

DOCKET NO. 578785

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
JOHN COTTER FLOWERS	§	
SHEILA ANN FLOWERS	§	
D/B/A RUTHIE'S ICE HOUSE	§	ALCOHOLIC
LICENSE NO(s). BG539287, BL539288	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-0481)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 8th day of January 2009, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Don Smith. The hearing convened on November 7, 2008 and adjourned the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 21, 2008. 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 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 performance bond in the amount of \$2,000.00 **SHOULD NOT BE FORFEITED**.

This Order will become final and enforceable on February 2, 2009, 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 8TH day of January, 2009, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (713) 812-1001

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6776 Southwest Freeway
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John Cotter Flowers
Sheila Ann Flowers
RESPONDENT
D/B/A Ruthie's Ice House
1932 Banks
Houston, TX 77098
VIA FIRST CLASS MAIL

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

SKP/aa

State Office of Administrative Hearings

H

Cathleen Parsley
Chief Administrative Law Judge

November 21, 2008

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

VIA REGULAR MAIL

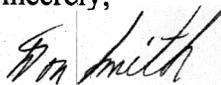
RE: Docket No. 458-09-0481; Texas Alcoholic Beverage Commission vs. John Cotter Flowers and Sheila Ann Flowers d/b/a Ruthie's Ice House

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,



Don Smith
Administrative Law Judge

DS/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Sandra Patton, 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**
Clyde Burselon, Attorney for Respondent, 6776 Southwest Freeway, Suite 620, Houston, TX 77074 -**VIA REGULAR MAIL**

SOAH DOCKET NO. 458-09-0481

TEXAS ALCOHOLIC BEVERAGE COMMISSION § BEFORE THE STATE OFFICE
V. §
§
§
§ OF
§
§
§ JOHN COTTER FLOWERS and SHEILA ANN §
§ FLOWERS D/B/A RUTHIE'S ICE HOUSE §
§ PERMIT NO(s). BG539287, BL539288 §
§ HARRIS COUNTY, TEXAS §
§ (TABC CASE NO(s). 567241, 571260) § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Petitioner or TABC) brought this forfeiture action against John Cotter Flowers and Sheila Ann Flowers doing business as Ruthie's Ice House (Respondent or Permittee). Petitioner sought forfeiture of Respondent's performance bond in the amount of \$2,000.00, and requested that Respondent be ordered to provide a second surety bond in the amount of \$4,000.00. The Administrative Law Judge (ALJ) recommends no forfeiture of the performance bond, since the adjudicated violation was not a violation of TEX. ALCO. BEV. CODE ANN. (CODE) §§ 1.61 or .71 as required, but was adjudicated as a violation of CODE § 106.13.

JURISDICTION, NOTICE AND PROCEDURAL HISTORY

There were no contested issues of notice or jurisdiction in this proceeding, and those issues are addressed only in the Finding of Fact and Conclusions of Law.

On October 2, 2008, Petitioner issued its notice of hearing, directed to John Cotter Flowers and Sheila Ann Flowers doing business as Ruthie's Ice House. On November 7, 2008, a hearing convened before ALJ Don Smith at 2020 North Loop West, Suite 1, Houston, Harris County, Texas. Petitioner was represented at the hearing by Sandra Patton, TABC Staff Attorney. Respondent was represented at the hearing by Clyde Burlison, attorney. Evidence was received and the record was closed on November 7, 2008.

LEGAL STANDARDS AND APPLICABLE LAW

As provided in CODE § 106.61 (b-1), a performance bond is forfeited to TABC on the suspension of the license or permit is under §§ 106.61 or 106.71

EVIDENCE AND PARTIES' CONTENTIONS

Permit records contained in TABC Exhibit 1 establish that a Wine and Beer Retailer's On Premise Permit, BG-539287, which includes the Retailer's On Premise Late Hours License, was issued to John Cotter Flowers and Sheila Ann Flowers, doing business as Ruthie's Ice House, 1829 Richmond Avenue, Houston, Harris County, Texas on July 3, 2003, and has been continuously renewed.

Petitioner alleged an Amended Order dated July 29, 2008, ordering Respondent's permits suspended for 40 days, subjects the performance surety bond to forfeiture. Respondent argues that the Order fails to set out the adjudicated violation of the Code. The order states that the case was heard by this ALJ on May 2, 2008, and adopts the Proposal for Decision into the Order. TABC Exhibit 1 does not have the Proposal for Decision attached.

The Proposal for Decision is a public record under SOAH Docket No. 458-08-2337. The Proposal for Decision has Conclusions of Law that Respondent violated CODE § 106.13. The Proposal for Decision does not have any Conclusions of Law that Respondent violated CODE §§ 106.61 or 106.71

The permit records' summary of administrative violations in TABC Exhibit 1 describes the violation that caused the suspension as a "Sale to Minor." This is a violation of Code § 106.13.

ANALYSIS

The only issue is whether TABC has statutory authority to revoke a performance bond for a violation that is not under CODE §§ 61 or 11.7. The answer is no.

RECOMMENDATION

The ALJ recommends that the performance bond, in the amount of two thousand dollars, not be forfeited.

PROPOSED FINDINGS OF FACT

Respondent, John Cotter Flowers and Sheila Ann Flowers, doing business as Ruthie's Ice House, holds a Wine and Beer Retailer's On Premise Permit, BG-539287, which includes the Retailer's On Premise Late Hours License, issued by the Texas Alcoholic Beverage Commission (TABC) on July 3, 2003, for the premises located at 1829 Richmond Avenue, Houston, Harris County, Texas.

2. TABC executed an Amended Order (Order) on July 29, 2008, suspending Respondent's permits for 40 days.
3. In the Order, TABC incorporated the Proposal for Decision, with the Findings of Fact and Conclusions of Law that SOAH ALJ Don Smith issued on May 2, 2008 in SOAH Docket No. 458-08-2337.
4. The Proposal for Decision (PFD) in SOAH Docket No. 458-08-2337 found that Respondent violated TEX. ALCO. BEV. CODE ANN. (CODE) § 106.13 by making a sale to a minor.
5. The Order "incorporates those Findings of Fact and Conclusions of Law (from the PFD) into this Order, as if such were fully set out and separately stated herein."
6. TABC permit records' summary of administrative violations describes the violation that caused the suspension to be a "Sale to Minor."

There is no finding in the Order that Respondent violated CODE §§ 61 or 71.

8. On October 2, 2008, Petitioner issued its notice of hearing, directed to Respondent. The

notice of hearing alleges that by having an adjudicated violation of the Code resulting in a suspension, Respondent's performance bond in the amount of \$2,000.00 is forfeited and a second surety bond in the amount of \$4,000.00 must be furnished.

- 9 On November 7, 2008, a hearing convened before ALJ Don Smith, SOAH, at 2020 North Loop West, Suite 111, Houston, Harris County, Texas. Petitioner was represented at the hearing by TABC Staff Attorney Sandra Patton. Respondent was represented at the hearing by attorney Clyde Burleson.

CONCLUSION OF LAW

TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5.

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 with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
- 3 Respondent received timely notice of hearing.
4. Based upon the Findings of Fact, Respondent received a suspension for a Code § 106.13 "Sale to Minor" violation.
- 5 Based upon the Findings of Fact, Petitioner did not suspend Respondent's permits for a Code §§ 11.61 or 11.71 violation.
- 4 Based upon the Findings of Fact and Conclusions of Law, Respondent's performance bond in the amount of \$2,000.00 should not be forfeited, and Respondent should not be required to provide a second surety bond in the amount of \$4,000.00.

SIGNED on this the 21st day of November, 2008.



DON SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS