

DOCKET NO. 458-03-3840

| | | |
|--------------------------|---|-------------------------|
| TEXAS ALCOHOLIC BEVERAGE | § | BEFORE THE STATE OFFICE |
| COMMISSION | § | |
| Petitioner | § | |
| | § | |
| vs | § | OF |
| | § | |
| AMERICAN LEGION | § | |
| OTHO MORGAN POST NO. 17 | § | |
| GREENVILLE, TEXAS | § | |
| T.A.B.C. CASE NO. 592349 | § | |
| Respondent | § | ADMINISTRATIVE HEARINGS |

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission staff (Staff) brought this disciplinary action against American Legion Otho Morgan Post No. 17, Greenville, Texas, (Post) alleging that on or about November 11, 2000, Respondent, or its agents, employees, or servants, engaged in conduct inimical to the general welfare, health, peace, morals, and safety of the people and the public sense of decency by using Respondent's premises as a gambling place and, with the intent to further gambling, knowingly possessing gambling devices or equipment on Respondent's premises. Staff requested that Respondent's permits be suspended for fifteen days or, in lieu of suspension, that Respondent be ordered to pay a civil penalty of \$2,250.00. The Administrative Law Judge (ALJ) finds Respondent should not be disciplined and therefore recommends that Staff's request be denied.

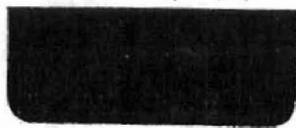
I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On September 5, 2003, a hearing was held before Jerry Van Hamme, ALJ, State Office of Administrative Hearings, at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by its attorney, Timothy Griffith. Respondent was represented by counsel, Frank Hughes. The record was closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) 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 the place or manner in which the permittee conducts its business warrants the cancellation or suspension of the permit based Page 2 on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

According to 16 TEX. ADMIN. CODE § 35.31(a),(b),(c)(14), the above-cited statute is violated if any gambling offense described in Chapter 47 of the Texas Penal Code is committed by the permittee in the course of conducting its alcoholic beverage business or by any person on the permittee's premises, and the permittee knew, or in the exercise of reasonable care should have known, of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent it.

According to TEX. PEN CODE ANN. §§ 47.06 a person violates Chapter 47, Texas Penal Code, for any one of the following reasons:

(a) A person commits an offense if, with the intent to further gambling, he knowingly owns, manufactures, transfers, or possesses any gambling device that he knows is designed for gambling purposes or any equipment that he knows is designed as a subassembly or essential part of a gambling device.

(b) A person commits an offense if, with the intent to further gambling, he knowingly owns, manufactures, transfers commercially, or possesses any altered gambling equipment that he knows is designed for gambling purposes or any equipment that he knows is designed as a subassembly or essential part of such device.

(c) A person commits an offense if, with the intent to further gambling, the person knowingly owns, manufactures, transfers commercially, or possesses gambling paraphernalia.

According to TEX. PENAL CODE § 47.04(a) a person also violates Chapter 47, Texas Penal Code, if he knowingly uses or permits another to use as a "gambling place" any real estate, building, room, or other property whatsoever owned by him or under his control. A "gambling place," is defined in TEX. PENAL CODE § 47.01(3), as any real estate, building, room, or other property whatsoever, one of the uses of which is the making or settling of bets. A "bet" is defined in TEX. PENAL CODE § 47.01(1) as an agreement to win or lose something of value solely or partially by chance.

There is an affirmative defense to the above-cited TEX. PENAL CODE § 47.04(a), however. Pursuant to TEX. PENAL CODE § 47.04(b), an affirmative defense to prosecution under § 47.04(a) is:

(1) If the gambling occurred in a private place. A "private place," under TEX. PENAL CODE § 47.01(8), is a place to which the public does not have access, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops; and

- (2) No person received any economic benefit other than personal winnings; and
- (3) Except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

III. EVIDENCE AND CONTENTIONS

A Staff's Evidence and Contentions

On Veteran's Day, November 11, 2000, Kenneth Peters, an Agent with the Texas Alcoholic Beverage Commission (Commission), conducted an inspection of Respondent's establishment and observed persons gambling in one particular room of the establishment. Approximately twenty people were playing cards and betting money at five different tables, and approximately seven people were at a table betting on the roll of dice. The leaders of the Post, including the Post Commander, were aware gambling was occurring on the premises.

Staff contends the gambling and the gambling equipment on Respondent's premises constituted a violation of Chapter 47 of the Penal Code, and therefore, pursuant to 16 TEX. ADMIN. CODE § 35.31(a),(b),(c)(14), constituted a *per se* violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7), thereby making Respondent subject to discipline. Staff further contends Respondent's actions do not come under the affirmative defense stated above because that defense requires a showing that the gambling occurred in a private place, and Respondent's establishment, according to Staff, is not a private place. Agent Peters testified that a private place is one that is not regulated by the State. A private residence, for example, is a private place. It is a location where one may possess and consume alcoholic beverages without either a permit or license from the Commission, and where investigators from the Commission have neither the mandate nor authority to conduct investigations on behalf of the Commission. Because Respondent in the instant case has permits issued by the Commission and is subject to investigation by Commission agents, it is, to that extent, regulated by the State, and is not, Staff argues, a private place.

B Respondent's Evidence and Contentions

Respondent does not dispute that gambling occurred on its premises. Respondent contends, however, that it meets the above stated affirmative defense in that (1) the gambling occurred in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

Robert Earl Jordan testified he was present at the Post on the date in question and was at the dice table when Agent Peters arrived. Mr. Jordan agreed with Agent Peters that gambling was

occurring on the premises, but stated the gambling only occurred in this particular back room of the Post, that this room was open only to members of the Post and their guests (as was true of the Post in general), and that a person was stationed at the doorway of this room to ensure that only members and their guests were allowed to enter the room. Membership in the Post is limited to those who served in the active duty military during a time of national crisis, were granted an honorable discharge, and were voted into membership by the other members. He also stated the Post derived no profit from any of the gambling that occurred, that it, in fact, lost money funding this event, that one could win at gambling by either skill or luck, and that the gambling only occurred on the premises one day each year, on Veteran's Day.

Rex Bunch, Commander of the Post, likewise testified he was aware gambling was occurring on the premises. He testified the Post only allowed gambling on the premises as part of its membership drive one day each year, on Veteran's Day, and that only those persons with paid memberships, and their guests, were allowed to enter the premises.

IV. ANALYSIS

A **TEX. PENAL CODE § 47.06: GAMBLING DEVICES, ALTERED GAMBLING EQUIPMENT, AND GAMBLING PARAPHERNALIA**

The evidence in the instant case shows that the gambling that occurred on Respondent's premises involved cards, dice, and the requisite gaming tables. No other forms of gambling-related items were either alleged or proven to have been on Respondent's premises.

Staff alleged in its Notice of Hearing that the gambling on Respondent's premises violated TEX. PENAL CODE §§ 47.06(a). This statute states, in pertinent part, that a person commits an offense if, with the intent to further gambling, he knowingly owns or possesses any gambling device that he knows is designed for gambling purposes or any equipment that he knows is designed as a subassembly or essential part of a gambling device.

A "gambling device" is defined in TEX. PENAL CODE §§ 47.01(4) as an "electronic, electromechanical, or mechanical contrivance." In the instant case, the only gambling-related items on Respondent's premises were cards, dice, and tables. No "electronic, electromechanical, or mechanical contrivances" were shown on the record to have been present on Respondent's premises. Accordingly, the evidence does not show Respondent violated this statute.

Staff also alleged in its Notice of Hearing that the gambling on Respondent's premises violated TEX. PENAL CODE § 47.06(b), which makes it an offense when, with the intent to further

gambling, a person knowingly owns or possesses any altered gambling equipment that he knows is designed for gambling purposes or any equipment that he knows is designed as a subassembly or essential part of such device. "Altered gambling equipment" is defined in TEX. PENAL CODE §§ 47.01(5) as any contrivance that has been altered in some manner, including, but not limited to, shaved dice, loaded dice, magnetic dice, mirror rings, electronic sensors, shaved cards, marked cards, and any other equipment altered or designed to enhance the actor's chances of winning.

The evidence in the instant case fails to show that any altered gambling equipment was present on Respondent's premises. Gambling equipment, in the form of cards and dice, were certainly present, but, so far as the record shows, none of that equipment was altered. Accordingly, the evidence does not show Respondent violated this statute.

Staff further alleged in its Notice of Hearing that the gambling on Respondent's premises violated TEX. PENAL CODE § 47.06(c), which states that a person commits an offense if, with the intent to further gambling, the person knowingly owns or possesses gambling paraphernalia.

"Gambling paraphernalia" is defined in TEX. PENAL CODE §§ 47.01(6) as any book, instrument, or apparatus by means of which bets have been or may be recorded or registered; any record, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, lotteries, numbers, policy, or similar games. The evidence in the record fails to show the presence of any of the above-enumerated items on Respondent's premises. Staff therefore failed to show Respondent violated this statute.

As such, the evidence on the record fails to support Staff's allegation that Respondent violated TEX. PENAL CODE § 47.06.

B TEX. PENAL CODE § 47.04: GAMBLING PLACE

Staff also alleged in its Notice of Hearing that the gambling on Respondent's premises violated TEX. PENAL CODE § 47.04, in that Respondent's premises were used as a gambling place where bets were made.

The parties agree that gambling occurred on Respondent's premises, and that Respondent, or its agents, employees, or servants, were aware of, and in fact actually responsible for, the gambling that occurred. Further, the parties are in agreement that the room in Respondent's premises where the gambling occurred was a room which Respondent knowingly put to use for the making and settling of bets. Respondent, however, argues that it is not subject to discipline because it meets the affirmative defense set forth above under TEX. PENAL CODE § 47.04(b), in that the

gambling occurred in a private place, no person received any economic benefit other than personal winnings, and except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

1 No Economic Benefit Other Than Personal Winnings and Chances of Winning Same for all Participants

The un rebutted testimony of Robert Jordan and Rex Bunch shows that no person received any economic benefit other than personal winnings, that, in particular, the Post did not take a percentage of the bets, and, except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants. Staff presented no evidence to the contrary. Accordingly, Respondent showed that it met those two elements of the affirmative defense.

2 Private Place

Eligibility for membership is limited solely to those persons who have served in the military during a time of national crisis and have been honorably discharged, and of those eligible for membership only those who have likewise been voted into membership by the current members may actually become members. This is not a "private club" that merely requires payment of a membership fee, or some similar payment, to become a member. The limitations on the membership here are significant, and are, by the very nature of the organization, exclusive. This evidence supports Respondent's contention that it is a private place.

a TEX. PENAL CODE § 47.01(8): PRIVATE PLACE

Respondent's assertion that it is a private place is bolstered by the definition of "private place" in TEX. PENAL CODE § 47.01(8). A private place is one to which the public does not have access. Examples of places specifically listed in this section that do not meet this definition and are therefore not private places are, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops.

Fraternal organizations in general, and veterans-related organizations like Respondent's in particular, are nowhere mentioned in this list of "non-private" places. The legislature could have added veteran's organizations to this list had it wanted to. It chose not to do so.

Likewise, no organizations that have the same kind of membership requirements as Respondent's are listed. In particular, none of the above-listed places are characterized as having limited memberships requiring the voting approval of the existing membership to join. Although the statutory list is only intended as illustrative, and not exhaustive, it is still instructive that American Legion Posts, and other similarly situated veterans-related organizations, are not listed.

In addition, private places are not so defined based on whether they are licensed or regulated

by the State. Contrary to Staff's position, nowhere in the definition of "private place" is State regulation a criteria for determining whether a place is public or not.

b Koenig v. State

Respondent's assertion is further bolstered by Texas case law. A search of Texas appellate decisions found no reported cases addressing the propriety of gambling on American Legion Posts or similar veterans organizations. However, one case was found dealing with all three elements of playing cards, alcoholic beverages, and public places.

Although not a recent case, it was alleged in Koenig v. State, 33 Tex. Crim. 367, 26 S.W. 835 (1894), that the Defendant violated the law by playing cards in a public place where spiritous liquors were retailed. The location of the card playing was the club room of the Cuero German Turnverein, Cuero, Texas. The Court of Criminal Appeals held that the Cuero German Turnverein was not a public place because it was a private corporation chartered for the purpose of "mental, moral, and physical improvement of the stockholders, their families and others;" that the members of this organization were elected by ballot and had a right, with their families, to visit and take part in festivities of the association and to introduce strangers as guests; that the names of the guests were entered in a guest book along with that of the member introducing the guest; and that only members and their guests could rightly enter the premises. In concluding that the club was not a public place, the court stated, "The statute contemplates public houses and public places. Was the club room of the association either? None but members and their guests could enter there or share its privileges. So long as this rule was enforced it was not public, and the evidence shows that the rule was strictly observed." Koenig v. State, at 28.

In the instant case, Respondent shares many of the same characteristics as this club. Respondent's members are likewise elected and have a right, with their families, to visit and take part in festivities of the association and to introduce strangers as guests, and likewise only members and their guests can rightly enter the premises. Accordingly, using this criteria, so long as this rule is enforced, (and the evidence shows that the rule was observed), Respondent appears not to be a public place. To that extent, despite its age, this case supports Respondent's contention that Respondent is not a public place.

C **Conclusion**

In the instant case, Respondent has produced sufficient evidence to meet its burden of affirmatively showing it is a private place. The public *qua* public does not have access to Respondent's premises, nor is it capable of obtaining such access. Membership is doubly limited, requiring both veteran status, with an accompanying honorable discharge, and the voting approval of the membership. Although non-members do have access to the premises as guests of Respondent's members, the public as a whole does not.

Accordingly, although Staff has shown that gambling occurred on Respondent's premises on

November 11, 2000, and that Respondent or its agents, employees, or servants, were responsible for the gambling that occurred there, Respondent has shown, by a preponderance of the evidence, that it meets the affirmative defense under TEX. PENAL CODE § 47.04(b).

This proposed decision, however, should not be construed as holding that Respondent has now and forever been declared a private place for all gambling-related purposes. On the contrary, this holding is based solely, and narrowly, on the facts presented at the hearing, to wit: that the gambling occurred on a one-day-per-year basis, at a monetary loss to the Post, and was open only to members and guests. Altering those facts can change everything.

A private place that starts acting like a public place may become a public place.¹ If, for example, Respondent starts allowing gambling on its premises more frequently than once a year and its "guests" start multiplying during the time gambling is available; or if it is shown that Respondent takes a percentage of the bets to offset costs or to make a profit or in any other way receives an economic benefit from the gambling; or if Respondent's "guest" status is effectively a sham and anyone, or virtually anyone, can enter Respondent's premises as a "guest," such actions might well show that Respondent does not meet the affirmative defense.

However, given the evidence as presented on the record, Respondent meets the definition of a private place in the manner in which it presently conducts its gambling activities, and as such meets the affirmative defense under TEX. PENAL CODE § 47.04(b).

V. RECOMMENDATION

The ALJ recommends Staff's request not be granted, and Respondent not be disciplined.

FINDINGS OF FACT

1. All parties received notice of the hearing, all parties appeared at the hearing, and no objection was made to jurisdiction, venue, or notice.
2. Respondent, American Legion Otho Morgan Post No. 17 Greenville Texas, 4509 Moulton, Greenville, Hunt County, Texas, holds a Private Club Exemption Certificate Permit, NE-066621, and Beverage Cartage Permit, PE-066622, issued by the Texas Alcoholic Beverage Commission (Commission) on October 12, 1971.
3. Respondent's membership is limited to military veterans who have served in the active duty military during a time of national crisis, been honorably discharged, and been voted into

¹"Of course if a private residence or hotel room is converted to a gambling casino, it becomes subject to injunction... and the promoters are criminally responsible under the gambling promotion offenses of this chapter. The defense is not extended to clubs and other locations that are only nominally private and to which, in fact, the public has access." Searcy & Patterson, Practice Commentary, TEX. PENAL CODE ANN. § 47.02 (VERNON 1989).

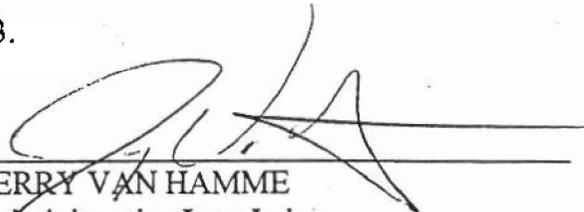
membership by the other members.

4. Non-members may only enter onto Respondent's premises as guests of members.
5. On Veteran's Day, November 11, 2000, Kenneth Peters, an Agent with the Commission, conducted an inspection of Respondent's establishment.
6. Agent Peters observed persons gambling on Respondent's premises. Approximately 20 persons were at five different tables playing cards and betting money, and approximately seven people were at another table betting on the roll of dice. The gambling was limited to one room in Respondent's premises, which was open only to members of the Post and their guests. The only gambling equipment on the premises were dice, playing cards, and the requisite gaming tables.
7. The leadership of the Post, including the Commander of the Post, were aware gambling was occurring and that gambling equipment was present on Respondent's premises.
8. Annually, on Veteran's Day, the leadership of the Post, including the Commander of the Post, permit gambling on Respondent's premises and provide gambling equipment for the use and enjoyment of Respondent's members and guests.
9. Respondent did not receive any economic benefit from the gambling. It neither received a percentage of the bets or winnings, nor did it participate in the gambling as "the house." Respondent incurred a monetary loss by providing the gambling equipment.
10. No participants in the gambling received any economic benefit other than their personal winnings.
11. The risk of winning or losing for each participant was the same, other than the result of skill or luck of the individual participant.
12. Petitioner instituted disciplinary action against Respondent alleging Respondent or its agents, employees, or servants, violated the general welfare, health, peace, morals, and safety of the people and the public sense of decency by using Respondent's premises as a gambling place and, with the intent to further gambling, knowingly possessed gambling equipment on the premises.
13. A hearing was held on September 5, 2003, before Jerry Van Hamme, ALJ, State Office of Administrative Hearings, at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by its attorney, Timothy Griffith. Respondent was represented by counsel, Frank Hughes. The record was closed on that date.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Subchapter B of ch. 5, §§ 6.01 and 11.61. 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. §2003.021.
2. Respondent received adequate notice of the proceedings and hearing.
3. Respondent, or its agents, employees, or servants, allowed gambling to occur on Respondent's premises on November 11, 2000.
4. On that date, Respondent's premises was a private place. TEX. PENAL CODE §§ 47.04(b), 47.01(8).
5. On that date, no person received any economic benefit from the gambling on the premises other than personal winnings from the gambling, and, except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants. TEX. PENAL CODE § 47.04(b).
6. On that date, Respondent did not have gambling devices, altered gambling equipment, or gambling paraphernalia on its premises. TEX. PENAL CODE § 47.06.
7. Respondent did not violate the Texas Penal Code by allowing gambling on its premises on that date. TEX. PENAL CODE § 47.04(b).
8. Respondent did not violate 16 TEX. ADMIN. CODE § 35.31(a),(b),(c)(14) by allowing gambling on its premises on that date.
9. Based on the foregoing Findings and Conclusions, Respondent is not subject to discipline by the Commission. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7).

SIGNED this 3 day of November, 2003.



JERRY VAN HAMME
Administrative Law Judge
State Office of Administrative Hearings

DOCKET NO. 592349

| | | |
|--------------------------------|---|---------------------|
| IN RE AMERICAN LEGION OTHO | § | BEFORE THE |
| MORGAN POST NO. 17 | § | |
| GREENVILLE, TEXAS | § | |
| PERMIT NOS. NE066621, PE066622 | § | TEXAS ALCOHOLIC |
| | § | |
| HUNT COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-03-3840) | § | BEVERAGE COMMISSION |

O R D E R

CAME ON FOR CONSIDERATION this 29th day of January 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on September 5, 2003 and adjourned on September 5, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 3, 2003. This Proposal For Decision (attached hereto as Exhibit "A"), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Petitioner filed a Motion to Vacate and or Modify the Proposal for Decision on November 18, 2003 and Respondent filed a Response to Petitioner's Motion to Vacate or Modify on December 1, 2003.

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.

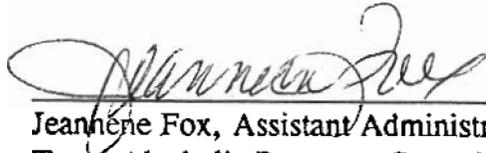
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations regarding Permit Nos. NE066621 and PE066622 are hereby **DISMISSED** with prejudice.

This Order will become final and enforceable on February 19, 2004, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 29th day of January, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
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