

**DOCKET NO. 582616**

IN RE RUSSELL STOCKTON	§	BEFORE THE
D/B/A FISH TALES CHARTERS	§	
PERMIT NO. V-265003	§	
	§	TEXAS ALCOHOLIC
	§	
CAMERON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0290)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 27th day of September, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Edel P. Ruiseco. The hearing convened on March 6, 2000 and adjourned May 1, 2000. Administrative Law Judge Earl A. Corbitt made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 1, 2000. 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.

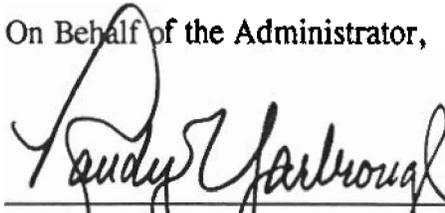
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

**This Order will become final and enforceable on October 18, 2000**, 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 27th day of September, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Earl A. Corbitt  
Administrative Law Judge  
State Office of Administrative Hearings  
VIA FACSIMILE (512) 869-6648

Holly Wise, Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 504  
Austin, Texas 78701  
VIA FACSIMILE (512) 475-4994

Russell Stockton & Susan Woolet-Stockton  
**RESPONDENT**  
d/b/a Fish Tales Charters  
P. O. Box 1219  
Port Isabel, Texas 78578  
VIA CERTIFIED MAIL RRR Z 473 042 791

Gayle Gordon  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
McAllen District Office



# TEXAS ALCOHOLIC BEVERAGE COMMISSION

Post Office Box 13127, Austin, Texas 78711-3127 (512) 206-3333  
<http://www.tabc.state.tx.us> Fax: (512) 206-3498

Doyme Bailey, Administrator

September 5, 2000

Mr. Randy Yarbrough  
Assistant Administrator  
Texas Alcoholic Beverage Commission  
P. O. Box 13127  
Austin, Texas 78711-3127

Re: Docket No.: 582616  
TABC v. Russell Stockton d/b/a Fish Tales Charter

Dear Mr. Yarbrough:

Please find enclosed a Proposal for Decision and exhibits in the above-referenced cause.

After your review, please inform this office of your decision. We will then draft an Order conforming with your judgment.

Thank you for your attention to this matter.

Yours truly,

*for Chris*  
Gayle Gordon  
Legal Division

*Adopt PFD  
Forfeit Conduct Surety  
Randy Yarbrough  
9-5-2000*

KGG/vr

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

September 1, 2000

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

**HAND DELIVERY**

**RE: Docket No. 453-00-0290; Texas Alcoholic Beverage Commission vs. Russell Stockton d/b/a/ Fish Tales Charters**

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 Gayle Gordon, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Russell Stockton and Susan Woollet-Stockton d/b/a Fish Tales Charters (Respondent). For reasons discussed in the Proposal for Decision, I recommend Respondent's conduct surety bond should be forfeited.

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,

Earl A. Corbitt  
Administrative Law Judge

ECrk  
Enclosure

cc: **Gayle Gordon, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - VIA HAND DELIVERY**  
**Russell Stockton and Susan Woollet-Stockton d/b/a/ Fish Tales Charters, P.O. Box 1219, Port Isabel, Texas 78578-VIA**  
**REGULAR U.S. MAIL**  
**Rommel Corro, Docket Clerk, State Office of Administrative Hearings- VIA HAND DELIVERY**

SOAH DOCKET NO. 458-00-0290

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION, Petitioner

BEFORE THE STATE OFFICE

VS.

OF

RUSSELL STOCKTON  
D/B/A FISH TALES CHARTERS  
V-265003, Respondent

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Russell Stockton d/b/a Fish Tales Charters (the 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 appeared and contended it had settled the matter with TABC and that a representative of TABC had told them no action would be taken beyond that set out in the settlement agreement. 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 March 6, 2000, at the office of the State Office of Administrative Hearings (SOAH), 1508 Dove Avenue, McAllen, Texas. Gayle Gordon represented TABC and appeared by telephone. The Respondent appeared and was represented by its owners, Russell Stockton and Susan Woollet-Stockton. Edel P. Ruiseco, Administrative Law Judge (ALJ), presided. Following the receipt of evidence, ALJ Ruiseco left the record open to allow the Respondent to obtain an affidavit or deposition from TABC staff to support the position taken at the hearing by the Respondent. The record closed on May 1, 2000. On July 31, 2000, the matter was assigned to ALJ Earl A. Corbitt to prepare the proposal for decision. The undersigned ALJ has reviewed the entire record including the audio tape of the hearing, the exhibits received at the hearing, the three affidavits submitted by the Respondent on April 21, 2000, and the objections to the affidavits filed by TABC on May 5, 2000.

The notice of hearing, dated February 2, 2000, was sent, by certified mail, return receipt requested, to the Respondent. It was received by Susan Woollet on an unspecified date. No party challenged notice, jurisdiction, or venue. 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 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. EVIDENCE AND ANALYSIS

### A. Evidence.

#### 1. Evidence Received at the Hearing.

The staff of TABC (the Staff) offered documentary evidence from the TABC files. Those documents show:

(a) On March 12, 1996, the Respondent posted a conduct surety bond in the amount of \$5,000 asserting it would faithfully conform with the Texas Alcoholic Beverage Code (the Code) and the rules of TABC.

(b) Russell Stockton dba Fish Tales Charter was issued Wine and Beer Retailer's Permit Excursion Boat, V-265003, by TABC on April 26, 1996.

(c) On July 31, 1998, the Respondent was issued citations for three alleged violations of the Code.

(d) On August 31, 1998, the Respondent signed a document entitled "Agreement and Waiver of Hearing" which includes 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."

(e) The waiver document listed the three alleged violations as possession of uninvoiced alcoholic beverages, purchase of alcoholic beverages from an unauthorized source, and failure to post the issued permit.

(f) On September 10, 1998, based on the "Agreement and Waiver of Hearing," TABC issued an Order assessing the Respondent a 10 day suspension of the permit number V-265003 unless the Respondent paid a \$1,500.00 penalty before November 18, 1998.

Susan Woollet-Stockton testified she is the wife of Russell Stockton. She testified as to the reasons why the Respondent's issued permit was not posted on July 31, 1998. She testified she questioned whether she had received the correct permit. She placed a call to TABC but had not received a return call. She also testified she was present when Russell Stockton met with Mr. Tijerina, the TABC Supervisor who discussed the Agreement and Waiver of Hearing form with her husband. She did not testify as to the contents of the discussion. She testified her husband signed the Agreement form.

Russell Stockton was offered but declined the opportunity to testify. The Respondent offered no documentary evidence.

## **2. Evidence Received After the Hearing.**

ALJ Ruiseco granted the Respondent additional time, until April 21, 2000, to obtain the deposition or statement of Mario Villarreal or Armando (sic) F. Tijerina, employees of TABC. The undersigned ALJ notes that on the Agreement and Waiver of Hearing, Mario Villarreal and Amaro Tijerina are listed as representatives of TABC and the matter was settled by Amaro Tijerina. The Respondent had argued, but not testified, that the TABC representatives had stated there would be no penalty sought by TABC other than the 10 day suspension listed on the Agreement and Waiver form. ALJ Ruiseco granted TABC until May 1, 2000, to respond to any filing by the Respondent.

On April 21, 1998, the Respondent filed three affidavits. The affidavits included one signed by Russell Stockton, one signed by Susan Woolet, and one signed by Stuart Diamond, who was the attorney of record for the Respondent in regards to TABC Administrative Notice 133623, the number reflected on the Agreement and Waiver of Hearing. The Respondent did not submit the deposition or statement of either Mario Villarreal or Amaro Tijerina.

On May 5, 2000, the Staff filed its objections to the affidavits filed by the Respondent. The objections were valid, but not timely. ALJ Ruiseco's Order No. 3 issued on March 9, 2000, required a response from the Staff not later than May 1, 2000. There is no indication in the file that ALJ Ruiseco granted the Staff an extension of time beyond May 1, 2000, for filing its response. The Staff's objections were not considered because they were not timely.

Even though the affidavits were objectionable hearsay and not the evidence for which ALJ Ruiseco granted the Respondent additional time, they were considered because Staff failed to timely object. Mr. Diamond did not, in his affidavit or cover letter, make an appearance on behalf of the Respondent and is not considered the attorney of record for the Respondent in this case.

The three affidavits each indicate the Respondent and TABC agreed upon a 10 day suspension of the Respondent's license. They also indicate Amaro Tijerina assured the Respondent that the agreement reached was the entire penalty and recourse by TABC against the liquor license held by the Respondent.

### **B. Analysis.**

The Staff had the burden of proof in this hearing. The issues to be decided are whether the Respondent was the subject of "final adjudication" of three violations of the Code after September 1, 1995, and if so, did TABC waive its right to pursue action against the Respondent's conduct surety bond.

The rules of TABC, at 16 TEX. ADMIN. 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. . . .

The Staff takes the position that the Order issued on September 10, 1998, amounts to a "final adjudication." The Order is final. In addition to being final, the Order finds the Respondent "has agreed that the violation of law did occur . . . The agreed violations are as stated in the agreement and waiver of hearing." The Order contains a warning to the Respondent that the Order will become final and enforceable 21 days after the date it is signed unless the Respondent files a motion for rehearing. There is no evidence the Respondent filed such a motion. The undersigned ALJ agrees with the Staff's position that the Order issued on September 10, 1998, became a final adjudication that the Respondent thrice violated the Code when the Respondent failed to seek a rehearing. The instant hearing is not the proper forum to challenge the findings contained in the Order.

The Respondent was represented by counsel at the meeting at which the Agreement and Waiver of Hearing was signed. That document lists three violations of the provisions of the Code. The document also includes the following: ". . . signing of this waiver may result in the forfeiture of any related conduct surety bond." The attorney who represented the Respondent at the meeting signed an affidavit indicating his understanding was that the Respondent would suffer no further punishment from TABC other than the 10 day suspension. However, no one offered any evidence that the TABC representative who negotiated the agreement had any authority to waive further action by TABC. Even though the Respondent was given an opportunity and additional time to depose or obtain a statement from the TABC representative, no deposition or statement was offered. Having no evidence of the authority of the representative, the ALJ has no grounds for finding that TABC is bound by the statement of its employee.

The written agreement between the parties, which is in evidence, states that the Respondent's conduct surety bond may be in jeopardy. The evidence contains no written agreement to the contrary.

### 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. Russell Stockton dba Fish Tales Charter (the Respondent) is the holder of Wine and Beer Retailer's Permit-Excursion Boat, Permit No. V265003, issued by the Texas Alcoholic Beverage Commission (TABC) on April 26, 1996.
2. On March 12, 1996, the Respondent executed a conduct surety bond in the amount of \$5,000.00 payable to TABC.
3. On February 2, 2000, 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.
4. The hearing on the merits was held on March 6, 2000, at the offices of the State Office of Administrative Hearings (SOAH), 1508 Dove Avenue, McAllen, Texas. Gayle Gordon appeared by telephone and represented the Staff. The Respondent appeared and was represented by Russell Stockton and Susan Woollet-Stockton, owners. Edel P. Ruisecco, Administrative Law Judge (ALJ) presided.
5. On July 31, 2000, the matter was assigned to ALJ Earl A. Corbitt to write the proposal for decision.
6. On August 31, 1998, 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 10 day suspension or a civil penalty of \$1,500.00 on the Respondent.
7. The Respondent did not timely file a motion for rehearing with TABC and the Order described in Finding of Fact No. 6 became final.
8. 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. GOV'T 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 1<sup>st</sup> day of September, 2000.



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EARL A. CORBITT  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS