

DOCKET NO. 583586

IN RE JOSEPH SHULL	§	BEFORE THE
D/B/A NEW RISING SUN	§	
PERMIT NO. BG-420668	§	
LICENSE NO. BL-420669	§	TEXAS ALCOHOLIC
	§	
CAMERON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0291)	§	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. Ruiseco. The hearing convened on March 6th, 2000 and adjourned April 3rd, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 10th, 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,

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

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

Mr. Victor Quintanilla
ATTORNEY FOR RESPONDENT
777 E. Houston
Brownsville, Texas 78520
VIA FACSIMILE (956) 541-7694

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
McAllen District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 12, 2000



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

VIA CERTIFIED MAIL
Z 136 743 053

RE: **Docket No. 458-00-0291; Texas Alcoholic Beverage Commission vs. Joseph Shull d/b/a New Rising Sun (TABC Case No. 583586)**

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 Gayle Gordon, attorney for Texas Alcoholic Beverage Commission, and to Victor Quintanilla, attorney for Joseph Shull d/b/a New Rising Sun. For reasons discussed in the proposal, I recommend that the 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,
A handwritten signature in black ink, appearing to read "Edel P. Ruiseco".

Edel P. Ruiseco
Administrative Law Judge

EPR:mar
Enclosure

xc: Holly Wise, Docket Clerk, State Office of Administrative Hearing - **FACSIMILIE 512-475-4994**
Gayle Gordon, Staff Attorney, Texas Alcoholic Beverage Commission -
CERTIFIED MAIL NO. Z 136 743 057
Victor Quintanilla Attorney at Law, 777 E. Harrison, Brownsville, Texas 78520- **CERTIFIED MAIL NO. Z 136 743 058. RETURN RECEIPT REQUESTED**

**DOCKET NO. 458-00-0291
(TABC CASE NO. 583586)**

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
VS.	§	OF
JOSEPH SHULL D/B/A NEW RISING SUN	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Alcoholic Beverage Commission (the Commission) initiated this action seeking forfeiture of the conduct surety bond posted by Joseph Shull (Respondent), d/b/a New Rising Sun. The Respondent posted a conduct surety bond¹ on September 8, 1998, in compliance with the TEX. ALCO. BEV. CODE ANN. (Code) §§ 11.11 and 61.13 (Vernon 1999). 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 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 was represented by attorney, Victor Quintanilla. The parties requested time to prepare briefs, and, therefore, the ALJ closed the record in this matter on April 3, 2000.

The Commission and the SOAH 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, Bond Number XTL 02006, from the First Indemnity of America Insurance Company. 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 September 8, 2000. Exhibit 2.

II. Background

On January 10, 1999, the Commission issued a Wine and Beer Retailer's Permit No. BG-450668 and Retail Dealer's On Premise Late Hours License No. BL-420669 to Respondent for the premises known as New Rising Sun located at 2411 Central Boulevard, Brownsville, Cameron County, Texas. On September 8, 1998, the Respondent, posted a conduct surety bond for New Rising Sun for \$5,000.00 as required by §§ 11.11 and 61.13, of the Code.

Respondent committed three violations of the Commission's rules and regulations since September 1, 1995. The violations all occurred at one incident on January 10, 1999. The Respondent signed an "Agreement and Waiver of Hearing," regarding these violations, on February 10, 1999. The agreement contained the following language:

My name is **JOSEPH SHULL**. I am the holder of the above mentioned permit. 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 **\$1,050.00** 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. **The signing of this waiver may result in the forfeiture of any related conduct surety bond.** (emphasis added in bold)

In lieu of the cash civil penalty noted above, the Respondent was offered seven days suspension for the violations. As a result of the waiver agreement, the Administrator entered an Order on February 19, 1999. The Order adjudicated that the violations acknowledged by the Respondent in the waiver agreements had occurred. The Order 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 §§ 6.01 and 61.71 of the Code. 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 Code 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 Code and rules of the Commission.² In signing the bond, the permittee is also put on notice that if he violates the Code or a rule of the Commission, the bond shall be paid to the state.³

IV. Analysis

The Staff proffered two exhibits, one being the Notice of Hearing with the certified, return receipt request attached. The second exhibit was twelve pages, which included the CLP history of violations, Order, Agreement and Waiver of Hearing, and conduct surety bond documents, which was not contested by Respondent.

Respondent offered no evidence or exhibits, and only argued that the process was wholly unfair. Respondent noted that there was only one actual violation, which was separated into three parts, and therefore it was unfair to consider each of the violations as a distinct violation. In addition, Respondent strongly emphasized the unfairness of the procedure because the employees of TABC lead licensees to believe that the matter was wholly resolved by signing the Agreement and Waiver of Hearing where it specifically states that, **“I neither admit nor deny that the violations stated above have occurred.”** Respondent asserted that licensees are normally not represented by counsel at these meetings when the agreement is explained, and therefore permittees are led to believe that the payment of the fine or serving the period of suspension satisfied the legal penalty. In addition, counsel argued that after the agreement is signed by permittee, the fine is paid without reviewing the Order, which contains the one sentence, **“The agreed violations are as stated in the agreement and waiver of hearing.”** This is overlooked by permittees because the violations have not been agreed, since permittee neither admitted nor denied that the violations occurred, and since by the time of receipt of the Order, the fine may have been paid. Respondent further argued that none of the violations were ever finally “adjudicated”.

The Staff contended that the Agreement and Waiver of Hearing was actually a nolo contendere plea, which is a de facto admission of the violation. The Staff also explained that Respondent had time after receiving the Order, and could have appealed the order at such time, but did not do so, and therefore “agreed” that the violations occurred.

² §11.11(b) A surety bond required under this sections shall contain the following statements on the face of the bond: (1) that the holder of the permit will not violate a law of the state relating to alcoholic beverages or a rule of the commission;

³ §61.13(b) A surety bond required under this section shall contain the following statements on the face of the bond: (2) that the holder of the license agrees that the amount of the bond shall be paid to the state if . . . the holder violated a provision of this code, regardless of whether the actions of an employee of a holder are not attributable to the holder under Section 106.14.

While Respondent's arguments are valid in that permittees are not fully informed of the consequences of signing the Agreement and Waiver of Hearing, in regards to the conduct surety bond, the Staff cannot review each licensee's records and advise them of their legal position. The fact that the Staff counted one incident as three separate violations, while harsh, was not shown by Respondent to be unfair or contrary to Commission rules or practice.

V. Proposed Findings of Fact

1. On September 8, 1998, Joseph Shull (Respondent) posted a conduct surety bond for New Rising Sun at 2411 Central boulevard, Brownsville, Cameron County, Texas 78520, for \$5,000.00. The Texas Alcoholic Beverage Commission (Commission) issued a Wine and Beer Retailer's Permit No. BG-450668 and Retail Dealer's On Premise Late Hours License No. BL-420669 to Respondent.
2. On September 8, 1999, the Commission 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, received on February 4, 2000. The notice was properly sent to the Respondent via certified mail, return receipt requested, to his attorney of record, Victor Quintanilla.
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 hearing was convened on March 6, 2000, by the State Office of Administrative Hearings (SOAH) in the offices of the Texas Workers' Compensation Commission in McAllen, Hidalgo County, Texas. The Respondent appeared by attorney of record, Victor Quintanilla. Gayle Gordon represented the Staff. The Administrative Law Judge closed the record in this matter on May 1, 2000.
6. On February 10, 1999, the Respondent signed an "Agreement and Waiver of Hearing" (Agreement) regarding violations of the TEX. ALCO. BEV. CODE ANN. (Code). By signing the Agreement, the Respondent declared and acknowledged that violations which occurred on January 10, 1999, that the Respondent's permit would be suspended or canceled by the Commission unless he paid a specified civil penalty for each occurrence, and could result in the forfeiture of the conduct surety bond.
7. The Commission Administrator entered an order on February 19, 1999, finding the Respondent had committed violations of the Commission's rules and regulations.
8. Since September 1, 1995, the Respondent committed three violations of the Commission's rules and regulations which resulted in a final adjudication of these violations.

VI. Proposed Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01, 11.61, and 61.71 (Vernon 1999) and 16 TEX. ADMIN. CODE (TAC) § 33.24 (1999).
2. SOAH 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 § 5.43 of the Code 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. BG-420668 and BL-420669, and posted a conduct surety bond in accordance with the requirements set forth in 16 TAC § 33.24 and §§ 11.11 and 61.13 of the Code.
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 §§ 11.11 and 61.13 of the Code, by violating a commission rule and a law of the State of Texas relating to alcoholic beverages while holding Wine and Beer Retailer's Permit BG-420668 and Retail Dealer's On Premise Late Hours License BL-420669, issued by the Commission, and the Respondent's conduct surety bond should be forfeited to the State.

SIGNED and entered this 10th day of May, 2000.



EDEL RUISECO
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS