

DOCKET NO. 597878

IN RE ROBERTO MONTEMAYOR, JR.
D/B/A TEQUILA FROGS
PERMIT NOS. MB447306, LB447307;
PE447308

CAMERON COUNTY, TEXAS
(SOAH DOCKET NO. 458-02-2201)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of July, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Kyle J. Groves . The hearing convened on May 16, 2002, and adjourned on May 16, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 17, 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.

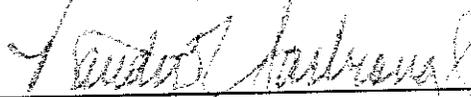
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

This Order will become final and enforceable on JULY 31, 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 10th day of July, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

Hon. Kyle J. Groves
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (214) 956-8611

Holly Wise
State Office of Administrative Hearings
Austin, Texas
VIA FAX (512) 475-4994

Roberto Montemayor Jr.
d/b/a Teguila Frogs
RESPONDENT
612 Escandon
Rancho Viejo, Tx. 78575
CERTIFIED MAIL RRR #7001 2510 0000 7277 7996

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
McAllen District Office

(b) On March 5, 1999, the Respondent was issued Mixed Beverage Permit MB-447306, Mixed Beverage Late Hours Permit LB-447307, and Beverage Cartage Permit PE-447308.

(c) On April 22, 1999, the Respondent signed a document entitled "Agreement and Waiver of Hearing." The document listed an alleged violation occurring March 5, 1999, for sale to an intoxicated person. By signing this document, the Respondent waived his right to a hearing. The Respondent neither admitted nor denied such violations. The document also states the signing of the waiver may result in the forfeiture of any related conduct surety bond.

(d) On April 27, 1999, the Petitioner entered a waiver order stating the Respondent violated the Texas Alcoholic Beverage Code as set out in the April 22, 1999 waiver signed by the Respondent. This order imposed a seven-day suspension or a civil penalty of \$1,050.00 on the Respondent.

(e) On April 22, 1999, the Respondent signed a second document entitled "Agreement and Waiver of Hearing." The document listed an alleged violation occurring April 3, 1999, for sale to a minor. By signing this document, the Respondent waived his right to a hearing. The Respondent neither admitted nor denied such violations. The document also states the signing of the waiver may result in the forfeiture of any related conduct surety bond.

(f) On April 27, 1999, the Petitioner entered a second waiver order stating the Respondent violated the Texas Alcoholic Beverage Code as set out in the second April 22, 1999 waiver signed by the Respondent and imposed a seven-day suspension or a civil penalty of \$1,050.00 on the Respondent.

(g) On September 10, 2001, the Petitioner and the Respondent entered into an Agreement and Waiver of Hearing. This document states on March 21, 2001, the Respondent, his agent, servant, or employee exposed or permitted the exposure of a person's genitalia. By signing this document, the Respondent waived his right to a hearing. The Respondent neither admitted nor denied such violations. The document also states the signing of the waiver may result in the forfeiture of any related conduct surety bond. The document imposed a ten-day suspension on the Respondent.

(h) On March 29, 2002, the Petitioner sent a Notice of Hearing by certified mail, return receipt requested, to the Respondent asserting that the TABC was seeking to forfeit the Respondent's surety bond. The Respondent timely received the notice letter.

The Respondent offered no evidence.

III. STATUTORY AUTHORITY

The rules of the TABC, at 16 TEX. ADMIN. CODE §33.24(j) provide:

(1) When a license or permit is canceled, or a final adjudication that the licensee or permittee has committed three violations of the Alcoholic Beverage Code since September 1, 1995, 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 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 provision at TEX. ALCO. BEV. CODE ANN. §§11.11(b)(2) states:

(b) . . . the 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. . . .

TEX. ADMIN. CODE §155.55(a) states:

If, after receiving notice of a hearing, a party fails to appear in person or by representative on the day and time set for hearing or fails to appear by telephone in accordance with this chapter, the ALJ may proceed in that party's absence and, as authorized by applicable law, may enter a default judgment against the defaulting party.

TEX. ADMIN. CODE §155.55(b) states:

For purposes of this section, entry of a default judgment means the issuance of a proposal for decision or order, where provided by law, against the defaulting party in which the factual allegations against that party in the notice of hearing are deemed admitted as true without the requirement of submitting additional proof.

III. RECOMMENDATION

Based on a preponderance of the evidence, the Respondent committed three violations of the Code since September 1, 1995, in violation of Texas Alcoholic Beverage Commission rules, 16 TAC §33.24. As a consequence, the full amount of the conduct surety bond, or any instrument serving in place of a conduct surety bond (including, but not limited to certificates of deposit and letters of credit), should be forfeited.

IV. FINDINGS OF FACT

1. Roberto Montemayor, Jr. d/b/a Tequila Frogs (the Respondent) is the holder of Mixed Beverage Permit MB-447306, Mixed Beverage Late Hours Permit LB-447307, and Beverage Cartage Permit PE-447308.

2. On February 25, 1999, the Respondent posted a conduct surety bond in the amount of \$5,000.00 asserting it would faithfully conform with the Texas Alcoholic Beverage Code (the Code) and the rules of TABC.
3. On March 29, 2002, the staff of TABC (the Staff) sent a Notice of Hearing by certified mail, return receipt requested, to the Respondent asserting that TABC was seeking to forfeit the Respondent's surety bond. The Respondent timely received the notice letter.
4. The hearing on the merits was held by telephone on May 16, 2002. Gayle Gordon appeared and represented the Staff. The Respondent did not appear. Kyle J. Groves, Administrative Law Judge (ALJ) presided.
5. On April 22, 1999, the Respondent signed a document entitled "Agreement and Waiver of Hearing." The document listed an alleged violation occurring March 5, 1999, for sale to an intoxicated person. By signing this document, the Respondent waived his right to a hearing. The Respondent neither admitted nor denied such violations. The document also states the signing of the waiver may result in the forfeiture of any related conduct surety bond.
6. On April 27, 1999, the Petitioner entered a waiver order stating the Respondent violated the Texas Alcoholic Beverage Code as set out in the April 22, 1999 waiver signed by the Respondent and imposed a seven-day suspension or a civil penalty of \$1,050.00 on the Respondent.
7. On April 22, 1999, the Respondent signed a second document entitled "Agreement and Waiver of Hearing." The document listed an alleged violation occurring April 3, 1999, for sale to a minor. By signing this document, the Respondent waived his right to a hearing. The Respondent neither admitted nor denied such violations. The document also states the signing of the waiver may result in the forfeiture of any related conduct surety bond.
8. On April 27, 1999, the Petitioner entered a second waiver order stating the Respondent violated the Texas Alcoholic Beverage Code as set out in the second April 22, 1999 waiver signed by the Respondent and imposed a seven-day suspension or a civil penalty of \$1,050.00 on the Respondent.
9. On September 10, 2001, the Petitioner and the Respondent entered into an Agreement and Waiver of Hearing. This document states on March 21, 2001, the Respondent, his agent, servant, or employee exposed or permitted the exposure of a person's genitalia. By signing this document, the Respondent waived his right to a hearing. The Respondent neither admitted nor denied such violations. The document also states the signing of the waiver may result in the forfeiture of any related conduct surety bond. The document imposed a ten-day suspension on the Respondent.
10. The Respondent has committed three violations of the Code since September 1, 1995.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 11.11.
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. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. The Respondent violated the rules of TABC found at 16 TEX. ADMIN. CODE §33.24 by committing three violations of the Texas Alcoholic Beverage Code (the Code) since September 1, 1995.
5. TABC is permitted by TEX. ALCO. BEV. CODE ANN. §11.11 and 16 TEX. ADMIN. CODE §33.24 to forfeit the conduct surety bonds of permittees who commit three or more violations of the Code since September 1, 1995.
6. Based on the foregoing Findings of Fact and Conclusions of Law, the conduct surety bond executed by the Respondent should be forfeited to the State.

SIGNED this 17th day of June, 2002.



KYLE J. GROVES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS