

DOCKET NO. 609786

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
PHANTOM GROUP LLC D/B/A VOLTA 17, Respondent	§	ALCOHOLIC
	§	
	§	
PERMITS MB721750, LB & PE	§	
	§	
HIDALGO COUNTY, TEXAS (SOAH DOCKET NO. 458-12-6898)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of July, 2013, the above-styled and numbered cause.

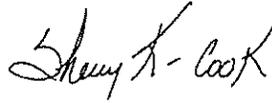
After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Steven M. Rivas presiding. The hearing convened on August 8, 2012, and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 13, 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. 2-83-62-95, issued by Great American Insurance Company as Surety with Respondent as Principal, be **FORFEITED** to the State of Texas.

This Order will become final and enforceable on the 3rd day of August, 2013, unless a Motion for Rehearing is filed on or before the 2nd day of August, 2013.

SIGNED this the 10th day of July, 2013, 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 July, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Steven M. Rivas
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, TX 78701
VIA FACSIMILE: (512) 322-2061

Phantom Group LLC
d/b/a Volta 17
RESPONDENT
2107 Colorado Street
Mission, TX 78572
VIA FIRST CLASS MAIL, CMRRR # 70120470000133006633

Judith Kennison
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: judith.kennison@tabc.state.tx.us

II. DISCUSSION

A. Applicable Law

Section 11.11 of the Code requires the holder of a retail dealer's permit 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

The following past TABC enforcement actions have been resolved between Respondent and the TABC by Waiver Order, Settlement Agreement, and Waiver of Hearing:

1. By Waiver Order dated February 24, 2011, TABC found that Respondent violated Section 102.32 of the Code on February 8, 2011, by becoming delinquent in the payment of an account for liquor.² Respondent executed a Settlement Agreement and Waiver for this violation on February 17, 2011.
2. By Waiver Order dated June 10, 2011, TABC found that Respondent violated Section 105.06 of the Code on May 22, 2011, by permitting consumption of an alcoholic beverage on a licensed premise during prohibited hours. Respondent executed a Settlement Agreement and Waiver for this violation on June 3, 2011.
3. By Waiver Order dated February 15, 2012, TABC found that Respondent violated Section 105.06 of the Code on December 4, 2011, by permitting consumption of an alcoholic beverage on a licensed premise during prohibited hours. Respondent executed a Settlement Agreement and Waiver for this violation on February 8, 2012.

By letter dated March 5, 2012, TABC notified Respondent that it intended to seek forfeiture of the full amount of conduct surety bond No. 2-83-62-95. The letter referenced the aforementioned violations. Respondent requested a hearing on the bond forfeiture.

¹ 16 TAC § 33.24(j).

² TABC refers to this as a credit law violation.

C. Code Section 102.32

Mr. Garza conceded the two violations regarding alcohol consumption during prohibited hours were valid. However, he argued the one credit law violation should not be counted against him because it stemmed from an error made by his wholesale dealer. The credit law violation was based on Code Section 102.32, which states in relevant part:

(c) On purchases made from the 1st through 15th day of a month, payment must be made on or before the 25th day of that month. On purchases made on the 16th through the last day of a month, payment must be made on or before the 10th day of the following month.

(d) Each delivery of liquor shall be accompanied by an invoice giving the date of purchase. If a retailer becomes delinquent in the payment of an account for liquor, the wholesale dealer immediately shall report the fact in writing to the TABC.

D. Evidence and Argument

Mr. Garza testified he mistakenly accepted the credit law violation in February 2011, and asserted this matter had been "cleared up" after he investigated it further. In support of his position, Mr. Garza offered a letter from Statewide Beverage, LLC, a wholesale dealer in Pharr, Texas. The letter was dated April 4, 2012, signed by Patricia Jackson of Statewide's accounts receivable department, and stated the following:

Feldman's Hidalgo County Warehouse, Permit #695478 reported [Respondent] on the delinquent list in error, for delivery period January 16-31, 2011, in the amount of \$4,171.62. Please accept this letter as a formal request to have these violations removed from our clients [sic] permit as this was our error.

Ms. Jackson further asserted in the letter that on February 1, 2011, Respondent paid \$4,171.62, but was not removed from the TABC list before the violation became effective. Staff argued the credit law violation had already been fully adjudicated and that Mr. Garza should have brought the error to the attention of the TABC in February 2011.

E. 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. Mr. Garza argued that the credit law violation, which occurred on February 8, 2011, should not be counted against him because he cleared up the matter of the delinquent account with Statewide Beverage, LLC, after the violation had been adjudicated.

Mr. Garza failed to persuade the ALJ that the credit law violation should not be counted against him. The evidence he presented—consisting of Ms. Jackson's letter—did not sufficiently demonstrate the TABC had erred in assessing a credit law violation against him. It is unclear to the ALJ what, if any, evidence Ms. Jackson relied on when she wrote that letter. In addition, the letter contained mostly uncorroborated hearsay statements. For example, the letter would have the ALJ believe the relevant delivery period was January 16-31, 2011, and that Respondent issued a check for the proper amount to the wholesale dealer that reported Respondent to the TABC as delinquent.

If Feldman Hidalgo County Warehouse was the wholesale dealer that reported Respondent as delinquent, the ALJ would like to have heard an explanation from a Feldman representative as to why Respondent was reported to the TABC if Respondent indeed issued a check for \$4,171.62 (assuming that was the correct amount owed) on February 1, 2011. It is also unclear why Respondent's representative, Jose H. Moreno, executed a settlement agreement with the TABC on February 17, 2011, for the credit law violation, if the delinquent payment in question was remitted on February 1, 2011.³ Regardless, neither party offered any rule or statute that allows an ALJ to re-litigate a prior violation that has already been fully adjudicated by a Settlement Agreement and Waiver.

³ Mr. Moreno was present at the hearing and introduced himself as Mr. Garza's business partner but presented no testimony.

Under Code Section 102.32(d), a wholesale dealer shall immediately report to the TABC in writing a retailer that becomes delinquent in his payment for liquor. Based on the Settlement Agreement and Waiver executed by Respondent on February 17, 2011, Respondent admitted that such a violation occurred on February 8, 2011. In addition to the two subsequent violations of Code Section 105.06, Respondent has three fully adjudicated violations on his permit. 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. 2-83-62-95 should be forfeited.

III. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued Phantom Group LLC Respondent, License No. MB721750, PE & LB for its business, Volta 17.
2. Great American Insurance Company issued Respondent's conduct surety bond No. 2-83-62-95 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 November 15, 2011, TABC found that Respondent violated Section 105.06 of the Texas Alcoholic Beverage Code (Code) on August 28, 2011, by permitting consumption of an alcoholic beverage on a licensed premise during prohibited

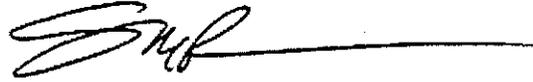
- hours. Respondent executed a Settlement Agreement and Waiver for this violation on October 13, 2011.
5. By Waiver Order dated June 10, 2011, TABC found that Respondent violated Section 105.06 of the Code on May 22, 2011, by permitting consumption of an alcoholic beverage on a licensed premise during prohibited hours. Respondent executed a Settlement Agreement and Waiver for this violation on June 3, 2011.
 6. By Waiver Order dated February 15, 2012, TABC found that Respondent violated Section 105.06 of the Code on December 4, 2011, by permitting consumption of an alcoholic beverage on a licensed premise during prohibited hours. Respondent executed a Settlement Agreement and Waiver for this violation on February 8, 2012.
 7. Respondent has committed three or more violations of the Code since September 1, 1995.
 8. On March 5, 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 June 29, 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 August 8, 2012, in Pharr, Texas, before ALJ Steven M. Rivas. Staff appeared by phone and Respondent's owner, Jose Garza, appeared in person. The hearing concluded and the record closed that same day.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under 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. Respondent has been finally adjudicated of three violations of the Code since September 1, 1995.

5. Based on the findings of fact and conclusions of law, Respondent's conduct surety bond No. 2-83-62-95 should be forfeited. Code § 11.11 and 16 Tex. Admin. Code § 33.24(j).

SIGNED September 13, 2012.



STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS