

the TABC notified the Respondent of its intention to seek forfeiture of the full amount of the conduct surety bond.² The Respondent requested a hearing on this forfeiture and, on February 27, 2009, the TABC sent a Notice of Hearing to the Respondent.³ The notice informed the Respondent of: the date of the hearing; the matters asserted against it; the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; and the statutes and rules involved in the proceeding. The Notice of Hearing alleged that the Respondent “had violated Texas Alcoholic Beverage Code § 11.11 and the Texas Alcoholic Beverage Commission Rule § 33.24(j), for which Respondent must forfeit Respondent’s conduct surety bond, certificate of deposit, or letter of credit.”⁴

On March 23, 2009, ALJ Kerrie Jo Qualtrough convened the hearing on the merits on the proposed forfeiture. Judith Kennison, attorney for the TABC, appeared telephonically on behalf of the TABC. Debbie Teague and David C. Meza appeared on behalf of the Respondent. Since the Respondent had not received TABC’s exhibits, the hearing was continued until April 7, 2009 to allow the Respondent to review the information.

On April 7, 2009, the hearing was reconvened and the parties appeared by telephone. Evidence was taken, arguments were heard, and the record was closed on that date.

III. CONDUCT SURETY BOND

A surety bond is required of certain licensees and permittees.⁵ A holder of a permit issued under Chapters 25, 28, or 32 of the Texas Alcoholic Beverage Code “shall file with the [TABC] a surety bond in the amount of \$5,000 conditioned on . . . the holder’s conformance with alcoholic beverage law”⁶ A permit holder may also use a letter of credit to satisfy the surety bond requirement.⁷

² TABC Exh. 2.

³ TABC Exh. 1.

⁴ TABC Exh. 1.

⁵ TEX. ALCO. BEV. CODE ANN. § 11.11; 16 TEX. ADMIN. CODE § 33.24.

⁶ TEX. ALCO. BEV. CODE ANN. § 11.11(a)(1).

⁷ *Id.* § 11.11(d)(1).

On September 20, 2005, a \$5,000.00 letter of credit was issued in favor of the State of Texas for the account of the Respondent.⁸ The letter of credit states:

The condition of the obligation of this letter of credit is such that the permittee or licensee shall faithfully conform with the Texas Alcoholic Beverage Code and the rules of the commission. If the holder of this permit or license violates a law of the state relating to alcoholic beverages or a rule of the commission, the amount of the letter of credit shall be paid to the state.⁹

The letter of credit was “in effect until the State Bank [was] released or discharged by the Texas Alcoholic Beverage Commission or until the expiration date of 3-21-2009.”¹⁰ There is no evidence in the record regarding whether the TABC released or discharged State Bank from its obligations under the letter of credit.

IV. VIOLATIONS

On June 2, 2008, a Waiver Order was issued based on a “Settlement Agreement and Waiver of Hearing” signed by the Respondent on May 16, 2008.¹¹ This May 16, 2008 Settlement Agreement alleged that:

On or about December 16, 2007, Respondent, CSK Lounge Corporation, or Respondent’s agent, servant, or employee, sold or offered to sell mixed beverages during prohibited hours. By selling or offering to sell mixed beverages during prohibited hours, Respondent violated Texas Alcoholic Beverage Code §§ 11.61(b)(2) and 105.03.

On or about December 16, 2007, Respondent, CSK Lounge Corporation, or Respondent’s agent, servant, or employee, consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours. By consuming or permitting others to consume an alcoholic beverage on the licensed premises during prohibited hours, Respondent violated Texas Alcoholic Beverage Code §§ 105.06, 11.61(b)(2), and 32.17(a)(7).¹²

⁸ TABC Exh. 2.

⁹ TABC Exh. 2.

¹⁰ TABC Exh. 2.

¹¹ TABC Exh. 2.

¹² TABC Exh. 2.

The June 2, 2008 Waiver Order found that the Respondent “violated Section 11.61(b)(2), 32.17(a)(7) and 105.03 of the Texas Alcoholic Beverage Code.”¹³

On July 2, 2008, another Waiver Order was issued based on a “Settlement Agreement and Waiver of Hearing” signed by the Respondent on June 24, 2008.¹⁴ This June 24, 2008 Settlement Agreement alleged that the violation of “Intoxicated Perm./Lic./Employee On The Premises” had occurred on June 14, 2008.¹⁵ The June 24, 2008 Settlement Agreement references “VIO CODE 562” but does not cite to a specific section of the Texas Alcoholic Beverage Code that the Respondent is alleged to have violated.¹⁶ However, the July 2, 2008 Waiver Order found that “[t]he Respondent violated those sections of the Texas Alcoholic Beverage Code stated in the Agreement and Waiver of Hearing.”¹⁷

V. POSITIONS OF THE PARTIES

The TABC takes the position that it has established that the Respondent has three violations and that the surety bond is subject to forfeiture. TABC asserts that the June 2, 2008 Waiver Order found that two separate violations occurred on December 16, 2007. Therefore, the two Waiver Orders together document three violations.

The Respondent recognized that the two settlement agreements advised that a result of the agreement may be the forfeiture of any conduct surety bond the Respondent is required to maintain. Ms. Teague testified on behalf of the Respondent that the incidents regarding the December 16, 2007 violations occurred because an employee forgot to lock the front door at closing time. When the TABC investigators entered, they found drinks on the bar that the Respondent’s employees had not had an opportunity to clean off. Ms. Teague stated that the Respondent had done everything that TABC has asked and had closed the club down.

¹³ TABC Exh. 2.

¹⁴ TABC Exh. 2.

¹⁵ TABC Exh. 2.

¹⁶ TABC Exh. 2.

¹⁷ TABC Exh. 2.

VI. ALJ'S RECOMMENDATION

It is the ALJ's opinion that the TABC has demonstrated that the criteria for forfeiture of the conduct surety bond have been satisfied. The Respondent has two orders issued by the TABC that find that the Respondent has committed at least three violations of Texas' alcoholic beverage laws since September 1, 1995. Although the July 2, 2008 Waiver Order and June 24, 2008 Settlement Agreement do not specify which sections of the Texas Alcoholic Beverage Code were violated by the Respondent, the notation in the Settlement Agreement and the corresponding finding in the Waiver Order is sufficient to demonstrate the third violation. Therefore, the TABC has met its burden to prove that forfeiture is warranted in this matter.

VII. FINDINGS OF FACT

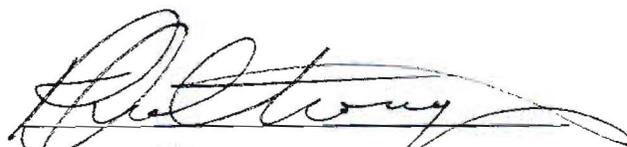
1. CSK Lounge Corporation d/b/a Tonix/Metro/The Lounge, Respondent, holds a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit, Permit/License No. B 613367, issued by the TABC for the premises known as Tonix/Metro/The Lounge located at 701 E. University Drive, Building B, Suite 300, College Station, Texas.
2. A \$5,000.00 letter of credit was issued for the account of the Respondent on September 20, 2005.
3. In a Waiver Order signed on June 2, 2008, the TABC found that the Respondent had violated TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 32.17(a)(7), and 105.03 based on a "Settlement Agreement and Waiver of Hearing" signed by Respondent on May 16, 2008. The May 16, 2008 Settlement Agreement and Waiver of Hearing alleged two violations occurred on December 16, 2007.
4. In a Waiver Order signed on July 2, 2008, the TABC found that "the Respondent had violated those sections of the Texas Alcoholic Beverage Code stated in the Agreement and Waiver of Hearing." The "Settlement Agreement and Waiver of Hearing" signed by the Respondent on June 24, 2008 alleged a June 14, 2008 violation of "Intoxicated Perm./Lic./Employee on the Premises."
5. The three violations referenced in Finding of Fact Nos. 3 and 4 were adjudicated while the conduct surety bond was in effect.
6. On July 22, 2008, the TABC notified the Respondent of its intent to seek forfeiture of the full amount of the conduct surety bond.

7. The February 27, 2009 Notice of Hearing notified the Respondent of: the date of the hearing; the matters asserted against it; the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; and the statutes and rules involved.
8. The hearing convened March 23, 2009 at the State Office of Administrative Hearings, 300 West 15th Street, fourth floor, Austin, Texas. Judith Kennison, attorney, represented the TABC. Respondent was represented by Debbie Teague and David Meza. The hearing was continued until April 7, 2009. On that date, the hearing was held and the record closed.

VIII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., Chapter 5, Subchapter B; and §§ 6.01 and 11.11.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042(6).
3. Based on the above Findings of Fact, the Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. A conduct surety bond may be forfeited when there is a final adjudication that a permittee or licensee has committed three violations of the Code since September 1, 1995, pursuant to 16 TEX. ADMIN. CODE § 33.24(j).
5. There are two final adjudications determining that the Respondent has committed at least three violations of the Texas Alcoholic Beverage Code since September 1, 1995.
6. Based upon these Findings of Fact and Conclusions of Law, the criteria in 16 TEX. ADMIN. CODE § 33.24(j) for forfeiture of a conduct surety bond have been met.
7. In compliance with TEX. ALCO. BEV. CODE ANN. § 11.11, the Respondent's surety bond shall be forfeited.

Signed April 20, 2009.



**KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**