

DOCKET NO. 593639

IN RE LUIS MARIO QUINTANILLA
D/B/A A QUICK DRINK
PERMIT NO. BG-474602

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

EL PASO COUNTY, TEXAS
(SOAH DOCKET NO. 458-01-2662)

ORDER

CAME ON FOR CONSIDERATION this 27th day of July, 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 on June 8, 2001 and adjourned on June 8, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 21, 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. 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.

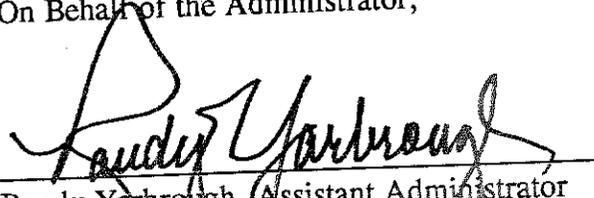
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 **NOT BE FORFEITED**.

This Order will become final and enforceable on August 17, 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 27th day of July, 2001.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

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

Luis Mario Quintanilla
d/b/a A Quick Drink
RESPONDENT
717 E. San Antonio, Ste. C
El Paso, Texas 79901-2520
Via Certified Mail No. 7000 1530 0002 0413 2523

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
El Paso District Office

As a result of the agreement, TABC issued an order canceling Respondent's permits. The order mentioned no other penalty in addition to cancellation.

Respondent's contention at the hearing was that the cancellation of his permits was based on a defective underlying agreement. He testified that he had gone to the TABC El Paso office and met with Agent John Peek. Respondent told Agent Peek he had already decided to close down his business and was prepared to surrender his permits. The agent told him he could agree to a cancellation and assured him he would not have to pay any money as a penalty. He wrote down "0" in the blank in the agreement for the amount of civil penalty to be paid and did not mention anything about forfeiture of a conduct surety bond. Respondent testified that he had felt fully confident that on signing the Agreement he would not have to pay any money whatsoever as a result of the cancellation. If he had known he would be liable for forfeiture of the bond, he would have simply taken a suspension in order to avoid a forfeiture since he had only two violations of the Code since September 1, 1995. At the conclusion of the suspension, he could have voluntarily surrendered his license without being subject to forfeiture of the bond.

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, [sic] 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) and §61.13(b)(2) state:

[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. . . .

No hearing was held on the two violations which were the basis for cancellation, and consequently, there was no adjudication of cancellation. Therefore, the Staff has to rely completely on the Agreement and Waiver of Hearing to establish a cancellation, and the terms of the agreement have to be clear in order for it to be valid. Any ambiguities in the document have to be resolved against the Staff since it drafted the form. Furthermore, any material representations by a TABC agent should be considered.

On its face, the Agreement and Waiver of Hearing contains ambiguities. In the paragraph mentioned before, it states that permits will be "suspended/canceled." Whether the action to be taken is a suspension or cancellation can be made clear by lining through one of the two words. This was not done in this case, and the ambiguity remained. The zero in the blank for the amount of the monetary civil penalty could apply to a suspension as well as to a cancellation. If the action was to be a cancellation, the word "cancellation" could have been written in the blank.

Finally, the sentence warning a permittee that the waiver "may result" in forfeiture of the bond leaves it unclear under what circumstances forfeiture will actually be sought and whether a TABC agent--such as Mr. Peek--could waive pursuit of a bond forfeiture. The sentence also contradicts the prior sentence that claims the monetary penalty will be zero. That contradiction should be resolved against the Staff. On this point, the Staff contended that there were two distinct monetary penalties--one in connection with the violations and the other in connection with a forfeiture pursuant to the cancellation. The Staff is well acquainted with the Code and the TABC rules, but it is another thing to expect a permittee to readily appreciate the distinction, especially under the pressure of negotiations with a TABC agent.

Agent Peek's representation to Respondent not to worry about a monetary penalty could easily be interpreted as meaning that it would include all possible monetary consequences, including a bond forfeiture. If the agent was going to discuss the consequences with Respondent, he had to be careful not to mislead Respondent on the ultimate monetary consequences of his agreement to cancel.

In their discussion, the parties were not dealing at arms' length, but instead the Staff had the upper hand under the circumstances. The meeting took place in the TABC offices. An agent sits in a position of greater power and is supposedly more knowledgeable than a permittee. It is understandable how Respondent was misled--surely unintentionally by the agent--into agreeing to a cancellation when he had the right to opt for a suspension. Respondent could have easily gotten the impression that Agent Peek had the authority to negotiate and to waive requirements written in the agreement, including any further penalties beyond cancellation.

III. CONCLUSION

Based on a preponderance of the evidence, cancellation of Respondent's permits was erroneous because it was based on contradictory statements in the agreement and on misrepresentations made by a TABC agent which induced Respondent to sign the agreement. As a consequence, the criteria for forfeiture of Respondent's conduct surety bond have not been satisfied.

FINDINGS OF FACT

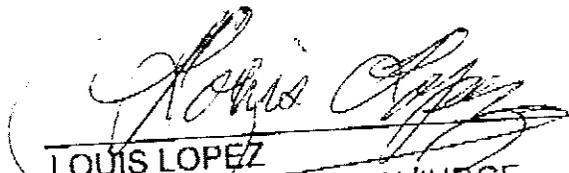
1. Luis Mario Quintanilla (Respondent) d/b/a A Quick Drink is the holder of Wine and Beer Retailer's Permit No. BG-474602 and Retail Dealer's On Premise Late Hours License No. BL-474603, issued by the Texas Alcoholic Beverage Commission (TABC) on June 22, 2000. TABC canceled the permits for cause on January 29, 2001.
2. On May 11, 2000, Respondent executed a conduct surety bond in the amount of \$5,000.00 payable to TABC.
3. On February 15, 2001, 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.
5. On April 18, 2001, the Staff sent a notice of hearing by certified mail 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 April 25, 2001.
6. On January 3, 2001, Respondent signed an Agreement and Waiver of Hearing, regarding two violations of the Texas Alcoholic Beverage Code, which was made the basis for cancellation of Respondent's permits.
7. The Agreement and Waiver of Hearing contained contradictory statements on whether Respondent's permits were being suspended or canceled and on the correct amount that Respondent would have to pay.
8. Respondent signed the Agreement and Waiver of Hearing only after TABC Agent John Peek represented to him that he would not suffer any monetary penalty in the future if he signed.
9. The Agreement and Waiver of Hearing was defective for the reasons described above and could not support the TABC order canceling Respondent's permits.

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. GOVT. 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. GOVT. CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. CODE §§11.11 and 61.31 and 16 TEX. ADMIN. CODE §33.24(j) (West 2000) provide the criteria for forfeiture of the conduct surety bond of a permittee whose permit has been canceled.
5. Based on the foregoing Findings of Fact and Conclusions of Law, the criteria for forfeiture of the conduct surety bond have not been satisfied.

SIGNED this 21st day of June, 2001.



LOUIS LOPEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS