

DOCKET NO. 591869

IN RE JESUS MONTALVO	§	BEFORE THE
D/B/A JESSE'S HIDEAWAY	§	
PERMIT NO. BG467633	§	
LICENSE NO. BL467634	§	TEXAS ALCOHOLIC
	§	
MATAGORDA COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-1300)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 5th day of March, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Don Smith. The hearing convened and adjourned on January 25, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 7, 2001. 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 February 13, 2001.

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 Nos. 6 and 10, and Conclusion of Law No. 4.

Finding of Fact No. 6 is substituted as follows:

Based on the September 20, 2000 Order, Respondent had two adjudicated violations of the Code.

Finding of Fact No. 10 is substituted as follows:

Based on the July 20, 2000 Order, Respondent had one adjudicated violation 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 (5th 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. 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.

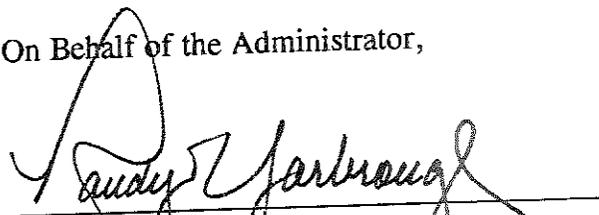
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

This Order will become final and enforceable on March 26, 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 5th day of March, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Don Smith
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (713) 812-1001

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DOCKET NO. 458-01-1300

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

V.

JESUS MONTALVO
D/B/A JESSE'S HIDEAWAY
MATAGORDA 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 Jesus Montalvo d/b/a Jesse's Hideaway (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 December 28, 2000, Petitioner issued its Notice of Hearing, directed to Jesus Montalvo d/b/a Jesse's Hideaway, 1700 Baywood Drive, # 845, Bay City, Texas 77414-7656. On January 25, 2001, a hearing convened before ALJ Don Smith (SOAH) at 2020 North Loop West, Suite 111, Houston, Harris County, Texas. Petitioner was represented at the hearing by Christopher Burnett, TABC Staff Attorney. Respondent appeared and was represented at the hearing by Clyde Burlison, Attorney At Law. Evidence was received from both parties on that date. The record was closed on January 30, 2001.

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 and a Retail Dealer's On-Premise Late Hours Permit, issued by TABC. Respondent did not dispute this allegation. Permit records contained in TABC Exhibit One establish that a Wine and Beer Retailer's Permit, Permit Number BG-467633, and a Retail Dealer's On-Premise Late Hours Permit, Permit Number BL-467634, was issued to Jesus Montalvo, doing business as Jesse's Hideaway, 4103 Ave F, Bay City, Matagorda County, Texas, on March 1, 2000.

In reference to the issued permits, Petitioner alleged that Respondent posted a conduct surety bond. Again, Respondent did not dispute this allegation. TABC Exhibit One contains a certified copy of Texas Alcoholic Beverage Commission Conduct Surety Bond Number XTM03661, dated January 31, 2000. The bond was executed by Jesus Montalvo d/b/a Jesse's Hideaway, 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 generally disputed this allegation. TABC Exhibit One contains an Agreement and Waiver of Hearing, signed by Respondent on September 12, 2000, regarding two violations of the Code alleged to have occurred on July 21, 2000. The exhibit also contains an Agreement and Waiver of Hearing, signed by Respondent on July 12, 2000, regarding one violation of the Code alleged to have occurred on June 3, 2000. In both documents, 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.” TABC Exhibit One contains an Order, executed by TABC Assistant Administrator Randy Yarbrough on September 20, 2000, which adopts the Agreement and Waiver of Hearing signed on September 12, 2000. The exhibit also contains an Order, executed by TABC Assistant Administrator Randy Yarbrough on July 20, 2000, which adopts the Agreement and Waiver of Hearing signed on July 12, 2000. Both orders read, 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 One contains a letter dated October 19, 2000, addressed to Jesus Montalvo d/b/a Jesse's Hideaway, 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 and a Retail Dealer's On-Premise Late Hours Permit, that Respondent has posted a conduct surety bond in relation to the permits, 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.

Petitioner adopted the two waiver agreements signed by Respondent in separate orders dated September 20, 2000 and July 20, 2000. However, the orders never state that Petitioner finds the alleged 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 XTM03661, dated January 31, 2000, in the amount of five thousand dollars, not be forfeited.

PROPOSED FINDINGS OF FACT

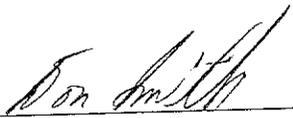
1. Respondent, Jesus Montalvo d/b/a Jesse's Hideaway, holds a Wine and Beer Retailer's Permit, BG-467633, and a Retail Dealer's On-Premise Late Hours Permit, BL-467634, issued by TABC on March 1, 2000, for the premises located at 4103 Ave F, Bay City, Matagorda County, Texas.

2. Respondent has posted Texas Alcoholic Beverage Commission Conduct Surety Bond Number XTM03661, dated January 31, 2000. The bond was executed by Jesus Montalvo d/b/a Jesse's Hideaway, 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 September 12, 2000, Respondent signed an Agreement and Waiver of Hearing regarding two violations of the Code alleged to have occurred on July 21, 2000.
4. The Agreement and Waiver of Hearing states that Respondent was neither admitting nor denying that the two violations occurred.
5. The Agreement and Waiver of Hearing was adopted by TABC in an Order dated September 20, 2000. The Order was executed by TABC Assistant Administrator Randy Yarbrough.
6. The Order fails to state that TABC finds the violations occurred.
7. On July 12, 2000, Respondent signed an Agreement and Waiver of Hearing regarding one violation of the Code alleged to have occurred on June 3, 2000.
8. The Agreement and Waiver of Hearing states that Respondent was neither admitting nor denying that the violation occurred.
9. The Agreement and Waiver of Hearing was adopted by TABC in an Order dated July 20, 2000. The Order was executed by TABC Assistant Administrator Randy Yarbrough.
10. The Order fails to state that TABC finds the violation occurred.
11. Petitioner sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond by letter dated October 19, 2000.
12. Respondent requested a hearing to determine if the conduct surety bond should be forfeited.
13. On December 28, 2000, Petitioner issued its Notice of Hearing, directed to Jesus Montalvo d/b/a Jess's Hideaway, 1700 Baywood Drive, Suite 845, Bay City, Texas 77414-7656.
14. On January 25, 2001, a hearing convened before ALJ Don Smith, SOAH, at 2020 North Loop West, Suite 111, Houston, Harris County, Texas. Petitioner was represented at the hearing by TABC Staff Attorney Christopher Bumett. Respondent appeared and was represented at the hearing by Attorney Clyde Burleson.

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 XTM03661, dated January 31, 2000, in the amount of five thousand dollars, should not be forfeited.

SIGNED on this the 7 day of February, 2001.



DON SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS