

TABC DOCKET NO. 588209

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
BADGER BEVERAGE LLC	§	
D/B/A LA ZONA ROSA CABARET	§	ALCOHOLIC
PERMIT/LICENSE NO(s). BG661554, BL	§	
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-3588)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 6th day of July, 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Laura Kuchinsky, presiding. The hearing convened on April 19, 2010 and the record was closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on May 18, 2010. Exceptions and Reply to the Exceptions were filed to which the Administrative Law Judge replied and recommended that no changes be made to the Proposal for Decision.

The matter is before the Administrator, Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

It is further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on July 30, 2010, 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 6th day of July, 2010, at
Austin, Texas.

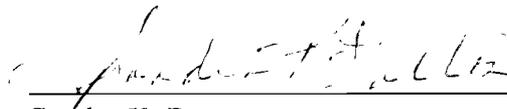
On behalf of the Administrator,



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that each party or person with an interest in the above matter has been notified of the agency order in the manner indicated below on July 7, 2010.



Sandra K. Patton
Texas Alcoholic Beverage Commission
Legal Division

ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6333 Forest Park Road, Suite 150-A
Dallas, Texas 75235
VIA FACSIMILE TO: (214) 956-8611

Jerry R McClain
ATTORNEY FOR RESPONDENT
205 Cedar Ridge
McKinney, TX 75069
VIA FACSIMILE: (866)-364-3990

Badger Beverage LLC
d/b/a La Zona Rosa Cabaret
RESPONDENT
7017 John Carpenter Fwy., Ste 225
Dallas, TX 75247
VIA U.S. REGULAR MAIL

Sandra K. Patton
ATTORNEY FOR PETITIONER
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Licensing Division

SKP/aa

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REGARDING: PROPOSAL FOR DECISION

DOCKET NUMBER: 458-10-3588

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NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT LEIGH NOLAN(lda) (214) 956-8616

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State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

May 18, 2010

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

VIA FACSIMILE 512/206-3203

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION V. BADGER BEVERAGE,
LLC D/B/A LA ZONA ROSA CABARET
SOAH DOCKET NUMBER: 458-10-3588
TABC CASE NUMBER: 588209**

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 cursive script, appearing to read "Laura Kuchinsky".

Laura Kuchinsky
Administrative Law Judge

LK/lan
Enclosure

Xc. Sandra Patton, Staff Attorney, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 713/426/7965**
Jerry McClain, Attorney for Respondent, **VIA FACSIMILE 866/364-3990**
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 512/206-3498**

of Law. The hearing in this matter convened April 29, 2010, before ALJ Laura Kuchinsky. at 6333 Forest Park Road, Suite 150-A, Dallas, Texas 75235. Petitioner was represented by Sandra K. Patton, Staff Attorney, who appeared by telephone. Respondent appeared through its attorney, Jerry R. McClain.

II. DISCUSSION

A. Summary of Staff's Evidence and Argument

Respondent holds a TABC-issued Wine and Beer Retailer's On Premise Permit, Retail Dealer's On Premise Late Hours License, permit number BG661554, BL (Permit), for the premises known as La Zona Rosa Cabaret located at 1676 Regal Row, Dallas, Dallas County, Texas. Staff's exhibits include a copy of Respondent's permit, conduct surety bond, violation history, settlement agreements, and TABC orders.

TABC's Orders against Respondent's Permit, issued on October 1, 2008, and June 10, 2009, in Docket Numbers 579640 and 584341, adopted Respondent's settlement agreements concerning its Code and Rule violations. Both agreements state:

By my [Respondent's] signature below I understand: 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 This agreement may result in the forfeiture of any conduct surety bond I [Respondent] have on file. . . . I may rescind this agreement within three calendar days from the date of signature by giving actual notice to the TABC representative signing this agreement.

TABC's Orders against Respondent's Permit state findings of fact, conclusions of law, and assess civil penalties and suspension provisions against Respondent's Permit. The civil penalties and suspension terms in the Orders in Docket Numbers 579640 and 584341 are identical to Respondent's agreements with Staff. Staff argued that TABC's Orders, including the adopted settlement

agreements, show Respondent committed at least three violations of the Texas Alcoholic Beverage Code since September 1, 1995, and therefore, Respondent's conduct surety bond should be forfeited on this basis.

B. Summary of Respondent's Evidence and Argument

Respondent argued that Staff's evidence does not show a final adjudication of three Code violations as required under 16 TAC § 33.24(j)(1), and, therefore, its conduct surety bond should not be forfeited. Respondent relied on district court cases in other surety bond forfeiture cases.¹

C. Analysis

The issue in this hearing is whether the criteria for forfeiture of the bond, as established by Code §11.11 and 16 TAC § 33.24(j)(1), have been satisfied.²

TABC's Orders in Docket Numbers 579640 and 584341 constitute a state agency's determination of a contested case under the APA. Respondent argued that its purported Code violations were not adjudicated, and therefore, are not a valid basis upon which to seek forfeiture of its conduct surety bond. Under the APA, a party must have an *opportunity* for a hearing prior to a state agency's determination of a party's rights, duties, or privileges; a party need not actually contest the violations.³ In this case, Respondent waived its opportunity to a hearing to adjudicate whether it committed the violations. Instead, Respondent agreed that the violations listed in its agreements

¹ Respondent offered to evidence Resp. Ex. "C" as a certified copy of TABC's public records. Ex. "C" includes copies of district court petitions, district court orders, and a TABC order in other cases. The parties contested the certification of the exhibit as a TABC public record and relevancy. The ALJ does not admit Resp. Ex. "C" to evidence.

² See Notice of Hearing and 16 TAC § 33.24(j)(2).

³ See TEX. GOV'T CODE ANN. § 2001.003(1) and (7). 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.

would become part of its Permit history, and further agreed that the agreement may result in the forfeiture of its conduct surety bond.

To be a final determination, a state agency's 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.⁴ In this case, the TABC's Orders against Respondent contain findings of fact and conclusions of law with respect to Respondent's violations under its Permit, and orders civil penalties and suspension terms. There is no evidence that Respondent appealed either TABC Order. Accordingly, the Orders in Docket Numbers 579640 and 584341 have a final and binding effect against Respondent, and the ALJ gives both Orders⁵ weight as final determinations that that Respondent violated the Code or Rules under its Permit.⁶

The preponderance of the evidence shows that Respondent committed seven Code or Rule violations under its Permit since September 1, 1995, including the three most recent violations under its Permit: on January 13, 2009, Respondent permitted public lewdness, sexual contact, or an obscene act; on March 14, 2009, Respondent committed an aggravated breach of the peace; and on March 20, 2009, Respondent engaged in sales of alcoholic beverages while its Permit was suspended. The ALJ finds that a lack of (then-applicable) citation numbers does not invalidate Respondent's agreements, as Respondent argued, because Respondent's violations are listed more fully by their description and offense date.

For the above reasons, the ALJ finds that Respondent committed three violations of the Alcoholic Beverage Code since September 1, 1995, and those violations were final adjudications under the APA as required under 16 TAC § 33.24(j)(1). Accordingly, the ALJ recommends that

⁴ See TEX. GOV'T CODE ANN. § 2001.141

⁵ TABC Order 579640 against Badger Beverage LLC d/b/a Lady Luck Cabaret, BG661554, and TABC Order 584341 against Badger Beverage LLC d/b/a La Zona Rosa Cabaret, BG 661554.

⁶ The Orders and settlement agreements correspond according to the terms of the Orders and Respondent's Permit history, for example, the Orders recite the identical penalty and suspension provisions per Respondent's agreements.

9. On April 7, 2010, Staff issued notice of the hearing. The notice of hearing contained the time, date, and location of the hearing; the applicable rules and statutes involved; and a short,

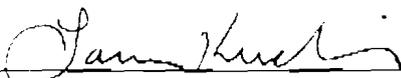
plain statement of the matters asserted.

10. The hearing in this matter convened on April 29, 2010, before ALJ Laura Kuchinsky with the State Office of Administrative Hearings (SOAH). Petitioner was represented by Sandra K. Patton, Staff Attorney. Respondent appeared through its attorney, Jerry R. McClain. The record closed at the conclusion of the hearing.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.11, and 16 TEX. ADMIN. CODE (TAC) § 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. Notice of the hearing was provided as required by the Administrative Procedure Act (APA), TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052
4. TABC's orders dated October 1, 2008, and June 10, 2009, in Docket Nos. 579640 and 584341, respectively, are final and binding determinations of Respondent's Code violations in accordance with the APA. TEX. GOV'T CODE ANN. §§ 2001.003, 2001.141, and 2001.144.
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 TAC § 33.24(j).

SIGNED May 18, 2010.



LAURA KUCHINSKY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS