

DOCKET NO. 580727

IN RE JAVIER A. CASTILLO	§	BEFORE THE
D/B/A B29 LOUNGE	§	
PERMIT NO. BG-313897 &	§	
LICENSE NO. BL-313898	§	TEXAS ALCOHOLIC
	§	
VAL VERDE COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-0107)	§	BEVERAGE COMMISSION

ORDER

**CAME ON FOR CONSIDERATION** this 1st day of September, 1999, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Joe R. Gilbreath. The hearing convened on April 9, 1999, was subsequently reassigned to ALJ Michael Borkland. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 11, 1999 and a Amended Proposal For Decision containing Findings of Fact and Conclusions of Law was filed on July 29, 1999. This Amended 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. Exceptions have been filed by both parties.

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 Amended 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.

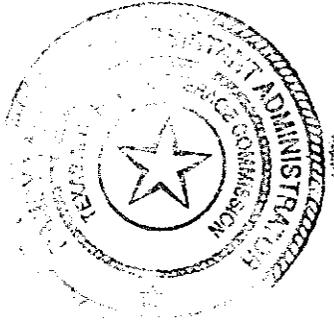
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's conduct surety bond is **NOT FORFEITED**.

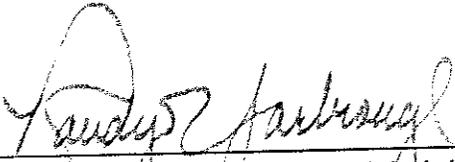
**This Order will become final and enforceable on September 21, 1999**, unless a Motion for Rehearing is filed **before** that date.

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 1st day of September, 1999.

On Behalf of the Administrator,



  
Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

KGG/pah

The Honorable Michael J. Borkland  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15th Street, Suite 502  
Austin, Texas 78701  
**VIA FACSIMILE (512) 475-4994**

Shanee Woodbridge  
State Office of Administrative Hearings  
300 West 15th Street, Suite 504  
Austin, Texas 78701  
**VIA FACSIMILE (512) 475-4994**

Javier A. Castillo  
**RESPONDENT**  
700 E. Virginia Street  
Del Rio, Texas 78840  
**CERTIFIED MAIL/RRR NO. P 419 581 729**

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

Licensing Division



**INTER-OFFICE COMMUNICATION  
TEXAS ALCOHOLIC BEVERAGE COMMISSION**

August 31, 1999

**TO:** Gayle Gordon, Director of Legal

**FROM:** Randy Yarbrough, Assistant Administrator

**SUBJECT:** Docket No. 458-99-0107  
TABC Case No. 580727  
Javier A. Castillo d/b/a B29 Lounge  
Wine and Beer Retail Dealer's Permit (BG-313897) Retail Dealers Late Hours  
License (BL-313898)  
Val Verde County, Texas

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I have read the attached record of the above referenced case and find the following:

Based on the record, I concur with the finding of the Administrative Law Judge that the Conduct Surety Bond issued for this location should not be forfeited. Please prepare an **ORDER** adopting the Proposal for Decision recommendation that the Conduct Surety Bond should **NOT BE FORFEITED**.

Please make a copy of this decision and submit it along with the order to the respective parties.

A handwritten signature in cursive script that reads "Randy Yarbrough". The signature is written over a horizontal line.

RY

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

July 29, 1999

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

**HAND DELIVERY**

RE: Docket No. 458-99-0107; Javier A. Castillo; TABC No. 580727

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 Andrew Del Cueto, counsel representing the Texas Alcoholic Beverage Commission, and to Javier A. Castillo. For reasons discussed in the Proposal for Decision, I have recommended Respondent's surety bond not be forfeited to the State.

