

SOAH DOCKET NO. 458-02-0463

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

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BEFORE THE STATE OFFICE

VS.

MARIA CARMEN RODRIGUEZ  
D/B/A FLORIDA NITE CLUB  
PERMIT NO. BG440333

OF

HARRIS COUNTY, TEXAS  
(TABC CASE NO. 593338)

ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 4th day of March, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Don Smith. The hearing convened on November 28, 2001, and adjourned January 2, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 7, 2002. 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 Respondents conduct surety bond in the amount of \$5,000 be **FORFEITED**.

This Order will become final and enforceable on **MARCH 25, 2002**, 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 4th day of March, 2002.

On Behalf of the Administrator,

  
\_\_\_\_\_  
Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Leah Don Smith  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (713) 812-1001**

Mr. Clyde Burleson  
**ATTORNEY FOR RESPONDENT**  
11767 Katy Frwy.  
Houston, Tx. 77079  
**VIA FAX (281) 597-8284**  
**& VIA REGULAR MAIL**

Maria Carmen Rodriguez  
**RESPONDENT**  
d/b/a Florida Nite Club  
6842 Avenue T  
Houston, Tx 77011-1234  
**VIA CERTIFIED MAIL 7001 2510 0000 7279 0186**

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

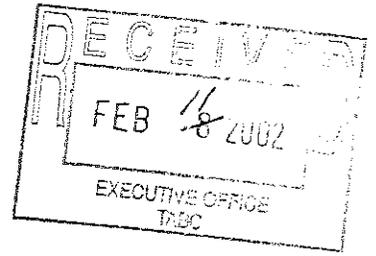
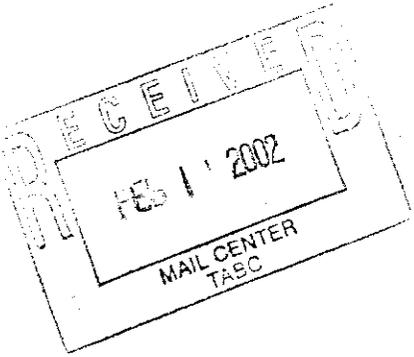
Licensing Division  
Houston District Office

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

February 7, 2002



VIA REGULAR MAIL

Mr. Rolando Garza, Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa, Suite 160  
Austin, Texas 78731

**RE: Docket No. 458-02-0463; TABC vs. Maria Carmen Rodriguez d/b/a Florida Nite Club; Permit No. BG440333**

Dear Mr. Garza:

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 Gayle Gordon, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Clyde Burleson, attorney for the Respondent. For reasons discussed in the Proposal for Decision, this proposal recommends that Respondent's conduct surety bond be forfeited.

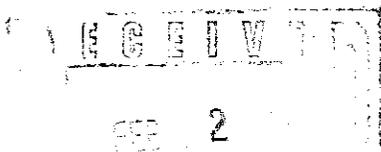
Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according 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,

Don Smith  
Administrative Law Judge

DS\mc  
Enclosure

xc: Gayle Gordon, Staff Attorney, TABC - VIA FACSIMILE / (512) 206-3498  
Clyde Burleson, Attorney for the Respondent - VIA FACSIMILE / (713) 520-1604



North Loop Office Park  
2020 North Loop West, Suite 111 ♦ Houston, Texas 77018  
(713) 957-0010 Fax (713) 812-1001

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MARIA CARMEN RODRIGUEZ  
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PERMIT NO. BG440333  
HARRIS COUNTY, TEXAS  
(TABC CASE NO. 593338)

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (TABC) brought this action seeking forfeiture of the conduct surety bond posted by Maria Carmen Rodriguez d/b/a Florida Nite Club (Respondent) because Respondent was found to have committed three violations of the Alcoholic Beverage Code (the Code) since September 1, 1995. The violations of the Code have been adjudicated. This Proposal for Decision finds the allegations proven and adopts the recommendation of the staff that Respondent's conduct surety bond be forfeited.

**I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

There were no contested issues of notice or jurisdiction in this proceeding, therefore they are addressed herein in the findings of fact and conclusions of law without further discussion in the text of this proposal.

On November 28, 2001, a hearing convened before Administrative Law Judge Don Smith at the State Office of Administrative Hearings (SOAH) at 2020 North Loop West, Suite 111, Houston, Harris County, Texas. Petitioner was represented at the hearing by Gayle Gordon, TABC Staff Attorney. Respondent was represented at the hearing by Clyde Bureson, Attorney. The contested issue is whether the settlement of each of the three violations is a final adjudication of a violation in the code. The record closed on January 1, 2002.

**II. EVIDENCE AND APPLICABLE STATUTORY PROVISIONS**

TEX. ALCO. BEV. CODE ANN. §11.11 and/or §61.13 provides that the amount of the surety bond shall be paid to the state if the license is revoked or on final adjudication that the holder violated a provision of the code. Commission rule found at 16 TEX. ADMIN. CODE §33.24, 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.

Petitioner introduced Exhibit TABC 1, which is the affidavit of Brian L. Guenther, Custodian of Records, with Respondent's TABC records (the records) attached. The records state that the Wine and Beer Retailer's Permit, BG-440333 and Retail Dealer's On-Premise Late Hours License, BL-440334 were issued to Maria Carmen Rodriguez, doing business as Florida Nite Club, 5120 Canal Street, Houston, Harris County, Texas, by the Texas Alcoholic Beverage Commission, on October 2, 1998. The records contain final orders dated September 14, 1999, November 22, 1999, and December 6, 2000, indicating that Respondent had committed three violations under the code. Two orders state that the agreed violations are as stated in the agreement and waiver of hearing. One order finds that Respondent violated those sections of the Code as stated in the agreement and waiver of hearing. All three orders assessed a penalty to Respondent, as agreed by Respondent in the adopted agreement and waiver of hearing. On January 10, 2001, the Commission mailed a notice to Respondent that the Commission intended to forfeit the conduct surety bond. Respondent requested a hearing. Petitioner mailed a Notice of Hearing to the Respondent on October 25, 2001, notifying Respondent of the allegations and date of hearing. Respondent alleges the two orders that state "the agreed violations are as stated in the agreement and waiver of hearing" are not final adjudications because they were not admitted or denied.

Petitioner's brief states two cases defining what constitutes an agency final adjudication. **Any agency process that results in a final disposition is necessarily an adjudication. Sierra Club v. Peterson, 185 F.3d 349 (5<sup>th</sup> Cir. 1999).** Petitioner argues that by Respondent paying a civil penalty or having their permits suspended as a result of the adoption of the signed Agreement and Waiver of Hearing, a final disposition and adjudication of the charges against the Respondent occurred. Further, Petitioner argues that the orders signed by the Texas Alcoholic Beverage Commission's Assistant Administrator declare a legal effect or consequence. **When an administrative agency declares a legal requirement is satisfied, it states a conclusion of law. Smith v. Houston Chemical Serv., Inc., 872 SW2d 252 (Tex. App. -- Austin, 1994, writ granted, order withdrawn, denied).** Petitioner argues that when the orders were signed, a conclusion of law that the Respondent violated the Code is implied. Respondent argues that two orders never state that Petitioner finds the alleged violation occurred, and as such, the violations have not been finally adjudicated.

### III. RECOMMENDATION

Because the Respondent agreed to the payment of a civil penalty or having permits suspended as a result of the adoption of each signed Agreement and Waiver of Hearing, the ALJ finds that there has been a final adjudication that Respondent committed three violations of the Code since September 1, 1995. The Respondent has forfeited the full amount of the conduct surety bond.

### IV. FINDINGS OF FACT

1. Maria Carmen Rodriguez, doing business as Florida Nite Club, 5120 Canal Street, Houston, Harris County, Texas, was issued a Wine and Beer Retailer's Permit (BG-440333) and a Retail Dealer's On-Premise Late Hours License (BL-440334) by the Texas Alcoholic Beverage Commission.

2. Respondent posted Texas Alcoholic Beverage Commission Conduct Surety Bond Number XTL02463, dated September 15, 1998. The bond was executed by Maria C. Rodriguez d/b/a Florida Nite Club, as Principal, and First Indemnity of America Insurance Company, as Surety. The bond is in the amount of \$10,000.00, and is payable to the State of Texas.
3. On September 8, 1999, Respondent signed an Agreement and Waiver of Hearing regarding a violation of the Code alleged to have occurred on August 7, 1999.
4. The Agreement and Waiver of Haring states that Respondent was neither admitting nor denying that the violation occurred.
5. The Agreement and Waiver of Hearing states that Respondent understands that the permits will be suspended/canceled unless the licensee or permittee elects to pay a civil penalty of \$750.00 in lieu of a suspension.
6. On September 14, 1999, the Assistant Administrator of the Texas Alcoholic Beverage Commission signed an order that "the agreed violations are as stated in the agreement and waiver of hearing," and imposed the penalty as agreed.
7. On November 15, 1999, Respondent signed an Agreement and Waiver of Hearing regarding a violation of the Code alleged to have occurred on October 22, 1999.
8. The Agreement and Waiver of Hearing states that Respondent was neither admitting nor denying that the violation occurred.
9. The Agreement and Waiver of Hearing states that Respondent understands that the permits will be suspended/canceled unless the licensee or permittee elects to pay a civil penalty of \$1,050.00 in lieu of a suspension.
10. On November 22, 1999, the Assistant Administrator of the Texas Alcoholic Beverage Commission signed an order that "the agreed violations are as stated in the agreement and waiver of hearing," and imposed the penalty as agreed.
11. On November 29, 2000, Respondent signed an Agreement and Waiver of Hearing regarding a violation of the Code alleged to have occurred on September 26, 2000.
12. The Agreement and Waiver of Hearing states that Respondent was neither admitting nor denying that the violation occurred.
13. The Agreement and Waiver of Hearing states that Respondent understands that the permits will be suspended/canceled unless the licensee or permittee elects to pay a civil penalty of \$1,500.00 in lieu of a suspension.

14. On December 6, 2000, the Assistant Administrator of the Texas Alcoholic Beverage Commission signed an order that "the Commission further finds that respondent violated those sections of the code as stated in the agreement and waiver of hearing," and imposed the penalty as agreed.
15. Petitioner sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond by letter dated January 10, 2001.
16. Respondent requested a hearing to determine if the conduct surety bond should be forfeited.
17. On October 25, 2001, Petitioner issued its Notice of Hearing, directed to Maria Carmen Rodriguez d/b/a Florida Nite Club, 6842 Avenue T, Houston, Texas 77011-1234.
18. On November 28, 2001, a hearing convened before ALJ Don Smith, SOAH, at 2020 North Loop West, Suite 111, Houston, Harris County, Texas. Petitioner was represented at the hearing by TABC Staff Attorney Gayle Gordon. Respondent was represented at the hearing by Attorney Clyde Burleson.
19. Respondent has committed at least three violations of the Code and has had at least three final adjudications regarding these violations since September 1, 1995.

## **V. CONCLUSIONS OF LAW**

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§11.11 and 61.13.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOVT CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOVT CODE ANN. §§2001.051 and 2001.052.
4. TEX. ALCO. BEV. CODE ANN. §11.11 and/or §61.13 provides that the amount of the surety bond shall be paid to the state if the license is revoked or on final adjudication that the holder violated a provision of the code. Commission rule found at 16 TEX. ADMIN. CODE § 33.24, 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.

5. Based on the Findings of Fact and the above Conclusions of Law, the conduct surety bond executed by Respondent should be forfeited to the State.

SIGNED this 7<sup>th</sup> day of February, 2002.



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DON SMITH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS