

DOCKET NO. 582768

IN RE J & J EATERY, INC.	§	BEFORE THE
D/B/A CABARET 101	§	
PERMIT NOS. MB-256309, LB-256310	§	
& pe-256311	§	TEXAS ALCOHOLIC
	§	
CAMERON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0298)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 14th day of June, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Edel P. Ruisecco. The hearing convened on March 6th, 2000 and adjourned March 17th, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 11th, 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.

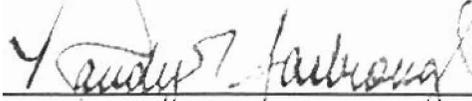
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

This Order will become final and enforceable on July 5, 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 14th day of June, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Edel P. Ruiseco
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (361) 884-5427

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

J & J Eatery, Inc.
RESPONDENT
d/b/a Cabaret 101
2001 S. Mopac #2224
Austin, Texas 78746
CERTIFIED MAIL/RRR NO. Z 473 042 779

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
McAllen District Office

DOCKET NO. 458-00-0298
(TABC CASE NO. 582768)

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
vs.	§	
	§	OF
J & J EATERY, INC.	§	
D/B/A CABARET 101	§	
PERMIT NOS. MB-256309, LB-256310,	§	
AND PE-256311	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Alcoholic Beverage Commission (Commission) initiated this action seeking forfeiture of the conduct surety bond posted by J & J Eatery, Inc. (Respondent) d/b/a Cabaret 101. The Respondent posted a conduct surety bond¹ on July 1, 1996, in compliance with the TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13 (Vernon 1995 and Supp. 2000). The Staff recommended that the bond be forfeited because the Respondent had committed three violations of the Commission's rules and regulations since September 1, 1995. The Respondent did not appear and was not represented at the hearing. The undersigned Administrative Law Judge (ALJ) agrees with the Staff's recommendation that the Respondent's conduct surety bond be forfeited.

I. Jurisdiction, Notice, and Procedural History

The hearing in this matter convened on March 6, 2000, before State Office of Administrative Hearings (SOAH) ALJ Edel Ruiseco, at the offices of the Texas Workers' Compensation Commission in McAllen, Hidalgo County, Texas. The Staff was represented by Staff Attorney, Gayle Gordon. 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. Because the hearing proceeded on a default basis, Staff's factual allegations are deemed admitted as true, and the ALJ has incorporated those allegations into the Findings of Fact without further discussion. The ALJ closed the record in this matter on March 17, 2000.

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 the notice 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.

¹ The Respondent provided a conduct surety bond, Irrevocable Letter of Credit No. 700-S, from the Texas State Bank in McAllen, Texas. The Bond specifies that it shall remain in effect until the bank is either released or discharged by the Commission or until the expiration date of December 21, 1999. Exhibit 1.

II. Background

On July 17, 1995, the Commission issued a Mixed Beverage Permit No. MB-256309, a Mixed Beverage Late Hours Permit No. LB-256310, and a Beverage Cartage Permit No. PE-256311 to the Respondent for the premises known as Cabaret 101 located at 101 N. Illinois, Mercedes, Hidalgo County, Texas, and whose mailing addresses are P.O. Box 720397, McAllen, Texas 78504 and 2001 S. Mopac, Suite 2224, Austin, Texas 78746. On July 1, 1996, the Respondent, as applicant for a mixed beverages permit, posted a conduct surety bond for Cabaret 101 for \$5,000.00 as required by TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13 (Vernon 1995 and Supp. 2000).

The Respondent committed three violations of the Commission's rules and regulations since September 1, 1995. The violations occurred on November 1, 1996, (one violation) and June 14, 1998, (two violations). The Respondent signed an "Agreement and Waiver of Hearing," regarding these violations, on January 10, 1997, and July 13, 1998, respectively. Each agreement contained the following language:

My name is (see names below). I am one of the officers of the above mentioned permits. I neither admit nor deny 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/canceled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of (see amounts below) 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. *The signing of this waiver may result in the forfeiture of any related conduct surety bond.*

(emphasis added in italics)

1. Tanya Ortega-Olivarez, signed January 10, 1997 - - \$1050.00 civil penalty; and,
2. Javier Olivarez, signed July 13, 1998 - - \$3000.00 civil penalty.

In lieu of the cash civil penalties noted above, the Respondent was offered seven days suspension for the violation which occurred on November 1, 1996, and twenty days suspension for the violations which occurred on June 14, 1998.

As a result of these waiver agreements, the Commission Administrator entered Orders on January 21, 1997, and September 14, 1998, respectively. The Orders adjudicated that the violations acknowledged by the Respondent in the waiver agreements had occurred. The Orders further provided that the Respondent's permit would be suspended unless the Respondent paid a civil penalty as indicated above.

III. Applicable Law

The Commission may revoke a license or permit, or deny renewal of a license or permit, if the holder violates a provision of the rules or regulations of the Commission, in accordance with TEX. ALCO. BEV. CODE ANN. §§ 6.01 (Vernon 1995) and 61.71 (Vernon 1995 and Supp. 2000). Additionally, the Commission may seek forfeiture of a conduct surety bond when a license or permit has been canceled, or where there has been a final adjudication that the licensee or permittee has committed three violations of the TEX. ALCO. BEV. CODE ANN. since September 1, 1995, in accordance with 16 TAC § 33.24(j) (1999).

When posting a conduct surety bond, the bond specifies on its face that the permit or license holder must agree to “conform with the Texas Alcoholic Beverage Code and rules of the Commission.” In signing the bond, the permittee is also put on notice that if he “violates a law of the state relating to alcoholic beverages or a rule of the commission, the amount of the [bond]² shall be paid to the state.” See TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13.

IV. Proposed Findings of Fact

1. On July 1, 1996, J & J Eatery, Inc. (Respondent) posted a conduct surety bond for Cabaret 101 located at 101 N. Illinois, Mercedes, Hidalgo County, Texas, for \$5,000.00. The Texas Alcoholic Beverage Commission (the Commission) issued a Mixed Beverage Permit No. MB-256309, a Mixed Beverage Late Hours Permit No. LB-256310, and a Beverage Cartage Permit No. PE-256311 to the Respondent on July 17, 1995.
2. As of July 17, 1999, the Commission had continuously renewed the Respondent's permits.
3. The Respondent received proper and timely notice of the hearing from the staff for the Commission (Staff) in a notice of hearing, dated February 2, 2000. The notice was properly sent to the Respondent via certified mail, return receipt requested, at its mailing address at 2001 S. Mopac, Suite 2224, Austin, Texas 78746. There is no evidence the Respondent received the notice.
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. The notice of hearing also contained the following language in 10-point or larger boldface type: If a party fails to appear at the hearing, the factual allegations in the notice of hearing will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default.

² In this instance, the bond was actually a letter of credit.

6. The hearing was convened on March 6, 2000, by the State Office of Administrative Hearings in the offices of the Texas Workers' Compensation Commission in McAllen, Hidalgo County, Texas. The Respondent did not appear at the hearing. Gayle Gordon represented the Staff. The ALJ closed the record in this matter on March 17, 2000.
7. On January 10, 1997, and July 13, 1998, the Respondent signed an "Agreement and Waiver of Hearing" regarding violations of the TEX. ALCO. BEV. CODE ANN. By signing each waiver agreement, the Respondent declared and acknowledged that violations had been committed on November 1, 1996, (one violation), and on June 14, 1998, (two violations), respectively, and that the Respondent's permit would be suspended or canceled by the Commission unless he paid a specified civil penalty for each occurrence.
8. The Commission Administrator entered two separate orders on January 21, 1997, and September 14, 1998, finding the Respondent had committed violations of the Commission's rules and regulations.
9. The Respondent committed three violations of the Commission's rules and regulations which resulted in two final adjudications of these violations since September 1, 1995.

V. 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, 11.11, and 61.71 (Vernon 1995 and Supp. 2000) and 16 TEX. ADMIN. CODE (TAC) § 33.24 (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 1995 & Supp. 2000) and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000).
3. Proper and timely notice of the hearing was effected on the Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000), and 1 TAC § 155.55(d) (1999).
4. The Respondent holds Permit Nos. MB-256309, LB-256310 and PE-256311, and posted a conduct surety bond in accordance with the requirements set forth in 16 TAC § 33.24 and TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13 (Vernon 1995 & Supp. 2000).
5. The Respondent committed three violations of the Commission's rules and regulations, in accordance with 16 TAC § 33.24(j).

6. The Respondent violated 16 TEX. ADMIN. CODE § 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 Mixed Beverage Permit No. MB-256309, Mixed Beverage Late Hours Permit No. LB-256310, and Beverage Cartage Permit No. PE-256311, issued by the Commission, and the Respondent's conduct surety bond should be forfeited to the State.

SIGNED and entered this 11th day of May, 2000.



Edel P. Ruiseco
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS