

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
1 KINGDOM GROUP INC.	§	
D/B/A HOTEL CAPRI	§	ALCOHOLIC
PERMIT/LICENSE NO(s). MB712504, CB &	§	
LB & PE	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-1889)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 21st day of April, 2010, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Laura Kuchinsky. The hearing convened on the 25<sup>th</sup> day of January, 2010 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 the 22<sup>nd</sup> day of March, 2010. 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. On March 23, 2010, Respondent's Attorney filed Exceptions to the Proposal for Decision. Staff filed a Reply to Respondent's Exceptions on March 23, 2010. On March 26, 2010, the Administrative Law Judge replied to Respondent's Exceptions and Staff's reply to Exceptions and recommends no change to the Proposal for Decision.

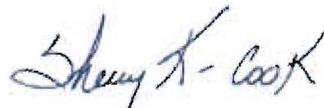
The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law made by the Administrative Law Judge.

**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to rules adopted by the commission found in Title 16, Texas Administrative Code §33.24, your conduct surety bond is hereby FORFEITED.

**IT IS FURTHER ORDERED** that service of this Order shall be made to the surety company, bank or savings institution holding the bond, certificate of deposit or letter of credit securing performance of the holder of the permit on the date it becomes final, and the amount of the bond payable to the state be remitted to the commission, not later than 10 days from the date the final order is served.

This Order will become final and enforceable on the 17th day of May, 2010, unless a Motion for Rehearing is filed **before** that date.

**SIGNED** this the 21st day of April, 2010, at Austin,  
Texas.



\_\_\_\_\_  
Sherry K-Cook, Assistant Administrator

**CERTIFICATE OF SERVICE**

I certify that I have served copies of the above Order on the parties shown below in the manner indicated on the \_\_\_ day of April, 2010.

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Judith L. Kennison  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

JLK/cb

Honorable Judge Laura Kuchinsky  
**Administrative Law Judge**  
State Office of Administrative Hearings  
Dallas, Texas  
**VIA FACSIMILE: (214) 956-8611**

First Indemnity of America Insurance, Co.  
**SURETY, BANK OR SAVINGS INSTITUTION**  
119 Littleton Rd.  
Parippany, NJ 07054  
**VIA REGULAR MAIL**

Timothy E. Griffith  
**ATTORNEY FOR RESPONDENT**  
101 East Park Blvd., Suite 600  
Plano, TX 75074  
**VIA FACSIMILE: (469) 742-9521**

1 Kingdom Group, Inc.  
**RESPONDENT**  
d/b/a Hotel Capri  
4138 Travis St.  
Dallas, TX 75204  
**VIA REGULAR MAIL**

Judith L. Kennison  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Dallas District Office

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

March 22, 2010

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

VIA FACSIMILE 512/206-3203

RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.  
I KINGDOM GROUP INC. D/B/A HOTEL CAPRI  
SOAH DOCKET NUMBER 458-10-1889  
TABC CASE NUMBER 588585

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](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in cursive script, appearing to read "Laura Kuchinsky".

Laura Kuchinsky  
Administrative Law Judge

LK/lan  
Enclosure

Xc: Judith Kennison, Staff Attorney, Texas Alcoholic Beverage Commission, VIA FACSIMILE 512/206-3498  
Timothy Griffith, Attorney for Respondent, VIA FACSIMILE 469/742-9521  
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, VIA FACSIMILE 512/206-3498

SOAH DOCKET NO. 458-10-1889  
TABC CASE NO. 588585

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	
	§	
1 KINGDOM GROUP INC.	§	OF
D/B/A HOTEL CAPRI,	§	
Respondent	§	
	§	
PERMIT NOS.	§	
MB712504, CB & LB & PE	§	
DALLAS COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

Staff of the Texas Alcoholic Beverage Commission (Staff or Petitioner) seeks forfeiture of a \$5,000 conduct surety bond posted by 1 Kingdom Group Inc. d/b/a Hotel Capri (Respondent) pursuant to Respondent's settlement agreements and waivers resulting in Texas Alcoholic Beverage Commission (Commission) orders that show Respondent committed three violations of the Texas Alcoholic Beverage Code in 2009. Respondent asserted that its conduct surety bond should not be forfeited because the evidence does not show final adjudications of the violations. The Administrative Law Judge (ALJ) finds that the Commission's orders against Respondent establish final determinations of Respondent's three Code violations as discussed below and recommends that Respondent's \$5,000 conduct surety bond be forfeited.

**I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

Jurisdiction and notice were not contested and are set out in the Findings of Fact and Conclusions of Law. The hearing in this matter convened January 25, 2010, before ALJ Laura Kuchinsky, at 6333 Forest Park Road, Suite 150-A, Dallas, Texas 75235. Petitioner was represented by Judith Kennison, Staff Attorney, who appeared by telephone. Respondent appeared through its attorney, Timothy E. Griffith.

## II. DISCUSSION

### A. Legal Standard

TEX. ALCO. BEV. CODE ANN. (Code) § 11.11 requires a surety bond for a mixed beverage permit holder in the amount of \$5,000, conditioned on the permit holder's compliance with alcoholic beverage law. Staff may seek forfeiture of a conduct surety bond when, among other things, there is "a final adjudication that the licensee or permittee has committed three violations of the Alcoholic Beverage Code since September 1, 1995." 16 TEX. ADMIN. CODE § 33.24(j)(1). The issue in this hearing is whether the criteria for forfeiture of the bond, as established by Code §11.11 and 16 TEX. ADMIN. CODE § 33.24(j)(1), have been satisfied.<sup>1</sup>

### B. Summary of Staff's Evidence and Argument

Staff's exhibits include a copy of Respondent's permit, conduct surety bond, violation history, settlement agreements, and Commission orders. Respondent holds a Mixed Beverage Permit, including a Beverage Cartage Permit, Caterer's Permit, and Mixed Beverage Late Hours Permit, permit number 712504 (Permit), for the premises located at 2018 Greenville Avenue, Dallas, Dallas County, Texas. Respondent's conduct surety bond shows that the principle, 1 Kingdom Group Inc., and the surety, First Indemnity of America Insurance Company, are bound to pay the State of Texas the amount of \$5,000, if Respondent violates a state law relating to alcoholic beverages.

On March 24, 2009, Respondent, through its president, signed a "Settlement Agreement and Waiver," which recites that, on January 31, 2009, Respondent permitted consumption of an alcoholic beverage during prohibited hours in violation of the Code. Also, on July 30, 2009, Respondent, through its attorney, Timothy E. Griffith, signed a "Settlement Agreement and Waiver," which recites that on, June 28, 2009, Respondent permitted consumption of alcoholic beverage(s) during

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<sup>1</sup> See Notice of Hearing and 16 TEX. ADMIN. CODE § 33.24(j)(2).

prohibited hours in violation of the Code, and that, on July 3, 2009, Respondent stored alcoholic beverage(s) away from licensed premises in violation of the Code. Respondent's Agreements also stated:

I [Respondent] acknowledge that the Commission will make a finding that the above listed violation(s) occurred; I [Respondent] am waiving my right to have an attorney, waiving my right to a hearing, waiving my right to a re-hearing, and waiving my right to appeal; the above violation(s) will become part of my [Respondent's] license/permit history; and this agreement may result in the forfeiture of any conduct surety bond I [Respondent] have on file.<sup>2</sup>

Subsequently, on March 30, 2009, in Docket No. 584339, the Commission issued an order wherein the Commission made findings of fact and conclusions of law, including finding that Respondent violated the Code section as agreed in Respondent's March 24, 2009, Agreement. Similarly, on August 5, 2009, in Docket No. 587400, the Commission issued an order wherein the Commission made findings of fact and conclusions of law, including the finding that Respondent violated the Code sections as agreed in Respondent's July 30, 2009, Agreement. The Commission's March 30, 2009, and August 5, 2009, Orders against Respondent concern "all rights and privileges granted under the permit/license." Both Orders assess civil penalties and license suspension terms against Respondent's Permit in accordance with the terms of Respondent's Agreements dated March 24, 2009, and July 30, 2009.

### C. Summary of Respondent's Evidence and Argument

Respondent argued that Staff's evidence does not show a "final adjudication" of three Code violations under 16 TEX. ADMIN. CODE § 33.24(j)(1), and, therefore, its conduct surety bond should not be forfeited. Respondent relied on *Rutherford Oil Corp. v. General Land Office*, 776 S.W.2d 232 (Tex. App. — Austin 1989, no writ) and *Big D Bamboo, Inc. v. State*, 567 S.W.2d 915 (Tex.

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<sup>2</sup> TABC Ex. 2. Respondent also acknowledged it could rescind the agreements within three calendar days from the date of Respondent's signature; there is no evidence Respondent rescinded these agreements.

Civ. App.--Beaumont 1978, *no writ*). Respondent also asserted that three courts have reversed the Commission's orders requiring the forfeiture of conduct surety bonds based on underlying settlement agreements in the following cases:

- (1) *Alfonso Cabanas d/b/a La Estrella Sports Bar v. Texas Alcoholic Beverage Commission*, 193<sup>rd</sup> Judicial District, District Court of Dallas County;<sup>3</sup>
- (2) *North by East Entertainment Ltd. d/b/a Platinum 11 Adult Cabaret v. Texas Alcoholic Beverage Commission*, 44<sup>th</sup> State Civil District Court;<sup>4</sup> and
- (3) *Hurrshell Ray Whitefield d/b/a Boar's Nest v. Texas Alcoholic Beverage Commission*, 266<sup>th</sup> Judicial District, District Court of Erath County, Texas.<sup>5</sup>

#### D. Analysis

For the reasons discussed in the Analysis below, the ALJ finds that Respondent committed three violations of the Alcoholic Beverage Code since September 1, 1995, and those violations were final adjudications as required under 16 TEX. ADMIN. CODE § 33.24(j)(1).

First, the plain language of Respondent's Agreements shows that Respondent waived its right to a hearing concerning its Code violations, agreed that the violations will become part of its Permit history, and agreed that the Commission will make a finding that these violations occurred. The preponderance of the evidence shows that Respondent committed three Code violations since September 1, 1995, as follows: (1) on January 31, 2009, Respondent permitted consumption of an alcoholic beverage during prohibited hours in violation of the Code; (2) on June 28, 2009, Respondent permitted consumption of an alcoholic beverage during prohibited hours in violation of

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<sup>3</sup> Copies of Plaintiff's Original Petition and district order signed on January 16, 2009.

<sup>4</sup> Copies of Plaintiff's Original Petition, Ex Parte Motion to Suspend TABC Order, district court order [county not identified] signed on January 18, 2008, and TABC dismissal order signed on April 3, 2008.

<sup>5</sup> Copies of Plaintiff's First Amended Original Petition and Request for Expedited Appeal and district court's final judgment signed on June 14, 2007.

the Code; and (3) on July 3, 2009, Respondent stored alcoholic beverage(s) away from licensed premises in violation of the Code.

Secondly, Staff's evidence shows that in a proceeding before the Commission,<sup>6</sup> on March 30, 2009, and August 5, 2009, in Docket Numbers 584339 and 587400, respectively, the Commission determined the legal rights, duties, or privileges of Respondent with respect to its Permit after an opportunity for an adjudicatory hearing, which Respondent waived through its Agreements. The Commission's Orders assess penalties against Respondent concerning its legal rights, duties, or privileges under its Permit in the form of civil penalties and suspension terms pertinent to "to all rights and privileges granted under the permit/license." The Commission's Orders constitute a state agency's determination of a contested case<sup>7</sup> under the Administrative Procedure Act concerning Respondent's legal rights, duties, or privileges with respect to its Permit after Respondent waived its opportunity for an adjudicatory hearing.

Third, to be a final determination, a state agency's decision or order that is adverse to a party in a contested case must be in writing or stated on the record and must include findings of fact and conclusions of law.<sup>8</sup> In this case, the Commission's Orders against Respondent, dated March 30, 2009, and August 5, 2009, in Docket Numbers 584339 and 587400 respectively, contain findings of fact, conclusions of law, and order civil penalties and suspension terms against Respondent's Permit. The Commission's Orders find Respondent committed the Code violations as recited by Respondent in its Agreements and find that Respondent waived its opportunity to a hearing to adjudicate those Code violations. These findings of fact are supported by relevant conclusions of law. Accordingly,

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<sup>6</sup> See TEX. GOV'T CODE ANN. § 2001.003(1) and (7). Under the Administrative Procedure Act, a "contested case" means a proceeding in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing. "State agency" means a state officer, board, commission, or department with statewide jurisdiction that makes rules or determines contested cases.

<sup>7</sup> Respondent argued that Respondent did not contest the underlying violations and these violations were not adjudicated. "Contested case" in administrative law is a term defined by statute, requiring a party to have the opportunity for a hearing prior to a state agency's determination of a party's rights, duties, or privileges. See TEX. GOV'T CODE ANN. § 2001.003(1).

<sup>8</sup> See TEX. GOV'T CODE ANN. § 2001.141.

the Orders in Docket Numbers 584339 and 587400 have a final and binding effect against Respondents' Permit and constitute a final determination of Respondent's Code violations. There is no evidence that Respondent appealed either Commission Order.

Respondent argued that its Code violations were not final adjudications within the meaning of 16 TEX. ADMIN. CODE § 33.24(j)(1). In *Rutherford Oil Corp.*, the court addressed separation of powers concerning judicial adjudication and agency adjudication. *Rutherford Oil Corp.*, 776 S.W.2d at 234-35. The court noted that "State agencies usually employ hearings to construe and enforce regulatory requirements." *Id.* at 234. The court held that a state agency, the General Land Office, could not adjudicate property and land rights, as "no power is more properly or certainly attached to the judicial department than that which determines controverted rights to property." *Rutherford Oil Corp.*, 776 S.W.2d at 234-35. Accordingly, the court of appeals in *Rutherford Oil Corp.* ordered the trial court to reinstate an injunction prohibiting the General Land Office from conducting a hearing on the basis that the General Land Office had no authority to adjudicate leased mineral rights.

Unlike *Rutherford Oil Corp. v. General Land Office*, Respondent did not present authority that Respondent's Code violations should have been determined through judicial adjudication and did not seek to enjoin the Commission's previous determinations of Respondent's rights concerning its Permit. Instead, in this case, Respondent agreed that the Commission would make findings that Respondent committed the Code violations and assess penalties to Respondent's Permit as described in Respondent's Agreements; Respondent did not appeal either Commission Order.

The court in *Big D. Bamboo, Inc.* discussed the definition of a contested case in order to determine whether an agency's action constitutes a contested case. *Big D Bamboo, Inc.*, 567 S.W.2d at 918 (finding, "This, in our opinion, does not constitute a contested case."). In *Big D Bamboo, Inc.* the State of Texas, acting by and through its Alcoholic Beverage Commission, filed suit against Big D Bamboo, Inc. and National Surety Corporation for the recovery of \$13,132.36 in gross receipts liquor taxes due under the Texas Penal Code. *Big D Bamboo, Inc.*, 567 S.W.2d at 916. In reaching its opinion, the court analyzed the meaning of a "contested case" under the Administrative Procedure

and Texas Register Act, which defined contested case as one in which “the legal rights, duties, or privileges are to be *determined* by an agency after an opportunity for adjudicative hearing.” *Id.* at 918 (emphasis in original). The court analyzed the meaning of the word *determined* in relation to the agency’s action and found this to mean that the agency’s decision must have a binding effect. *Id.* Based on the facts in that case, the court in *Big D Bamboo, Inc.* found that the amount of the tax deficiency or liability assessed by TABC “was not a final determinative or binding order or decree with reference to such deficiency or liability.” *Id.* As discussed above, the previous Orders against Respondent include appropriate findings of fact and conclusions of law to become the Commission’s final determinations under the Administrative Procedure Act concerning Respondent’s Code violations.

The district court orders in (1) *Alfonso Cubanas d/b/a La Estrella Sports Bar v. Texas Alcoholic Beverage Commission*; (2) *North by East Entertainment Ltd. d/b/a Platinum 11 Adult Cabaret v. Texas Alcoholic Beverage Commission*; and (3) *Hurrshell Ray Whitefield d/b/a Boar’s Nest v. Texas Alcoholic Beverage Commission* were not given weight by the ALJ because those courts’ decisions do not state an underlying rationale to reverse the Commission’s Orders other than through broad language, such as finding that the Commission’s Orders were not supported by substantial evidence. Also, the underlying settlement agreements that Respondent asserted were the basis for the surety bond forfeitures in these three cases were not admitted to evidence, nor were the Commission’s orders that were appealed in those cases. Accordingly, it is unknown what facts and conclusions, if any, were adopted by the Commission in those cases or what the specific issue(s) the parties argued in the district courts.<sup>9</sup>

For the above reasons, the ALJ recommends that Respondent’s conduct surety bond be forfeited.

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<sup>9</sup> No weight is given to the copies of Plaintiff’s Original Petition or Plaintiff’s Amended Original Petition, as these pleadings establish mere allegations. In fact, the copy of Plaintiff’s Original Petition in *North by East Entertainment Ltd. d/b/a Platinum 11 Adult Cabaret v. Texas Alcoholic Beverage Commission* is an unsigned, non-file marked copy. See Resp. Ex. 5, pp. 9-10.

### III. FINDINGS OF FACT

1. I Kingdom Group Inc. d/b/a Hotel Capri (Respondent) holds a Mixed Beverage Permit, including a Beverage Cartage Permit, Caterer's Permit, and Mixed Beverage Late Hours Permit, Permit No. 712504 (Permit), issued by the Texas Alcoholic Beverage Commission (Commission) for the premises located at 2018 Greenville Avenue, Dallas, Dallas County, Texas.
2. First Indemnity of America Insurance Company issued a conduct surety bond for Respondent in favor of the State of Texas in the amount of \$5,000 based on the Commission's issuance of Respondent's Permit.
3. On March 24, 2009, and July 30, 2009, Respondent, through its representatives, signed settlement agreements and waivers (Agreements) whereby Respondent waived its right to a hearing concerning three Code violations.
4. In Respondent's Agreements dated March 24, 2009, and July 30, 2009, Respondent agreed that the Commission will make a finding that the following violations occurred: (1) on January 31, 2009, Respondent permitted consumption of an alcoholic beverage during prohibited hours in violation of the Texas Alcoholic Beverage Code (Code); (2) on June 28, 2009, Respondent permitted consumption of an alcoholic beverage during prohibited hours in violation of the Code; and (3) on July 3, 2009, Respondent stored alcoholic beverage(s) away from licensed premises in violation of the Code.
5. On March 30, 2009, and August 5, 2009, in Docket Numbers 584339 and 587400, the Commission, a state agency, through its Orders issued on those respective dates, found that Respondent violated the Code as per Respondent's Agreements.
6. The Commission's Orders dated March 30, 2009, and August 5, 2009, contain findings of fact, conclusions of law, and assess civil penalties and suspension provisions against Respondent's Permit.
7. Respondent did not appeal the Commission's March 30, 2009, or August 5, 2009, Orders against its Permit.
8. On September 11, 2009, Staff of the Commission (Staff or Petitioner) informed Respondent that it intended to seek forfeiture of Respondent's \$5000 conduct surety bond because Respondent committed three Code violations in 2009.
9. Respondent requested a hearing to determine if the bond should be forfeited.
10. On January 4, 2010, Petitioner issued the notice of hearing. The notice of hearing contained

the time, date, and location of the hearing; the applicable rules and statutes involved; and a short, plain statement of the matters asserted.

11. The hearing in this matter convened on January 25, 2010, before ALJ Laura Kuchinsky with the State Office of Administrative Hearings (SOAH). Petitioner was represented by Judith Kennison, Staff Attorney. Respondent appeared through its attorney, Timothy E. Griffith. The hearing concluded and the record closed the same day.

#### IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.11, and 16 TEX. ADMIN. CODE § 33.24.
2. SOAH has jurisdiction to conduct the hearing in this proceeding and to issue a proposal for decision with findings of fact and conclusions of law as provided by TEX. GOV'T CODE ANN. ch. 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43(a).
3. The notice of hearing was provided as required by the Administrative Procedure Act. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. The Commission's Orders dated March 30, 2009, and August 5, 2009, constitute a state agency's final determinations of contested cases concerning Respondent's legal rights, duties, or privileges with respect to its Permit after Respondent waived its opportunity for an adjudicatory hearing.
5. Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's \$5,000 conduct surety bond should be forfeited. TEX. ALCO. BEV. CODE ANN. § 11.11 and 16 TEX. ADMIN. CODE § 33.24(j).

SIGNED MARCH 22, 2010.

  
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LAURA KUCHINSKY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS