

DOCKET NO. 530072

IN RE BYRON EUGENE CORY	§	BEFORE THE TEXAS
D/B/A SHOOTERS BILLIARDS	§	
PERMIT NOS. BG511962, BL511963	§	
	§	ALCOHOLIC
	§	
EL PASO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-3103)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 26th day of March 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica Najera. The hearing convened on September 1, 2006 and adjourned on November 1, 2006. The Administrative Law Judge made and filed a Proposal for Decision on February 6, 2007 containing Findings of Fact and Conclusions of Law. The 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. Petitioner filed exceptions to which the Administrative Law Judge replied by amending the Proposal of Decision on February 21, 2007.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the First Amended Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, that are contained in the First Amended 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 permit(s) and/or license(s) are herein **SUSPENDED for sixty (60) days**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$12,000.00** on or before the **22nd day of May 2007**, all rights and privileges under the above described permits will be **SUSPENDED for a period of sixty (60) days beginning at 12:01 A.M. on the 30th day of May 2007**.

This Order will become final and enforceable on April 19, 2007 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 on this the 26th day of March 2007.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

SKP/aa

The Hon. Veronica Najera
Administrative Law Judge
State Office of Administrative Hearings
401 East Franklin Avenue, Suite 580
El Paso, Texas 79901
VIA FACSIMILE: (915) 834-5657

Mary Stillinger
ATTORNEY FOR RESPONDENT
4911 Alameda Avenue
El Paso, TX 79905
VIA FACSIMILE: (915) 775-1337

Byron Eugene Cory
d/b/a Shooters Billiards
RESPONDENT
P. O. Box 640604
El Paso, Texas 79904
VIA U.S. FIRST CLASS MAIL

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

El Paso District Office

the hearing, the parties moved for judgment on an agreed statement of facts and they agreed on all ultimate facts essential for the determination of the case. The motion was granted and the ALJ established a procedural schedule:

DATE	PROCEDURAL SCHEDULE
11-22-06	Agreed Statement of Facts due
11-22-06	Agreed Exhibits due
12-01-06	extension date for filing Agreed Statement of Facts
12-05-06	Closing Arguments due
12-05-06	Record closed

II. APPLICABLE LAW

The applicable law sets forth that TABC may suspend for not more than 60 days or cancel an original or renewal retail dealer's license if it is found, after notice and hearing, that the licensee conducted his business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety and sense of decency of the people.² The TABC's own rule provides that a licensee or permittee violates the provisions of the Alcoholic Beverage Code if any gambling offense is committed, and the rule defines such offense as an offense against the general welfare.³ The gambling offenses to be considered are described in the Texas Penal Code.⁴ The TABC alleges that Respondent has committed two gambling offenses:

² TEX. ALCO. BEV. CODE ANN. § 61.71(a)(17) [Grounds for Cancellation or Suspension: Retail Dealer].

³ 16 TEX. ADMIN. CODE §35.31(a), (b) and (c)(14) [Offenses Against the General Welfare]. The rule specifically relates to section 61.71(a)(17) of the Alcoholic Beverage Code and states that any gambling offense described in Chapter 47 of the Texas Penal Code is subject of the rule.

⁴ TEX. PEN. CODE ANN. § 47.01 *et seq.* [Gambling].

(1) using the licensed premises as a gambling place;⁵ (2) and possessing gambling paraphernalia.⁶

III. EVIDENCE

A. Agreed Exhibits

Exhibit 1	Notice of Hearing
Exhibit 2	Certified copy of permit history
Exhibit 3	Green note pad showing players on any given night with total purse and amount paid to 1 st , 2 nd , and 3 rd place winners.
Exhibit 4	Yellow legal pad showing list of names of players by table, how many players were at each numbered table, and total number of players by day and time.
Exhibit 5	Colored chips used; each color represents a different point value.
Exhibit 6	Small white card entitled Shooter's chip point value indicating how many points each color chip was worth. Card given out to each player.
Exhibit 7	White sheet of paper with tournament payout amounts.
Exhibit 8	Inventory of property seized by TABC Agent Wesley Rappe on April 14, 2006. Serial # 106954-955-956-957.

⁵ TEX. PEN. CODE ANN. § 47.04 [Keeping a Gambling Place]. According to this statute, a person violates Chapter 47 of the Texas Penal Code if he/she knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, boat, or other property whatsoever owned by him or under his control, or rents or lets any such property with a view or expectation that it be so used. In turn, a "gambling place" is defined in § 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 also specifically defined in § 47.01(1) as an agreement to win or lose something of value solely or partially by chance.

⁶ TEX. PEN. CODE ANN. § 47.06(a) [Possession of Gambling Device, Equipment, or Paraphernalia]. This section states that a person commits an offense if, with the intent of further gambling, he knowingly owns, manufactures, transfers, or possesses any gambling device that he knows is designed for gambling purposes. In turn, gambling paraphernalia is defined in § 47.061(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.

All agreed exhibits were admitted into evidence.

B. Agreed Statement of Facts

The parties agree on all the ultimate facts essential for the determination of the case. The Agreed Statement of Facts establishes a fact scenario as follows. The Respondent routinely hosted a “Texas-Hold-Em” poker tournament on the premises known as Shooters Billiards. Each player paid a nominal fee of \$20.00 to enter the “Texas-Hold-Em” tournament. The registered players participated at various tables and used chips that had a point value. The winning prize, the amount that could be won, consisted of all of the money paid by the players. As the tournament progressed, the players who accumulated the most chips in the game of poker won the tournament. The normal payout was 50% of the pot to 1st prizewinner, 30% of the pot to 2nd prizewinner, and 20% of the pot to 3rd prizewinner. Respondent, or “the house,” did not take a cut of the entry fees paid.⁷

IV. ARGUMENTS AND ANALYSIS

A. Petitioner’s Argument

It is Petitioner’s position that the “Texas-Hold-Em” poker tournaments held in Petitioner’s licensed premises violate the prohibition against “keeping a gambling place.” To support its position, Petitioner relies on an Attorney General opinion (AG) which holds that a “Texas-Hold-Em” tournament to be gambling in violation of Texas law:

“A holder of an on-premise alcoholic beverage permit may not, without violating both section 47.04(a) of the Penal Code and Rule 35.31 of the Alcoholic Beverage Commission, host a poker tournament in which participants risk money or any other thing of value for the opportunity to win a prize.”⁸

⁷ See Agreed Statement of Facts. The complete Agreed Statements of Facts has been incorporated into the Findings of Fact section of this Proposal for Decision.

⁸ Op.Tex.Att’y.Gen.No. GA-0335 (2005).

B. Respondent's Argument

Respondent concedes that the AG opinion is on point. But, Respondent believes that the Texas Attorney General's analysis is incorrect. Respondent argues that the fault with the Attorney General's opinion lies in the definition of a "bet." It is the Respondent's position that the payment of an entry fee into a tournament is not a bet.

C. Analysis

Although AG opinions are advisory in nature, the ALJ gives significant weight to the AG opinion's interpretation of "gambling" and "bet." The AG opinion cited is entirely on point.

Aside from the fact that Respondent asserts that the AG interpreted the definition of "bet" erroneously, Respondent proffers no legal authority to support its argument. As discussed in the AG opinion, the determinative factors regarding whether an action is a "bet" are the elements of prize *and* consideration. Under the facts presented herein, a participant in the referenced poker tournament would be required to risk a sum of money, \$20.00 specifically, for the opportunity to win a prize. It is clear that, under such circumstances, the participant "plays and bets for money or other things of value."⁹

It follows that Respondent possessed gambling paraphernalia. The ledgers, scratch sheets, chips all fall within the statutory definition. No further analysis is required in this regard.

Based on the evidence, it is clear that Respondent engaged in gambling in a manner that warrants suspension based on the general welfare, peace morals of the people and on the public morals.

⁹ TEX. PEN. CODE ANN. § 47.02(a)(3).

VI. FINDINGS OF FACT

1. Byron Eugene Cory (Respondent) holds a Wine and Beer Retailer's Permit which includes a Retail Dealer's On-Premise Late Hours License BG-511962, issued by the TABC for the premises known as Shooters Billiards, located at 3905 Broaddus, El Paso, Texas 79904.
2. The permit and license were issued by the TABC on March 29, 2002, and have been continuously renewed.
3. On August 8, 2006, TABC issued its notice of hearing directed to Respondent at the mailing address provided by Respondent via certified mail no. 7005 3110 0000 6409 0345.
4. The notice 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.
5. On November 1, 2006, a hearing convened before Administrative Law Judge Veronica S. Najera at the State Office of Administrative Hearings, located at 401 E. Franklin Avenue, Suite, El Paso, Texas 79901.
6. The Texas Alcoholic Beverage Commission was represented at the hearing by Sandra Patton, TABC Staff Attorney.
7. Respondent appeared in person and was represented by his attorney, Mary Stillinger.
8. The parties agreed on all ultimate facts essential for the determination of the case and requested to proceed by filing an agreed statement of facts, in lieu of an evidentiary hearing.
9. After an Agreed Statement of Facts, Agreed Exhibits, and Closing Arguments were filed, the record closed on December 5, 2006.
10. Agent Luis Ojeda in February 2006 received an anonymous complaint alleging that Shooters Billiards was holding on-premise poker games on a regular basis.
11. On all relevant dates Agent Luis Ojeda was a certified peace officer employed by the TABC.
12. TABC began an investigation of the licensed location known as Shooters Billiards.
13. On February 3, February 10, February 17, March 3, March 17, and/or April 13, 2006, Agent

Ojeda visited Shooters Billiards in an undercover capacity and encountered the Respondent.

14. On each of the dates referred to in Finding of Fact No. 13, Agent Ojeda observed the customers playing a poker game called "Texas-Hold-Em," and he observed the Respondent running the tournament.
15. Respondent ran the poker tournament on each Thursday and Friday night at Shooters Billiards.
16. Each player paid a nominal fee of \$20.00 to enter the Texas-Hold- Em poker tournament.
17. Respondent received the participant's fees to enter the tournament, kept the pot, and paid the winners.
18. This tournament was played in plain view at Shooters Billiards.
19. On some occasions, Respondent also played in the poker tournament.
20. Tournament rules were as follows:
 - Each player was required to pay \$20.00 to play in the tournament.
 - There were five to six tables.
 - Each table had eight to ten players.
 - In exchange for the \$20.00, players would receive different color chips.
 - Each color chip had a different point value.
 - Chips had no actual cash value.
 - The pot (amount that could be won) consisted of all of the money paid by the players.
 - The game began by each table issuing cards to the players.
 - Each player played poker until they were out of chips.
 - Losing all of their chips eliminated players. Players could not purchase additional chips at any time during the tournament, nor could chips be exchanged among players.
 - Last person with chips won 1st prize.
 - Normal payout was 50% of pot to 1st prizewinner, 30% of pot to 2nd prizewinner, and 20% of pot to 3rd prizewinner.
 - Payout could be adjusted based of number of total players to allow a payout for 4th place winner.
 - The pot funds were kept separate from the register or any funds of Shooters.
21. Occasionally, players were allowed to play a one-table game. This game consisted of six to

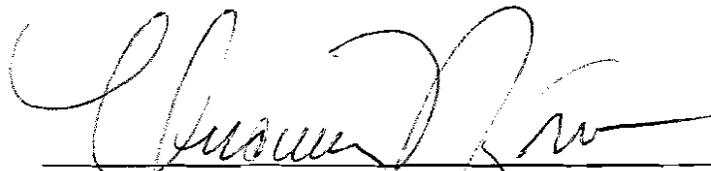
- eight players, a smaller entry fee, and one winner.
22. The tournament game that was played was always "Texas-Hold-Em."
 23. On Friday, April 14, 2006, at approximately 1:00 a.m., after the Thursday night tournament, TABC agents issued Respondent an administrative citation for two violations of the Alcohol Beverage Code: 1) Keeping a gambling place and 2) Possession of gambling paraphernalia.
 24. On Friday, April 14, 2006, TABC agents also seized gambling paraphernalia from Shooters Billiards.
 25. Respondent has one prior gambling violation of record in 2003 in which Respondent's permit and license were suspended for 15 days.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.31 and 5.35.
 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 findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.
 3. Proper and timely notice of the hearing was effected on all parties pursuant to 1 TEX. ADMIN. CODE (TAC) §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN § 11.63.
 4. On February 3, February 10, February 17, March 3, March 17, and/or April 13, 2006, Respondent hosted a poker tournament known as Texas-Hold-Em, and in doing so engaged in gambling and/or kept a gambling place on the licensed premises known as Shooters Billiards in violation of TEX. PEN. CODE ANN. § 47.01 *et seq.*, 16 TEX. ADMIN. CODE §§35.31(a),(b) and (c)(14) and TEX. ALCO. BEV. CODE ANN. § 61.71(a)(17).
 5. On February 3, February 10, February 17, March 3, March 17, and/or April 13, 2006, Respondent hosted a poker tournament known as Texas-Hold-Em, and doing so possessed gambling paraphernalia in violation of TEX. PEN. CODE ANN. § 47.01 *et seq.*
 6. A bet for purposes of TEX. PEN. CODE ANN. § 47.01 (3) which defines a gambling place as a place for the making and settling of bets, requires the elements of prize and consideration.
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7. The payment of a fee to enter or participate in the Texas-Hold-Em poker tournament is consideration pursuant to Op.Tex.Att'y.Gen.No. GA-0335 (2005).
8. Respondent hosted/operated a poker tournament in which participants risked money for the opportunity to win a prize therefore keeping a gambling place on the licensed premises in a manner that warrants suspension based on the general welfare, peace, morals and safety of the people and on the public sense of decency, in violation of TEX. ALCO. BEV. CODE ANN. § 61.71(a)(17).
9. Respondent's permit and licenses should be suspended for 60 days or Respondent should be allowed to pay \$12,000.00 in lieu of suspension.

SIGNED February 21, 2007.



**VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

February 21, 2007

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

VIA FACSIMILE NO. 512-206-3350
AND REGULAR MAIL

RE: Docket No. 458-06-3103
Texas Alcoholic Beverage Commission v. Byron Eugene Cory d/b/a Shooters
Billiards (TABC case no. 530072).

Dear Ms. Fox:

Pursuant to TAC § 155.59(e), the undersigned ALJ is amending the Proposal for Decision in response to an exception filed by counsel for TABC on February 14, 2007. The ALJ is proceeding without waiting for replies because this case involved an agreed statement of facts, and the amended statement is part of such agreed statement of facts. Thus, please find enclosed the First Amended Proposal for Decision on the above referenced case.

Sincerely,

Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso Regional Office

VSN/cr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA Docket Change Form**

Sandra K. Patton, Attorney, TABC Legal Division- **VIA Facsimile No. 713-426-7965**

Mary Stillinger, Attorney for Respondent- **VIA Facsimile No. 915-775-1337**