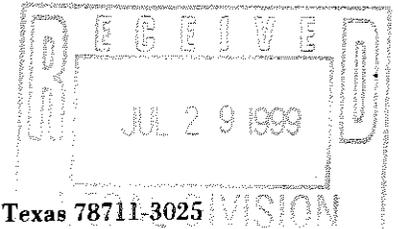
Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon Supp. 1996), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed 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,

Michael J. Borkland  
Administrative Law Judge

MJB/es  
Enclosures

cc: Andrew Del Cueto, TABC, 5806 Mesa, Suite 160, Austin, Texas - VIA HAND DELIVERY  
Javier A. Castillo, B29 Lounge, 700 E. Virginia Street, Del Rio, TX 788407 - VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED NO. Z 383 248 487  
Shanee Woodbridge, Docketing, State Office of Administrative Hearings



William P. Clements Building  
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025  
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

DOCKET NO. 458-99-0107  
(TABC CASE NO. 580727)

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
vs.	§	
	§	OF
JAVIER A. CASTILLO	§	
D/B/A B29 LOUNGE	§	
PERMIT NO. BG-313897 &	§	
LICENSE NO. BL-313898	§	
VAL VERDE COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff or Commission) initiated this action seeking forfeiture of the conduct surety bond posted by Javier A. Castillo (Respondent) d/b/a B29 Lounge. Respondent renewed a conduct surety bond<sup>1</sup> on December 5, 1998, in compliance with Sections 11.11 and 61.13 of the Texas Alcoholic Beverage Code (the Code). The Staff recommended that the bond be forfeited because Respondent had committed three violations of the Code since September 1, 1995. A Proposal for Decision was issued on May 11, 1999. Both parties excepted to the decision stating that the respondent had in fact appeared at the hearing and did not default as set forth in that PFD. The Administrative Law Judge (ALJ) now has the complete record and agrees with the parties that the case was not a default and issues this Amended Proposal for Decision in place of the original PFD. The Administrative Law Judge does not agree with the Staff's recommendation that Respondent's conduct surety bond be forfeited.

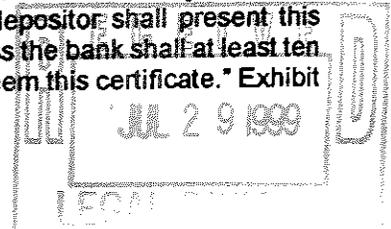
**I. Jurisdiction, Notice, and Procedural History**

The hearing in this matter convened on April 9, 1999, before ALJ Joe R. Gilbreath, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Staff was represented by Andrew del Cueto, Assistant Attorney General. The Respondent appeared in person with the aid of an interpreter but was not represented by counsel at the hearing.

Subsequently, this case was reassigned to ALJ Michael Borkland.

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<sup>1</sup>Respondent provided a certificate of deposit (in place of a surety bond), Certificate Number 13959, from Del Rio Bank & Trust Co. The Certificate of Deposit provided that "it shall be automatically renewed for an additional period of time equal to the original term hereof, dating from the first maturity date, and thereafter for similar periods of time equal to the original term, unless the depositor shall present this certificate for payment at any maturity date, or within 10 days thereafter or unless the bank shall at least ten days prior to any maturity mail written notice to the depositor of its desire to redeem this certificate." Exhibit 2.



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. Conduct Surety Bond

On December 21, 1998, the Commission renewed a *Wine and Beer Retailer's Permit, BG-313897* and a *Retail Dealer's On-Premise Late Hours License, BL-313898*, to Respondent for the premises known as B29 Lounge at 104 Margarita, Del Rio, Val Verde County, Texas. On December 5, 1998, Respondent, as holder of both a permit and a license, renewed a conduct surety bond for B29 Lounge for \$5,000 as required by Sections 11.11 and 61.13 of the Code.

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

On October 23, 1996, Respondent signed an "Agreement and Waiver of Hearing" regarding two violations of the Code. The waiver agreement stated that on September 4, 1996, Respondent consumed and permitted consumption of alcoholic beverages during prohibited hours in violation of Section 61.71(a)(18) of the Code. The agreement contained the following language:

My name is Augustin A. Castillo. I am permittee of B29 Lounge. 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. A civil penalty in the amount of \$1500.00 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.

As a result of this waiver agreement, the Commission Administrator entered an Order on November 12, 1996. The Order stated Respondent violated the Code as stated in the agreement and waiver of hearing. The Order further provided that Respondent's licenses were suspended for ten (10) days unless Respondent paid \$1500.00 as a civil penalty.

On March 5, 1997, Respondent signed an "Agreement and Waiver of Hearing" regarding a third violation of the Code. The waiver agreement stated that on December 21, 1996, Respondent made a sale to an intoxicated person. The agreement contained the following language:

My name is Javier A. Castillo. I am the permittee of B29 Lounge. 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. A civil penalty in the amount of \$1050.00 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 question.

As a result of this waiver agreement, the Commission Administrator entered an Order on March 18, 1997. The Order stated Respondent violated the Code as stated in the agreement and waiver of hearing. The Order further provided that Respondent's licenses were suspended for seven days unless Respondent paid \$1050.00 as a civil penalty.

#### **IV. Forfeiture of Conduct Surety Bond**

The Commission may revoke a license or permit, or deny renewal of a license or permit, if the holder violates a provision of the Code or a rule of the Commission. TEX. ALCO. BEV. CODE ANN., §§ 6.01 and 61.71. Texas Alcoholic Beverage Commission's (TABC) rule found at 16 Tex. Admin. Code (TAC) § 33.24(j), governs forfeiture of a conduct surety bond, 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 three violations of the Code since September 1, 1995.

#### **V. Respondent's Testimony**

The Respondent testified at the hearing, through an interpreter, that the bond money was not his, but had been earned by his children working in the fields up north. He further testified that the recent floods had severely damaged both his house and his business. He borrowed money from a bank to repair his home and he planned on using the bond money to repay the bank. His business was damaged by the flood and was closed for repairs and business has been slow since reopening.

The Respondent also testified that he did not understand what he was signing when he entered into the waiver agreements with the Commission. He did not understand that signing the agreements would cause him to lose his bond and that no one explained this to him.

#### **VI. Recommendation**

At the conclusion of the hearing ALJ Gilbreath announced that he would deny the Commission's petition for forfeiture because Respondent did not have an adequate understanding of the law and the effect of signing the waiver agreements. Staff recommended to the ALJ that he consider basing the denial on economic impact. The ALJ announced that he would consider that recommendation.

The undersigned ALJ agrees with ALJ Gilbreath and recommends that the conduct surety bond of Respondent not be forfeited to the Commission.

## PROPOSED FINDINGS OF FACT

1. On December 21, 1998, the Texas Alcoholic Beverage Commission (Commission) renewed a *Wine and Beer Retailer's Permit, BG-313897* and a *Retail Dealer's On-Premise Late Hours License, BL-313898*, to Respondent for the premises known as B29 Lounge at 104 Margarita, Del Rio, Val Verde County, Texas. On December 5, 1998, Respondent, as holder of both a permit and a license, renewed a conduct surety bond for B29 Lounge for \$5,000.
2. Respondent received proper and timely notice of the hearing from the Staff for the Commission (the Staff) in a notice of hearing, dated January 25, 1999, and an amended notice of hearing dated February 23, 1999. Both notices were properly sent to Respondent's address at 700 E. Virginia Street, Del Rio, Val Verde County, Texas. The notice of hearing dated February 23, 1999, was received by Respondent on February 25, 1999, as shown by the signed return receipt.
3. The hearing was convened on April 9, 1999, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Respondent appeared at the hearing and was assisted by an interpreter. Andrew del Cueto, Assistant Attorney General, represented the Staff.
4. Javier A. Castillo, Respondent, holder of the permits referenced in Finding No. 1, is an American Citizen and resident of Val Verde County, Texas, whose primary language is Spanish; Mr. Castillo's ability to speak and comprehend English is very limited.
5. On October 23, 1996, Respondent signed an "Agreement and Waiver of Hearing" regarding two violations of the Code. By signing the waiver agreement, Respondent declared that on September 4, 1996, Respondent consumed and permitted consumption of alcoholic beverages during prohibited hours. Respondent acknowledged two violations of the Code. The legal effect of signing the waiver agreement was Respondent's acknowledgment that the two violations of the Code had occurred and that his primary permit and related license would be suspended or canceled by the Commission unless he paid a civil penalty and his conduct surety bond could be forfeited. There is no evidence that the effect of the agreement was explained to him in Spanish, and Mr. Castillo did not understand the legal significance of his signing the waiver agreement.
6. On November 12, 1996, the Commission Administrator entered an order finding Respondent had committed two violations of the Code consistent with Respondent's admissions found in Finding of Fact No. 5.
7. On March 5, 1997, Respondent signed an "Agreement and Waiver of Hearing"

regarding a third violation of the Code. By signing the agreement, Respondent declared that on December 21, 1996, Respondent made a sale to an intoxicated person. Respondent acknowledged one violation of the code. The legal effect of signing the waiver agreement was Respondent's acknowledgment that a violation of the Code had occurred and that his permit and related license would be suspended or canceled by the Commission unless he paid a civil penalty and his conduct surety bond could be forfeited. There is no evidence that the effect of the agreement was explained to him in Spanish, and Mr. Castillo did not understand the legal significance of his signing the waiver agreement.

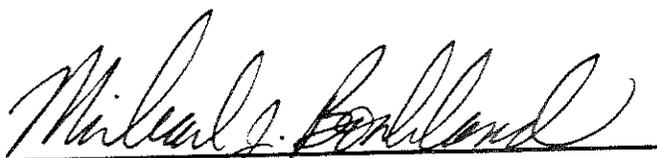
8. On March 18, 1997, the Commission Administrator entered an order finding Respondent had violated the Code consistent with Respondent's admissions as stated in Finding of Fact No. 7.
9. Respondent has committed at least three violations of the Code and had at least three final adjudications regarding these violations since September 1, 1995.
10. Respondent did not understand that signing the waiver agreements would subject his bond to forfeiture.
11. Respondent's home and business were severely damaged in a recent flood in Del Rio, Texas.
12. Respondent borrowed money from a bank to repair his home and planned on using the bond money to repay the bank.
13. Respondent's business was damaged by the flood and had to be closed for days for repairs and business has been slow since reopening.
14. The bond money was raised by Respondent's children by working in the fields up north.

#### **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, and 61.71 (Vernon 1995 & Supp. 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 Supp. 1999) and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 1999).
3. Proper and timely notice of the hearing was effected on Permittee pursuant to Administrative Procedure Act (APA), TEX. GOV'T CODE ANN. ch. 2001 (Vernon 1999).

4. Respondent holds permit number BG-313897 and license number BL-313898 and posted a conduct surety bond in accordance with the requirements set forth in 16 TEX. ADMIN. CODE (TAC) § 33.24 and TEX. ALCO. BEV. CODE ANN. §§ 11.11 and 61.13 (Vernon 1995 & Supp. 1999).
5. Respondent signed waiver agreements indicating that he had violated 16 TAC § 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 a *Wine and Beer Retailer's Permit, BG-313897* and a *Retail Dealer's On-Premise Late Hours License, BL-313898* issued by the Commission, however, Respondent did not knowingly enter into the waiver agreements with the Commission because he did not understand the law, and the effect of signing the waiver agreements was not adequately explained to him.
6. Based on Findings 4, 5, 7, 8 and 10 and Conclusion 5, the conduct surety bond renewed by Respondent should **NOT** be forfeited to the State.

SIGNED and entered this 29<sup>th</sup> day of July 1999.



MICHAEL BORKLAND  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS