

DOCKET NO. 582766

IN RE J. REYES ALVAREZ	§	BEFORE THE
D/B/A EL 2 DE ORO	§	
LICENSE NOS. BE402707, BL402708	§	
	§	TEXAS ALCOHOLIC
	§	
McLENNAN COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-0487)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of July, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan Moon Shinder. The hearing convened on May 5, 2000 and adjourned May 5, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 14, 2000. This Proposal For Decision was properly served of 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.

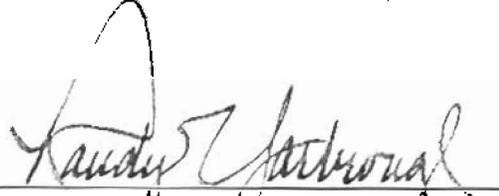
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

This Order will become final and enforceable on July 31, 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 10th day of July, 2000.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Randy Yarbrough", written over a horizontal line.

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Suzan Moon Shinder
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (254) 750-9380

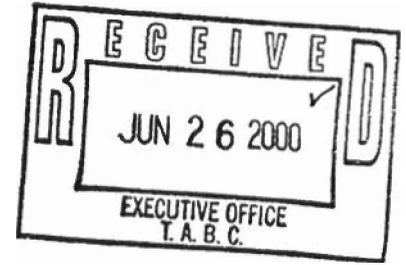
Holly Wise, Docket Clerk
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

J. Reyes Alvarez
d/b/a El 2 De Oro
RESPONDENT
1917 South 22nd
Waco, Texas 76706
CERTIFIED MAILNO. Z 473 042 821

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Waco District Office

State Office of Administrative Hearings



26

Shelia Bailey Taylor
Chief Administrative Law Judge

June 14, 2000

Doyme Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

CERTIFIED MAIL DELIVERY NO. Z207823586

RE: Docket No. 458-99-0487; Texas Alcoholic Beverage Commission vs. J. Reyes Alvarez d/b/a El 2 De Oro, License No. BE-402707; (TABC Case No. 582766)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Christopher Burnett, attorney for Texas Alcoholic Beverage Commission, and to Respondent, J. Reyes Alvarez, d/b/a El 2 De Oro. For reasons discussed in the proposal, I recommend Respondent's conduct surety bond be forfeited.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

Suzan Moon Shinder.
Administrative Law Judge

Enclosure

xc: Holly Wise, Docket Clerk, State Office of Administrative Hearing -**REGULAR MAIL**
Christopher Burnett, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Ste. 160, Austin, Texas 78731 -**CERTIFIED MAIL DELIVERY NO. Z207823588 RETURN RECEIPT REQUESTED**
J. Reyes Alvarez, d/b/a El 2 De Oro, 1917 South 22nd, Waco, Texas 76706 - **CERTIFIED MAIL NO. Z207823589 RETURN RECEIPT REQUESTED**

76706. As required of all applicants and holders of permits and licenses, by Sections 11.11 (permit) and 61.13 (license) of the Code, Respondent executed the related Conduct Surety Bond, No. 422440165, in the amount of \$5000.00, on October 8, 1996, identifying the principal as "J. Reyes Alvarez DBA Tex-Mex Bar." Effective July 18, 1997, the name of the principal on this bond was amended to read "J. Reyes Alvarez dba El 2 De Oro." All other terms and conditions of the bond remained the same.

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

On February 18, 1998, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 577764, regarding one violation of the Code. The waiver agreement stated that on January 31, 1998, consumption during prohibited hours was permitted, in violation of Section 61.71(a)(18) of the Code. In this agreement Respondent neither admitted nor denied that the violation occurred, and waived his right to a hearing in the matter, accepting the penalty assessed. At that time, Respondent agreed that the above referenced license or permit be suspended or canceled unless Respondent paid the civil penalty of \$750.00 in lieu of suspension by the final due date stated on the administrative order. This agreement also contained the following language: The signing of this waiver may result in the forfeiture of any related conduct surety bond.

As a result of this waiver agreement, the Commission Administrator entered a waiver order on February 23, 1998, stating that the above violations did occur, and assessing a penalty of suspension of Respondent's permit and license for a period of five days, beginning April 1, 1998, unless Respondent paid the civil penalty of \$750.00 on or before March 18, 1998.

On October 22, 1998, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 581061, regarding two violations of the Code. The waiver agreement stated that on September 26, 1998, a minor was permitted to possess alcoholic beverages, and there occurred the sale of an alcoholic beverage to an intoxicated person, in violation of the Code. (See: Sections 106.13 and 101.63 of the Code, respectively). In this agreement Respondent neither admitted nor denied the violation, and waived his right to a hearing in the matter, accepting the penalty assessed. At that time, Respondent agreed that the above referenced license or permit be suspended or canceled unless Respondent paid the civil penalty of \$1,200.00 in lieu of suspension by the final due date stated on the administrative order. This agreement also contained the following language: The signing of this waiver may result in the forfeiture of any related conduct surety bond.

As a result of this waiver agreement, the Commission Administrator entered a waiver order on October 27, 1998, stating that the above violation did occur, and assessing a penalty of suspension of Respondent's licenses for a period of eight days, beginning December 16, 1998, unless Respondent paid the civil penalty of \$1,200.00 on or before December 2, 1998.

Respondent's position was that because he was not present at the time one of the above violations occurred, he should not be held responsible for the violation. However, all of the above violations have been fully and finally adjudicated. The time for Respondent to argue the merits relative to those violations expired prior to the filing of the instant case.

IV. Forfeiture of Conduct Surety Bond

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, if the holder violated three provisions of the Code since September 1, 1995. This conduct surety bond, in the amount of \$5000.00, is conditioned on the applicant's or holder's conformance with alcoholic beverage law, in accordance with the requirements set forth in 16 TEX. ADMIN. CODE §33.24 and TEX. ALCO. BEV. CODE §§11.11 (permit) and 61.13 (license). The Commission may revoke or suspend a permit or license, if the holder violates a provision of the Code or a rule of the Commission pursuant to TEX. ALCO. BEV. CODE §6.01. Forfeiture of a conduct surety bond is governed by 16 TEX. ADMIN. CODE §33.24(j), and provides that the Commission may seek forfeiture when a license or permit has been canceled, or where there has been a final adjudication that the licensee or permittee has committed at least three violations of the Code since September 1, 1995.

FINDINGS OF FACT

1. A Beer Retailer's On Premise License, BE-402707, and Retail Dealer's On-Premise Late Hours License, BL-402708, were issued to J. Reyes Alvarez, d/b/a El 2 De Oro, 501 North Loop Drive, Waco, McLennan County, Texas, by the Texas Alcoholic Beverage Commission, on the 24th day of October, 1996, and had been continuously renewed since that time, as of March 10, 1999. The licenses both reflect that Respondent's mailing address is 1917 South 22nd Street, Waco, Texas 76706.
2. As required of all applicants and holders of permits and licenses, by Sections 11.11 (permit) and 61.13 (license) of the Code, Respondent executed the related Conduct Surety Bond, No. 422440165, in the amount of \$5000.00, on October 8, 1996, identifying the principal as "J. Reyes Alvarez DBA Tex-Mex Bar." Effective July 18, 1997, the name of the principal on this bond was amended to read "J. Reyes Alvarez dba El 2 De Oro." All other terms and conditions of the bond remained the same.
3. There were no contested issues of notice or jurisdiction in this proceeding, and Respondent received proper and timely notice of the original setting for the hearing on the merits from the Commission in a notice of hearing, dated April 13, 1999. The notice was properly sent to Respondent at the mailing address provided in Proposed Finding of Fact No. 1, as evidenced by the notice's Certificate of Service, reflecting service by Certified Mail No. P 419 581 352, and by Respondent's appearance at the hearing on June 8, 1999.
4. This 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. Both parties appeared for the above described June 8, 1999 hearing, and the Commission's unopposed motion was granted, continuing the hearing on the merits to an uncertain date.

6. The hearing on the merits was finally convened on May 5, 2000, before Administrative Law Judge Suzan Shinder, in the offices of the State Office of Administrative Hearings, 801 Austin Avenue, Suite 750, in Waco, McLennan County, Texas. Petitioner appeared by and through its staff attorney, Christopher Burnett. Respondent appeared pro se. At Respondent's request, Respondent's spouse, Ludivina Alvarez Garcia, intermittently translated portions of the proceeding. Evidence and argument were heard, and the record was closed the same day.

7. There were no contested issues of notice or jurisdiction in this proceeding, and Respondent received proper and timely notice of the second and final setting for the hearing on the merits from the undersigned Administrative Law Judge in the Pre-Trial Order No. 3, dated January 21, 2000. The notice was properly sent to Respondent at the mailing address provided in Finding of Fact No. 1, as evidenced by the Domestic Return Receipt attached to this pre-trial order, reflecting service on January 26, 2000 by Certified Mail No. Z 207823474, by Respondent's signature on this receipt, and by Respondent's appearance at the hearing.

8. On February 18, 1998, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 577764, regarding one violation of the Code. The waiver agreement stated that on January 31, 1998, consumption during prohibited hours was permitted, in violation of Section 61.71(a)(18) of the Code. In this agreement Respondent neither admitted nor denied that the violations occurred, and waived his right to a hearing in the matter, accepting the penalty assessed. At that time, Respondent agreed that the above referenced license or permit be suspended or canceled unless Respondent paid the civil penalty of \$750.00 in lieu of suspension by the final due date stated on the administrative order. This agreement also contained the following language: The signing of this waiver may result in the forfeiture of any related conduct surety bond.

9. As a result of this waiver agreement, the Commission Administrator entered a waiver order on February 23, 1998, stating that the above violations did occur, and assessing a penalty of suspension of Respondent's permit and license for a period of five days, beginning April 1, 1998, unless Respondent paid the civil penalty of \$750.00 on or before March 18, 1998.

10. On October 22, 1998, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 581061, regarding two violations of the Code. The waiver agreement stated that on September 26, 1998, a minor was permitted to possess alcoholic beverages, and there occurred the sale of an alcoholic beverage to an intoxicated person, in violation of the Code. (See: Sections 106.13 and 101.63 of the Code, respectively). In this agreement Respondent neither admitted nor denied the violation, and waived his right to a hearing in the matter, accepting the penalty assessed. At that time, Respondent agreed that the above referenced license or permit be suspended or canceled unless Respondent paid the civil penalty of \$1,200.00 in lieu of suspension by the final due date stated on the administrative order. This agreement also contained the following language: The signing of this waiver may result in the forfeiture of any related conduct surety bond.

11. As a result of this waiver agreement, the Commission Administrator entered a waiver order on October 27, 1998, stating that the above violation did occur, and assessing a penalty of suspension of Respondent's licenses for a period of eight days, beginning December 16, 1998, unless Respondent paid the civil penalty of \$1,200.00 on or before December 2, 1998.

12. Respondent has committed at least three violations of the Code and had at least three final adjudications regarding these violations since September 1, 1995.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Subchapter B of Chapter 5, of the TEX. ALCO. BEV. CODE (Vernon 1995).

2. The State Office of Administrative Hearings has jurisdiction over the matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. §§2003.021(b) and 2003.042(6) (Vernon 2000).

3. As referenced in Findings of Fact Nos. 1,3,4,5,6, and 7, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN §§2001.051 and 2001.052 (Vernon 2000).

4. Based upon Findings of Fact Nos. 1 and 2, Respondent holds Beer Retailer's On Premise License, BE-402707, and Retail Dealer's On-Premise Late Hours License, BL-402708, issued to J. Reyes Alvarez, d/b/a El 2 De Oro, and posted the related Conduct Surety Bond, No. 422440165, in accordance with the requirements set forth in 16 TEX. ADMIN. CODE §33.24 (1999) and TEX. ALCO. BEV. CODE §61.13 (license) (Vernon 1995 and Vernon Supp. 2000).

5. Based upon Findings of Fact Nos. 8, 9, 10, 11, and 12, Respondent violated 16 TEX. ADMIN. CODE §33.24 (1999) and TEX. ALCO. BEV. CODE §61.13 (license) (Vernon 1995 and Vernon Supp. 2000) by violating a Commission rule and law of the State of Texas relating to alcoholic beverages while holding a Beer Retailer's On Premise License, BE-402707, and Retail Dealer's On-Premise Late Hours License, BL-402708, having at least three violations of the Code since September 1995.

6. Based on Findings of Fact Nos. 1,2, 8, 9, 10, 11, and 12, and Conclusions of Law Nos. 4 and 5, the conduct surety bond executed by Respondent should be forfeited to the State.

Signed this 14th day of June, 2000.



Suzan Moon Shinder
Administrative Law Judge