

SOAH DOCKET NO.458-07-2201

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE
V.		OF
THE NEW FORAJIDO'S PRIVATE CLUB, Respondent		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC; Commission; or Petitioner) brought this forfeiture action against The New Forajido's Private Club (Respondent). Petitioner sought forfeiture of Respondent's conduct surety bond, alleging that Respondent was found to have committed three violations of the Texas Alcoholic Beverage Code (the Code) or Commission's rules (the Rules) since September 1, 1995. Petitioner also alleged that the violations have been finally adjudicated. The Administrative Law Judge (ALJ) recommends the conduct surety bond be forfeited.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No party challenged notice or jurisdiction. Therefore, those matters are addressed only in the findings of fact and conclusions of law.

On June 29, 2007, a hearing convened before State Office of Administrative Hearings (SOAH) ALJ Brenda Coleman. Staff was represented at the hearing by Barbara Moore, TABC Staff Attorney. Respondent's representative, Dorothy Spicer, appeared and was represented by Clyde Burleson, attorney. Evidence and argument were presented. The record closed on July 20, 2007.

II. DISCUSSION

A. Applicable Law

Petitioner alleged that (1) Respondent had been issued a permit; (2) Respondent was found to have committed at least three violations of the Code or the Rules since September 1, 1995; (3) the violations have been finally adjudicated; and (4) Respondent has forfeited the full amount of the conduct surety bond.

When posting a conduct surety bond, the permit or license holder must agree not to violate a Texas law or the Rules relating to alcoholic beverages. The holder must also agree that the amount of the bond shall be paid to the state if the permit is revoked or after final adjudication that determines the holder violated a provision of the Code.

Forfeiture of a conduct surety bond is governed by 16 TEX. ADMIN. CODE (TAC) § 33.24(j), which provides that the Commission may seek forfeiture when a license or permit has been canceled, or when there has been a final adjudication that the licensee or permittee has committed three violations of the Code since September 1, 1995.

B. Evidence Presented

Petitioner's two exhibits were admitted at the hearing without objection. Exhibit No. 2 included a copy of the permit, violation history, the conduct surety bond, and correspondence. Petitioner issued Private Club Registration Permit, N-601120, which includes the Beverage Cartage Permit, to Respondent on June 10, 2005. The permit has been continuously renewed. Respondent's licensed premise is located at 3701 Highway 45 North, Ennis, Ellis County, Texas.

Respondent posted TABC Conduct Surety Bond Number 3331912. Respondent executed

the bond as principal; SureTec Insurance Company is the surety. The bond is in the amount of \$5,000.00 and is payable to the State of Texas.

On March 22, 2006, Respondent signed an Agreement and Waiver of Hearing regarding the following two violations of the Code alleged to have been committed on November 23, 2005: "cash law violation sec. 102.31" and "purchase of alcoholic beverages with money other than replacement money violation sec. 32.06(B(4))." Respondent agreed to waive its right to a hearing to contest Petitioner's claims. Respondent also acknowledged that the signing of the waiver "may result in the forfeiture of any related conduct surety bond." The Agreement and Waiver of Hearing became final and enforceable by TABC Order, dated April 11, 2006, in TABC Docket No. 525438, finding "that Respondent violated those sections of the Code as stated in the Agreement and Waiver of Hearing," and imposing the penalty reflected in the Order.

On September 27, 2006, Respondent signed an Agreement and Waiver of Hearing regarding an "administrative violation" described as "open saloon" alleged to have been committed on October 21, 2005. Respondent agreed to waive its right to a hearing to contest Petitioner's claim. Respondent also acknowledged that the signing of the waiver "may result in the forfeiture of any related conduct surety bond." The Agreement and Waiver of Hearing became final and enforceable by TABC Order, dated October 25, 2006, in TABC Docket No. 511087, finding "that Respondent violated those sections of the Code as stated in the Agreement and Waiver of Hearing," and imposing the penalty reflected in the Order.

Respondent presented no evidence at the hearing.

C. Argument Presented

Respondent does not dispute that Petitioner has proven two final adjudications of the Code (cash law violation and purchase of alcoholic beverages with money other than replacement money

violation) in TABC Docket No. 525438. Respondent argues, however, that the Agreement and Waiver of Hearing signed on September 27, 2006, is defective, fails to prove a third violation of the Code was committed, and should not be counted against Respondent because it merely states that the alleged violation is “open saloon” without listing a section of the Code. Therefore, Respondent argues, no final adjudication can be found in the TABC Order, dated October 25, 2006, in TABC Docket No. 511087.

Petitioner, on the other hand, argues that Respondent agreed to the payment of a civil penalty or having the permit suspended for the alleged open saloon violation as set forth in the Agreement and Waiver of Hearing signed on September 27, 2006, and a penalty was assessed to Respondent. Therefore, argues Petitioner, as a result of the adoption of the signed Agreement and Waiver of Hearing, a final disposition and adjudication of the allegation against Respondent occurred.

III. ANALYSIS

As the holder of an alcoholic beverage permit, Respondent was required to provide a conduct surety bond, in the amount of \$5,000.00, payable to Petitioner.¹ Respondent also agreed not to violate the Code or the Rules. Petitioner may seek forfeiture of the bond if Respondent is found to have committed three violations of the Code since September 1, 1995.²

Petitioner provided evidence that Respondent has violated the Code at least three times since September 1, 1995. Respondent entered into an Agreement and Waiver on two separate occasions regarding violations of the Code, all of which occurred after September 1, 2005. Respondent signed the agreements which included the following language, “The signing of this waiver may result in the forfeiture of any related conduct surety bond.” This statement put Respondent on notice that there was a possibility that Petitioner would seek forfeiture of the conduct surety bond. Final orders

1 Code § 11.11.

2 16 TAC § 33.24(j).

regarding these violations were issued by the Commission. Each of the orders issued by Commission stated that unless Respondent filed a motion for rehearing, the orders would become final and enforceable. The orders were not appealed and became final, resulting in the violations being adjudicated. "Any agency process that results in a final disposition is necessarily an adjudication."³

The evidence on the record is sufficient to establish that Respondent has been finally adjudicated of three violations of the Code since September 1, 1995. According to §33.24 (j) of the Rules, forfeiture of the conduct surety bond is the penalty for this violation. Therefore, the ALJ recommends that Respondent's conduct surety bond be forfeited.

IV. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC; Commission; or Petitioner) issued Private Club Registration Permit N-601120, which includes the Beverage Cartage Permit, to The New Forajido's Private Club on June 10, 2005.
2. Respondent's licensed premise is located at 3701 Highway 45 North, Ennis, Ellis County, Texas.
3. Respondent posted Conduct Surety Bond Number 3331912. Respondent executed the bond as principal; SureTec Insurance Company is the surety. The bond is in the amount of \$5,000.00 and is payable to the State of Texas.
4. On March 22, 2006, Respondent signed an Agreement and Waiver of Hearing regarding two violations of the Texas Alcoholic Beverage Code (the Code) which occurred on November 23, 2005.
5. The Agreement and Waiver of Hearing included the statement, "The signing of this waiver may result in the forfeiture of any related conduct surety bond."
6. The violations were adjudicated against Respondent by Commission Order, dated April 11, 2006, in TABC Docket No. 525438.

³ See Sierra Club v. Peterson, 185 F. 3d 349 (5th Cir. 1999).

7. The TABC Order included the statement, "This Order will become final and enforceable in 21 days from the date this Order was signed, unless you file a motion for rehearing with the Commission."
8. Respondent did not file a motion for rehearing.
9. On September 27, 2006, Respondent signed an Agreement and Waiver of Hearing regarding a violation of the Code which occurred on October 21, 2005.
10. The Agreement and Waiver of Hearing included the statement, "The signing of this waiver may result in the forfeiture of any related conduct surety bond."
11. The violation was adjudicated against Respondent by Commission Order, dated October 25, 2006, in TABC Docket No. 511087.
12. The TABC Order included the statement, "This Order will become final and enforceable in 21 days from the date this Order was signed, unless you file a motion for rehearing with the Commission."
13. Respondent did not file a motion for rehearing.
14. Respondent has committed at least three violations of the Code or Rules since September 1, 1995.
15. On November 16, 2006, Petitioner notified Respondent that it intended to seek forfeiture of Respondent's conduct surety bond based on the Commission's final adjudication of Respondent's violations of the Code.
16. Respondent requested a hearing to determine whether the conduct surety bond should be forfeited.
17. On May 29, 2007, Petitioner issued its notice of hearing to Respondent. The notice of hearing was received by Respondent on May 31, 2007.
18. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
19. The hearing was convened before State Office of Administrative Hearings Administrative Law Judge Brenda Coleman on June 29, 2007. Petitioner appeared and was represented by Barbara Moore, TABC Staff Attorney. Respondent's representative, Dorothy Spicer,

appeared and was represented by Clyde Burleson, attorney.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Code ch. 5 and § 11.11, as well as 16 TEX. ADMIN. CODE (TAC) § 33.24.
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 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. Respondent has committed at least three violations of the Texas Alcoholic Beverage Code since September 1, 1995.
5. The conduct surety bond posted by Respondent should be forfeited. Code § 11.11 and 16 TAC § 33.24 (j).

SIGNED September 18, 2007.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC v. The New Forajido's Private Club

DOCKET NUMBER: 458-07-2201

AGENCY CASE NO: 511087

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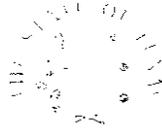
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as of September 18, 2007

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



September 18, 2007

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

RE: Docket # 458-007-2201
TABC V. THE NEW FORAJIDO'S PRIVATE CLUB

Dear Ms. Fox:

Please find enclosed a PROPOSAL FOR DECISION in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "Brenda Coleman".

Brenda Coleman
Administrative Law Judge

BC/sr
Enclosure

cc: Barbara Moore, Agency Counsel for Texas Alcoholic Beverage Commission, **Via Fax**,
Clyde Burselson, Respondent's Attorney, **Via Fax**