

DOCKET NO. 589567

IN RE ARCADIO GALLEGOS, JR.
D/B/A BOMBADIERS NITE CLUB
PERMIT NOS. MB453585, LB453586

EL PASO COUNTY, TEXAS
(SOAH DOCKET NO. 458-00-2361)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 16th day of February, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Louis Lopez. The hearing convened and adjourned on November 22, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 14, 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 March 8, 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 16th day of February, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB\bc

The Honorable Louis Lopez
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (915) 834-5657

Arcadio Gallegos, Jr.
RESPONDENT
109 E. Castellano
El Paso, Texas 79902-6107
VIA CERTIFIED MAIL NO. Z 280 626 988

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
El Paso District Office

DOCKET NO. 458-00-2361

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

ARCADIO GALLEGOS
D/B/A BOMBARDIERS NITE CLUB
MB-453585, LB-453586
EL PASO COUNTY, TEXAS

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (the Staff) brought this enforcement action against Arcadio Gallegos, Jr. d/b/a Bombardiers Nite Club (Respondent) seeking forfeiture of Respondent's conduct surety bond. The Staff alleged that Respondent committed three violations of the Texas Alcoholic Beverage Code (the Code) since September 1, 1995. This proposal finds that the criteria for forfeiture of Respondent's conduct surety bond have been satisfied.

The hearing on the merits was held on November 22, 2000, at the State Office of Administrative Hearings, 401 East Franklin Avenue, Suite 580, El Paso, Texas. The Staff appeared by telephone through attorney Christopher Burnett. Respondent appeared in person and represented himself. Administrative Law Judge Louis Lopez presided.

Since there were no contested issues related to jurisdiction or notice, those matters are set out in the Findings of Fact and Conclusions of Law.

I. EVIDENCE

The only exhibit introduced into evidence was a set of documents presented by the Staff related to Respondent's permits. The exhibit was admitted without objection. Respondent was the only witness who testified.

The evidence found in the exhibit was undisputed. It showed that Respondent had signed a Texas Alcoholic Beverage Commission (TABC) form called an Agreement and Waiver of Hearing on March 7, 2000. The agreement related to violations of the Code that had occurred on February 21, 2000. In the paragraph directly above Respondent's signature, it was stated that Respondent was waiving a right to a hearing. The last line of the paragraph read, "The signing of this waiver may result in the forfeiture of any related conduct surety bond." As a result of the agreement, TABC issued an order signed by Randy Yarbrough, Assistant Administrator of TABC. The order confirmed that Respondent had waived the right to a hearing. It assessed a seven-day suspension or a civil penalty of \$1,050.00 for the violations. The order contained the following warning to Respondent:

This order will become final and enforceable 21 days from the date this order was signed, unless you file a motion for rehearing with the commission.

It was not disputed that (1) Respondent never filed such a motion, (2) he timely satisfied each of the civil penalties assessed, and (3) his business is still in operation.

Respondent's source of contention was that he had not been presented with good evidence in March 2000 for the violations charged against his business. He was especially concerned with a violation which was not presented until two weeks after it had occurred.

In February 2000, Respondent was presented with two citations for violations that occurred at Bombardiers Nite Club on February 21. They involved intoxicated persons on the premises. At the hearing in this case, Respondent expressed some skepticism about one of the intoxicated persons. Respondent had seen the allegedly intoxicated person at the club on the night in question, and the person had not appeared intoxicated to him. Respondent left before the TABC agents came and issued the citations under discussion here. Respondent was resigned to the fact, however, that the person could have become intoxicated by the time the agents arrived and, therefore, did not argue about that citation.

When he went to the El Paso TABC office on March 7 to discuss the two citations he had been given, he was only then presented with a third violation: selling an alcoholic beverage to a minor. The violation supposedly occurred on the same night of February 21. Later, Respondent asked the bartender who had been on duty if he knew whether any minor was served that night; the bartender said he did not. The TABC agents never furnished Respondent the name of the minor nor any details about the sale. Respondent was perplexed on how the agents could deliver a citation to him two weeks after the occurrence, given the circumstances.

In spite of his reservations, Respondent admitted that he had signed the Agreement and Waiver of Hearing when he went to the TABC office. He did not consult a lawyer. He said he felt pressure to sign the agreement because Agent D.K. Coleman, with whom he dealt that day in the TABC office, told him his bar could be closed. He testified that Agent Coleman did not tell him he could have a hearing.

II. ANALYSIS

The TABC rule applicable in this case, found at 16 TEX. ADMIN. CODE (TAC) §33.24(j), provides:

- (1) When a license or permit is canceled, or a final adjudication that the licensee or permittee has committed three violations of the Alcoholic Beverage Code since September 1, 1995, the commission shall notify the licensee or permittee, in writing, of its intent to seek forfeiture of the bond.

(2) The licensee or permittee may . . . request a hearing on the question of whether the criteria for forfeiture of the bond, as established by the Alcoholic Beverage Code, §11.11 and §61.13 and this rule have been satisfied.

The applicable statutory provisions at TEX. ALCO. BEV. CODE ANN. §11.11(b)(2) states:

(b) [T]he holder of the permit agrees 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 this code. . . .

Any lack of evidence for Respondent's violations of February 21, 2000, cannot be considered in this case. Any disagreement with the evidence for the violations would have had to be settled in a hearing brought last March directly challenging the violations. Respondent openly admitted he did not do this but instead signed the Agreement and Waiver of Hearing. TABC then issued an order which advised Respondent he could still ask for a hearing on the violations. The required time to ask for a hearing passed, and the order became a final adjudication that Respondent had violated the Code. Respondent demonstrated further acquiescence with the accusations against him when he paid the civil penalty levied against him by the order. Due to the final adjudication on the three violations in question, the merits of the evidence behind the violations cannot be opened in this case. The only question in this case is whether there was a final adjudication of the three violations, and there was.

It is unfortunate that Respondent felt pressured by Agent Coleman's statements, but he did not mention any threat or coercion to sign the agreement. Respondent only mentioned the fear he felt from the possibility that he might not have enough time to avoid having his bar closed. Respondent did not have to sign anything on March 7. He had time, even after that day, to deliberate on his best course of action and to possibly consult an attorney. Respondent did not sign the agreement as a result of duress.

Based on (1) the agreement he signed, (2) the related order issued by TABC, and (3) his satisfaction of the related civil penalties assessed against him, Respondent committed three violations of the Code.

III. CONCLUSION

Based on a preponderance of the evidence, Respondent committed three violations of the Code since September 1, 1995, in violation of 16 TAC §33.24(j). As a consequence, the criteria for forfeiture of Respondent's conduct surety bond have been satisfied.

FINDINGS OF FACT

1. Arcadio Gallegos, Jr. d/b/a Bombardiers Nite Club (Respondent) is the holder of Mixed Beverage Permit, MB-453585, and Mixed Beverage Late Hours Permit, MB-

453586, issued by the Texas Alcoholic Beverage Commission (TABC) on June 25, 1999. The permits are still in effect.

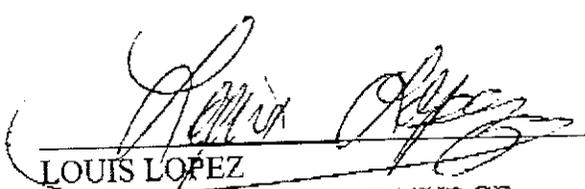
2. On June 10, 1999, Respondent executed a conduct surety bond in the amount of \$5,000.00 payable to TABC.
3. On May 24, 2000, the staff of TABC (the Staff) sent a notice by certified mail to Respondent asserting that TABC was seeking to forfeit Respondent's surety bond and that he had the right to request a hearing on the matter.
4. On September 15, 2000, the Staff sent a notice of hearing by certified mail, return receipt requested, to Respondent. The hearing notice specified the time, place, and nature of the hearing; the legal authority for the hearing; and the matter to be determined. The State Office of Administrative Hearings notified Respondent of the hearing in an Order Setting Prehearing Conference on September 14, 2000.
5. On March 7, 2000, Respondent signed an Agreement and Waiver of Hearing regarding three violations of the Texas Alcoholic Beverage Code (the Code).
6. The violations were (1) sale of an alcoholic beverage to a minor, (2) intoxicated employee on the premises, and (3) sale of an alcoholic beverage to an intoxicated person.
7. All three violations occurred on February 21, 2000.
8. Based on Respondent's Agreement and Waiver of Hearing, TABC entered an order finding the Respondent committed the violations and imposed a seven-day suspension or a civil penalty of \$1,050.00.
9. Respondent did not file a motion for rehearing with TABC, and the TABC order became final.
10. Respondent paid the civil penalty assessed against him.
11. Respondent committed three violations of the Code since September 1, 1995.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. [CODE] §§5.31--5.44 (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding pursuant to CODE §5.43(a) and TEX. GOV'T. CODE ANN. §§2003.021 and 2003.042 (Vernon 2000).

3. Service of proper notice of the hearing was made on Respondent pursuant to CODE §11.63 and the Administrative Procedure Act, TEX. GOV'T. CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. TABC is permitted by CODE §11.11 and 16 TEX. ADMIN. CODE §33.24(j) (2000) to forfeit the conduct surety bond of a permittee who commits three or more violations of the Code since September 1, 1995.
5. Respondent violated the rules of TABC found at 16 TEX. ADMIN. CODE §33.24(j) by committing three violations of the Code since September 1, 1995.
6. Based on the foregoing Findings of Fact and Conclusions of Law, the criteria for forfeiture of the conduct surety bond have been satisfied.

SIGNED this 14th day of December, 2000.



LOUIS LOPEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS