

DOCKET NO. 583154

IN RE JOSE ANTONIO PENA
D/B/A THE TEXAN
PERMIT NOS. BG-314610

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

BEXAR COUNTY, TEXAS
(SOAH DOCKET NO. 458-99-1557)

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 13th 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

Jose Antonio Pena
d/b/a The Texan
RESPONDENT
4518 W. Avenue
San Antonio, Texas 78213
CERTIFIED MAIL NO. Z 473 040 542

Licensing Division
San Antonio District Office



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

April 11, 2000

TO: Gayle Gordon, Director of Legal

FROM: Randy Yarbrough, Assistant Administrator

SUBJECT: Docket No. 458-99-1557
TABC Case No. 580513
Jose Antonio Pena d/b/a The Texan
Wine and Beer Retailers Permit (BG-314610)
Bexae County, Texas

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

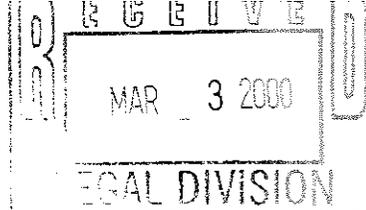
Based on the record, I concur with the finding of the Administrative Law Judge that the Conduct Surety Bond issued for this location should be forfeited. Please prepare an **ORDER** adopting the Proposal for Decision recommendation that the Conduct Surety Bond should be **FORFEITED**.

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

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

RY

DOCKET NO. 458-99-1557
(TABC CASE NO. 583154)



TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

vs.

OF

JOSE ANTONIO PENA
D/B/A THE TEXAN
PERMIT NO. BG-314610
BEXAR COUNTY, TEXAS

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) initiated this action seeking forfeiture of the conduct surety bond posted by Jose Antonio Pena (Respondent) d/b/a The Texan. Respondent renewed a conduct surety bond¹ on January 16, 1999, 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 did not appear and was not represented at the hearing. The undersigned Administrative Law Judge (ALJ) who reviewed the evidence in the case agrees with the 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 in San Antonio, Bexar County, Texas. Staff was represented by Dewey Brackin, Assistant Attorney General. The Respondent did not appear and was not represented at the hearing; therefore, the hearing proceeded on a default basis, pursuant to 1 TEX. ADMIN. CODE § 155.55. Because the hearing proceeded on a default basis, Staff's factual allegations are deemed admitted as true, and the ALJ has incorporated those allegations into the Findings of Fact without further discussion.

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the Conclusions of Law. The notice of intention to institute enforcement action and the notice of the hearing met the notice requirements imposed by statute and by rule as set forth in the Findings of Fact and Conclusions of Law.

II. Conduct Surety Bond

On January 16, 1996, the Texas Alcoholic Beverage Commission (the Commission) issued a *Wine and Beer Retailer's Permit No. BG-314610*, to Respondent for the premises known as *The*

¹Respondent provided a conduct surety bond, Bond Number 422438731, from Gramercy 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.

Texan at 4518 W. Avenue, San Antonio, Bexar County, Texas. On December 5, 1995, Respondent, as applicant for a wine and beer retailer's permit, posted a conduct surety bond for The *Texan* for \$5,000 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 three separate occasions (January 16, 1998, March 31, 1998, and January 14, 1999) Respondent signed an "Agreement and Waiver of Hearing" regarding a cash law violation of the Code, governed by TEX. ALCO. BEV. CODE ANN. § 102.31.

Each agreement contained the following language:

My name is Jose Antonio Pena. I am the permittee. I hereby declare 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 (see amounts 1 through 3 below) 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)

1. January 14, 1998 - five-days suspension -or- \$750.00 civil penalty;
2. March 31, 1998 - ten-days suspension -or- \$1500.00 civil penalty; and
3. January 14, 1999 - eleven-days suspension -or- \$1650.00 civil penalty.

As a result of these waiver agreements, the Commission Administrator entered Orders on January 20, 1998, April 1, 1998, and January 21, 1999, respectively. The Orders adjudicated that the violations acknowledged by Respondent in the waiver agreements had occurred. The Orders further provided that Respondent's permit would be suspended unless Respondent paid a civil penalty as indicated above.

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 Commission's rule, 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 cancelled, 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." In signing the bond, 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...."

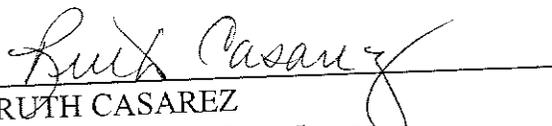
PROPOSED FINDINGS OF FACT

1. On December 5, 1995, Jose Antonio Pena (Respondent) posted a conduct surety bond for The Texan located at: 4518 W. Avenue, San Antonio, Bexar County, Texas, for \$5,000. The Texas Alcoholic Beverage Commission (the Commission) issued a wine and beer retailer's permit No. BG-314610 to Respondent on January 16, 1996.
2. On January 16, 1999, the Commission renewed Respondent's wine and beer retailer's permit.
3. 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 received the notice as shown by the signed returned receipt dated August 21, 1999.
4. 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.
5. The notice of hearing also contained the following language in capital letters in 10-point or larger boldface type: If a party fails to appear at the hearing, the factual allegations in the notice of hearing will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default.
6. 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 did not appear at the hearing. Dewey Brackin, Assistant Attorney General, represented Staff.
7. On the following dates Respondent signed an "Agreement and Waiver of Hearing" regarding a cash law violation of the Code: January 14, 1998, March 31, 1998, and January 14, 1999. By signing each waiver agreement, Respondent declared that a cash law violation had been committed on November 28, 1997, February 20, 1998 and on December 4, 1998, respectively. Respondent acknowledged that a cash law violation had occurred on the three separate occasions and that his permit would be suspended or cancelled by the Commission unless he paid a specified civil penalty for each occurrence.
8. The Commission Administrator entered three separate orders on January 20, 1998, April 1, 1998, and January 21, 1999, finding Respondent had committed a cash law violation of the Code, consistent with Respondent's admissions found in Findings of Fact No. 7.
9. 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 (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. 2000).
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. 2000) and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000).
3. Proper and timely notice of the hearing was effected on Permittee pursuant to Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000), and 1 TEX. ADMIN. CODE § 155.55(d) (1999).
4. Respondent holds permit number BG-314610, 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. 2000).
5. Respondent violated a cash law provision of the Texas Alcoholic Beverage Code on three separate occasions. The cash law provision is governed by TEX. ALCO. BEV. CODE ANN. § 102.31 (Vernon 1995).
6. Respondent violated 16 TEX. ADMIN. CODE § 33.24 and TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13, by violating a commission rule and a law of the State of Texas relating to alcoholic beverages while holding *Wine and Beer Retailer's Permit No. BG-314610*, 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