

SOAH DOCKET NO. 458-04-2402

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

v.

DUKE TRACY'S L.L.C.
D/B/A DUKE TRACY'S,
POTTER COUNTY, TEXAS
(TABC CASE NO. 524592),
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC, Staff), brought this disciplinary action against Duke Tracy's L.L.C. dba Duke Tracy's (Respondent), alleging that Respondent was found to have committed three or more violations of the Texas Alcoholic Beverage Code (the Code) since September 1, 1995. Based on the evidence, the Administrative Law Judge (Judge) finds that TABC proved the allegations by a preponderance of the evidence and recommends that Respondent's conduct surety bond be forfeited.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

On August 8, 2006, a hearing was convened before Judge B. L. Phillips, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner was represented by Diane Brown, attorney, who appeared by telephone. Respondent appeared and was represented by William R, McKinney, Jr., attorney, who appeared by telephone. The record closed the same day.

The Commission and the State Office of Administrative Hearings (SOAH) have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute

disciplinary 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. CONDUCT SURETY BOND

On February 21, 2005, the Commission issued a Mixed Beverage Permit, MB-573437, and a Mixed Beverage Late Hours Permit, LB-573438, to Respondent. On January 20, 2005, Respondent posted a conduct surety bond for \$5,000 as required by sections 11.11 and 61.13 of the Code.

III. EVENTS LEADING TO THE REQUEST TO FORFEIT RESPONDENT'S CONDUCT SURETY BOND

On December 14, 2005, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. The waiver agreement alleged that, on November 20, 2005, an employee possessed a local distributor stamp that was not mutilated in violation of Code. As a result of this waiver agreement, the Commission's Administrator entered an order on December 27, 2005, finding that Respondent violated those sections of the Code as stated in the agreement and waiver of hearing and suspending Respondent's licenses for five days unless Respondent paid a civil penalty of \$750.00.

On October 24, 2005, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. The waiver agreement alleged that, on August 2, 2005, Respondent, his agent, servant or employee permitted a minor to possess/consume an alcoholic beverage on the licensed premises in violation of Code. As a result of this waiver agreement, the Commission's Administrator entered an order on November 1, 2005, finding that Respondent violated those sections of the Code as stated in the agreement and waiver of hearing and suspending Respondent's licenses for three days unless Respondent paid a civil penalty of \$450.00.

On December 14, 2005, Respondent signed an "Agreement and Waiver of Hearing" regarding three violations of the Code. The waiver agreement alleged that, on December 3, 2005, Respondent permitted a minor to possess and consume an alcoholic beverage on the licensed

premises in violation of Code, permitted consumption on the licensed premises during prohibited hours in violation of the Code, and permitted an employee to be intoxicated on the licensed premises in violation of the Code. As a result of this waiver agreement, the Commission's Administrator entered an order on December 27, 2005, finding that Respondent violated those sections of the Code as stated in the agreement and waiver of hearing and suspending Respondent's licenses for twenty days unless Respondent paid a civil penalty of \$3,000.00.

Respondent did not testify at the hearing but his attorney argued that he had already paid for the violations through the previous agreed orders and should not be made to forfeit his bond.

IV. FORFEITURE OF CONDUCT SURETY BOND

The Commission may revoke a license or permit, or deny renewal of a license or permit, if the holder violates a provision of the Code or rule of the Commission pursuant to Code sections 6.01 and 61.71. The Commission's rule found at 16 TAC section 33.24(j) governs forfeiture of a conduct surety bond, and provides that the Commission may seek forfeiture when a license or permit has been canceled, or where there has been a final adjudication that a licensee or permittee has committed three violations of the Code since September 1, 1995.

When posting a conduct surety bond, the permit or license holder must agree not to violate a Texas law relating to alcoholic beverages or a Commission rule. The holder must also agree 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 the Code.

Respondent admitted in three Agreements and Waivers of Hearing that he has violated provisions of the Code three or more times since September 1, 1995. His argument that he has already paid for these violations is not supported by the law. Since October of 2005, Respondent agreed to the payment of civil penalties totaling \$4,200.00 based on five violations of the Code which were described in the aforementioned documents. The documents that Respondent signed set out with particularity the description of the administrative violations, the period of suspension or

civil penalty, and the possible consequences of the signing of the documents. Furthermore, each "Agreement and Waiver of Hearing" document states in capitalized and bold print "THE SIGNING OF THIS WAIVER MAY RESULT IN THE FORFEITURE OF ANY RELATED CONDUCT SURETY BOND." Respondent was therefore given notice of the fact that there was a possibility of further penalty in the form of a bond forfeiture.

V. PROPOSED FINDINGS OF FACT

1. On February 21, 2005, the Commission issued a Mixed Beverage Permit, MB-573437, and a Mixed Beverage Late Hours Permit, LB-573438, to Respondent. On January 20, 2005, Respondent posted a conduct surety bond for \$5,000 as required by TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated July 13, 2006. The hearing was continued and reset for August 8, 2006.
3. The hearing on the merits convened August 8, 2006, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Texas. The TABC was represented by attorney Diane Brown. The Respondent appeared and was represented by attorney William R, McKinney, Jr.. The record closed on the same day.
4. On December 14, 2005, Respondent signed an "Agreement and Waiver of Hearing" regarding an allegation that, on December 3, 2005, Respondent permitted an intoxicated employee on the premises, permitted consumption on the premises during prohibited hours, and permitted a minor to possess and consume an alcoholic beverage, all violations of the Code. On December 27, 2005, the Commission entered an Order finding that Respondent violated those sections of the Code as stated in the agreement and waiver of hearing.
5. On October 24, 2005, Respondent signed an "Agreement and Waiver of Hearing" regarding an allegation that, on August 2, 2005, Respondent, his agent, servant or employee permitted a minor to possess/consume an alcoholic beverage, a violation of the Code. On November 1, 2005, the Commission entered an Order finding that Respondent violated those sections of the Code as stated in the agreement and waiver of hearing.
6. On December 14, 2005, Respondent signed an "Agreement and Waiver of Hearing" regarding an allegation that, on November 20, 2005, Respondent's employee possessed a local distributor stamp that was not mutilated, a violation of the Code. On December 27, 2005, the Commission entered an Order finding that Respondent violated those sections of the Code as stated in the agreement and waiver of hearing.

7. Respondent has committed at least three violations of the Code and had at least three final adjudications regarding these violations since September 1, 1995.

VI. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.35, 25.04 and 61.71.
2. The State Office of Administrative Hearings has jurisdiction to conduct the 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 TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Based upon Findings of Fact No. 4-7, the Commission proved that Respondent violated three provisions of the Code since September 1, 1995.
5. Based on the foregoing, forfeiture of Respondent's conduct surety bond is warranted.

SIGNED this 23th day of August, 2006 .



B. L. Phillips

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS