

DOCKET NO. 559224

TEXAS ALCOHOLIC BEVERAGE COMMISSION

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BEFORE THE STATE OFFICE

VS.

BENNY LEE MOORE
d/b/a BENNY'S

OF

PERMIT/LICENSE NO(s). BG555396
GREGG COUNTY, TEXAS
(SOAH DOCKET NO. 458-07-2563)

ADMINISTRATIVE HEARINGS

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 Brenda Coleman. The hearing convened on June 15, 2007 and adjourned June 22, 2007. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 16, 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. 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 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 October 18, 2007, unless a Motion for Rehearing is filed **before** that date.

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

SIGNED this the 21 day of September, 2007, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

Administrative Law Judge
State Office of Administrative Hearing
Fort Worth, Texas
VIA FAX: 817-377-3706

Timothy E. Griffith
101 East Park Blvd., Suite 600
PLANO, TX 75074
ATTORNEY FOR RESPONDENT
VIA FAX: 469-742-9521

BENNY LEE MOORE
d/b/a BENNY'S
404 SHELTON
LONGVIEW, TX 75601
RESPONDENT
VIA US MAIL

BARBARA MOORE
TABC Legal Section
ATTORNEY FOR PETITIONER

Licensing Division

SOAH DOCKET NO. 458-07-2563

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

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BEFORE THE STATE OFFICE

OF

V.

BENNY LEE MOORE D/B/A BENNEY'S,
Respondent

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC; Commission; or Petitioner) brought this forfeiture action against Benny Lee Moore d/b/a Benny's (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. This proposal finds that the allegations against Respondent are true. The Administrative Law Judge (ALJ) recommends forfeiture of Respondent's conduct surety bond.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

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

On June 15, 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 owner, Benny Lee Moore, appeared and was represented by Timothy Griffith, attorney. Evidence and argument were presented. The record closed on June 22, 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. Petitioner's Evidence

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,¹ and correspondence. Petitioner issued Wine and Beer Retailer's Permit, BG-555396, which includes the Retail Dealer's On-Premise Late Hours License, to Respondent on April 7, 2004. The permit has been continuously renewed. Respondent's licensed premise is located at 1308 E. Marshall Avenue, Longview, Gregg County, Texas.

On May 20, 2005, Respondent signed an Agreement and Waiver of Hearing regarding two violations of the code. Respondent agreed to waive its right to a hearing to contest Petitioner's claims that on April 27, 2005, Respondent, its agent, servant, or employee sold alcoholic beverages to two intoxicated persons. Respondent also acknowledged that the signing of the waiver "may

¹ The conduct surety bond was in the form of an assignment. Respondent assigned \$5,000.00 from a White Oak State Bank savings account to Petitioner in order to comply with Code §§ 11.01 and 61.13.

result in the forfeiture of any related conduct surety bond." The Agreement and Waiver of Hearing became final and enforceable by TABC Order, dated June 1, 2005, in TABC Docket No. 616286, finding that Respondent violated the section of the Code as stated, and imposing the penalty reflected in the Order.

On August 7, 2006, Respondent signed an Agreement and Waiver of Hearing regarding a cash law violation of the code. Respondent agreed to waive its right to a hearing to contest Petitioner's claim that on July 7, 2006, Respondent, its agent, servant, or employee presented for payment an insufficient check for beer. 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 August 15, 2006, in TABC Docket No. 541880, finding that Respondent violated the section of the Code as stated, and imposing the penalty reflected in the Order.

On October 13, 2006, Respondent signed an Agreement and Waiver of Hearing regarding three cash law violations of the code. Respondent agreed to waive its right to a hearing to contest Petitioner's claims that on August 28, 2006, August 30, 2006, and September 9, 2006, Respondent, its agent, servant, or employee presented for payment three insufficient checks for beer. 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 24, 2006, in TABC Docket No. 549284, finding that Respondent violated the section of the Code as stated, and imposing the penalty reflected in the Order.

C. Respondent's Evidence

Respondent's owner, Benny Lee Moore, testified on behalf of Respondent. He acknowledged that he signed the Agreements and Waivers of Hearing. However, he testified that when he signed the agreements, it was his understanding that he would simply pay a fine and that would be it. He stated that by signing the agreements, he was not admitting to the violations.

According to Mr. Moore, at the time that he signed the agreements, the TABC representative did not inform him that entering into the agreements would constitute adjudicated violations of the Code, or that his conduct surety bond would be forfeited. Mr. Moore testified that had he known such to be the case, he never would have signed the agreements. He also stated that he does not know under what circumstances a conduct surety bond would be forfeited pursuant to the Code.

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.² 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, 1995.³

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 three separate occasions regarding violations of the Code, all of which occurred after September 1, 2005. Final orders regarding these violations were issued by the Commission.

Respondent argues that he did not realize that the violations would be considered as adjudicated when he signed the agreements. However, 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.

Furthermore, Mr. Moore admitted at the hearing that he 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

² Code § 11.11

³ 16 FAC § 33.24(j).

that Petitioner would seek forfeiture of the conduct surety bond.

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 Wine and Beer Retailer's Permit BG-555396, which includes the Retail Dealer's On-Premise Late Hours License, to Benny Lee Moore d/b/a Benny's on April 7, 2004.
2. Respondent's licensed premise is located at 1308 E. Marshall Avenue, Longview, Gregg County, Texas.
3. On April 17, 2006, Respondent assigned, for conduct surety purposes, funds from a White Oak State Bank savings account, in the amount of \$5,000.00, to the Commission.
4. On May 20, 2005, Respondent signed an Agreement and Waiver of Hearing regarding two violations of the Texas Alcoholic Beverage Code (the Code) which occurred on April 22, 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 June 1, 2005, in TABC Docket No. 616286.
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 August 7, 2006, Respondent signed an Agreement and Waiver of Hearing regarding a violation of the Code which occurred on July 7, 2006.
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."

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11. The violation was adjudicated against Respondent by Commission Order, dated August 15, 2006, in TABC Docket No. 541880.
 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. On October 13, 2006, Respondent signed an Agreement and Waiver of Hearing regarding three violations of the Code which occurred on August 28, 2006, August 30, 2006, and September 9, 2006.
 15. 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."
 16. The violations were adjudicated against Respondent by Commission Order, dated October 24, 2006, in TABC Docket No. 549284.
 17. 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."
 18. Respondent did not file a motion for rehearing.
 19. Respondent committed at least three violations of the Code or Rules since September 1, 1995.
 20. 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.
 21. Respondent requested a hearing to determine whether the conduct surety bond should be forfeited.
 22. On May 2, 2007, Petitioner issued its amended notice of hearing to Respondent. This notice of hearing was received by Respondent on May 10, 2007.
 23. 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.
 24. The hearing was convened before State Office of Administrative Hearings Administrative Law Judge, Brenda Coleman, on June 15, 2007. Petitioner appeared and was represented by
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Barbara Moore, TABC Staff Attorney. Respondent's owner, Benny Lee Moore, appeared and was represented by Timothy Griffith, 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 August 16, 2007.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC v. Benny Lee Moore d/b/a Benny's

DOCKET NUMBER 458-07-2563

AGENCY CASE NO: 559224

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Benny Moore
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RESPONDENT
VIA MAIL

as of August 16, 2007