

DOCKET NO. 458-98-2447

TEXAS ALCOHOLIC	§	BEFORE THE STATE OFFICE
BEVERAGE COMMISSION	§	
	§	
VS.	§	
	§	
EIGHT-O-MANAGEMENT, INC.	§	OF
D/B/A THE FLYING SAUCER	§	
PERMIT NO. BG-308031 &	§	
LICENSE NO. BL-308032	§	
TARRANT COUNTY, TEXAS	§	
(TABC CASE NO. 579651)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (the Commission) requested forfeiture of the conduct surety bond posted by Shannon Shelmire Wynne, President, Eight-O-Management, Inc. d/b/a The Flying Saucer (Respondent). The Commission alleged that Respondent had three violations of the Texas Alcoholic Beverage Code since September 1, 1995, justifying the forfeiture of Respondent's conduct surety bond pursuant to §11.11 of the TEX. ALCO. BEV. CODE ANN. (the Code) and 16 TEX. ADMIN. CODE §33.24. Respondent argued that The Flying Saucer has been commended for its compliance in the past and that steps have been taken to prevent repeat violations. Respondent further argued that the penalty is too severe. The Administrative Law Judge recommends Respondent's conduct surety bond be forfeited.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing was held on January 22, 1999, and the record was closed at the conclusion of the hearing. Mr. Timothy E. Griffith, TABC Commission Attorney, represented the Commission. The Respondent was represented pro se by Mr. Larry Richardson, Director of Operations, Eight-O-Management, and Ms. Vickie Cage, General Manager, The Flying Saucer.

II. CONDUCT SURETY BOND

Respondent holds Wine and Beer Retailer's Permit No. BG-308031 and Retail Dealer's On Premise Late Hours License No. LB-308032 for the premises known as The Flying Saucer located at 111 E. Fourth Street, Fort Worth, Tarrant County, Texas. Respondent's permit and license were issued on May 25, 1995 under the authority of Chapters 25 and 70 of the Code, respectively, and have been continuously renewed. Section 11.11 of the Code and the Commission's rule at 16 TEX. ADMIN. CODE §33.24 require the holder of permits issued under Chapter 25 of the Code to file with the Commission a conduct surety bond in the amount of \$5,000 unless the permit holder meets certain exceptions not applicable here. Respondent obtained and filed with the Commission a \$5,000 conduct surety bond.

III. EVENTS LEADING TO THE REQUEST TO FORFEIT RESPONDENT'S CONDUCT SURETY BOND

On May 13, 1997, Respondent agent signed an "Agreement and Waiver of Hearing" which reflected that The Flying Saucer, the subject premises, had been charged with the following violations of the Code: Three charges of "Sale Of Alcoholic Beverages To A Minor". The agreement contained the following language:

My name is Shannon Wynne. I am an officer of the above corporation. 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/canceled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension.

As a result of this waiver agreement, the Commission's Assistant Administrator found Respondent in violation of the Code for the allegations set out in the waiver of hearing and entered an order suspending The Flying Saucer's permit and license for 7 days unless Respondent paid a civil penalty in the amount of \$1,050.

On February 4, 1998, Respondent signed a similar agreement and waiver of hearing on the following violations of the Code: (1) "Permitting Consumption During Prohibited Hours (one violation) and (2) Employee Consuming During Prohibited Hours (eight violations)." Pursuant to this waiver agreement, the Commission's Assistant Administrator found Respondent in violation of the Code for the allegations set out in the waiver of hearing and on February 17, 1998, entered an order suspending The Flying Saucer's permit and license for 5 days unless Respondent paid a civil penalty in the amount of \$750.

On June 18, 1998, Commission notified Respondent of its intent to seek forfeiture of Respondent's conduct surety bond for the premise, The Flying Saucer. Respondent requested a hearing on the proposed forfeiture, as permitted by 16 TEX. ADMIN. CODE §33.24(j)(2). There is no evidence that Respondent appealed any of the foregoing orders or the violation notice.

IV. FORFEITURE OF THE BOND

The basis for the forfeiture of a conduct surety bond is set out in §11.11 of the Code and in the Commission's rule at 16 TEX. ADMIN. CODE §33.24. According to §11.11(b) of the Code, the permit holder must agree on the face of the bond that the amount of the bond will be paid to the state if the permit holder is finally adjudicated as having violated any provision of the Code. Section 33.24 is more lenient, requiring three violations of the Code after September 1, 1995, before the Commission seeks to forfeit the conduct surety bond.

Respondent argued at the hearing that all the fines have been paid and that steps have been taken to prevent future violations. Respondent argued that The Flying Saucer had received a letter of commendation from the Commission and also that forfeiture of the \$5,000 conduct surety bond was too severe for the incidents mentioned.

At the time Respondent signed the two waivers of hearing, the Respondent was also put on notice that the signing of the waivers could result in the forfeiture of the conduct surety bond: the conduct surety bond filed by the Respondent states plainly, "If the holder of this permit or license violates a law of the state relating to alcoholic beverages or a rule of the commission, the amount of the bond shall be paid to the state." (Emphasis added) Section 11.11 of the Code contains similar language stating that the bond "shall be paid to the state" if violations of the Code are finally adjudicated.

Two separate final orders were entered against Respondent pertaining to twelve separate violations of the Code. Contrary to Respondent's assertions that "we have been the model of compliance," the Administrative Law Judge is not persuaded. Therefore, it is recommended that Respondent's conduct surety bond be forfeited.

V. FINDINGS OF FACT

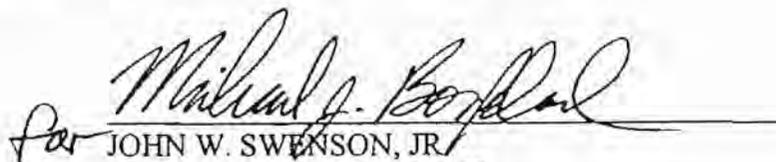
1. Eight-O-Management, Inc., d/b/a The Flying Saucer (Respondent) holds Wine And Beer Permit No. BG-308031 and Retail Dealer's On Premise Late Hours License No. BL-308032 for the premises known as The Flying Saucer, located at 111 E. Fourth Street, Fort Worth, Tarrant County, Texas. Respondent's permit and license were issued by the Texas Alcoholic Beverage Commission under the authority of Chapters 25 and 70 of the Code, respectively, on May 25, 1995, and have been continuously renewed.
2. Respondent received proper and timely notice of the hearing from the Commission in a notice of hearing dated December 31, 1998, and proper and timely notice from the Administrative Law Judge in the order setting the hearing and establishing prehearing requirements, dated January 6, 1999.
3. The hearing was convened on January 22, 1999. All parties appeared and participated in the hearing.
4. Respondent obtained and filed with the Commission a \$5,000 conduct surety bond, in accordance with §11.11(a)(1) of the Code.
5. The conduct surety bond referred to in Finding of Fact No. 4 states that if the holder of the permit or license violates a law of the state relating to alcoholic beverages or a rule of the Commission, the amount of the conduct surety bond is to be paid to the state [State of Texas].
6. On May 13, 1997, Respondent signed an "Agreement and Waiver of Hearing" waiving Respondent's right to a hearing on charges of "Sale Of Alcoholic Beverages To A Minor" on September 21, 1996.
7. By signing the waiver agreement, Respondent accepted the terms stated in the agreement that Respondent's conduct surety bond could be forfeited.
8. As a result of the waiver agreement described in Finding of Fact No. 6, the Commission's Assistant Administrator found that Respondent had violated the Code with regard to the allegations set out in Finding of Fact No. 6 and entered an order dated May 22, 1997, suspending Respondent's permit for 7 days unless Respondent paid a civil penalty of \$1,050.

9. On February 4, 1998, Respondent signed an agreement and waiver of hearing waiving Respondent's right to a hearing on the following charges: (1) "Permitting Consumption During Prohibited Hours" and (2) "Employee Consuming During Prohibited Hours."
10. By signing the waiver agreement, Respondent accepted the terms stated in the agreement that Respondent's conduct surety bond could be forfeited.
11. Pursuant to the waiver of hearing described in Finding of Fact No. 9, the Commission's Assistant Administrator found the Respondent had violated the Code with regard to the allegations set out in Finding of Fact No. 9 and entered an order dated February 17, 1998, suspending Respondent's permits for 5 days unless Respondent paid a civil penalty in the amount of \$750.
12. Respondent did not appeal the Commission's orders described in Findings of Fact Nos. 8 and 11.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. ANN. Subchapter B of Chapter 5 and §61.73(b).
2. The State Office of Administrative Hearings has jurisdiction over 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. Ch. 2003.
3. Notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Pursuant to 16 TEX. ADMIN. CODE §33.24(j), a conduct surety bond may be forfeited when there is a final adjudication that a permittee has committed three violations of the Code since September 1, 1995.
5. Based upon the Findings of Fact, Conclusion of Law No. 4, TEX. ALCO. BEV. CODE ANN. §11.11 and TEX. ADMIN. CODE §33.24, Respondent's conduct surety bond should be forfeited because Respondent had three violations of the Code since September 1, 1995.

SIGNED this 15th day of March, 1999.


for JOHN W. SWENSON, JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS