

**DOCKET NO. 580331**

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
EUN HEE CHONG	§	
D/B/A CHAMPION BILLIARD & GAME	§	ALCOHOLIC
PERMIT/LICENSE NO(s). BG511880,	§	
BL511881	§	
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-2352)	§	BEVERAGE COMMISSION

**ORDER ADOPTING AMENDED PROPOSAL FOR DECISION**

**CAME ON FOR CONSIDERATION** this 29th day of October 2009 the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on June 12, 2009 and adjourned the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 8, 2009; which was amended on September 9, 2009. The Amended 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.

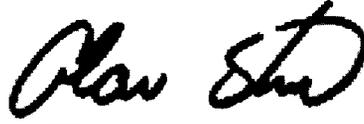
The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Amended Proposal for Decision adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Amended Proposal For Decision and incorporates those Findings 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 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 **NO ACTION** be taken by the Texas Alcoholic Beverage Commission against the Respondent’s Permit/License.

This Order will become final and enforceable on November 23, 2009, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties in the manner indicated below.

**SIGNED** this the 29<sup>th</sup> day of October, 2009, at  
Austin, Texas.



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Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

ADMINISTRATIVE LAW JUDGE  
State Office of Administrative Hearings  
6333 Forest Park Road, Suite 150-A  
Dallas, Texas 75235  
**VIA FACSIMILE (214) 956-8611**

Raymond V. Jobe  
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6060 N. Central Expwy.,  
Suite 658  
Dallas, TX 75206  
**VIA FACSIMILE (214) 522-3550**

Eun Hee Chong  
d/b/a Champion Billiard & Game  
**RESPONDENT**  
9530 Overlake, Dr 'D'  
Dallas, TX 75220  
**VIA U.S. REGULAR MAIL**

Shelia A. Lindsey  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Dallas Enforcement Office

SAL/aa

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

September 9, 2009

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

**VIA FACSIMILE 512/206-3203**

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.  
EUN HEE CHONG D/B/A CHAMPION BILLIARD & GAME  
SOAH DOCKET NUMBER 458-09-2352**

Dear Mr. Steen:

Please find enclosed an Amended 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 § 155.507(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in cursive script that reads "Brenda Coleman".

Brenda Coleman  
Administrative Law Judge

BC/lan  
Enclosure

Xc: Shelia A. Lindsey, Staff Attorney, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 713/426/7965**  
Raymond Jobe, Attorney for Respondent, **VIA FACSIMILE 214/522-3550**  
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 512/206-3498**

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**SOAH DOCKET NO. 458-09-2352**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,  
Petitioner**

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§

**BEFORE THE STATE OFFICE**

**V.**

**OF**

**EUN HEE CHONG D/B/A  
CHAMPION BILLIARD & GAME,  
Respondent**

**ADMINISTRATIVE HEARINGS**

**AMENDED PROPOSAL FOR DECISION<sup>1</sup>**

The Texas Alcoholic Beverage Commission (TABC; Commission) Staff (Petitioner) brought this enforcement action against Eun Hee Chong d/b/a Champion Billiard & Game (Respondent) alleging that Respondent, its agent, servant, or employee, possessed or permitted others to possess a narcotic on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. (the Code) §§ 61.71(a)(1) and 104.01(9). The Administrative Law Judge (ALJ) finds Petitioner failed to prove the allegation by a preponderance of the evidence and recommends that no adverse action be taken against Respondent.

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

The single disputed issue concerning notice is addressed in the discussion section below. Other notice and jurisdiction matters are set out in the findings of fact and conclusions of law without further discussion here.

On February 25, 2009, Petitioner issued its notice of hearing scheduling a hearing for March 17, 2009. On March 5, 2009, Respondent filed a motion for continuance. The motion was granted and the hearing reset for June 12, 2009.

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<sup>1</sup> This Amended Proposal for Decision amends ONLY the ALJ's clerical error in Conclusions of Law No. 4.

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On June 12, 2009, a hearing convened before Administrative Law Judge Brenda Coleman at the State Office of Administrative Hearings, located at 6333 Forest Park Lane, Suite 150A, Dallas, Texas. Petitioner was represented at the hearing by Shelia A. Lindsey, TABC Staff Attorney. Respondent appeared in person and was represented by her attorney, Ray Jobe. The record closed on July 10, 2009.

## II. DISCUSSION AND ANALYSIS

### A. Applicable law

The Commission may cancel or suspend a retail dealer's on-premises license if it finds the holder violated a provision of the Code or a rule of the Commission.<sup>2</sup> The provisions of the Code applicable to the cancellation and suspension of a retail dealer's on-premises license also apply to the cancellation and suspension of a wine and beer retailer's permit.<sup>3</sup>

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, possession of a narcotic or any equipment used or designed for administering a narcotic or permitting a person on the licensed premises to do so.<sup>4</sup> "Narcotic" is defined as "any substance defined in the Texas Controlled Substance Act."<sup>5</sup> Marijuana and cocaine are controlled substances defined in the Texas Controlled Substance Act.<sup>6</sup> Possession means "actual care, custody, control, or management."<sup>7</sup>

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<sup>2</sup> Code § 61.71(a)(1).

<sup>3</sup> *Id.* § 25.04.

<sup>4</sup> *Id.* § 104.01(9).

<sup>5</sup> 16 TEX. ADMIN. CODE (TAC) § 35.41(2).

<sup>6</sup> TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(26) and (29).

<sup>7</sup> *Id.* § 481.002(38).

**B. Petitioner's Evidence**

Petitioner presented nine exhibits and the testimony of two witnesses at the hearing. The Commission issued Respondent's Wine and Beer Retailer's On-Premises permit BG-511880, which includes Respondent's Late Hours Retailer's On-Premise Permit, on April 3, 2002. Respondent's premises are located at 9530 Overlake Drive D, Dallas, Dallas County, Texas.

**1. Testimony of TABC Agent Leigh Sosebee**

TABC Agent Leigh Sosebee testified that she has been employed with the Commission since October 2007. She became a certified peace officer and TABC agent in March 2008. Agent Sosebee, along with Agent Christopher Aller, arrived at Respondent's premises at approximately 10:30 p.m. on September 11, 2008, to conduct a routine compliance check for Code violations. The agents observed officers from the Dallas Police Department enter the premises and followed the officers inside. Agent Sosebee contacted the female bartender standing behind the bar, later identified as Young Kim. Dallas officers contacted two males inside the utility closet located approximately 30 feet from the bar.

Agent Sosebee said she photographed the utility closet and its contents. In doing so, she observed what she believed to be methamphetamine residue on a small piece of foil. She stated that she has received training on what methamphetamine looks like. However, she also stated that they were not able to positively identify the substance as methamphetamine through any type of field test analysis or laboratory analysis because there was not a usable amount for testing. Agent Sosebee also observed cigarette lighters and razor blades, which she stated are commonly used for methamphetamine use, along with a broken Sharpie pen and balloon for use as a makeshift pipe. She admitted on cross-examination that the contents of the closet were destroyed on the scene, and no narcotics were found on the premises.

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Agent Sosebee determined that the two men used a narcotic inside the utility closet based on the presence of all of the items taken together. She added that the men had glassy eyes; they stared at the floor, were very quiet, and would not respond to the officer's questions. In her opinion, the two men appeared to be "a little out of it," and were on some type of substance, either drugs or alcohol.

Finally, Agent Sosebee said she issued a citation to Respondent for the administrative violation of permitting others to possess a narcotic on the premises on September 11, 2008, because the owner was not there; Ms. Kim admitted that she was the bartender and appeared to be the person in charge; Ms. Kim said the two men helped "do stuff" on the premises, like emptying the trash; and Agent Sosebee believed Ms. Kim was aware of the men's alleged illegal drug activity in the utility closet.

## **2. Testimony of Dallas Police Officer Paul Berscherer**

Officer Paul Berscherer testified that he has been a certified peace officer with the Dallas Police Department for nearly 20 years. On September 11, 2008, he and other officers conducted a "bar sweep" of Respondent's premises due to a complaint alleging a homeless male in a white van dealing drugs in the parking lot. Officer Berscherer stated that, upon entering the premises, he observed the female bartender run toward the utility closet located approximately 30 feet to the left of the bar, where he found two homeless men. Officer Berscherer removed the Hispanic males from the closet and observed what, in his opinion, appeared to be drug paraphernalia inside. He said he observed one of the men sitting on the floor of the 10-foot deep closet moving the items around.

Officer Berscherer stated that he received drug training in the Police Academy, and he participated in over 100 drug investigations in 2008. He described the contents of the closet as follows: a three-to-four inch pipe scorched on each end, commonly referred to on the street as a "straight shooter" and used to inhale crack cocaine vapor; a razor blade used for cutting drugs;

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cigarette lighters used for smoking drugs; eyebrow tweezers used for moving small amounts of drugs around; small pieces of aluminum foil associated with heroin and crack cocaine; a Sharpie pen, often sniffed by drug users to get high; and a clear, plastic CD case used to cut drugs. He added that he believed there was residue from some type of illegal substance visible on the CD case. But it was nothing that could be tested, and he could not state whether it was crack cocaine, methamphetamine, or heroin. Officer Berscherer said he made the determination that those items collectively, were drug paraphernalia, especially, the scorched straight shooter.

According to Officer Berscherer, no narcotics were found on the premises, and he had no reason to suspect the men were actually using drugs inside the utility closet. Based on his experience, there was no evidence of methamphetamine use on the premises. He said there is a definite difference between methamphetamine and crack cocaine, and the paraphernalia on the premises was overwhelmingly consistent with crack cocaine use. Based on the grooming items found inside the closet, *i.e.*, lotion, a comb, pillows, etc., which would not be indicative of drug paraphernalia, he believed the men were crackheads living in the utility closet. He said the men were charged with possession of drug paraphernalia due to their knowledge of the items inside the closet and proximity to the items. He also said Respondent was not charged with any offense. Finally, Officer Berscherer said all of the evidence was destroyed at the scene.

### C. Respondent's Evidence

Respondent's owner, Eun Hee Chong, testified on behalf of Respondent. Ms. Chong stated that she is the only person who supervises the premises, and her husband regularly cleans the premises. She said she and her husband were on vacation for a week and were not present on September 11, 2008, when the two men were arrested on the premises. She said neither Ms. Kim nor the two men are Respondent's employees. According to Ms. Chong, Ms. Kim is a friend who helps Ms. Chong maintain the premises when Ms. Chong and her husband occasionally go on vacation.

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Ms. Chong said her husband regularly entered the utility closet for cleaning purposes, and she last observed the condition of the utility closet approximately two days prior to the alleged incident, at which time only mops and buckets were inside the closet. Finally, Ms. Chong stated that Ms. Kim informed her, after the incident, that Ms. Kim had asked the two men to empty trash on the premises. After viewing the photograph of the two men admitted into evidence, Ms. Chong acknowledged that she knew the men were homeless; however, she said she did not personally know their names. She added that she and her husband have never had a problem with drugs on the premises, and Ms. Kim may not have known what was going on.

#### D. Analysis

In its notice of hearing, Petitioner alleges that on or about September 11, 2008, Respondent, or its agent, servant, or employee, possessed or permitted others to possess a narcotic on the licensed premises in violation of Code §§ 61.71(a)(1) and 104.01(9). There are two issues to be determined in this case. The first is whether a narcotic was possessed on the premises. If so, then the second is whether Respondent permitted the possession of the narcotic. After considering the arguments and evidence, the ALJ finds that Petitioner failed to prove the first issue. Therefore, the ALJ will not address the second issue in this proposal for decision.

Petitioner's only evidence that the alleged residue found inside the utility closet was a narcotic were the conclusory statements of Petitioner's witnesses, who offered different opinions as to the type of residue present. Both witnesses testified that the items retrieved from the utility closet were destroyed, and there was insufficient residue for any type of presumptive field test analysis or laboratory analysis. Agent Sosebee opined, based on her visual observation, training, and one-and-a-half years of experience as a certified peace officer and TABC agent, that the alleged drug residue was a narcotic substance, specifically, methamphetamine.

DPD Officer Berscherer, based on his nearly 20 years of experience, testified that there was

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no evidence of methamphetamine use. In his opinion, there was a small amount of visible residue of some type of illegal substance. However, he could not state whether the substance was crack, heroin, or methamphetamine. He also said he believed the items found in the utility closet were more consistent with crack cocaine use, even though the residue appeared to be darker than one might expect to see with crack use. An officer's opinion that a substance is a narcotic is insufficient to prove the fact.<sup>8</sup> Therefore, the ALJ gives no weight to the opinions of Agent Sosebec or Officer Berscherer that the residue was a narcotic. There is no evidence to support Petitioner's claim that any person possessed a narcotic on Respondent's premises.

Pursuant to §§ 2001.051 and 2001.052 of the Administrative Procedure Act, Petitioner was required to provide notice to Respondent which contained a statement of all matters asserted.<sup>9</sup> Petitioner did not allege in the notice of hearing that Respondent, its agent, servant or employee, possessed or permitted others to possess "any equipment used or designed for administering a narcotic," *i.e.*, drug paraphernalia, on the licensed premises in violation of Code § 104.01(9). Respondent objected that the possession of drug paraphernalia was not alleged as a ground for disciplinary action in the notice of hearing or notice of violation<sup>10</sup> and should not be considered as a basis for disciplinary action. The ALJ agrees with Respondent.

Petitioner requested that Respondent's permits be suspended for 30 days or that Respondent pay a \$9,000 administrative penalty in lieu of the suspension. Based on the evidence, the ALJ finds that Petitioner failed to establish, by a preponderance of the evidence, the matter alleged in the notice of hearing. Therefore, the ALJ recommends that no adverse action be taken against Respondent.

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<sup>8</sup> *Curtis v. State*, 548 S.W.2d 57, 59 (Tex.Crim.App. 1977)(heroin); *Gonzales v. State*, 666 S.W.2d 496, 499 (Tex.Ct.App.-Hous. [14<sup>th</sup> Dist.] 1983, pet. for dis. rev. denied)(methadone).

<sup>9</sup> TEX. GOV'T CODE ANN. Ch. 2001.

<sup>10</sup> Letter issued to Respondent on January 16, 2009.

**III. FINDINGS OF FACT**

1. Eun Hee Chong d/b/a Champion Billiard & Game (Respondent) holds Wine and Beer Retailer's On-Premise Permit BG-511880, which includes the Retailer's On-Premise Late Hours Permit, issued by the Texas Alcoholic Beverage Commission (TABC; Commission) on December 13, 2005.
2. Respondent's premises are located at 9530 Overlake Drive D, Dallas, Dallas County, Texas.
3. On July 14, 2008, Petitioner issued its notice of hearing to Respondent.
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 June 12, 2009, a hearing convened before Administrative Law Judge (ALJ) Brenda Coleman at the State Office of Administrative Hearings (SOAH), located at 6333 Forest Park Road, Suite 150A, Dallas, Texas. Petitioner was represented by Shelia A. Lindsey, TABC Staff Attorney. Respondent appeared and was represented by attorney Ray Jobe. The record closed on July 10, 2009.
6. On September 11, 2008, Dallas police officers entered Respondent's premises to conduct a "bar sweep."
7. On that same date, TABC agents Leigh Sosebec and Christopher Aller conducted a compliance check of Respondent's premises for violations of the TEX. ALCO. BEV. CODE ANN. (the Code). The agents arrived as the Dallas officers entered the premises.
8. Dallas officer, Paul Berscherer, found two homeless males inside the utility closet located approximately 30 feet to the left of the bar.
9. Officer Berscherer and Agent Sosebee observed what they believed to be drug paraphernalia and drug residue inside the utility closet.
10. There was not enough residue for a field test analysis or laboratory analysis to positively identify whether the substance was a controlled substance.
11. The contents of the closet were destroyed at the scene.
12. No narcotics were found on the premises.

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13. Petitioner presented no credible evidence that Respondent, or its agent, servant, or employee, possessed or permitted others to possess a narcotic on the premises.

#### IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) Ch. 5 and §§ 61.71 and 104.01.
2. SOAH 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.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing findings, Petitioner has failed to establish by a preponderance of the evidence that Respondent, its agent, servant, or employee, possessed or permitted others to possess a narcotic on Respondent's licensed premises in violation of Code §§ 61.71(a)(1) and 104.01(9).
5. No adverse action should be taken against Respondent.

**SIGNED September 9, 2009.**



**BRENDA COLEMAN**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**DALLAS OFFICE**

**6333 Forest Park Road Suite 150a  
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DN-580231 (2)

DATE: **09/09/2009**  
NUMBER OF PAGES INCLUDING THIS COVER SHEET: **11**  
REGARDING: **AMENDED PROPOSAL FOR DECISION**  
DOCKET NUMBER: **458-09-2352**

**JUDGE BRENDA S COLEMAN**

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