

DOCKET NO. 608913

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
VICE BOUTIQUE NIGHT CLUB, INC. D/B/A VICE BOUTIQUE NIGHT CLUB, Respondent	§	ALCOHOLIC
	§	
PERMITS NO. MB731707, LB	§	
	§	
HIDALGO COUNTY, TEXAS (SOAH DOCKET NO. 458-12-6000)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this the 10th day of September, 2012, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Howard S. Seitzman presiding. The hearing convened on May 29, 2012 and was continued until June 14, 2012, and the SOAH record closed on June 14, 2012.. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on June 19, 2012. 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.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that Conduct Surety Bond No. S914-4091, issued by Washington International Insurance Company, be **FORFEITED** to the State of Texas.

This Order will become final and enforceable on the 12th day of October, 2012, unless a Motion for Rehearing is filed on or before the 11th day of October, 2012.

SIGNED this the 10th day of September, 2012, at Austin, Texas.



Sherry K-Cook, Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 10th day of September, 2012.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Howard S. Seitzman
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
Corpus Christi, Texas
VIA FACSIMILE: 512.322.0470

Vice Boutique Night Club, Inc,
d/b/a Vice Boutique Night Club
RESPONDENT
221 S. 17th Street
McAllen, Texas 78501
VIA REGULAR MAIL

Fernando Lopez
ATTORNEY FOR RESPONDENT
611 West 6th Street
Weslaco, Texas 78596
VIA REGULAR MAIL
AND VIA FACSIMILE: None listed

Judith Kennison
ATTORNEY FOR PETITIONER
TABC Legal Division

II. DISCUSSION

A. Applicable Law

Section 11.11 of the Code requires the holder of a retail dealer's permit to provide TABC with a \$5,000 surety bond conditioned on the holder's conformance with alcoholic beverage law. The bond may be forfeited if the licensee has been finally adjudicated of three violations of the Code since September 1, 1995, and TABC notifies the licensee in writing of its intent to seek forfeiture of the bond.¹

B. Relevant Facts

Respondent has resolved each of the following past TABC enforcement actions by Waiver Order, following execution of a Settlement Agreement and Waiver of Hearing:

1. By Waiver Order dated June 1, 2011, TABC found that Respondent violated the Code on May 6, 2011, by permitting the sale, service, or delivery of an alcoholic beverage to a minor. Respondent executed a Settlement Agreement and Waiver for this violation on May 19, 2011.
2. By Waiver Order dated August 24, 2011, TABC found that Respondent violated the Code on July 3, 2011, by failing to report a breach of the peace. Respondent executed a Settlement Agreement and Waiver for this violation on August 16, 2011.
3. By Waiver Order dated January 5, 2012, TABC found that Respondent violated the Code on November 3, 2011, by failing to comply with the retail cash/credit provisions. Respondent executed a Settlement Agreement and Waiver for this violation on December 16, 2011.

By letter dated February 1, 2012, TABC notified Respondent that it intended to seek forfeiture of the full amount of Conduct Surety Bond No. S914-4091. The letter referenced the aforementioned violations. Respondent requested a hearing on the bond forfeiture.

¹ 16 TAC § 33.24(j).

C. ALJ's Analysis, Conclusion, and Recommendation

Conduct surety bonds are posted by TABC license and permit holders to encourage compliance with provisions of the Code and the rules promulgated by TABC (Rules). Staff argued that Respondent committed three violations of the Code and Rules in 2011; and that as a matter of law the conduct surety bond is now subject to forfeiture. Respondent argued that the May 6, 2011, violation for the sale, service, or delivery of an alcoholic beverage to a minor was subject to a "safe-harbor defense," and should not be counted as a violation. For purposes of this bond forfeiture proceeding, Respondent argued it only has two violations.

Although Respondent may have had a defense to the violation when it was alleged, Respondent waived any defenses when it executed the May 19, 2011 Settlement Agreement and Waiver and allowed that agreement to become final.

Respondent chose to waive the right to a contested hearing on, and admitted to, the three violations. The language in each Settlement Agreement and Waiver clearly states that Respondent understood that the violations would become part of the violation history and might result in a forfeiture of any conduct surety bond on file.

Staff met its burden of proof for forfeiture of Respondent's conduct surety bond. The evidence shows that Respondent posted the required conduct surety bond in favor of the TABC. Respondent was finally adjudicated of three or more violations of the Code or Rules since September 1, 1995, by the execution of a Settlement Agreement and Waiver of Hearing on those violations. Staff notified Respondent in writing of its intent to seek forfeiture of the bond as authorized by 16 TAC § 33.24(j). Therefore, Respondent's Conduct Surety Bond No. S914-4091 should be forfeited.

III. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued Vice Boutique Night Club, Inc. (Respondent), License No. MB731707 for its business, Vice Boutique Night Club.
2. Washington International Insurance Company issued Conduct Surety Bond No. S914-4091 to Respondent in the amount of \$5,000.

3. The conduct surety bond 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 bond shall be paid to the state...."
4. By Waiver Order dated June 1, 2011, TABC found that Respondent violated the Tex. Alco. Bev. Code (Code) on May 6, 2011, by permitting the sale, service, or delivery of an alcoholic beverage to a minor. Respondent executed a Settlement Agreement and Waiver for this violation on May 19, 2011.
5. By Waiver Order dated August 24, 2011, TABC found that Respondent violated the Code on July 3, 2011, by failing to report a breach of the peace. Respondent executed a Settlement Agreement and Waiver for this violation on August 16, 2011.
6. By Waiver Order dated January 5, 2012, TABC found that Respondent violated the Code on November 3, 2011, by failing to comply with the retail cash/credit provisions. Respondent executed a Settlement Agreement and Waiver for this violation on December 16, 2011.
7. Respondent has committed three or more violations of the Code since September 1, 1995.
8. On February 1, 2012, the staff of TABC (Staff) sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond.
9. Respondent requested a hearing on this matter.
10. On May 7, 2012, 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.
11. The hearing convened on May 29, 2012. By agreement, both parties appeared telephonically. At the request of the parties, the case was continued until June 14, 2012.
12. On May 30, 2012, Staff issued a second notice of hearing. It informed all parties of the hearing in this matter. Staff's second 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 June 14, 2011, both parties appeared by telephone. Judith L. Kennison, TABC Legal Services Division attorney, represented TABC at the hearing. Attorney Fernando Lopez appeared on behalf of Respondent. The hearing concluded and the record closed that same day.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Tex. Alco. Bev. Code ch. 5 and § 11.11.
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 ch. 2003.
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 findings of fact and conclusions of law, Respondent's Conduct Surety Bond No. S914-4091 should be forfeited. Tex. Alco. Bev. Code § 11.11 and 16 Tex. Admin. Code § 33.24(j).

SIGNED June 19, 2012.


HOWARD S. SEITZMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS