

DOCKET NO. 458-03-1551

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

Vs.

VIRGINIA MERMELLA
d/b/a KONY'S
PERMIT NOS. BG483094, BL483095
BEXAR COUNTY, TEXAS
(TABC CASE NO. 601938)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

(SAN ANTONIO, TEXAS)

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Virginia Mermella (Respondent) seeking forfeiture of the full amount of the Respondent's conduct surety bond. TABC alleged the Respondent committed three violations of the Texas Alcoholic Beverage Code since September 1, 1995. TABC also alleged the violations have been finally adjudicated. The Respondent did appear, and testified on her own behalf. This Proposal for Decision finds the Respondent's conduct surety bond should be forfeited.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this matter convened on February 11, 2003. Attorney Gale Gordon represented TABC. Respondent appeared and represented herself. Ms. Mermella speaks primarily Spanish, therefore her son-in law, Mr. Navarro, assisted in translating the hearing for Ms. Mermella. Administrative Law Judge Cyrena Benson (ALJ), presided. The hearing was concluded and the record closed that same day.

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here or venue.

II. EVIDENCE

A. Evidence.

1. Evidence Received at the Hearing.

The staff of TABC (Staff) introduced as Exhibit#1 documentary evidence establishing the following:

(a) On October 31, 2000, the Respondent posted a conduct surety bond in the amount of \$5,000.00 asserting she would faithfully conform with the Texas Alcoholic Beverage Code (the Code) and the rules of TABC.

(b) On November 16, 2001, Respondent was issued Wine and Beer Retailer's Permit BG-483094 and Retail Dealer's On Premise Late Hours License BL-483095 by TABC.

(c) On August 5, 2002, the Respondent signed a document entitled "Agreement and Waiver of Hearing" which included the following language, "I neither admit nor deny that the violations stated above have occurred and do hereby waive my right to a hearing... The signing of this waiver may result in the forfeiture of any related conduct surety bond."

(d) The waiver document alleged three violations: inspection refusal, and two instances of permitting a minor to possess and consume alcoholic beverages.

(e) On August 13, 2002, TABC entered a waiver order stating that Respondent violated the Code as set out in the waiver signed by Respondent and imposed a 15 day suspension or a civil penalty of \$2,250.00 on the Respondent.

Respondent testified on her own behalf. She stated the violations occurred when she was not present at the establishment and that the bar had been opened by a bartender without her knowledge. On cross-examination, Respondent acknowledged that she was responsible for the actions of her employees.

III. STATUTORY AUTHORITY

The rules of TABC, at 16 TEX. ADMIN. CODE CODE (TAC) §33.24(j) provide:

(1) When a license or permit is canceled, or a final adjudication that the licensee or permittee has committed three violations of the Alcoholic Beverage Code since September 1, 1995, the commission shall notify the licensee or permittee, in writing, of its intent to seek forfeiture of the bond.

(2) The licensee or permittee may . . . request hearing on the question of whether the criteria for forfeiture of the bond, as established by the Alcoholic Beverage Code, §11.11 and §61.13 and this rule have been satisfied.

The applicable statutory provisions at TEX. ALCO. BEV. CODE ANN. §§11.11(b)(2) state:

(b) . . . the holder of the permit agrees that the amount of the bond shall be paid to the state if the permit is revoked or on final adjudication that the holder violated a provision of this code. . . .

III. RECOMMENDATION

Based on a preponderance of the evidence, the Respondent committed three violations of the Code since September 1, 1995, in violation of Texas Alcoholic Beverage Commission rules, 16 TAC §33.24. As a consequence, the full amount of the conduct surety bond, or any instrument serving in place of a conduct surety bond (including, but not limited to certificates of deposit and letters of credit), should be forfeited.

IV. FINDINGS OF FACT

1. Virginia Mermella d/b/a Kony's (Respondent) is the holder of Wine and Beer Retailer's Permit BG-483094 and Retail Dealer's on Premise Late Hours License BL-483095, issued by the Texas Alcoholic Beverage Commission (TABC) on November 16, 2001.
2. On October 31, 2000, the Respondent executed a conduct surety bond in the amount of \$5,000.00 payable to TABC.
3. On August 5, 2002, the Respondent signed an "Agreement and Waiver of Hearing" regarding three alleged violations of the Texas Alcoholic Beverage Code (the Code), for which TABC entered an Order finding the Respondent committed three violations of the Code and imposed a 15 day suspension or a civil penalty of \$2,250.00 on the Respondent.
4. On December 30, 2002, the staff of TABC (the Staff) sent a Notice of Hearing by certified mail, return receipt requested, to the Respondent asserting that TABC was seeking to forfeit the Respondent's surety bond. The Respondent timely received the notice letter.
5. The hearing on the merits was held on by telephone February 11, 2003. Gayle Gordon appeared and represented the Staff. The Respondent represented herself. Cyrena Benson, Administrative Law Judge (ALJ) presided.
6. The Respondent has committed three violations of the Code since September 1, 1995.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 11.11.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.

3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOVT CODE ANN. §§2001.051 and 2001.052.
4. The Respondent violated the rules of TABC found at 16 TEX. ADMIN. CODE §33.24 by committing three violations of the Texas Alcoholic Beverage Code (the Code) since September 1, 1995.
5. TABC is permitted by TEX. ALCO. BEV. CODE ANN. §11.11 and 16 TEX. ADMIN. CODE §33.24 to forfeit the conduct surety bonds of permittees who commit three or more violations of the Code since September 1, 1995.
6. Based on the foregoing Findings of Fact and Conclusions of Law, the conduct surety bond executed by the Respondent should be forfeited to the State.

SIGNED this 7th day of April, 2003.



CYRENA BENSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 601938

IN RE VIRGINIA REYNA MERMELLA	§	BEFORE THE
D/B/A KONY'S	§	
PERMIT NO. BG483094, BL483095	§	
	§	TEXAS ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-1551)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 2nd day of May, 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Cyrena Benson. The hearing convened on February 11, 2003 and adjourned on February 11, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on , 2001. 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. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the 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.

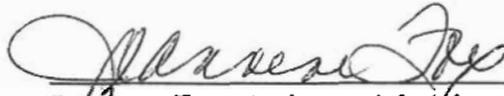
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

This Order will become final and enforceable on May 23, 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.

WITNESS MY HAND AND SEAL OF OFFICE on this the 2nd day of May, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/yt

Administrative Law Judge
State Office of Administrative Hearings
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San Antonio, Texas 78216
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Gayle Gordon
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission

Regulatory Division
San Antonio District Office