

SOAH DOCKET NO. 458-07-2731

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	
	§	
HUMMER'S, INC.	§	OF
D/B/A HUMMER'S,	§	
POTTER COUNTY, TEXAS	§	
(TABC CASE NO. 519080),	§	ADMINISTRATIVE HEARINGS
Respondent	§	

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Commission) brought this enforcement action against Hummer's d/b/a Hummer's (Respondent), alleging that Respondent violated Texas Alcoholic Beverage Code (the Code) § 11.61(b)(7), and/or Commission rule 16 Texas Administrative Code (TAC) § 35.31(c)(14). Based on the evidence, the Administrative Law Judge (ALJ) finds the Petitioner proved the allegations by a preponderance of the evidence and recommends that the Respondent's permit be suspended or a civil penalty paid.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The Commission and the State Office of Administrative Hearings (SOAH) have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute protest action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. HEARING AND EVIDENCE

On June 25, 2007, a hearing was convened before Judge B. L. Phillips, at SOAH, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner was represented by Danielle Boazeman-Schick, attorney. Respondent was represented by its president, Ted Sanders, who appeared in person. The record closed that same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 11.46 (b)(7) , the Commission may suspend a permit if it finds that the place or manner in which the permittee conducts his business warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. A permittee violates the provisions of § 11.46 (b)(7) if any gambling offense described in Chapter 47 of the Texas Penal Code is committed:

- (1) by the licensee or permittee in the course of conducting his/her alcoholic beverage business; or
- (2) by any person on the licensee or permittee's licensed business, and
- (3) the licensee or 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 the offense.¹

“Permittee” is defined as the person who is the holder of the permit or an agent, servant, or employee of that person.² A person commits an offense of gambling if he makes a bet on the results of a game.³ “Bet” is as an agreement to win or lose something of value solely or partially by chance.⁴

IV. DISCUSSION AND ANALYSIS

A. Background

The following facts are undisputed. Respondent's licensed premises are located at 2600 Paramount 'B2', Amarillo, Potter County, Texas. Respondent holds a Mixed Beverage Permit MB-154933, which includes the Beverage Cartage Permit and Mixed Beverage Late Hours Permit issued

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1. 16 TEX. ADMIN. CODE (TAC) 35.31(a), (b) and (c)(14).
 2. Code § 1.04(11).
 3. TEX. PEN. CODE ANN. § 47.02(a)(1).
 4. TEX. PEN. CODE ANN. § 47.01(1).

by TABC on September 23, 1983. Ted Sanders serves as Respondent's president. On January 16, 2006, a football square was located on the licensed premises that was being used to wager on the outcome of a football game. Respondent has conducted such a practice on the licensed premises for twenty-two years without complaint by the Commission.

B. Petitioner's Evidence and Contentions

Petitioner contends that Respondent has operated its premises in violation of the Texas Penal Code, the Alcoholic Beverage Code, and the Commission's rules by knowingly using or permitting another to use the premises as a gambling place. It is Petitioner's position that the use of a football square at the Respondent's licensed premises violated the prohibition against gambling.

Petitioner presented the following evidence: the testimony of Agents Weise and Langley, the football square seized on the licensed premises on the night in question and Respondent's permit history. Agent Weise testified that he conducted an inspection of the licensed premises with Agent Langley on January 16, 2006. During the inspection, he observed a football square⁵ hanging on a clipboard in the licensed premises. He explained to the manager that it was a violation of the law to wager on football games and wrote an Administrative citation for the offense. Agent Langley testified that he arrived at Hummer's on the night of January 16, 2006, and observed the football square. He notified Agent Weise, who then talked to the manager regarding the find. No other evidence relating to the football square was located on the premises.

C. Respondent's Evidence and Contentions

Respondent's president, Ted Sanders, did not testify but admitted during argument of the case that a football square involving betting on football games had been conducted on the licensed premises for twenty-two years. He argued that he was unaware that this practice was prohibited and that TABC had not cited him for the violation during the lengthy time that it had been occurring.

