

DOCKET NO. 575588

IN RE CARLOS GERARDO ZARATE § BEFORE THE
D/B/A CONGAL FRIDAY §
PERMIT NOS. BG520943 & BL520944 §
§ TEXAS ALCOHOLIC
§
HARRIS COUNTY, TEXAS §
(SOAH DOCKET NO. 458-08-3744) § BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this 1ST day of October 2008, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Carrie L. McLarty. The hearing convened on August 15, 2008 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on August 22, 2008. 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 Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, that 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 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 permit and license are herein **SUSPENDED** for a period of **ten (10) days**, beginning at 12:01 A.M. on the **22nd day of October 2008**.

IT IS FURTHER ORDERED that Respondent's performance surety bond in the amount of **\$2,000.00** will be forfeited

IT IS FURTHER ORDERED that a second approved performance surety bond in the amount of **\$4,000.00** must be posted. If a second approved performance surety bond in the amount of **\$4,000.00** is not received by the Commission on or before the **4th day of November 2008**, all rights and privileges granted by the Commission under the above described permit and license shall be **SUSPENDED** beginning at 12:01 A.M. on the **5th day of November 2008** and the permit and license **WILL NOT BE REINSTATED** until a second approved performance surety bond as described above is posted.

This Order will become final and enforceable on October 24, 2008 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.

SIGNED on October 1, 2008.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

RMP/dp

Hon. Carrie L. McLarty
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
Houston, Texas 70018
VIA FAX (713) 812-1001

Larry McCotter
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1314 Texas Avenue, suite 1610
Houston, Texas 77090
VIA FAX (713) 228-3590

Carlos Gerardo Zarate
d/b/a Congal Friday
RESPONDENT
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Houston, Texas 77083
VIA U. S. FIRST CLASS MAIL

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Section

Houston District Office

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

August 22, 2008

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

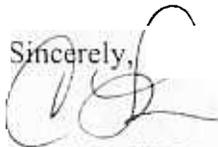
VIA REGULAR MAIL

RE: Docket No. 458-08-3744; Texas Alcoholic Beverage Commission vs. Carlos Gerardo Zarate d/b/a Congal Friday

Dear Mr. Steen:

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,

Carrie L. McLarty
Administrative Law Judge

CLM/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Ramona Perry, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Larry McCotter, Attorney At Law, 1314 Texas Avenue, Suite 1610, Houston, Texas 77090 -**VIA REGULAR MAIL**

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

VS.

CARLOS GERARDO ZARATE
D/B/A CONGAL FRIDAY,
Respondent

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§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Petitioner) seeks to suspend the permit and license of Carlos Gerardo Zarate d/b/a Congal Friday (Respondent) for ten days, alleging that Respondent permitted the consumption of alcoholic beverages during prohibited hours. The Administrative Law Judge (ALJ) recommends the suspension be imposed.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing in this case was held on August 15, 2008, in Houston, Texas, before Carrie L. McLarty, ALJ. Petitioner appeared through Ramona Perry, staff attorney. Respondent appeared through attorney Larry McCotter.

There are no disputed issues of notice in this proceeding. Therefore, matters relating to notice are set out in the proposed findings of fact and conclusions of law without further discussion here.

Petitioner has jurisdiction over the subject matter of this appeal pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71 and 61.73. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including issuing this Proposal for Decision with proposed findings of fact and proposed conclusions of law, pursuant to TEX. GOV'T CODE ANN. § 2003.021.

REPORT FOR DISCUSSION

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Agent Hardcastle observed the patrons drinking out of red plastic cups. He asked one patron, Santos Percira, what he was drinking, and Mr. Percira replied that it was beer. Agent Hardcastle testified he did not personally analyze the contents of Mr. Percira's cup to determine if it was a non-alcoholic beer, but that Agent Sahan did. Agent Hardcastle issued a citation to Mr. Percira for consuming alcoholic beverages during prohibited hours. Two other patrons, Wilmer Pineda and Manuel Calderon, also received citations for consuming alcoholic beverages during prohibited hours. In addition, Agent Hardcastle issued an Administrative Notice to Respondent for the offense of permitting consumption of alcoholic beverages during prohibited hours.

2. Michael Sehan

Agent Sehan is employed by Respondent as an enforcement agent. He testified that on April 6, 2008, he and two other agents drove by the licensed premises at 2:00 a.m. to make sure it was open. The agents entered the premises at 2:35 a.m. Agent Sehan observed five to ten patrons behind the bar and at tables. The patrons were drinking from red plastic cups. Agent Sehan used an intoximeter device and determined the three cited patrons were consuming alcoholic beverages. One of the cited patrons, Mr. Calderon, told Agent Sehan he was drinking beer.

3. Respondent's Permit History

Respondent holds a Wine and Beer Retailer's On Premise Permit and Late Hours License Nos. BG520943 and BL520944, issued by Petitioner. According to the permit history, Respondent entered a waiver order accepting a three-day suspension or payment of a civil penalty on a charge of purchasing an alcoholic beverage from an unauthorized source. The waiver order was entered on December 27, 2006.

C. Analysis

Petitioner contends it is entitled to suspend Respondent's permit/license for ten days because Respondent allowed consumption of beer by patrons after 2:15 a.m., after which time all consumption of alcoholic beverages was prohibited. Respondent concedes that patrons were on the premises and were consuming some type of beverage out of red cups, but contends Petitioner has not shown that the liquid being consumed was alcoholic as opposed to non-alcoholic beer.

The evidence is clear that the three patrons who received citations on April 6, 2008, were drinking alcoholic beer at 2:35 a.m. Agent Sehon tested the liquid being consumed by each patron, and each was determined to be an alcoholic beverage. Moreover, the patrons themselves admitted they were drinking beer. Respondent was behind the bar at the time, but took no action to ensure that alcoholic beverages were not consumed after 2:15 a.m., in violation of TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(18).

Petitioner relies on TEX. ALCO. BEV. CODE ANN. § 64(a) in support of the proposed suspension, which exempts Petitioner from the requirement of offering Respondent the opportunity to pay a civil penalty in lieu of suspension in cases involving permitting consumption of alcoholic beverages during prohibited hours. Accordingly, the ALJ recommends that Respondent's permit and license should be suspended for ten days.

III. PROPOSED FINDINGS OF FACT

The hearing in Docket No. 458-08-3744 was held on August 15, 2008, before Administrative Law Judge (ALJ) Carrie L. McLarty in Houston, Texas. The Texas Alcoholic Beverage Commission (Petitioner) appeared through Ramona Perry, staff attorney. Carlos Gerardo Zarate d/b/a Congal Friday (Petitioner) appeared through attorney Larry McCotter.

2 Notice of the hearing was sent to all parties on July 10, 2008. The notice contained a statement of the matters to be considered, the legal authority under which the hearing would