement stated that on July 29, 1998, Respondent violated a provision of the cash law, governed by TEX. ALCO BEV. CODE ANN. § 102.31. The agreement contained the following language:

My name is David Onate. 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/cancelled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of \$1,500.00 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 questions. The signing of this waiver may result in the forfeiture of any related conduct surety bond. (emphasis added)

As a result of this waiver agreement, the Commission Administrator entered an Order on October 9, 1998. The Order stated Respondent violated the Code as stated in the agreement and waiver of hearing. It further provided that Respondent's permit would be suspended for ten (10) days unless Respondent paid \$1,500.00 as a civil penalty.

On July 2, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. The waiver agreement stated that on May 25, 1998, Respondent violated a provision of the cash law, governed by TEX. ALCO BEV. CODE ANN. § 102.31. The agreement contained the same language as indicated in the first waiver agreement above, with the only difference being the penalty amount, which was \$750.00.

As a result of this waiver agreement, the Commission Administrator entered an Order on July 6, 1998. The Order stated Respondent violated the Code as stated in the agreement and waiver of hearing. It also provided that Respondent's permit would be suspended for five (5) days unless Respondent paid \$750.00 as a civil penalty.

On June 4, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. The waiver agreement stated that on May 16, 1998, Respondent purchased alcoholic beverages from an unauthorized source pursuant to TEX. ALCO BEV. CODE ANN. §§ 61.71(a)(19) and (20), and 69.09. The agreement contained the same language as indicated in the first waiver agreement above, with the only difference being the penalty amount, which was \$450.00.

As a result of this waiver agreement, the Commission Administrator entered an Order on June 10, 1998. The Order stated Respondent violated the Code as stated in the agreement and waiver of hearing. The Order further provided that Respondent's permit would be suspended for three (3) days unless Respondent paid \$450.00 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 ANN., §§ 6.01 and 61.71. The rule of the Commission found at 16 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 to "conform with the Texas Alcoholic Beverage Code and rules of the Commission." The Permittee is also put on notice that if he "violates a law of the state relating to alcoholic beverages or a rule of the commission, the amount of the bond shall be paid to the state, subject to certain conditions...."

In addition, when a person obtains a permit from a state regulatory agency, such as the Texas Alcoholic Beverage Commission, the person is deemed to know the law and rules that govern his conduct when he proceeds to benefit from the permit. Commission rule 33.24(j) provides that a conduct surety bond will be forfeited when a license or permit is canceled, or when a final adjudication has been made that the holder of the license or permit has committed three violations of the Code since September 1, 1995. Despite Respondent's statement that he was not aware of the impact of his earlier waiver agreements on his conduct surety bond, the fact remains that he, in effect, agreed in writing in 1998, that he had committed the violations listed in the notice of intent to seek forfeiture of the bond which was mailed to him on January 19, 1999. Respondent did not present any evidence to prove that he had not committed the violations presented by Staff.

V. PROPOSED FINDINGS OF FACT

1. On July 9, 1997, the Texas Alcoholic Beverage Commission (the Commission) renewed a *Beer and Wine Permit*, issued to David Marcelino Onate (Respondent) for the premises known as His & Hers Place at 107 Drury Lane, P.O. Box 240152, San Antonio, 78224-0152, Bexar, County, Texas. On June 6, 1997, Respondent, as holder of the permit, posted a conduct surety bond for His & Hers Place for \$5,000.
2. Respondent received proper and timely notice of the hearing from the staff for the Commission (Staff) in a notice of hearing, dated August 20, 1999. The notice was properly sent to Respondent at the address provided in findings of fact No. 1. Respondent admitted he received the notice of hearing.
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 sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. The hearing was convened on October 19, 1999, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Respondent appeared and represented himself at the hearing. Dewey Brackin, Assistant Attorney General, represented Staff.

5. On June 4, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. By signing the waiver agreement, Respondent declared that on May 16, 1998, Respondent purchased alcoholic beverages from an unauthorized source. Respondent acknowledged this violation of the Code had occurred and agreed that his permit would be suspended or canceled by the Commission unless he paid a civil penalty
6. On June 10, 1998, the Commission Administrator entered an order finding Respondent had committed a violation of the Code consistent with Respondent's admission found in Findings of Fact No. 5.
7. On July 2, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. By signing the waiver agreement, Respondent declared that on May 25, 1998, Respondent violated a provision of the Code's cash law. Respondent acknowledged this violation had occurred and agreed that his permit would be suspended or canceled unless he paid a civil penalty
8. On July 6, 1998, the Commission Administrator entered an order finding Respondent had committed a violation of the Code consistent with Respondent's admission found in Findings of Fact No. 7.
9. On October 7, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. By signing the waiver agreement, Respondent declared that on July 29, 1998, Respondent violated a provision of the Code's cash law. Respondent acknowledged this violation had occurred and agreed that his permit would be suspended or canceled by the Commission unless he paid a civil penalty
10. On October 9, 1998, the Commission Administrator entered an order finding Respondent had committed a violation of the Code consistent with Respondent's admission found in Findings of Fact No. 9.
11. Respondent has committed at least three violations of the Code and had at least three final adjudications regarding these violations since September 1, 1995.

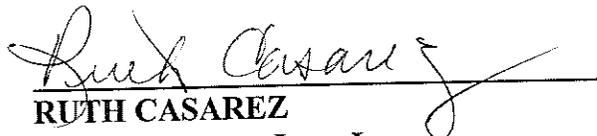
VI. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.35, 25.04, 61.71 and 11.11 (Vernon 1995 & Supp. 1999).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43 (Vernon 1995 & Supp. 1999) and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 1999).
3. Proper and timely notice of the hearing was effected on Permittee pursuant to TEX. GOV'T

CODE ANN. ch. 2001 (Vernon 1999).

4. Respondent holds permit number BG-415238, 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 ANN. §§ 11.11 and 61.13 (Vernon 1995 & Supp. 1999).
5. Respondent violated three provisions of the Texas Alcoholic Beverage Code: two violations of the Commission's cash law governed by TEX. ALCO BEV. CODE ANN. § 102.31 (Vernon 1995 & Supp. 1999); and one violation of TEX. ALCO BEV. CODE ANN. §§ 61.71(a)(19) and (20), and 69.09 (Vernon 1995 & Supp. 1999), purchase of alcoholic beverages from an unauthorized source.
6. Respondent violated 16 TEX. ADMIN. CODE § 33.24 (1999) and TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13 (Vernon 1995 & Supp. 1999), by violating a commission rule and a law of the State of Texas relating to alcoholic beverages while holding *Beer and Wine Permit No. BG-415238*, issued by the Commission, and Respondent's conduct surety bond should be forfeited to the State.

SIGNED and entered this 3rd day of March 2000.


RUTH CASAREZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS