

DOCKET NO. 588282

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
VS.	§	
	§	
BOIS D'ARC POST NO.9167	§	OF
VETERANS OF FOREIGN WARS OF	§	
THE UNITED STATES	§	
PERMIT NO. NE-465984 & PE-465985	§	
COLLIN COUNTY, TEXAS	§	
(SOAH Docket No. 458-00-1572)	§	ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 22nd day of January, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on September 29, 2000, and the record was closed on October 12, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 11, 2000. 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 Permit/License Nos. NE-465984 and PE-465985 is herein **SUSPENDED**.

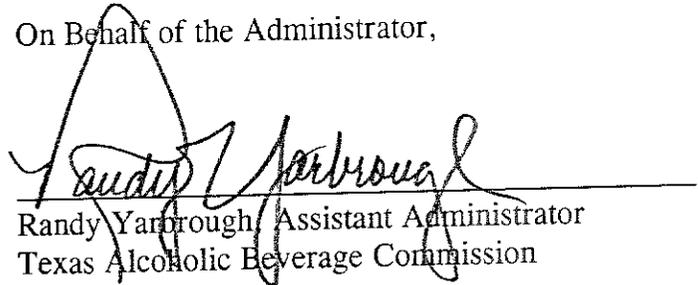
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$4,500.00** on or before the **16th** day of **April, 2001**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **thirty (30) days**, beginning at **12:01 A.M.** on the **23rd** day of **April, 2001**.

This Order will become final and enforceable on February 12, 2000, 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 22nd day of January, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DB/yt

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The Hon. Tanya Cooper, Administrative Law Judge
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Dallas District Office
Licensing Division

DOCKET NO. 458-00-1572

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

V.

OF

BOIS D'ARC POST NO. 9167
VETERANS OF FOREIGN WARS OF
THE UNITED STATES
PERMIT NOS. NE-465984 & PE-465985
COLLIN COUNTY, TEXAS §
(TABC CASE NO. 588282)

ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's staff (Staff) brought this disciplinary action against Bois D'Arc Post No. 9167 Veterans of Foreign Wars of the United States (VFW Post or Respondent) alleging three violations of the Texas Alcoholic Beverage Code (the Code). Staff alleges that a permit application filed by the VFW Post contained a false, misleading, or incorrect statement. Staff further contends that the VFW Post had been operated in a manner contrary to the general welfare, health, peace, morals, and safety of the public, first because a gambling device was on the licensed premises; and secondly, because the premises had been kept as a gambling place. Staff requested Respondent's permits be canceled or suspended for a period of 60 days for each violation. This proposal finds that a false, misleading, or incorrect statement was made on Respondent's permit application and that a gambling device was possessed on the premises as alleged. However, the Administrative Law Judge (ALJ) does not find that the VFW Post was kept as a gambling place and recommends Respondent's permits be suspended for a period of thirty days, or in lieu of suspension, that Respondent pay a civil penalty in the amount of \$4500.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under Chapter 5 and §§6.01 and 32.01 of the Code. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. § 2003.02. No contested issues of notice or jurisdiction exist.

Prior to hearing, the parties entered into a written stipulation agreement regarding Staff's allegations. Respondent did not contest the factual allegations regarding the alleged events or any legal conclusions regarding allegations associated with statements contained in its permit application or possession of a gambling device on the premises. Those issues will be addressed in the ALJ's analysis, findings of fact, and conclusions of law without further discussion. The only contested

issue remaining between the parties is whether from the facts of the case, it can be concluded that the licensed premises was kept as a gambling place.

On September 29, 2000, a hearing convened before ALJ Tanya Cooper at the State Office of Administrative Hearings in Dallas, Dallas County, Texas. Staff was represented at the hearing by its attorney, Dewey A. Brackin. Respondent was represented by counsel, Edgar A. Mason. The record was closed on October 12, 2000, after the parties were allowed to submit additional written materials in support of their positions.

APPLICABLE LAW

TABC is authorized under TEX. ALCO. BEV. CODE ANN. § 32.17(a)(8) to cancel or suspend for not more than 60 days a permit if it is found that the permittee has violated or assisted, aided or abetted in the violation of any provision of the Code. Staff alleged three violations of TEX. ALCO. BEV. CODE § 11.61(b)¹ occurred; however, only one violation is contested by Respondent.

Staff alleges that Respondent conducted its business in a manner contrary to the general welfare and public sense of decency because the VFW Post was being maintained as a gambling place. In relation to this allegation, the Staff suggested that the Texas Penal Code provides definitions of relevant terms.²

¹TEX. ALCO. BEV. CODE § 11.61(b) provides, in part:

The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

...

(4) the permittee made a false or misleading statement in connection with his original or renewal permit;

...

(7) the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency; . . . (Vernon 2000).

²TEX. PENAL CODE § 47.01 provides in part, that:

“Gambling place” means any real estate, building, room, . . . or other property whatsoever, one of the uses of which is . . . playing of gambling devices; and

“Gambling device” means any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term:

These terms, however, should be used within the context that they were intended. They are definitions developed for describing various forms of criminal conduct, including but not limited to the following offenses: gambling³, possession of a gambling device, equipment, or paraphernalia, gambling promotion, and keeping a gambling place⁴. Any violations that are associated with the place and manner of conducting one's business on a licensed premises contrary to the public sense of decency under the Code should be evaluated, not merely using definitions from criminal statutes, but further in the context of whether criminal activity is occurring on the premises.

EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds a Private Club Exemption Certificate Permit NE-465984 and a Beverage Cartage Permit PE-465985 issued for the premises, Bois D'Arc Post No. 9167 Veterans of Foreign Wars of the United States, located at 604 N. 4th Street, Princeton, Collin County, Texas. On December 22, 1999, TABC Staff received an application for private club exempt registration and beverage cartage permits from Respondent. A protest was filed against issuance of these permits by Captain Tim E. Risinger, City of Princeton Police Department, through letters dated January 5, 2000, and January 20, 2000. Captain Risinger's protest was based on events documented in affidavits.

On October 24, 1999, during an undercover investigation, Officer Carolyn Copeland observed a man, identified to her as R. Cox, playing electronic poker on a game machine located

(A) includes, but is not limited to gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits; and

(B) does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise, prizes, toys or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less.

³Section 47.02 of the Texas Penal Code makes it a Class C misdemeanor to play and bet for money or other thing of value at any game played with cards, dice, balls, or any other gambling device. Further under paragraph (e) of this section, a defense to prosecution is created if a person played for something of value other than money using an electronic, electromechanical, or mechanical contrivance excluded from the definition of "gambling device" under Section 47.01(4)(B). (Emphasis added).

⁴It is a Class A misdemeanor to knowingly use or permit another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned or under one's control with a view or expectation that the property will be used of this purpose. TEX. PENAL CODE ANN. § 47.04(a).

on the VFW Post's premises. After playing this game for approximately 40 minutes, Mr. Cox approached a bartender with tickets received from the machine. The bartender asked if Mr. Cox wanted to exchange the tickets for beer. He replied, "No." The bartender then opened the cash register, removed a bill from inside, and handed it to Mr. Cox. Officer Copeland was unsure of the bill's denomination.

On November 8, 1999, Officer Copeland was again inside the VFW Post. On this occasion, she did not see anyone playing game machines, but did see Mr. Cox place several tickets in a tray. The tray was taken by a bartender to the cash register. A note was written by the bartender and placed in the register. The bartender then took money from the register, handing it to Mr. Cox. Officer Copeland observed a ten-dollar bill changing hands, but she could not see the denomination of other bills given to Mr. Cox by the bartender.

TABC Staff asserts that because a gambling device, commonly referred to as an "Eight-Liner," was on the premises and the device's tickets were observed being exchanged for cash Respondent had kept a gambling place on the licensed premises. Initially Staff contended that this violation, in conjunction with the other uncontested violations, warranted cancellation of Respondent's permits. However, in closing argument, Staff's attorney suggested that a sixty-day suspension for each violation, or payment of a civil penalty ranging from \$150 to \$25,000 per each day in lieu of suspension, was appropriate.

Respondent argues that the one proven instance of exchanging tickets from the gambling device for money does not establish a consistent habit, pattern, or practice of Respondent's conduct that would be required to show that the VFW Post was maintained as a gambling place. In addition, Respondent points out Staff's request for cancellation of its permits is a punishment that does not fit the violations, for several reasons. Respondent's licensing history reflects that no other enforcement actions have been taken by Staff against Respondent in the past. Although an incorrect statement was made on Respondent's application, a sufficient explanation was offered to Staff regarding the response, the accurate information was provided, and Staff issued the permits at that point upon reviewing the corrected information. Questions regarding the legality of Eight-Liner devices still remain unresolved in Texas law which might be applicable to the device observed being played in this instance. Further, the criminal charges that were brought against Respondent in this situation have not been resolved.

Respondent acknowledged that redeeming tickets from this device for cash was inappropriate. Nevertheless, a cancellation or lengthy suspension of the VFW Post's permits would be contrary to the general public's welfare. The VFW Post is a not-for-profit business. Monies from the operation of the VFW Post are directed to charitable purposes. The VFW Post's continued operation is important to numerous veterans and others in the community, as demonstrated by the various contractual obligations that it has regarding upcoming events, such as dances, parties, and weddings.

ALJ'S ANALYSIS AND RECOMMENDATION

The parties' stipulations show that Respondent made a false, misleading, or incorrect statement on its application for permits. Prior arrests of Odis Glenn Ray, a VFW Post's officer, were not fully disclosed in response to Question 7 on his personal history sheet. Mr. Ray, while copying from another form that had the response "No" to the question regarding arrests, filled his form out incorrectly. He later acknowledged in an affidavit to TABC Staff that he had been arrested for driving while intoxicated twice, but had received deferred adjudication and probation for these arrests.

It was stipulated by the parties that the electronic poker game at the VFW Post was a gambling device. It was proven that gambling⁵ occurred on the licensed premises on October 24, 1999, because tickets from that device were exchanged for money. As to the events occurring on November 8, 1999, tickets from an unknown source were exchanged for cash, but in the opinion of the ALJ, the evidence was insufficient to show another instance of gambling on the premises. The only question to be determined is whether the proven instance of gambling on October 24, 1999, is sufficient to show that the premises was maintained as a gambling place.

The Texas Court of Criminal Appeals examined distinctions in the criminal offenses of gambling, promotion of gambling, and keeping a gambling place in State v. Taylor, 805 S.W.2d 440 (Tex. Crim. App. 1991, *en banc*). In that opinion, the Court stated that proof of one isolated instance of gambling does not prove the more serious promotion of gambling crime, "keeping a gambling place," in violation of TEX. PENAL CODE § 47.04(a). State v. Taylor, at 442. Considering the proof in the record, Staff did not show the Respondent was keeping a gambling place.

Staff initially requested a cancellation of Respondent permits for these violations, and later requested suspension of Respondent's permits for sixty days for each violation, or payment of a civil penalty in lieu of any permit suspension.⁶ TABC's rules establish recommended sanctions ranging from permit suspension for a designated time period or civil fine in lieu of suspension, to permit cancellation based upon the type of violation committed by the permittee and the permittee's prior violation history. See 16 TEX. ADMIN. CODE § 37.60.

Although this standard penalty chart is not binding in contested cases that do not settle, it provides some guidance for the ALJ's recommendation in this case. It was uncontested that Respondent's possession of the gambling device was contrary to the public's general welfare and sense of decency. According to the penalty chart, the first violation of this type may result in a

⁵ See Footnote 3.

⁶The amount of civil penalty may not be less than \$150 or more than \$25,000 for each day of permit or license was to have been suspended. TEX. ALCO. BEV. CODE ANN. § 11.64(a).

penalty ranging from a 15-day permit suspension to permit cancellation, depending on the details of the offenses committed on the premises. It was also uncontested that a false, misleading, or incorrect statement was contained in Respondent's permit application. Any violation of making a false, misleading, or incorrect statement on an application may result in permit cancellation according to the penalty chart.

The ALJ recommends that Respondent's permits be suspended for a period of thirty days, or in lieu of suspension, that Respondent be allowed to pay a civil penalty of \$4,500. In reaching this recommendation the ALJ considered the following as relevant factors:

1. The violations, making false, misleading, or incorrect statement on an application and possession of a gambling device on the license premises, are serious violations, and should accordingly warrant significant sanctions being imposed against Respondent;
2. Staff issued Respondent's permits knowing an incorrect statement was made in the application and was apparently satisfied with Respondent's explanations regarding its occurrence at that time.
3. Respondent's previous violation history includes no other enforcement actions by Staff; and
4. Respondent's premises is a non-profit entity serving charitable and other important purposes to veterans and other members of the public.

FINDINGS OF FACT

1. Bois D'Arc Post No. 9167 Veterans of Foreign Wars of the United States (VFW Post or Respondent) holds Private Club Exemption Certificate Permit NE-465984 and Beverage Cartage Permit PE-465985 issued by the Texas Alcoholic Beverage Commission (TABC) for a premises located at 604 N. 4th Street, Princeton, Collin County, Texas.
2. On July 17, 2000, TABC Staff gave Respondent notice of the hearing by certified mail, return receipt requested. A hearing was scheduled by the State Office of Administrative Hearings and convened on September 29, 2000. Both parties appeared at the hearing. TABC Staff was represented by its attorney, Dewey A. Brackin. Respondent was represented by its attorney, Edgar A. Mason. The record closed on October 12, 2000.
3. On January 21, 2000, Respondent failed to fully disclose past arrests of one of its officers, Odis Glenn Ray, in the response to Question 7 on his personal history sheet included in its application for permits.
4. On October 24, 1999, an electronic poker game machine was on Respondent's premises.

5. A patron of the bar played the game machine for approximately 40 minutes.
6. The bar patron exchanged tickets from the machine for money, which was given to him by a bartender from the cash register on the licensed premises.
7. Respondent has not committed previous violations of the Texas Alcoholic Beverage Code.
8. Respondent is a non-profit organization.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Chapter 5 and §§ 6.01 and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Chapter 2003.
3. Respondent received adequate notice of the proceedings and hearing as required by TEX. GOV'T CODE ANN. Chapter 2001.
4. Based on Finding of Fact No. 3, Respondent made a false, misleading, or incorrect statement on its application for permits contrary to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(4).
5. Based on Findings of Fact Nos. 4 - 6, Respondent operated its business in a manner contrary to the public's general welfare and public sense of decency, in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7).
6. Based on Findings of Fact Nos. 4 - 6, Staff failed to prove Respondent was keeping a gambling place. State v. Taylor, 805 S.W.2d 440, 442 (Tex. Crim. App. 1991, *en banc*).
7. Based on Findings of Fact Nos. 3 - 8, Conclusions of Law Nos. 4 - 6, Respondent's Private Club Exemption Certificate Permit NE-465984 and Beverage Cartage Permit PE-465985 should be suspended for a period of thirty days, or in lieu of suspension, Respondent should be allowed to pay a civil penalty of \$4,500.

SIGNED this 11th day of December, 2000.


TANYA COOPER, Administrative Law Judge
State Office of Administrative Hearings