

**DOCKET NO. 596951**

IN RE RICHARD O'DONNELL COOPER	§	BEFORE THE
D/B/A CLUB GALAXIE	§	
PERMIT NO. BG444496	§	
LICENSE NO. BL444497	§	TEXAS ALCOHOLIC
	§	
FORT BEND COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-1106)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 23<sup>rd</sup> day of April 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Timothy J. Horan. The hearing convened on January 18, 2002 and the record was closed on January 28, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 28, 2002. 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.

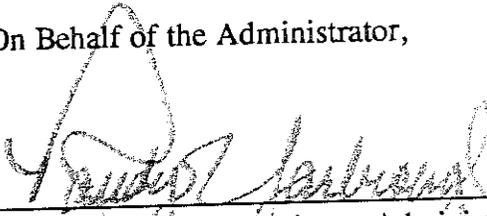
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

**This Order will become final and enforceable on May 14, 2002**, 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 23rd day of April, 2002.

On Behalf of the Administrator,

  
\_\_\_\_\_  
Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

LT/bc

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

Richard Odonnell Cooper  
d/b/a Club Galaxie  
**RESPONDENT**  
P.O. Box 554  
Rosharon, Texas 77583-0554  
**CERTIFIED MAIL NO. 7001 2510 0000 7278 9548**

Lindy To  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Houston District Office

SOAH DOCKET NO. 458-02-1106

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

RICHARD O'DONNELL COOPER  
D/B/A CLUB GALAXIE  
PERMIT NO. BG-444496  
LICENSE NO. BL-444497

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Richard Odonnell Cooper d/b/a Club Galaxie (Respondent) seeking forfeiture of the full amount of the Respondent's conduct surety bond. TABC alleged the Respondent committed three violations of the Texas Alcoholic Beverage Code since September 1, 1995. TABC also alleged the violations have been finally adjudicated. The Respondent appeared and contended that he had committed two violations and not three as asserted by TABC. This Proposal for Decision finds the Respondent's conduct surety bond should be forfeited.

**I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

The hearing in this matter convened on January 18, 2002. Staff Attorney Lindy To represented TABC. The Respondent appeared and was represented by Richard Odonnell Cooper. Timothy J. Horan, Administrative Law Judge (ALJ), presided and the record was closed on January 28, 2002.

The notice of hearing, dated December 12, 2001, was sent, by certified mail, return receipt requested, to the Respondent at P.O. Box 554, Rosharon, Texas 77583-0554. No party challenged notice, jurisdiction, or venue. 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 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. EVIDENCE AND ANALYSIS**

**A. Evidence.**

The staff of TABC (Staff) offered documentary evidence from the TABC files. Those documents show:

(a) On December 30, 1998, Respondent posted a conduct surety bond in the amount of \$5,000 asserting it would faithfully conform with the Texas Alcoholic Beverage Code (the Code) and the rules of TABC.

(b) Richard Odonnell Cooper d/b/a Club Galaxie was issued a Wine and Beer Retailer's Permit BG-444496 and Retail Dealer's On-Premises Late Hours License BL-444497, by TABC on January 12, 1999.

(c) On May 22, 2000 and on May 12, 2001, Respondent was issued citations for alleged violations of the Code.

(d) On October 18, 2000 and August 11, 2001, the Respondent signed a document entitled "Agreement and Waiver of Hearing" which, in each instance, included the following language, "I 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."

(e) The October 18 2000, waiver document listed the alleged violation as a cash law violation-issued five bad checks; the August 11, 2001, waiver document listed two alleged violations as a Cash Law Violation-Sec.102.31 and the other as a Credit Law Violation-Sec.102.32.

(f) On October 26, 2000 and on August 21, 2001, respectively, based on the "Agreement and Waiver of Hearing" documents signed by the Respondent, TABC issued Orders assessing the Respondent penalties for the violations listed. The October 26, 2000 Order assessed a five day suspension of license numbers BG-444496 and BL-444497 unless the Respondent paid a \$750.00 penalty before November 22, 2000. The August 21, 2001 Order assessed a five day suspension of the same license unless the Respondent paid a \$750.00 penalty before September 12, 2001.

Richard Odonnell Cooper argues that the two violations that occurred on May 12, 2001 should be considered as one violation since it was out of the same check transaction. He was under the impression that the two law violations were going to be combined into one violation.

## **B. Analysis.**

The Staff had the burden of proof in this hearing. The issues to be decided are whether the Respondent was the subject of "final adjudication" of three violations of the Code after September 1, 1995, and if so, did TABC waive its right to pursue action against the Respondent's conduct surety bond.

The rules of TABC, at 16 TEX. ADMIN. CODE CODE (TAC) §33.24(j) provide:

(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 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) state:

(b) . . . the 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. . . .

The Staff takes the position that the Orders issued on October 26, 2000 and August 21, 2001 each amounts to a final adjudication. The Orders contain a warning to the Respondent that the Order will become final and enforceable either at the time it is signed or 21 days after the date it is signed unless the Respondent files a motion for rehearing. There is no evidence the Respondent filed such a motion. The undersigned ALJ agrees with the Staff's position that the Orders issued on October 26, 2000 and on August 21, 2001, that each became a final adjudication that the Respondent had violated the Code when the Respondent failed to seek a rehearing. The instant hearing is not the proper forum to challenge the findings contained in the Order.

### **III. RECOMMENDATION**

Based on a preponderance of the evidence, the Respondent committed three violations of the Code since September 1, 1995, in violation of Texas Alcoholic Beverage Commission rules, 16 TAC §33.24. As a consequence, the full amount of the conduct surety bond, or any instrument serving in place of a conduct surety bond (including, but not limited to certificates of deposit and letters of credit), should be forfeited.

### **IV. PROPOSED FINDINGS OF FACT**

1. Richard Odonnell Cooper d/b/a Club Galaxie (Respondent) is the holder of Wine and Beer Retailer's Permit BG-444496 and Retail Dealer's On-Premises Late Hours License BL-444497, issued by the Texas Alcoholic Beverage Commission (TABC) on January 12, 1999 and which have been continuously renewed.

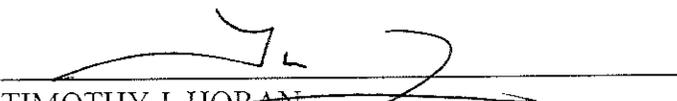
2. On December 30, 1998, the Respondent executed a conduct surety bond in the amount of \$5,000.00 payable to TABC.
3. On December 12, 2001, the staff of TABC (the Staff) sent a Notice of Hearing by certified mail, return receipt requested, to the Respondent asserting that TABC was seeking to forfeit the Respondent's surety bond.
4. The hearing on the merits was conducted on January 18, 2002. Staff Attorney Lindy To represented the Staff. The Respondent appeared and was represented by Richard Odonnell Cooper. Timothy J. Horan, Administrative Law Judge (ALJ) presided.
5. On October 18, 2000, the Respondent signed an "Agreement and Waiver of Hearing" regarding an alleged violation of the Texas Alcoholic Beverage Code (the Code), for which TABC entered an Order finding the Respondent committed the violation and imposed a five day suspension or a civil penalty of \$750.00 on the Respondent.
6. On August 11, 2001, the Respondent signed an "Agreement and Waiver of Hearing" regarding two alleged violations of the Code, for which TABC entered an Order finding the Respondent committed the violations and imposed an five day suspension or a civil penalty of \$750.00 on the Respondent.
7. The Respondent has committed three violations of the Code since September 1, 1995.

## **V. CONCLUSIONS OF LAW**

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 11.11.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE ANN. §§2001.051 and 2001.052.
4. The Respondent violated the rules of TABC found at 16 TEX. ADMIN. CODE §33.24 by committing three violations of the Texas Alcoholic Beverage Code (the Code) since September 1, 1995.
5. TABC is permitted by TEX. ALCO. BEV. CODE ANN. §11.11 and 16 TEX. ADMIN. CODE §33.24 to forfeit the conduct surety bonds of permittees who commit three or more violations of the Code since September 1, 1995.

6. Based on the foregoing Findings of Fact and Conclusions of Law, the conduct surety bond executed by the Respondent should be forfeited to the State.

SIGNED this 28<sup>th</sup> day of March, 2002.



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TIMOTHY J. HORAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS