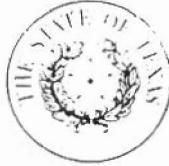


State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 11, 1999

Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

HAND DELIVERY

RE: Docket No. 458-99-0107; Javier A. Castillo; TABC No. 580727

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Andrew Del Cueto, counsel representing the Texas Alcoholic Beverage Commission, and to Javier A. Castillo. For reasons discussed in the Proposal for Decision, I have recommended Permittee's surety bond be forfeited.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon Supp. 1996), 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.

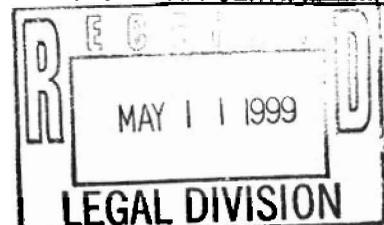
Sincerely,

A handwritten signature in cursive script that reads "Michael J. Borkland".

Michael J. Borkland
Administrative Law Judge

MJB/es
Enclosures

cc: Andrew Del Cueto, TABC, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**
Javier A. Castillo, B29 Lounge, 700 E. Virginia Street, Del Rio, TX 788407 - **VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED NO. Z 383 248 487**
Sarah Hudson, Docketing, State Office of Administrative Hearings



DOCKET NO. 458-99-0107
(TABC CASE NO. 580727)

TEXAS ALCOHOLIC BEVERAGE COMMISSION § BEFORE THE STATE OFFICE
§
§
vs. §
§ OF
§
JAVIER A. CASTILLO §
D/B/A B29 LOUNGE §
PERMIT NO. BG-313897 & §
LICENSE NO. BL-313898 §
VAL VERDE COUNTY, TEXAS § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

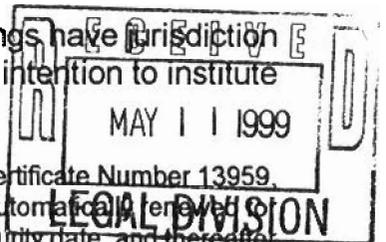
The Staff of the Texas Alcoholic Beverage Commission (Staff or Commission) initiated this action seeking forfeiture of the conduct surety bond posted by Javier A. Castillo (Respondent) d/b/a B29 Lounge. Respondent renewed a conduct surety bond¹ on December 5, 1998, in compliance with Sections 11.11 and 61.13 of the Texas Alcoholic Beverage Code (the Code). The Staff recommended that the bond be forfeited because Respondent had committed three violations of the Code since September 1, 1995. Respondent did not appear and was not represented at the hearing. The Administrative Law Judge (ALJ) agrees with the Staff's recommendation that Respondent's conduct surety bond be forfeited.

I. Jurisdiction, Notice, and Procedural History

The hearing in this matter convened on April 9, 1999, before ALJ Joe R. Gilbreath, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Staff was represented by Andrew del Cueto, Assistant Attorney General. The Respondent did not appear and was not represented at the hearing; therefore, the hearing proceeded on a default basis, pursuant to 1 TEX. ADMIN. CODE (TAC) § 155.55.

Subsequently, this case was reassigned to Deputy Director ALJ Michael Borkland (ALJ). Because the hearing proceeded on a default basis and Staff's factual allegations are deemed admitted as true, the ALJ has incorporated those allegations into the findings of fact without further discussion.

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute



¹Respondent provided a certificate of deposit (in place of a surety bond), Certificate Number 13959, from Del Rio Bank & Trust Co. The Certificate of Deposit provided that "it shall be automatically renewed for an additional period of time equal to the original term hereof, dating from the first maturity date, and thereafter for similar periods of time equal to the original term, unless the depositor shall present this certificate for payment at any maturity date, or within 10 days thereafter or unless the bank shall at least ten days prior to any maturity mail written notice to the depositor of its desire to redeem this certificate." Exhibit 2.

enforcement action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. Conduct Surety Bond

On December 21, 1998, the Commission renewed a *Wine and Beer Retailer's Permit, BG-313897* and a *Retail Dealer's On-Premise Late Hours License, BL-313898*, to Respondent for the premises known as B29 Lounge at 104 Margarita, Del Rio, Val Verde County, Texas. On December 5, 1998, Respondent, as holder of both a permit and a license, renewed a conduct surety bond for B29 Lounge for \$5,000 as required by Sections 11.11 and 61.13 of the Code.

III. Events Leading to the Request to Forfeit Respondent's Conduct Surety Bond

On October 23, 1996, Respondent signed an "Agreement and Waiver of Hearing" regarding two violations of the Code. The waiver agreement stated that on September 4, 1996, Respondent consumed and permitted consumption of alcoholic beverages during prohibited hours in violation of Section 61.71(a)(18) of the Code. The agreement contained the following language:

My name is Augustin A. Castillo. I am permittee of B29 Lounge. I hereby declare that the violations stated above have occurred and do hereby waive my right to a hearing. I understand that the primary CLP stated above as well as all associated licenses or permits will be suspended/cancelled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of \$1500.00 must be received by the final due date stated on the administrative order. I am aware that this agreement may be rejected by the Administrator of the Texas Alcoholic Beverage Commission at which time the licensee or permittee will be granted a hearing on the matters in questions.

As a result of this waiver agreement, the Commission Administrator entered an Order on November 12, 1996. The Order stated Respondent violated the Code as stated in the agreement and waiver of hearing. The Order further provided that Respondent's licenses were suspended for ten (10) days unless Respondent paid \$1500.00 as a civil penalty.

On March 5, 1997, Respondent signed an "Agreement and Waiver of Hearing" regarding a third violation of the Code. The waiver agreement stated that on December 21, 1996, Respondent made a sale to an intoxicated person. The agreement contained the following language:

My name is Javier A. Castillo. I am the permittee of B29 Lounge. I hereby declare that the violations stated above have occurred and do hereby waive my right to a hearing. I understand that the primary CLP stated above as well as all associated licenses or permits will be suspended/cancelled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of \$1050.00 must be received by the final due date stated on the administrative order. I am aware that this agreement may be rejected by the Administrator of the Texas Alcoholic Beverage Commission at which time the licensee or permittee will be granted a hearing on the matters in question.

As a result of this waiver agreement, the Commission Administrator entered an Order on March 18, 1997. The Order stated Respondent violated the Code as stated in the agreement and waiver of hearing. The Order further provided that Respondent's licenses were suspended for seven days unless Respondent paid \$1050.00 as a civil penalty.

IV. Forfeiture of Conduct Surety Bond

The Commission may revoke a license or permit, or deny renewal of a license or permit, if the holder violates a provision of the Code or a rule of the Commission. TEX. ALCO. BEV. CODE ANN., §§ 6.01 and 61.71. Texas Alcoholic Beverage Commission's (TABC) rule found at 16 Tex. Admin. Code (TAC) § 33.24(j), governs forfeiture of a conduct surety bond, and provides that the Commission may seek forfeiture when a license or permit has been cancelled, or where there has been a final adjudication that the licensee or permittee has committed three violations of the Code since September 1, 1995.

When posting a conduct surety bond, the permit or license holder must agree not to violate a Texas law relating to alcoholic beverages, or a Commission rule. The holder must also agree 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 the Code. Section 33.24 also applies and requires forfeiture upon cancellation, or upon final adjudication determining a holder has committed three violations of the Code since September 1, 1995.

PROPOSED FINDINGS OF FACT

1. On December 21, 1998, the Texas Alcoholic Beverage Commission (Commission) renewed a *Wine and Beer Retailer's Permit, BG-313897* and a *Retail Dealer's On-Premise Late Hours License, BL-313898*, to Respondent for the premises known as B29 Lounge at 104 Margarita, Del Rio, Val Verde County, Texas. On December 5, 1998, Respondent, as holder of both a permit and a license, renewed a conduct surety bond for B29 Lounge for \$5,000.
2. Respondent received proper and timely notice of the hearing from the Staff for the Commission (the Staff) in a notice of hearing, dated January 25, 1999, and an amended notice of hearing dated February 23, 1999. Both notices were properly sent to Respondent's address at 700 E. Virginia Street, Del Rio, Val Verde County, Texas. The notice of hearing dated February 23, 1999, was received by Respondent on February 25, 1999, as shown by the signed return receipt.
3. The hearing was convened on April 9, 1999, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Although duly notified of the hearing, Respondent failed to appear. Andrew del Cueto, Assistant Attorney General, represented the Staff.
4. On October 23, 1996, Respondent signed an "Agreement and Waiver of Hearing"

regarding two violations of the Code. By signing the waiver agreement, Respondent declared that on September 4, 1996, Respondent consumed and permitted consumption of alcoholic beverages during prohibited hours. Respondent acknowledged two violations of the Code had occurred and that his primary permit and related license would be suspended or cancelled by the Commission unless he paid a civil penalty.

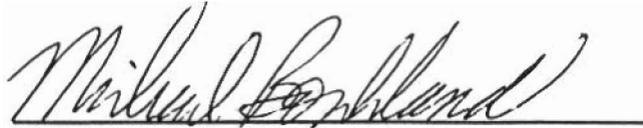
5. On November 12, 1996, the Commission Administrator entered an order finding Respondent had committed two violations of the Code consistent with Respondent's admissions found in Findings of Fact No. 4.
6. On March 5, 1997, Respondent signed an "Agreement and Waiver of Hearing" regarding a third violation of the Code. By signing the agreement, Respondent declared that on December 21, 1996, Respondent made a sale to an intoxicated person. Respondent acknowledged that his primary license and related licenses would be suspended or cancelled by the Commission unless he paid a civil penalty.
7. On March 18, 1997, the Commission Administrator entered an order finding Respondent had violated the Code consistent with Respondent's admissions as stated in Finding of Fact No. 6.
8. Respondent has committed at least three violations of the Code and had at least three final adjudications regarding these violations since September 1, 1995.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.35, 25.04, and 61.71 (Vernon 1995 & Supp. 1999).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43 (Vernon Supp. 1999) and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 1999).
3. Proper and timely notice of the hearing was effected on Permittee pursuant to Administrative Procedure Act (APA), TEX. GOV'T CODE ANN. ch. 2001 (Vernon 1999), and 1 TEX. ADMIN. CODE (TAC) § 155.55(d) (1998), which provides that service of notice of hearing shall be complete and effective if the document to be served is sent by registered or certified mail to the defaulting party's most recent address as shown in the records of the referring agency.
4. Respondent holds permit number BG-313897 and license number BL-313898 and posted a conduct surety bond in accordance with the requirements set forth in 16 TEX. ADMIN. CODE (TAC) § 33.24 and TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13 (Vernon 1995 & Supp. 1999).

5. Respondent violated 16 TAC § 33.24 and TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13, by violating a commission rule and a law of the State of Texas relating to alcoholic beverages while holding a *Wine and Beer Retailer's Permit*, BG-313897 and a *Retail Dealer's On-Premise Late Hours License*, BL-313898 issued by the Commission, and the conduct surety bond renewed by Respondent should be forfeited to the State.

SIGNED and entered this 10th day of May 1999.



MICHAEL BORKLAND
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS