

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

V.

BELAGIO ENTERTAINMENT INC.  
d/b/a MELAGIO  
PERMIT NOS. MB454224, LB454225  
TRAVIS COUNTY, TEXAS  
(TABC CASE NO. 600618)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (TABC) brought this forfeiture action against Belagio Entertainment, Inc. d/b/a Melagio (Respondent). TABC sought forfeiture of Respondent's conduct surety bond, alleging Respondent has had three or more adjudicated violations of the Texas Alcoholic Beverage Code (Code) since September 1, 1995. For reasons discussed in this proposal for decision, the Administrative Law Judge (ALJ) recommends forfeiture of the conduct surety bond.

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

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.11(b)(2), and 16 TEX. ADMIN. CODE (TAC) § 33.24. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003. There were no contested issues of notice or jurisdiction in this proceeding.

On September 24, 2002, TABC issued its Notice of Hearing to Respondent, setting a hearing for October 9, 2002. The parties submitted an Agreed Motion for Continuance, which was granted. The hearing was scheduled for October 24, 2002.

ALJ Sharon Cloninger convened the hearing on October 24, 2002, in Austin, Travis County, Texas. TABC was represented at the hearing by its staff attorney Gayle Gordon, who appeared by telephone. Respondent was represented by Lisa Zintmaster Verhaeghe, attorney. Evidence was

received and the record was left open until November 1, 2002, for the parties to submit post-hearing briefs.

At hearing, Respondent moved that this matter be abated pending the outcome Mr. Samaniego's case in Travis County. The motion is denied.

Respondent also requested attorney's fees. Respondent's request is denied because the requirements of TEX. CIV. PRAC. REM. CODE § 105.002 do not apply to this proceeding.

## **II. LEGAL STANDARDS AND APPLICABLE LAW**

TABC is authorized under § 11.11(b)(2) of the Code to require the permittee to forfeit the amount of a conduct surety bond on final adjudication that the permittee violated a provision of the Code. Pursuant to 16 TAC § 33.24, the permittee must have been "finally adjudicated" to have committed three violations of the Code since September 1, 1995, for a forfeiture to occur. TABC must notify the permittee, in writing, of its intent to seek forfeiture of the bond. The permittee may request a hearing on whether the criteria for forfeiture of the bond have been satisfied. The hearing is to be conducted in accordance with the Administrative Procedure Act.

## **III. EVIDENCE AND ARGUMENT**

### **A. BACKGROUND**

Respondent is the holder of Mixed Beverage Permit MB454224 and Mixed Beverage Late Hours Permit LB454225 issued by TABC for the premises known as Melagio, located at 400 East Sixth Street in Austin, Travis County, Texas, and whose mailing address is same.

TABC alleges Respondent has committed four violations of the Code since September 1, 1995. Respondent concedes to a cash law violation on July 17, 2001, and to an intoxicated employee on premises violation on November 30, 2001, but contends that the violations of possession of drugs by employees and sale of an alcoholic beverage to a minor, both alleged to have occurred on February 15, 2002, have not been finally adjudicated and cannot count toward the three violations required for bond forfeiture by 16 TAC § 33.24.

### **B. EVIDENCE**

TABC offered one document, which was admitted. Respondent called two witnesses.

#### **1. Documentary Evidence**

On May 13, 2002, Mr. Adame signed a Waiver neither admitting nor denying the February 15, 2002, violations, and waiving his right to a hearing on the matter. The last sentence of the Waiver

form, directly above Mr. Adame's signature, states, "The signing of this waiver may result in the forfeiture of any related conduct surety bond."

On May 22, 2002, TABC issued an order finding Respondent had waived hearing on the February 15, 2002, violations, and that Respondent had violated those sections of the Code as stated in the Waiver. The violations set out in the Waiver were the February 15, 2002, allegations of sale of alcoholic beverage to a minor and possession of dangerous drugs by employees. TABC imposed a penalty of either a 10-day suspension of Respondent's permits, or a \$1,500 fine. A note below the signature on the order states the order will become final and enforceable 21 days from the date the order is signed, unless a motion for rehearing is filed with TABC.

## **2. Testimony**

### **a. Mr. Adame**

Mr. Adame said he was not represented by an attorney when he signed the Waiver. He said if he had known that signing the Waiver could result in forfeiture of his conduct surety bond, he would not have waived the hearing. Although he was aware of the language in the Waiver stating that his agreement to it could result in the forfeiture of his conduct surety bond, he believed the allegations against his accused employee, Isaiah Samaniego, would have to be proven before a forfeiture could occur. Mr. Adame testified that to his knowledge, Mr. Samaniego has not been convicted of the charges, which are pending in Travis County. He said he believes Mr. Samaniego will be cleared of all charges.

Upon receipt of the TABC order dated May 22, 2002, Mr. Adame did not file a motion for rehearing. He paid the \$1,500 fine in lieu of suspension, because he wanted his business to remain open. He said he thought paying the \$1,500 fine would be the end of the matter.

### **b. Mr. Samaniego**

Mr. Samaniego, age 22, was a bartender at Melagio's on February 15, 2002. On that date, he was arrested for sale of an alcoholic beverage to a minor and possession of illegal drugs. He has been charged with the violations, but has not been convicted. His case is pending in Travis County.

## **C. Argument**

### **1. TABC's argument**

TABC contends that its order adopting the Waiver constitutes final adjudication. The order was final and enforceable 21 days after it was signed on May 22, 2002, unless Respondent requested a rehearing before the Commission. Respondent did not request a rehearing. Respondent conceded to two earlier violations, so the violations listed in the May 22, 2002, order constitute a third and

fourth violation. Under TABC rules, only three violations since September 1, 1995, are necessary for Respondent's bond to be forfeited. Respondent has four violations, so his bond should be forfeited.

## **2. Respondent's argument**

Respondent's counsel argues that because the February 15, 2002 allegations against Mr. Samaniego are pending in Travis County, those violations have not been finally adjudicated, and can not be counted toward the three violations necessary for Respondent's bond to be forfeited. Without the February 15, 2002 violations, Respondent only has two violations against him, and he should not be required to forfeit his bond.

## **IV. ANALYSIS**

Respondent concedes that two violations have been finally adjudicated since September 1, 1995, but contends that the May 22, 2002 TABC order does not constitute final adjudication of the February 15, 2002 violations. The ALJ finds otherwise. The clear and unambiguous language of the note at the bottom of the order is that it would be final and enforceable 21 days after it was signed, unless Respondent requested a rehearing before TABC. Respondent did not request a rehearing. Therefore, the order was final and enforceable as of June 12, 2002.

The order states Respondent violated the sections of the Code listed in the Waiver, which are sale of alcoholic beverage to a minor (Section 106.13 of the Code) and possession of dangerous drugs by employees (Section 11.61(b)(2) of the Code). In addition to the violations that were conceded to at hearing, these two violations bring Respondent's total to four violations since September 1, 1995, which triggers conduct surety bond forfeiture under 16 TAC § 33.24. The conditions of 16 TAC § 33.24 have been met, and Respondent's bond should be forfeited.

## **FINDINGS OF FACT**

1. Belagio Entertainment Inc. d/b/a Melagio (Respondent) holds Permit Nos. MB454224 and LB454225 issued by TABC on July 8, 2001, for the premises located at 400 East Sixth Street, Austin, Travis County, Texas.
2. Respondent has posted TABC Conduct Surety Bond Number XTL03173, dated June 17, 1999, in the amount of \$5,000, payable to the State of Texas.
3. Respondent has been finally adjudicated of at least three violations of the Code since September 1, 1995.
4. Petitioner sent Respondent written notice of its intent to seek forfeiture of the conduct surety bond by letter dated June 26, 2002.

5. Respondent requested a hearing to determine if the conduct surety bond should be forfeited.
6. On September 24, 2002, Petitioner issued its Notice of Hearing, directed to Respondent at Respondent's address of record, setting the hearing on the merits for October 9, 2002. The hearing was continued to October 24, 2002.
7. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
8. On October 24, 2002, a hearing convened before ALJ Sharon Cloninger at the State Office of Administrative Hearings in Austin, Travis County, Texas. Petitioner was represented at the hearing by TABC Staff Attorney Gayle Gordon, who appeared by telephone, and Respondent was represented by attorney Lisa Zintmaster Verhaeghe.

#### CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 6.01, 11.11, 11.61 and 61.13, and 16 TEX. ADMIN. CODE (TAC) § 33.24.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Based upon the Findings of Fact and TEX. ALCO. BEV. CODE ANN. § 11.11(b)(2) and 16 TAC § 33.24, TABC Conduct Surety Bond Number XTL03173, dated June 17, 1999, in the amount of \$5,000, should be forfeited.

**SIGNED on this the 16<sup>TH</sup> day of December 2002.**

  
**SHARON CLONINGER**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**DOCKET NO. 600618**

IN RE BELAGIO ENTERTAINMENT INC.	§	BEFORE THE
D/B/A MELAGIO	§	
PERMIT NOS. MB454224; LB454225	§	
	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-0237)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 6th day of February, 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Sharon Cloninger. The hearing convened on October 24, 2002 and adjourned on October 24, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 16, 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. Respondent filed exceptions on January 10, 2003.

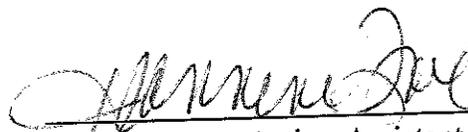
The Acting Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Respondent's Exceptions To Proposal For Decision, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained 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 Acting 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 February 27, 2003**, 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.

SIGNED this the 1 day of February, 2003.



Jeannene Fox, Acting Assistant Administrator  
Texas Alcoholic Beverage Commission

/vr

The Honorable Sharon Cloninger  
Administrative Law Judge  
State Office of Administrative Hearings  
VIA FACSIMILE (512) 475-4994

Lisa Zintsmaster Verhaeghe, P.L.L.C.  
ATTORNEY FOR RESPONDENT  
3307 Northland, Ste. 470  
Austin, Tx. 78731  
VIA FAX (512) 458-2826

Belagio Entertainment Inc.  
d/b/a Melagio  
RESPONDENT  
400 E. 6<sup>th</sup> Street  
Austin, Tx. 78701-4740  
CERTIFIED MAIL #7001 2510 0003 8688 7091

Gayle Gordon  
ATTORNEY FOR PETITIONER  
TABC Legal Section

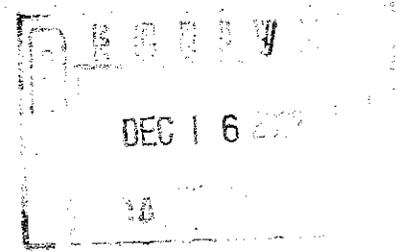
Regulatory Division  
Austin District Office

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

December 16, 2002



Mr. Rolando Garza, Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa, Suite 160  
Austin, Texas 78711

**HAND DELIVERY**

**RE: Docket No. 458-03-0237; TABC v. Belagio Entertainment Inc. d/b/a  
Melagio, Permit Nos. MB454224, LB454225 Travis County, Texas. (TABC Case No. 600618)**

Dear Mr. Garza:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. A copy of the Proposal for Decision is being sent to Gayle Gordon, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Lisa Zintmaster Verhaeghe, representative for Belagio Entertainment, Inc. For reasons discussed in the Proposal for Decision, the Administrative Law Judge (ALJ) recommends forfeiture of the conduct surety bond.

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,

A handwritten signature in cursive script that reads "Sharon Cloninger".

Sharon Cloninger  
Administrative Law Judge

SC/tll

Enclosure

xc: Lisa Zintmaster Verhaeghe, Attorney at Law, 3307 Northland, Ste 470, Austin, Texas 78731- **VIA REGULAR MAIL**  
Gayle Gordon, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**  
Rommel Corro, Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**