

parties. On July 17, 2009, ALJ Bill Zukauckas convened the hearing in this matter at the SOAH offices in Waco, Bell County, Texas. Martin Wilson, Staff attorney, appeared by telephone and represented the TABC. Respondents appeared in Waco through their attorney, Clyde W. Chandler.

There were no contested issues of notice, jurisdiction, or venue in the proceeding. Therefore, those matters are set out in the proposed Findings of Facts and Conclusions of Law without further discussion. Following the presentation of evidence, the record closed on July 17, 2009.

II. DISCUSSION

A. **Applicable Law**

The holder of a retail dealer's permit must provide the TABC with a \$5,000 surety bond (or in this case a certificate of deposit), conditioned on the holder's conformance with alcoholic beverage law. TEX. ALCO. BEV. CODE ANN. §11.11. The bond may be forfeited if: (1) the licensee has provided the TABC a conduct surety bond; (2) the licensee has been finally adjudicated of three violations of the Code since September 1, 1995; and (3) the TABC notifies the licensee in writing of its intent to seek forfeiture of the bond. 16 TEX. ADMIN CODE § 33.24(j).

B. **Evidence**

Staff's evidence consists of 12 exhibits and no testimony. Amy Harrison is the Director of the TABC Licensing Department, and is the custodian of all TABC records and files. By affidavit, Ms. Harrison identified the attachments to her Affidavit as true and correct copies of Respondent's permits, violation history, Certificate of Deposit, and correspondence concerning the Certificate of Deposit.

Attached to Ms. Harrison's affidavit is a copy of the Beer Retailer's On Premise License and Retailer's On Premise Late Hours License, Permits BE628098 and BL628098. The holder named

on the permits is the Respondents. The licensed premises is located at 3883 HWY. 53, Temple, Texas. TABC Conduct Surety Bond, in the form of a Certificate of Deposit from Compass Bank is attached to Ms. Harrison's affidavit. The Bond is executed by Respondent's representative, Jessie Salinas Olivarez, Jr., for Respondents.

Also attached to Ms. Harrison's affidavit are three Waiver Orders and Agreements and Waivers of Hearing for enforcement actions by TABC Staff taken against Respondent. Details concerning these enforcement actions are as follow:

1. TABC Docket No. 552295. By order dated January 3, 2007, the TABC found: (a) that Respondents violated Section 61.71(a)(9) of the Code by possessing an unauthorized beverage on the licensed premises; and (b) that Respondents waived hearing on this matter.

2. TABC Docket No. 562379. By order dated April 19, 2007, the TABC found: (a) that Respondents violated the Section 106.53 of the Code by selling an alcoholic beverage to a minor; and (b) that Respondents waived hearing on the matter.

3. TABC Docket No. 581293. By order dated November 25, 2008, the TABC found: (a) that Respondents violated Section 69.13 of the Code by having a breach of peace on the premises; and (b) that Respondents waived hearing on the matter.

By letter dated December 8, 2008, the TABC notified Respondents that the Commission intended to seek forfeiture of the full amount of Respondents' pledged Compass Bank Certificate of Deposit No. 1004262448. By letter dated December 19, 2008, Respondents requested a hearing on the bond forfeiture on behalf of Respondent.

C. Analysis, Conclusion, and Recommendation

Conduct surety bonds, or in their place certificates of deposit, are posted in favor of TABC by license and permit holders to encourage compliance with provisions of the Code and Rules. Staff argues that Respondent committed three violations of the Code and Rules since 1995 and that as a matter of law its pledged certificate of deposit is now subject to forfeiture.

Respondents do not specifically argue that they do, in fact, have three Commission orders rendered against them, as pled by Staff. They argue, however, that there are mitigating and extenuating circumstances associated with the January 3, 2007 order for possessing an unauthorized beverage on the licensed premises. Mr. Olivarez, speaking on behalf of both Respondents, testified that this incident involved the possession of an unopened bottle of "Crown" in the safe at their place of business. He testified that the bottle had been confiscated from a patron and put in the safe for security purposes. Mr. Olivarez testified that they did not serve this type of hard liquor on the premises.

In this contested case, Respondents have on three occasions waived its right to a contested hearing on alleged violations of the Code, agreed to the finding of a violation by the TABC, and paid a penalty in lieu of suspension. Each of the violations qualifies under the current statutes and rules to be finally determined by the TABC. In each situation, the Respondents waived their opportunity for a contested hearing. Even if the ALJ were to accept Mr. Olivarez' testimony about the mitigating circumstances of the incident forming the basis of the January 3, 2007 order, the ALJ has no authority to question the finality of that order, or the other two orders.

The language of the settlement agreement and waiver states that the Respondents understand that the violation will become part of their violation history and that by entering into the agreement, a forfeiture of any conduct surety bond may result. Each of the alleged violations and the agreed settlements and orders are final determinations of those violations. Any other interpretation of the parties' actions would negate the language and value of the settlement agreements and waivers

voluntarily entered into. The result would be that only a contested hearing could determine an alleged violation even if both parties did not want a hearing and did want a settlement. Such a result is not intended by the current rules and statutes.

Staff met its burden of proof for forfeiture of Respondent's conduct surety bond. Staff's evidence shows that Respondent posted a certificate of deposit in favor of the TABC, as was required. Respondent was finally adjudicated of three or more violations of the Code or Rules between January 3, 2007, and November 25, 2008, by its execution of Agreements and Waivers of Hearing on those violations. Staff notified Respondent in writing of its intent to seek forfeiture of the bond. 16 TEX. ADMIN CODE § 33.24(j). Therefore, the ALJ recommends that Respondents' certificate of deposit be forfeited.

III. PROPOSED FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued Franco Oviedo Mendez and Jessie Salinas Olivarez, Jr. (Respondents), License No. BE628098 and BL628098 for their business Club Rio and Restaurant.
2. Respondents posted a conduct surety bond, Certificate of Deposit No. 1004262448 in the amount of \$5,000.
3. Respondents, on April 13, 2006, assigned to the TABC title and interest in Compass Certificate of Deposit No. 1004262448.
4. The assignment of the Certificate of Deposit No. 1004262448 provides: "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 certificate of deposit shall be paid to the state."
5. The assignment of Certificate of Deposit No. 1004262448 by its terms gives the TABC the right to redeem, collect, and withdraw the full amount of such without notice to the assignor.
6. By order of January 3, 2007 in Docket No, 552295, the TABC found: (a) that Respondents violated Texas Alcoholic Beverage Code § 61.71(a)(9) by possessing an unauthorized beverage on the licensed premises; and (b) that Respondents waived hearing on this matter.

7. By order of April 19, 2007 in Docket 552295, the TABC found: (a) that Respondents violated the Texas Alcoholic Beverage Code § 106.53 by selling an alcoholic beverage to a minor; and (b) that Respondent waived hearing on the matter.
8. By order of November 25, 2008 in Docket No. 581293, the TABC found that (a) Respondents violated the Texas Alcoholic Beverage Code § 69.13 by allowing a breach on peace on the premises; and (b) that Respondents waived hearing on the matter.
9. Respondents committed three or more violations of the Code or Rules since September 1, 1995.
10. On December 5, 2008, the Staff of TABC (Staff) sent Respondents written notice of its intent to seek forfeiture of the conduct surety bond, Certificate of Deposit No. 1004262448.
11. Respondents requested a hearing on this matter on December 19, 2008.
12. On June 17, 2008, Staff issued a notice of hearing informing all parties of the hearing in this matter. Staff's notice to the parties contained the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; referenced the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
13. On July 17, 2009, the hearing was convened by Bill Zukauckas, Administrative Law Judge, at the State Office of Administrative Hearings, Waco, Texas. Both parties appeared and presented evidence. The record closed that same day.

IV. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §1.11, and 16 TEX. ADMIN. CODE § 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 with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2001.
3. Respondent received notice of the proceedings and hearing, pursuant to TEX. GOV'T CODE § 2001.051 and 1 TEX. ADMIN. CODE ch.155.

4. Based on the foregoing findings and conclusions, Texas Alcoholic Beverage Commission Compass Bank Certificate of Deposit No. 1004262448, should be forfeited. TEX. ALCO. BEV. CODE ANN. §11.11 and 16 TEX. ADMIN CODE § 33.24(j).

ISSUED AUGUST 17, 2009.



BILL ZUKAUCKAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 17, 2009

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

VIA INTERAGENCY MAIL

RE: Docket No. 458-09-4762, Texas Alcoholic Beverage Commission, v., Francisco Oviedo Mendez, Jr. D/B/A Club Rio and Restaurant License Nos. BE628098 and BL628098 (TABC Case No. 583256)

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in blue ink that reads "Bill Zukauckas".

Bill Zukauckas
Administrative Law Judge

AUG 18 2009

BZ/slc
Enclosure

xc Martin Wilson, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA

INTERAGENCY MAIL

Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA

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Clyde W. Chandler, P.O. Box 888, Cameron, TX 76520 - VIA REGULAR MAIL