5 See Petitioner's exhibit number 3.

D. Analysis

Under the Code, the Commission may suspend a permit if it finds that the place or manner in which the permittee conducts his business warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, which includes any gambling offense described in Chapter 47 of the Texas Penal Code.

The evidence is uncontested that a football square was located on the licensed premises or that it was being used to wager on the outcome of a football game. However, Respondent argued that he was unaware that this practice was a violation of the Code because he had conducted the football pool for twenty-two years without complaint by the Commission. Respondent had an obligation to know and abide by the provisions of the Code and is accountable for failing to meet this obligation. Based on the evidence, it is clear that Respondent knowingly engaged in the prohibited conduct of gambling on the licensed premises.

The evidence was sufficient to prove that Respondent violated the Code and his permits should be suspended or a civil penalty be paid.

V. RECOMMENDATION

A gambling violation is a health, safety and welfare violation of the Code, which provides for a suspension of up to sixty days or cancellation of the permits.⁶ The standard penalty chart recommends a fifteen day suspension up to cancellation for the first violation.⁷

Respondent's violation history was admitted into evidence. Respondent has not had a administrative violation in over seven years.

6 Code § 11.61.(b)(7).

7 16 TAC § 37.60.

Petitioner requested that Respondent's permits be suspended for twenty days or a civil penalty be paid. The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit was to have been suspended.⁸ The ALJ recommends that there be a fifteen day suspension of Respondent's permit or that Respondent be permitted to pay a civil penalty in the amount of \$2,250.00 in lieu of suspension, based on a first violation and a violation history showing no violations for the last seven years.

VI. FINDINGS OF FACT

1. Hummer's Inc. dba Hummer's, Potter County, Texas, holds Permit No. MB-154933, issued by the TABC for the premises located at 2600 Paramount 'B2', Amarillo, Potter County, Texas.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated May 16, 2007.
3. The hearing on the merits convened June 25, 2007, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by Danielle Boazeman-Schick, attorney. Respondent was represented by its president, Ted Sanders, who appeared in person. The record closed that same day.
4. Respondent is the president of the Hummer's, which operates under a Mixed Beverage permit, which includes a Mixed Beverage Late Hours, and Beverage Cartage permit.
5. On January 12, 2006, Respondent possessed a football square, used in gamble on football games, on the licensed premises.
6. Respondent had conducted a football square to bet on football games on the licensed premises for twenty-two years.
7. Respondent was unaware that this practice was a violation of the Texas Alcoholic Beverage Code because he had never previously been cited for the violation.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71, and 61.73.

2. SOAH has jurisdiction to conduct the 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 TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on Findings of Fact No. 4-7 the Commission proved that Respondent violated a provision of the Code § 11.61(b)(7).
5. Based on the foregoing, suspension of Respondent's permit for a period of fifteen days or payment of a civil penalty of \$2,250.00 is warranted.

SIGNED: July 26th, 2007



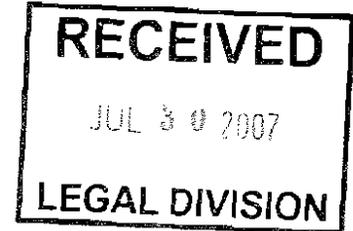
B. L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

July 26, 2007



Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: Docket No. 458-07-2731, Re: Hummer's Inc. d/b/a Hummer's

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "B.L. Phillips".

B.L. Phillips
Administrative Law Judge

BLP/vu

Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Danielle B. Schick, Licensing Attorney, Texas Alcoholic Beverage Commission, 8700 N. Stemmons Freeway, Suite 460, Dallas, TX 75247-VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-VIA REGULAR MAIL
Ted Sanders, President, Hummer's Inc., 2600 Paramount 'B2', Amarillo, TX 79109- VIA REGULAR MAIL