

SOAH DOCKET NO. 458-04-2185

PROPOSAL FOR DECISION

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asserted, as required by TEX. GOV'T CODE ANN. § 2001.052. The hearing was held on January 23, 2004, at the Fort Worth field office of the Texas State Office of Administrative Hearings (SOAH), 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas, before Cindy Greenleaf, an Administrative Law Judge (ALJ). Staff appeared and was represented by Timothy E. Griffith, Commission Staff Attorney. Applicant appeared *pro se*. There were no challenges to the notice of hearing, jurisdiction, or venue. Although Staff set the hearing to consider the prior offense, Staff did not adamantly oppose the application once other factors supporting the application were proven. The hearing concluded, and the record closed on January 23, 2004.

II. JURISDICTION

The Commission has jurisdiction and authority over this matter pursuant to Chapter 5 and §§ 6.01 and 11.61 of the Texas Alcoholic Beverage Code (the Code). TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.* SOAH has authority to conduct a hearing in this matter and make recommendations to the Commission, including the issuance of a proposal for decision containing proposed findings of fact and proposed conclusions of law, pursuant to TEX. GOV'T CODE ANN. Chapter 2003 and § 5.43 of the Code.

III. DISCUSSION

A. Applicable Law

The statutory foundation for the protest to this application is § 109.532(b)(1) of the Code, which provides:

The commission may deny a license or permit or the renewal of a license or permit for an applicant if:

(1) the commission determines that a previous criminal conviction or deferred adjudication indicates that the applicant is not qualified or suitable for a license or permit. . . .

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Additionally, 16 TEX. ADMIN. CODE § 33.1(b)(3) provides a deferred adjudication for prostitution “may indicate that the applicant is not qualified or suitable to hold a permit . . . and may be grounds for . . . denial unless five years have elapsed since the termination of a sentence, parole, or probation served by the applicant . . .”

B. Evidence

All of the following evidence was undisputed by the parties. In an order dated June 5, 2002, (Applicant’s Exhibit One) Applicant received deferred adjudication for the misdemeanor offense of attempt prostitution for an arrest in March 2001. Applicant disclosed this information in his original application for the permits discussed herein (TABC’s Exhibit Three). Charges were dropped from a Class B Solicitation of Prostitution offense to a Class C Attempted Prostitution offense due to lack of evidence to prove the initial charge. Applicant was placed on very limited community supervision for six months and assessed a small fine. Having satisfied all of the terms and conditions set out in the deferred adjudication order, Applicant has cleared his record and has maintained a clear record since the order was issued. Regarding the arrest, Applicant explained that he never offered or agreed to pay any money.

Applicant testified that he is a responsible person, in that he has obtained his bachelor’s degree in business management, that he financially supports his mother, and that he has owned and operated the restaurant on said premises since August 2001. Applicant argued that he has lost many restaurant customers at his place of business because they cannot order alcoholic beverages with their meal. Applicant stated that he does not engage in illegal activities and that he would stringently comply with Code provisions, Commission regulations, and other relevant laws if the application was granted.

Staff presented the application filed by Applicant with certificates of approval from the City Secretary of the City of Forest Hill, the Tarrant County Clerk, and the Tarrant County Judge. Staff offered no additional evidence showing that Applicant is not qualified or suitable for a license or permit.

C. Analysis, Conclusion, and Recommendation

The TABC's regulation provides discretion in determining whether deferred adjudication for a prostitution offense indicates that an applicant is not qualified or suitable to hold a permit and that an application for a permit should be denied.¹ This discretion is derived from the use of the word "may" in this section.² Since five years have not elapsed, the issue becomes whether the Applicant is disqualified or unsuitable to hold the requested permits based on this prior offense?

Applicant's arrest for the offense of prostitution occurred three years ago. Applicant fully disclosed this information to TABC and made no attempt to be deceitful. He has successfully completed the conditions and terms of the deferred adjudication, clearing his record. Since the charges were reduced from a Class B to a Class C attempted prostitution misdemeanor, the ALJ doubts that Applicant received deferred adjudication for "prostitution" in the strictest sense. This is particularly true where the record does not disclose all of the circumstances of Applicant's arrest. Even though five years has not elapsed, the ALJ does not find that Applicant's prior deferred adjudication indicates that he is not suitable or qualified to hold the requested permits.

Additionally, Applicant demonstrated how he has lived responsibly since the incident, in that he became owner of this restaurant five months after his arrest, he has operated this business for the past two years and seven months, and he is concerned about the loss of his customers. He depends on his business to financially support himself and his mother. He has maintained a clear record since this incident and has expressed his intention to operate these premises within state laws and regulations of the Commission. Applicant should be given an opportunity to conduct his business subject to the Commission's regulatory authority over these premises.

¹ 16 TAC § 33.1(b)(3).

² "May" creates discretionary authority or grants permission or a power. TEX. GOV'T CODE ANN. § 311.016(1)(Vernon 2002). The Code Construction Act, Chapter 311 of the Government Code, "applies to each rule adopted under a code." *Id.* § 311.002(4).

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Based on the evidence presented, the ALJ concludes that the Staff failed to demonstrate that the Applicant is not qualified or suitable for the requested permits based on his prior deferred adjudication offense of attempted prostitution. Thus, the ALJ cannot recommend that Applicant is unsuitable or disqualified because of the offense. The permit application for Fiesta Guadalajara, 3344 Mansfield Highway, Forest Hill, Tarrant County, Texas, meets the Commission's requirements. Accordingly, the application should be granted.

IV. PROPOSED FINDINGS OF FACT

1. On or about October 23, 2003, Ricardo Sandoval d/b/a Fiesta Guadalajara (Applicant), filed an original application with the Texas Alcoholic Beverage Commission (the Commission) for a Wine and Beer Retailers Permit and a Food and Beverage Certificate for the premises located at 3344 Mansfield Highway, Forest Hill, Tarrant County, Texas.
2. The Commission protested issuing the permits requested in the application due to Applicant's prior deferred adjudication for a prostitution offense in 2001.
3. On January 12, 2004, Commission's Staff (Staff) issued a notice of hearing to Applicant. This notice of hearing was received by Applicant on January 12, 2004.
4. 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.
5. A hearing convened before Cindy T. Greenleaf, an Administrative Law Judge with the State Office of Administrative Hearings (SOAH), on January 23, 2004, at the Fort Worth field office of SOAH, 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Staff appeared and was represented by Timothy E. Griffith, Commission Staff Attorney. Applicant appeared *pro se*. The record closed on January 23, 2004.
6. Applicant's application contains all required certifications from the City of Forest Hill and Tarrant County officials.
7. Applicant received deferred adjudication for attempt prostitution in an order dated June 5, 2002. Applicant was placed on very limited community supervision for six months and was assessed a small fine, and he successfully completed all terms and conditions.
8. No other evidence was offered to indicate that Applicant is not qualified or suitable to hold a license or permit.

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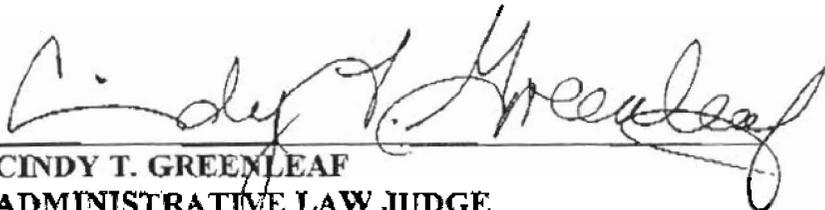
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V. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Chapter 5 and §§ 6.01 and 11.61 and TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.*
2. SOAH has jurisdiction over all matters related 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 ANN. Chapter 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.
3. No objections to the notice of hearing, jurisdiction, or venue were raised by the parties.
4. Based on the foregoing findings, a preponderance of the evidence does not indicate that Applicant is unqualified or unsuitable for permit issuance, pursuant to TEX. ALCO. BEV. CODE ANN. §109.532(b)(1) and 16 TEX. ADMIN. CODE § 33.1(b)(3).
5. Based on the foregoing findings and conclusions, this application meets all requirements for issuance by the Commission. TEX. ALCO. BEV. CODE chs. 11, 28, and 29.
6. The application of Ricardo Sandoval d/b/a Fiesta Guadalajara for a Wine and Beer Retailers Permit and a Food and Beverage Certificate should be granted.

SIGNED March 16, 2004.



CINDY T. GREENLEAF
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 607768

IN RE RICARDO SANDOVAL	§	BEFORE THE
D/B/A FIESTA GUADALAJARA	§	
ORIGINAL APPLICATION BG & FB	§	
	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-2185)	§	BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 5th day of April 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Cindy Greenleaf. The hearing convened on January 23, 2004, and adjourned on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 16, 2004. This Proposal For Decision (attached hereto as Exhibit "A"), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. 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.

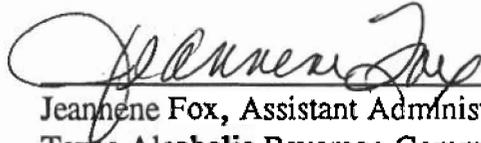
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Original Application for a BG and FB is hereby **GRANTED**.

This Order will become final and enforceable on April 26, 2004, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 5th day of April, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Cindy Greenleaf
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (817) 377-3706

RICARDO SANDOVAL
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