

DOCKET NO. 593038

IN RE JESUS D. GARCIA
D/B/A EL PORTERO BAR
PERMIT NO. MB473155

EL PASO COUNTY, TEXAS
(SOAH DOCKET NO. 458-01-2661)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 2nd day of August, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Louis Lopez. The hearing convened on June 8, 2001 and adjourned on June 8, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 20, 2001. 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.

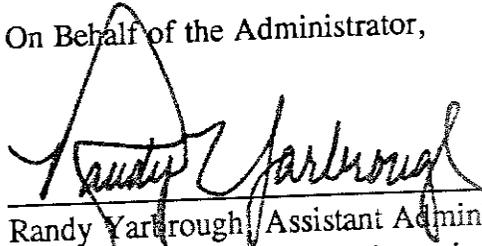
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

This Order will become final and enforceable on August 23, 2001, 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 2nd day of August, 2001.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Louis Lopez
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (915) 834-5657

Eduardo N. Lerma
ATTORNEY FOR RESPONDENT
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TABAC Legal Section

Licensing Division
El Paso District Office

DOCKET NO. 458-01-2661

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

JESUS D. GARCIA
D/B/A EL POTRERO BAR
MB-473155, LB-473156
EL PASO COUNTY, TEXAS
TABC NO. 593038

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (the Staff) brought this action against Jesus D. Garcia (Respondent) d/b/a El Potrero seeking forfeiture of Respondent's conduct surety bond. The Staff alleged that Respondent permits had been canceled. This proposal finds that the criteria for forfeiture of Respondent's conduct surety bond have been satisfied.

The hearing on the merits was held on June 8, 2001, at the State Office of Administrative Hearings, 401 East Franklin Avenue, Suite 580, El Paso, Texas. The Staff appeared by telephone through attorney Dewey Brackin. Respondent was not present but appeared through attorney Eduardo Lerma. Administrative Law Judge Louis Lopez presided.

Since there were no contested issues related to jurisdiction or notice, those matters are set out below in the Findings of Fact and Conclusions of Law.

I. EVIDENCE

The only exhibit introduced into evidence was a set of documents presented by the Staff related to Respondent's permits. It was admitted without objection. No witnesses were called to testify by either side.

One of the documents in the Staff's exhibit was a Texas Alcoholic Beverage Commission (TABC) form called Agreement and Waiver of Hearing. It was signed by Jesus Garcia on November 22, 2000 and referred to a violation of the Code that had occurred on November 17, 2000. The paragraph directly above Respondent's signature stated that Respondent was waiving his right to a hearing. It also stated that he understood that "all associated licenses or permits will be suspended/canceled . . ." In the space provided for entry of a monetary civil penalty, the word "cancellation" was

handwritten. The last line of the paragraph read, "The signing of this waiver may result in the forfeiture of any related conduct surety bond." As a result of the agreement, TABC issued an order canceling Respondent's permits. It recited that Respondent had violated "sections of the Code" and that the penalty imposed was cancellation.

Respondent's contention at the hearing was that the cancellation had not been for cause, but no evidence or argument was presented to support this.

II. ANALYSIS

The TABC rule applicable in this case, found at 16 TEX. ADMIN. CODE (TAC) §33.24(j), provides:

(1) When a license or permit is canceled . . . the commission shall notify the licensee or permittee, in writing, of its intent to seek forfeiture of the bond.

(2) The licensee or permittee may . . . request a hearing on the question of whether the criteria for forfeiture of the bond, as established by the Alcoholic Beverage Code §11.11 and §61.13 and this rule, have been satisfied.

The applicable statutory provisions at TEX. ALCO. BEV. CODE ANN. §11.11(b)(2) and §61.13(b)(2) state:

[T]he holder of the permit agrees that the amount of the bond shall be paid to the state if the permit is revoked or on final adjudication that the holder violated a provision of this code. . . .

Respondent's claim that his permits were not canceled for cause is in error. The Agreement and Waiver of Hearing signed by Respondent is clear in its intent that a cancellation is to take place based on the language it contains. The Agreement relates to a Code violation, and thus the cancellation was one for cause.

III. CONCLUSION

Based on a preponderance of the evidence, Respondent's permits were canceled. As a consequence, the criteria for forfeiture of Respondent's conduct surety bond set out in 16 TAC §33.24(j) have been satisfied.

FINDINGS OF FACT

1. Jesus D. Garcia (Respondent) d/b/a El Potrero Bar is the holder of Mixed Beverage Permit No. MB-473155 and Mixed Beverage Late Hours Permit No. LB-473156, issued by the Texas Alcoholic Beverage Commission (TABC) on June 25, 2000. The permits were canceled for cause on December 21, 2000.

2. On May 12, 2000, Respondent executed a conduct surety bond in the amount of \$5,000.00 payable to TABC.
3. On January 10, 2001, the staff of TABC (the Staff) sent a notice by certified mail to Respondent asserting that TABC was seeking to forfeit Respondent's surety bond and that he had the right to request a hearing on the matter.
5. On April 18, 2001, the Staff sent a notice of hearing by certified mail to Respondent. The notice specified the time, place, and nature of the hearing; the legal authority for the hearing; and the matter to be determined. The State Office of Administrative Hearings notified Respondent of the hearing in an Order Setting Prehearing Conference on April 25, 2001.
6. On November 22, 2000, Respondent signed an Agreement and Waiver of Hearing regarding a violation of the Texas Alcoholic Beverage Code, to-wit: sale of an alcoholic beverage to a minor.
7. The Agreement and Waiver of Hearing provided for cancellation of Respondent's permits and contained the handwritten word "cancellation" in the space providing for the penalty.
7. Based on Respondent's Agreement and Waiver of Hearing, TABC entered an order which canceled Respondent's permits.
8. Respondent did not file any motion for rehearing with TABC, and the TABC order became final.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (CODE) §§5.31–5.44 (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding pursuant to CODE §5.43(a) and TEX. GOV'T. CODE ANN. §§2003.021 and 2003.042 (Vernon 2000).
3. Service of proper notice of the hearing was made on Respondent pursuant to CODE §11.63 and the Administrative Procedure Act, TEX. GOV'T. CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. TABC is permitted by CODE §§11.11 and 61.31 and by 16 TEX. ADMIN. CODE §33.24(j) (West 2000) to forfeit the conduct surety bond of a permittee whose permit has been canceled.

- 5. Based on the foregoing Findings of Fact and Conclusions of Law, the criteria for forfeiture of the conduct surety bond have been satisfied.

SIGNED this 20th day of June, 2001.



LOUIS LOPEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS