

DOCKET NO. 559143

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	ALCOHOLIC
NORTH BY EAST ENTERTAINMENT LTD.	§	
D/B/A PLATINUM I I ADULT CABARET	§	
PERMIT/LICENSE NO(s). MB566183	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-07-2560)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Michelle Kallas. The hearing convened on June 14, 2007 and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 6, 2007. The 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. Respondent filed Exceptions on August 6, 2007. The Administrative Law Judge has ruled on the Exceptions.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision 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.

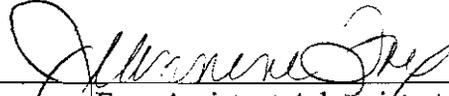
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's conduct surety bond be **FORFEITED**.

This Order will become final and enforceable on November 26, 2007, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this October 31, 2007, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

BM/rd

Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE: (214) 956-8611

Timothy Griffith
ATTORNEY FOR RESPONDENT
VIA FAX (469) 742-9521

NORTH BY EAST ENTERTAINMENT LTD.
RESPONDENT
d/b/a PLATINUM II ADULT CABARET
1595 CENTRAL EXPY STE 100
RICHARDSON, TX 75080
VIA US MAIL

Barbara Moore
TABC Legal Services
ATTORNEY FOR PETITIONER

Licensing Division

Enforcement District Office

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closed on June 30, 2007.

II. DISCUSSION

A. Applicable Law

A mixed beverage permit holder must provide Petitioner with a conduct surety bond, in the amount of \$5,000.00, conditioned on the holders conformance with alcoholic beverage law. TEX. ALCO BEV CODE ANN § 11.11 (a) (1) When a permittee has been finally adjudicated of three violations of the Texas Alcoholic Beverage Code since September 1, 1995, Petitioner may seek forfeiture of the permittee's bond. Petitioner must notify the permittee of its intent to seek forfeiture of the bond. The permittee may request a hearing on the questions of whether the criteria for forfeiture of the bond has been satisfied. TEX. ADMIN. CODE ch. 16 § 33.24(j)

B. Evidence

I. Petitioner's Evidence

Petitioner's two exhibits were admitted at the hearing without objection. The exhibits include a copy of the permit, violation history, the conduct surety bond¹, and correspondence. On November 12, 2004, Petitioner issued to Respondent a Mixed Beverage Permit, including a Mixed Beverage Late Hours Permit, MB-566183. This permit has been continuously renewed.

On September 12, 2006, Respondent signed an "Agreement and Waiver of Hearing" regarding three violations of the code. In this agreement, the Respondent waived its right to a hearing to contest the Petitioner's claim that on March 9, 2006, Respondent, its agent, servant, or employee: (1) permitted an act of public lewdness or sexual contact, (2) solicited, or allowed to be

¹ The conduct surety bond was in the form of an assignment. Respondent assigned \$5,000.00 from a Wells Fargo savings account to Petitioner in order to comply with §§ 11.11 and 61.13 of the Code.

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solicited. an alcoholic beverage for consumption by Respondent, its agent, servant, or employee, and. (3) participated in place or manner prostitution offenses. In this waiver, the Respondent acknowledged that the signing of the waiver could result in the forfeiture of any related conduct surety bond. This agreement became final and enforceable by the order signed by the Petitioner on September 21, 2006, finding that the Respondent violated the sections of the Code as stated in the "Agreement and Waiver of Hearing," and imposing the penalty reflected in that agreement.

2. Respondent's Evidence

John Auletta, Respondent's President, testified at the hearing regarding the September 12, 2006, "Agreement and Waiver." Mr. Auletta acknowledged that he signed the "Agreement and Waiver." He testified that his understanding of the agreement was that by signing the document he was not admitting to the violations. He would be neither guilty nor innocent of the violations.

According to Mr. Auletta, at the time of the agreement, no one discussed with him that entering into the agreement would lead to the conclusion that the violations had been adjudicated or that his conduct surety bond would be forfeited. Mr. Auletta testified that had he known such to be the case, he never would have signed the agreement. He did not think that signing the agreement would result in adjudication of the violations.

Mr. Auletta acknowledged that he received Petitioner's order dated September 21, 2006. He stipulated that no appeal of the final order was ever filed.

C. Discussion and Recommendation

As the holder of a mixed beverage permit, Respondent was required to provide a conduct surety bond, in the amount of \$5,000.00, payable to Petitioner. TEX. ALCO. BEV. CODE ANN. § 11.11 (a) (1). Petitioner may seek forfeiture of that bond if Respondent is found to have committed three

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violations of the Texas Alcoholic Beverage Code since September 1, 1995. TEX. ADMIN. CODE ch. 16 § 33.24(j).

Petitioner provided evidence that Respondent has violated the Texas Alcoholic Beverage Code three times since September 1, 1995. Respondent entered into an "Agreement and Waiver" regarding three separate violations of the code, all of which occurred on March 9, 2006. A final order regarding these violations was issued by Petitioner on September 21, 2006.

Respondent argues that he did not realize that the violations would be considered as adjudicated when he signed the agreement. However, the September 21, 2006 order issued by Petitioner states that unless Respondent files a motion for rehearing, the order would become final and enforceable. The order was not appealed and became final which resulted in the violations being adjudicated. Respondent could have appealed the order yet chose not to seek a rehearing on the violations.

Furthermore, Mr. Auletta testified that had he known that a result of his signing the agreement would be forfeiture of the conduct surety bond he never would have signed the agreement. He admitted at the hearing that he did sign the agreement 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.

The evidence on the record is sufficient to establish that Respondent, the holder of a mixed beverage permit, has been finally adjudicated of three violations of the Texas Alcoholic Beverage 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.

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III. FINDINGS OF FACT

1. North by East Entertainment, Ltd. (Respondent) holds a Mixed Beverage Permit, including a Mixed Beverage Late Hours Permit, MIB-566183 issued by the Texas Alcoholic Beverage Commission (Petitioner) for the premises located at 10557 Wire Way, Dallas, Dallas County, Texas.
2. On October 11, 2004, Respondent assigned, for conduct surety purposes, funds from a Wells Fargo savings account, in the amount of \$5,000.00, to the state.
3. On September 12, 2006, Respondent signed an "Agreement and Waiver" regarding three violations of the code which occurred on March 9, 2006.
4. On September 21, 2006, Petitioner issued a Waiver Order suspending Respondent's permits for the three violations of the Texas Alcoholic Beverage Code as set forth in the signed "Agreement and Waiver."
5. Respondent did not appeal the Waiver Order.
6. Respondent committed at least three violations of the Code or Rules since September 1, 1995.
7. By letter dated October 23, 2006, Petitioner sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond.
8. Respondent requested a hearing to determine whether the conduct surety bond should be forfeited.
9. On May 1, 2007, Petitioner sent a notice of hearing by certified mail, return receipt requested, to Respondent's mailing address as listed in the Commission's records, informing Respondent of the date, time, and place of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
10. The hearing on the merits convened June 14, 2007, at the State Office of Administrative Hearings, 6333 Forest Park Road, Suite 150-A, Dallas, Texas 75235, before ALJ Michelle Kallas. Petitioner was represented by Barbara Moore, TABC attorney. Respondent appeared and was represented by Timothy Griffith, attorney. The record closed on June 20, 2007.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.11 and TEX. ADMIN. CODE ch. 16 § 33.24.
2. SOAH 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. Proper and timely notice of the hearing was effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, 1 TEX. ADMIN. CODE (TAC) § 155.55 and 16 TAC § 37.3.
4. Respondent has committed three violations of the Texas Alcoholic Beverage Code since September 1, 1995.
5. The conduct surety bond posted by Respondent should be forfeited. TEX. ALCO. BEV. CODE ANN. § 11.11 and 16 TAC § 33.24 (j).

SIGNED August 6, 2007.



MICHELLE KALLAS

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. North By East Entertainment Ltd. D/b/a Platinum II Adult Cabaret

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as of August 06, 2007