

**DOCKET NO. 587921**

IN RE LESTER ELGIN MURPHY	§	BEFORE THE
D/B/A MURPHY'S	§	
PERMIT NO. BG456891	§	
	§	TEXAS ALCOHOLIC
	§	
WICHITA COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1912)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 26th day of January, 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 September 21, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 17, 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. Petitioner filed exceptions on November 22, 2000.

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, except for Finding of Fact No.6, and Conclusion of Law No.4.

Finding of Fact No. 6 is substituted as follows:

Based on the December 17, 1999 Order, Respondent had three adjudicated violations of the Code.

Conclusion of Law No. 4 is substituted as follows:

Based on the above Findings of Fact and Conclusions of Law, Respondent's conduct surety bond shall be forfeited.

The above changes are made pursuant to Section 2001.058(e)(1) of the Texas Administrative Procedures Act, TEX. GOV'T CODE ANN. 2000 (West Pamphlet). The administrative law judge did not properly apply or interpret applicable law in that any agency process that results in a final disposition is necessarily an "adjudication." Sierra Club v. Peterson, 185 F.3d 349 (5<sup>th</sup> Cir. 1999).

It is uncontested that Respondent paid a civil penalty or had his permits suspended as a result the adoption of the signed Agreement and Waiver of Hearing. [... ALL RIGHTS AND PRIVILEGES GRANTED UNDER THE PERMIT(S)/LICENSE(S) BE SUSPENDED FOR A PERIOD OF 45 DAYS BEGINNING 12:01 A.M. ON 1/19/2000, UNLESS THE PERMITTEE OR LICENSEE PAYS A CIVIL PENALTY IN THE AMOUNT OF 6,750.00 ON OR BEFORE 01/05/2000.] Thus, a final disposition of the rights held under Respondent's permits occurred.

Furthermore, when an agency declares a legal requirement satisfied, it necessarily states a conclusion of law. Smith v. Houston Chemical Services, Inc., 872 S.W.2d 252 (Tex. App-Austin 1994, writ granted, order withdrawn, denied). The December 17, 1999 Order patently declares a legal effect or consequence. Thus a conclusion of law that Respondent violated the Code sections described in the Agreement and Waiver of Hearing is necessarily implied.

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 February 16, 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 January, 2001.

On Behalf of the Administrator,

  
Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/dab

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

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

Lester Elgin Murphy  
d/b/a Murphy's  
**RESPONDENT**  
P.O. Box 1384  
Wichita Falls, Texas 76307  
**CERTIFIED MAIL NO. Z 280 626 857**  
**U.S MAIL**

Timothy E. Griffith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Wichita Falls District Office

**DOCKET NO. 458-00-1912**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION**

**v.**

**LESTER ELGIN MURPHY  
D/B/A MURPHY'S  
WICHITA COUNTY, TEXAS**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (Petitioner) brought this forfeiture action against Lester Elgin Murphy d/b/a Murphy's (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) does not recommend 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 (Vernon 2000) and 16 TEX. ADMIN. CODE § 33.24 (Vernon 2000). 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 2000). There were no contested issues of notice or jurisdiction in this proceeding.

On July 19, 2000, Petitioner issued its Notice of Hearing, directed to Lester Elgin Murphy d/b/a Murphy's, Post Office Box 1384, Wichita Falls, Texas 76307. On September 21, 2000, a hearing convened before ALJ Monica Branch (SOAH) at the Wichita County Courthouse, County Judge's Courtroom, 900 7th Street, Wichita Falls, Wichita County, Texas. Petitioner was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared pro se. Evidence was received from both parties on that date through testimony provided by witnesses and documentary evidence. The record was closed on September 21, 2000.

## 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 (Vernon 2000), 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 shall be conducted in accordance with the Administrative Procedure Act. *Id.*

## EVIDENCE AND PARTIES' CONTENTIONS

Petitioner alleged that Respondent is the holder of a Wine and Beer Retailer's Permit, issued by TABC. Respondent did not dispute this allegation. Permit records contained in TABC Exhibit Two establish that a Wine and Beer Retailer's Permit, Permit Number BG-456891, was issued to Lester Elgin Murphy, doing business as Murphy's, 111 E. Scott, Wichita Falls, Wichita County, Texas, on August 19, 1999.

In reference to the Wine and Beer Retailer's 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 XTL03162, dated June 3, 1999. The bond was executed by Lester Elgin Murphy d/b/a Murphy's, 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. Respondent disputed one of the alleged adjudicated violations, arguing that Petitioner had agreed to dismiss the violation. TABC Exhibit Two contains an Agreement and Waiver of Hearing, signed by Respondent on December 7, 1999, regarding three violations of the Code alleged to have occurred on November 4, 1999. 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." Respondent testified that he signed the document with the understanding that one of the three alleged violations would be dismissed, and that he did not realize his execution of the agreement would result in bond forfeiture. TABC Exhibit Two also contains an Order, executed by TABC Assistant Administrator Randy Yarbrough on December 17, 1999, which adopts the previously referenced Agreement and Waiver of Hearing. 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...

No evidence was received regarding any other alleged adjudicated violations of the Code by Respondent.

Finally, Petitioner offered evidence of its compliance with the notice requirements of 16 TEX. ADMIN. CODE § 33.24 (Vernon 2000). TABC Exhibit Two contains a letter dated February 2, 2000, addressed to Lester Elgin Murphy d/b/a Murphy's, 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.

#### ANALYSIS

It is clear from the evidence, and undisputed, that Respondent holds a Wine and Beer Retailer's permit, that Respondent has posted a conduct surety bond in relation to that 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.

Respondent contends that he entered into the Agreement and Waiver of Hearing on the understanding that one of the three alleged violations described in the document would be dismissed. However, this contention goes against the direct language of the Agreement and Waiver of Hearing, signed by Respondent, wherein it states that Respondent neither admits nor denies that the violations stated above have occurred. As such, any action taken by Petitioner regarding the Agreement and Waiver of Hearing pertains to all three alleged violations listed in the document.

Petitioner adopted the Agreement and Waiver of Hearing in its Order dated December 17, 1999. However, the Order never states that Petitioner finds the violations occurred. As such, the ALJ cannot find that Respondent has been 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 XTL03162, dated June 3, 1999, in the amount of five thousand dollars, not be forfeited.

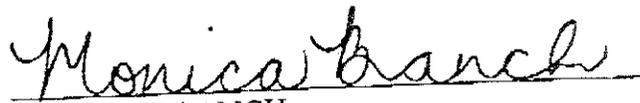
## PROPOSED FINDINGS OF FACT

1. Respondent, Lester Elgin Murphy d/b/a Murphy's, holds a Wine and Beer Retailer's Permit, BG-456891, issued by TABC on August 19, 1999, for the premises located at 111 E. Scott, Wichita Falls, Wichita County, Texas.
2. Respondent has posted Texas Alcoholic Beverage Commission Conduct Surety Bond Number XTL03162, dated June 3, 1999. The bond was executed by Lester Elgin Murphy d/b/a Murphy's, 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. On December 7, 1999, Respondent signed an Agreement and Waiver of Hearing regarding three violations of the Code alleged to have occurred on November 4, 1999.
4. The Agreement and Waiver of Hearing states that Respondent was neither admitting nor denying that the three violations occurred.
5. The Agreement and Waiver of Hearing was adopted by TABC in an Order dated December 17, 1999. The Order was executed by TABC Assistant Administrator Randy Yarbrough.
6. The Order fails to state that TABC finds the violations occurred.
7. Petitioner sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond by letter dated February 2, 2000.
8. Respondent requested a hearing to determine if the conduct surety bond should be forfeited.
9. On July 19, 2000, Petitioner issued its Notice of Hearing, directed to Lester Elgin Murphy d/b/a Murphy's, Post Office Box 1384, Wichita Falls, Texas 76307.
10. On September 21, 2000, a hearing convened before ALJ Monica Branch, SOAH, at the Wichita County Courthouse, County Judge's Courtroom, 900 7th Street, Wichita Falls, Wichita County, Texas. Petitioner was represented at the hearing by TABC Staff Attorney Timothy E. Griffith. Respondent appeared pro se.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.11(b)(2)(Vernon 2000) and 16 TEX. ADMIN. CODE § 33.24 (Vernon 2000).
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 2000).
3. Respondent received proper notice of hearing.
4. Based upon the Proposed Findings of Fact, Texas Alcoholic Beverage Commission Conduct Surety Bond Number XTL03162, dated June 3, 1999, in the amount of five thousand dollars, should not be forfeited.

SIGNED on this the 17<sup>th</sup> day of November, 2000.



MONICA BRANCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS