

DOCKET NO. 615105

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
WEIRD TIMES LLC D/B/A WEIRDO'S, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT MB740510, LB, PE & CB	§	
	§	
TRAVIS COUNTY, TEXAS (SOAH DOCKET NO. 458-13-2719)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of July, 2013, the above-styled and numbered cause.

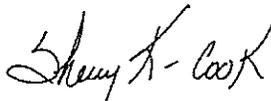
After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Steven M. Rivas presiding. The hearing convened on March 27, 2013, and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on May 24, 2013. 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. MS 22008756, 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 6th day of August, 2013, unless a Motion for Rehearing is filed on or before the 5th day of August, 2013.

SIGNED this the 12th 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 12th 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

Weird Times LLC
d/b/a Weirdo's
RESPONDENT
12408 N. Mopac Expressway
Austin, TX 78758-2409
VIA FIRST CLASS MAIL, CMRRR #70120470000133006664

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

SOAH DOCKET NO. 458-13-2719
(TABC CASE NO. 615105)

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

V.

WEIRD TIMES LLC, d/b/a WEIRDO'S,
PERMIT NO. MB740510, LB, PE & CB,
TRAVIS COUNTY, TEXAS,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (TABC) alleges that on or about January 2, 2013, Weird Times LLC, d/b/a Weirido's (Respondent), or Respondent's agent, servant, or employee had three or more adjudicated violations of the Texas Alcoholic Beverage Code or regulations in violation of Texas Alcoholic Beverage Code (Code) § 11.11 and Texas Administrative Code title 16, § 33.24(j). Staff seeks forfeiture of Respondent's \$5,000 conduct surety bond. Respondent requests the conduct surety bond not be forfeited. The evidence shows that, as of January 2, 2013, Respondent had three qualifying violations. The Administrative Law Judge (ALJ) recommends Respondent's \$5,000 conduct surety bond forfeited.

I. PROCEDURAL HISTORY

The hearing in this matter convened on March 27, 2013, before ALJ Steven M. Rivas. Judith L. Kennison, a Staff attorney with the Commission's Legal Services Division, appeared by telephone. Respondent's owner, Cecilia Fortney, appeared on behalf of Respondent. The hearing concluded and the record closed that same day. There are no contested issues of notice or jurisdiction in this case. Therefore, notice and jurisdiction are addressed in the findings of fact and conclusions of law without further discussion.

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

On January 19, 2012, the Commission issued License Number MB-740510 to Respondent, and Respondent posted a conduct surety bond for \$5,000 as required by Sections 11.11 and 61.13 of the Code. The records show that Great American Insurance Company issued a \$5,000 Conduct Surety Bond (No. MS22008756) for Respondent, and in favor of the State of Texas. The 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."

The following past TABC enforcement actions have been resolved between Respondent and the TABC by Waiver Order, Settlement Agreement, and Waiver of Hearing:²

1. By Waiver Order dated February 13, 2012, TABC found that on January 6, 2012, Respondent committed a cash law violation under Section 102.31 of the Code and Texas Administrative Code title 16, § 45.131. Respondent executed a Settlement Agreement and Waiver for this violation on February 7, 2012, and accepted a two-day suspension and/or a \$300 penalty.
2. By Waiver Order dated March 22, 2012, TABC found that on February 3, 2012, Respondent committed a cash law violation under Section 102.31 of the Code and Texas Administrative Code title 16, § 45.131. Respondent executed a Settlement

¹ Tex. Admin. Code title 16, § 33.24(j).

² The ALJ is unaware of the details regarding the enforcement actions.

Agreement and Waiver for this violation on March 16, 2012, and accepted a twelve-day suspension and/or a \$1,800 penalty.

3. By Waiver Order dated November 6, 2012, TABC found that on August 16, 2012, Respondent committed a failure to report violation under Texas Administrative Code title 16, § 35.32. Respondent executed a Settlement Agreement and Waiver for this violation on October 31, 2012, and accepted a twenty-six-day suspension and/or a \$7,800 penalty.

By letter dated December 3, 2012, TABC notified Respondent that it intended to seek forfeiture of the full amount of Conduct Surety Bond No. MS22008756. The letter referenced the aforementioned violations. Respondent requested a hearing on the bond forfeiture.

C. Evidence and Argument

Ms. Fortney testified she understood she was cited for a failure to report a breach of peace occurrence, but regretted the fact that she did not request a hearing to contest the failure to report violation because, she contends, she did report the occurrence. Ms. Fortney asserted that the breach of peace occurred on a weekend and she reported it to the TABC the following Monday morning—which was more than twenty-four hours after the occurrence. Ms. Fortney understands that under rule 35.32(b), she was required to report the breach of peace occurrence to the TABC within twenty-four hours if the occurrence resulted in serious bodily harm. But, Ms. Fortney testified, nobody suffered any bodily injury when the breach of peace occurred.

Ms. Fortney also acknowledged the cash law violations as being accurate but testified she paid all the fines assessed against Respondent for these violations. She also stated Respondent had not committed any additional cash law violations.

Staff understands Respondent's position but pointed out Ms. Fortney had an opportunity to request a hearing for each alleged violation. Staff further noted that because the alleged violations have been fully adjudicated, the only issue is whether the bond should be forfeited after three adjudicated violations.

D. 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. Staff argued that Respondent committed three violations of the Code and TABC Rules in 2012, and that as a matter of law, the conduct surety bond is now subject to forfeiture. Ms. Fortney's only contention was that she regretted not requesting a hearing on the breach of peace violation.

The ALJ has no details regarding the underlying breach of peace investigation and does not know why Ms. Fortney signed the Settlement Agreement and Waiver form instead of requesting a hearing on the matter. Other than Ms. Fortney's argument that she was not required to report the breach of peace occurrence to the TABC within twenty four hours due to the absence of serious bodily injury, no evidence was presented that the Commission erred in assessing a failure to report violation against Respondent. The ALJ may not reconsider a prior case that has already been fully adjudicated by a Settlement Agreement and Waiver.

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 State. 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 Texas Administrative Code § 33.24(j). As such, Respondent's Conduct Surety Bond No. MS22008756 should be forfeited.

III. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued Permit No. MB-740510 to Weird Times LLC, d/b/a Weirdo's (Respondent).
2. Great American Insurance Company issued Conduct Surety Bond No. MS22008756 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 February 13, 2012, TABC found that on January 6, 2012, Respondent committed a cash law violation under Section 102.31 of the Code and Texas Administrative Code title 16, § 45.131. Respondent executed a Settlement Agreement and Waiver for this violation on February 7, 2012, and accepted a two-day suspension and/or a \$300 penalty.
5. By Waiver Order dated March 22, 2012, TABC found that on February 3, 2012, Respondent committed a cash law violation under Section 102.31 of the Code and Texas Administrative Code title 16, § 45.131. Respondent executed a Settlement Agreement and Waiver for this violation on March 16, 2012, and accepted a twelve-day suspension and/or a \$1,800 penalty.
6. By Waiver Order dated November 6, 2012, TABC found that on August 16, 2012, Respondent committed a failure to report violation under Texas Administrative Code title 16, § 35.32. Respondent executed a Settlement Agreement and Waiver for this violation on October 31, 2012, and accepted a twenty-six-day suspension and/or a \$7,800 penalty.
7. On December 3, 2012, the Commission's staff (Staff) sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond and Respondent requested a hearing on this matter.
8. On February 21, 2013, Staff issued a notice of hearing informing all parties of the hearing in this matter.
9. 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.
10. The hearing convened on March 27, 2013, before ALJ Steven M. Rivas. Staff Attorney, Judith Kennison, appeared by telephone. Respondent's owner, Cecilia Fortney, appeared on Respondent's behalf. The hearing concluded and the record closed that same day.

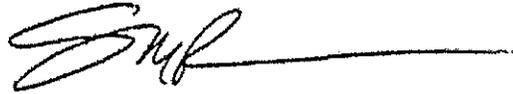
IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Texas Alcoholic Beverage Code (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 Texas Government Code ch. 2003.

3. Respondent received notice of the proceedings and hearing, pursuant to Texas Government Code § 2001.051 and Texas Administrative Code title 1, § 155.401.
4. Respondent has been finally adjudicated of three violations of the Code since September 1, 1995.
5. Respondent's Conduct Surety Bond No. MS22008756 should be forfeited pursuant to Code § 11.11 and Texas Administrative Code title 16, § 33.24(j).

SIGNED May 24, 2013.



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