

SOAH DOCKET NO. 458-03-1044

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,

VS.

T. M. CLUB INC.,  
D/B/A THE METRO  
TRAVIS COUNTY, TEXAS  
(TABC CASE NO. 599784)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (TABC) brought this forfeiture action against T. M. Club, Inc. d/b/a The Metro (Respondent). TABC sought forfeiture of Respondent's conduct surety bond, alleging Respondent's permits have been canceled for cause. For reasons discussed in this proposal for decision, the Administrative Law Judge (ALJ) recommends forfeiture of the conduct surety bond.

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

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.11(b)(2), and 16 TEX. ADMIN. CODE (TAC) § 33.24. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003. There were no contested issues of notice or jurisdiction in this proceeding.

On November 26, 2002, TABC issued its Notice of Hearing to Respondent. ALJ John H. Beeler convened the hearing on January 30, 2003, in Austin, Travis County, Texas. TABC was represented at the hearing by its staff attorney Gayle Gordon. Respondent was represented by Lisa Zinmaster, attorney. Evidence was received and the record closed on February 4, 2003, after the parties filed written closing arguments.

**II. LEGAL STANDARDS AND APPLICABLE LAW**

TABC is authorized under § 11.11(b)(2) of the Code to require the permittee to forfeit the amount of a conduct surety bond if the permit is revoked. TABC must notify the permittee, in writing, of its intent to seek forfeiture of the bond. The permittee may request a hearing on whether the criteria for forfeiture of the bond have been satisfied. The hearing is to be conducted in accordance with the Administrative Procedure Act.

### **III. EVIDENCE AND ARGUMENT**

#### **A. BACKGROUND**

Respondent is the holder of Mixed Beverage Permit MB836511 and Mixed Beverage Late Hours Permit LB836512 issued by TABC for the premises known as The Metro, located at 505-07 East Sixth Street in Austin, Travis County, Texas, and whose mailing address is the same.

TABC alleges Respondent's permits were canceled for cause. Respondent argues that the permits were not canceled for cause and that, by agreeing to cancellation, no action would be taken against the bond.

#### **B. EVIDENCE**

TABC offered one document, which was admitted, and the testimony of two witnesses. Respondent called one witness.

##### **1. Documentary Evidence**

On or about December 19, 2002, William C. Dufour, attorney for Respondent, signed a waiver agreeing to have the permits canceled for cause. The Waiver form stated, "The signing of this waiver may result in the forfeiture of any related conduct surety bond."

Base on the waiver TABC issued an order canceling the permits for cause.

##### **2. Testimony**

###### **a. Wayne Murray**

Mr. Murray is a compliance officer employed by TABC. and in that capacity, audited two clubs operated by Rene Adame, including The Metro. After completing the audits, he recommended that Mr. Adame's permits be canceled. He had no discussions with Mr. Adame concerning forfeiture of surety bonds.

###### **b. Deposition of David Ferraro**

In deposition, TABC Captain David Ferraro testified concerning the cancellation of Respondent's permits. He did not make an agreement not to seek forfeiture of any surety bond.

### **c. Rene Adame**

Mr. Adame is the owner of The Metro. If he had known that signing the Waiver could result in forfeiture of his conduct surety bond, he would not have waived the hearing. He thought that signing the waiver would end all of his problems concerning TABC violations. TABC has been harassing him.

### **C. Argument**

#### **1. TABC's argument**

TABC contends that because the permits were challenged for cause, the bond should be forfeited.

#### **2. Respondent's argument**

Respondent argues that he signed the waiver and agreed that the permits would be canceled because he understood that the bond would not be forfeited, and there was an agreement with TABC not to forfeit the bond.

## **IV. ANALYSIS**

Respondent signed a waiver agreeing to the cancellation of his permits. The waiver stated that Respondent "acknowledges that the signing of this waiver may result in the forfeiture of any related conduct surety bond." Although Respondent argues that there was a side agreement that the bond would not be forfeited, no evidence was offered to establish any agreement. Even Respondent's own testimony failed to actually state that there was such an agreement. The conditions of 16 TAC § 33.24 have been met, and Respondent's bond should be forfeited.

### **FINDINGS OF FACT**

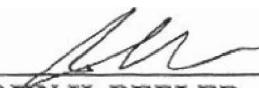
1. T. M. Club, Inc. d/b/a The Metro (Respondent) held Permit Nos. MB836511 and LB836512 issued by TABC on July 28, 2001, for the premises located at 505-07 E. East Sixth Street, Austin, Travis County, Texas.
2. Respondent has posted a TABC Conduct Surety Bond in the amount of \$5,000, payable to the State of Texas.
3. Respondent signed a waiver agreeing to the cancellation of his permits. The waiver stated that Respondent "acknowledges that the signing of this waiver may result in the forfeiture of any related conduct surety bond."
4. Respondent's permits have been canceled for cause.

5. Petitioner sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond.
6. Respondent requested a hearing to determine if the conduct surety bond should be forfeited.
7. On November 26, 2002, Petitioner issued its Notice of Hearing, directed to Respondent at Respondent's address of record, setting the hearing on the merits for January 30, 2003.
8. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
9. On January 30, 2003, a hearing convened before ALJ John H. Beeler at the State Office of Administrative Hearings in Austin, Travis County, Texas. Petitioner was represented at the hearing by TABC Staff Attorney Gayle Gordon. Respondent was represented by attorney Lisa Zintmaster. The record closed on February 4, 2003, after the parties filed written closing arguments.

#### CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 6.01, 11.11, 11.61 and 61.13, and 16 TEX. ADMIN. CODE (TAC) § 33.24.
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 proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Based upon the Findings of Fact and TEX. ALCO. BEV. CODE ANN. § 11.11(b)(2) and 16 TAC § 33.24, TABC Conduct Surety Bond Number XTL03173, dated June 17, 1999, in the amount of \$5,000, should be forfeited.

**SIGNED on this the 3<sup>rd</sup> day of April, 2003.**

  
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**JOHN H. BEELER**  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 599784**

IN RE T. M. CLUB INC.	§	BEFORE THE
D/B/A THE METRO	§	
PERMIT NO. MB475956	§	
	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-1044)	§	BEVERAGE COMMISSION

**O R D E R**

**CAME ON FOR CONSIDERATION** this 14th day of May, 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened on January 30, 2003 and adjourned on February 4, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 3, 2003. This 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. Exceptions to the Proposal for Decision were filed by Respondent and Petitioner filed a Response to Respondent's Exceptions to the Proposal for Decision.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Respondent's Exceptions To the Proposal for Decision, Petitioner's Response To Respondent's Exceptions To Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

**This Order will become final and enforceable on JUNE 4, 2003**, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

SIGNED this the 14<sup>th</sup> day of May, 2003.

On Behalf of the Administrator,



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Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

/vr

The Honorable John H. Beeler  
Administrative Law Judge  
State Office of Administrative Hearings  
VIA FACSIMILE (512) 475-4994

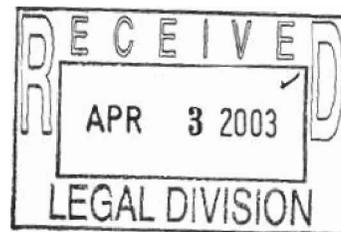
Lisa Zintsmaster, P.L.L.C.  
ATTORNEY FOR RESPONDENT  
VIA FAX (512) 458-2826

T. M. Club Inc.  
d/b/a The Metro  
RESPONDENT  
505-07 E 6<sup>th</sup> St  
Austin, Tx. 78701-3741  
CERTIFIED MAIL RRR #7001 2510 0000 8688 9040

Gayle Gordon  
ATTORNEY FOR PETITIONER  
TABC Legal Section

Regulatory Division  
Austin District Office

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

April 3, 2003

Mr. Rolando Garza, Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa, Suite 160  
Austin, Texas 78711

HAND DELIVERY

**RE: Docket No. 458-03-1044; Texas Alcoholic Beverage Commission vs. T.M. Club, Inc.,  
d/b/a The Metro, Travis County, Texas (TABC Case No. 599784)**

Dear Mr. Garza:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. A copy of the Proposal for Decision is being sent to Gayle Gordon, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Attorney Lisa Zintmaster, representing T. M. Club Inc. d/b/a The Metro, Respondent. For reasons discussed in the Proposal for Decision, the Administrative Law Judge recommends forfeiture of the conduct surety bond.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

A handwritten signature in black ink, appearing to read "John H. Beeler".

John H. Beeler  
Administrative Law Judge

JHB/sb  
Enclosure

xc: **Gayle Gordon, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - VIA HAND DELIVERY**  
**Lisa Zintmaster, 3307 Northland Drive, Suite 470, Austin, Texas 78731 - VIA REGULAR MAIL**  
**Rommel Corro, Docket Clerk, State Office of Administrative Hearings - VIA HAND DELIVERY**