



INTEROFFICE MEMO

Gary Grief, Executive Director

Alfonso D. Royal III, Charitable Bingo Operations Director

To: J. Winston Krause, Chairman
Carmen Arrieta-Candelaria, Commissioner
Peggy A. Heeg, Commissioner
Doug Lowe, Commissioner
Robert Rivera, Commissioner

From: Bob Biard, General Counsel *RB*

Date: February 2, 2017

Re: Consideration of the Status and Possible Approval of Orders in Enforcement Cases

The Legal Services Division staff recommends that the Commission approve each of the proposed orders in the enforcement cases presented under this item.

Commission Order No. 17-0020

Date: FEBRUARY 2, 2017

**TEXAS LOTTERY COMMISSION,
PETITIONER**

VS.

**THE REVOCATION OF CERTAIN
LOTTERY RETAILER LICENSES,
RESPONDENTS**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

ORDER OF THE COMMISSION

During an open meeting at Austin, Texas, the Texas Lottery Commission (Commission) heard the license revocation cases listed on Attachment A hereto, in which the Texas Lottery Ticket Sales Agent (Respondent) in each referenced case did not appear at the scheduled hearing before the State Office of Administrative Hearings (SOAH) to respond to the allegations set forth in the Commission's notice of hearing.

I. Findings of Fact

1. Timely and adequate notice of the hearings in the referenced cases before SOAH was provided to each Respondent, pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052, and 1 TEX. ADMIN. CODE § 155.401. Each notice of hearing included a disclosure in at least 12-point, bold-face type, that the factual allegations listed in the notice could be deemed admitted, and the relief sought in the notice of hearing might be granted by default against the party that fails to appear at hearing.

Commission Order No. 17-0020

Date: FEBRUARY 2, 2017

2. After timely and adequate notice was given in each case, each case was heard by a SOAH Administrative Law Judge (ALJ). In each case, the Respondent did not appear at the hearing.

3. The Commission, by and through its attorney of record, filed a motion to dismiss each of the referenced cases from the SOAH docket and to remand each case to the Commission for informal disposition, in accordance with TEX. GOV'T CODE ANN. § 2001.058(d-1) and 1 TEX. ADMIN. CODE § 155.501(d).

4. The ALJ dismissed the referenced cases from the SOAH docket and remanded these cases to the Commission for informal disposition under TEX. GOV'T CODE ANN. § 2001.056.

II. Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to TEX. GOV'T CODE ANN. § 466.155 and 16 TEX. ADMIN. CODE, Chapter 401.

2. The Respondent in each of the cases listed on Attachment A violated the State Lottery Act and the Commission's Rules as set forth in the Commission's notice of hearing applicable to such Respondent. Specifically, each Respondent failed to deposit money due to the State received from lottery ticket sales under the State Lottery Act, in violation of TEX. GOV'T CODE ANN. § 466.351 and 16 TEX. ADMIN. CODE §§ 401.51 and 401.352.

3. The relief sought by the Commission Staff is fair, reasonable, and adequately protects the public.

Commission Order No. 17-0020

Date: FEBRUARY 2, 2017

III. Order

NOW, THEREFORE, IT IS ORDERED that, after review and due consideration of the administrative record, each of the cases listed on Attachment A hereto, which is incorporated into this Order for all purposes, is hereby disposed by default, and:

1. All allegations set forth in each notice of hearing in the cases listed on Attachment A are deemed admitted; and
2. The Lottery Ticket Sales Agent License for each Respondent in the cases listed on Attachment A are hereby revoked.

Passed and approved at the regular meeting of the Texas Lottery Commission at Austin, Texas, on the 2ND day of FEBRUARY, 2017.

Entered this 2ND day of FEBRUARY, 2017.

J. WINSTON KRAUSE, CHAIRMAN

CARMEN ARRIETA-CANDELARIA,
COMMISSIONER

PEGGY A. HEEG, COMMISSIONER

DOUG LOWE, COMMISSIONER

ROBERT RIVERA, COMMISSIONER

Commission Order No. 17-0020**Date: FEBRUARY 2, 2017****ATTACHMENT A**

Tab No.	SOAH DOCKET NO.	LOTTERY TICKET SALES AGENT NAME	SALES AGENT ADDRESS	LOTTERY LICENSE NO.
A.	362-17-1250	M Rivas Food Stores of Donna D/B/A M Rivas Food Store No. 2	1010 Hooks Ave. Donna, TX 78537	100347
B.	362-17-0982	JAWA Fuel Inc. D/B/A Mainland Texaco	811 Island Meadow Ct. Houston, TX 77062	142206
C.	362-17-0983	Joy Liquors #1 LLC D/B/A Joy Liquor	1411 Mustang Crossing Missouri City, TX 77459	174241
D.	362-17-0984	Shakun & Sons Inc. D/B/A BAC Grocery	541 Wyoming Dr. Murphy, TX 75094	174480
E.	362-17-1252	Jai Jawan Jai Kissan Inc. D/B/A Home Run Food Mart	4506 Schaley Ct. Sugar Land, TX 77479	174817
F.	362-17-1013	Batesville One Stop Inc. D/B/A Batesville One Stop	P.O. Box 343 Batesville, TX 78829	176016
G.	362-17-0985	Gualberto Anaya D/B/A Adam's Mini Mart	11022 Oasis Dr. El Paso, TX 79936	177285
H.	362-17-0987	Campos International LLC D/B/A Bun Penny Food & Wine	715 Henderson St. Houston, TX 77007	179255

DOCKET NO.: SEE ATTACHMENT A

IN THE MATTER	§	BEFORE THE STATE OFFICE
	§	
OF THE REVOCATION OF	§	OF
CERTAIN LOTTERY RETAILER	§	
LICENSES	§	ADMINISTRATIVE HEARINGS

ORDER REMANDING CASE(S) TO COMMISSION

On December 8, 2016, a hearing was convened before the State Office of Administrative Hearings (SOAH) on the revocation of the lottery sales agent license held by each retailer listed on Attachment A. Notice of the hearing was provided to each retailer in accordance with 1 Texas Administrative Code § 155.501(b)(2). The Texas Lottery Commission (Commission) served the notice of hearing via certified mail at each retailer's last known address as it appears in the Commission's records, as authorized by 16 Texas Administrative Code § 401.205(4). Each notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing would be held; a reference to the particular sections of the statutes and rules involved; a short, plain statement of the factual matters asserted; and a statement in at least 12-point, bold-face type that the factual allegations listed in the notice could be deemed admitted and the relief sought might be granted by default against a party that failed to appear at the hearing.

The Commission's staff (Staff) appeared at the hearing. None of the referenced retailers appeared. Based on a retailer's failure to appear, Staff filed a motion to dismiss the summary license suspension case from SOAH's docket and to remand the case to the Commission for informal disposition in accordance with Texas Government Code § 2001.058(d-1) and 1 Texas Administrative Code § 155.501(d). The ALJ concludes that the motion has merit and should be granted.

Accordingly, the motion to dismiss each case listed on Attachment A is granted, and the case is dismissed from SOAH's docket and remanded to the Commission for informal disposition under Texas Government Code § 2001.056.

SIGNED December 15, 2016.



GARY W. ELKINS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS LOTTERY COMMISSION
REVOCATION HEARINGS
STATE OFFICE OF ADMINISTRATIVE HEARINGS
ATTACHMENT A

HEARING HELD: December 8, 2016

SOAH DOCKET NO.	LOTTERY TICKET SALES AGENT NAME	SALES AGENT ADDRESS	LOTTERY NO.	LICENSE
362-17-1250	M Rivas Food Stores of Donna, Agent D/B/A M Rivas Food Store No. 2	1010 Hooks Ave. Donna, TX 78537	100347	
362-17-0982	JAWA Fuel Inc., Agent D/B/A Mainland Texaco	811 Island Meadow Ct Houston, TX 77062	142206	
362-17-0983	Joy Liquors #1 LLC, Agent D/B/A Joy Liquor	1411 Mustang Crossing Missouri City, TX 77459	174241	
362-17-0984	Shakun & Sons Inc., Agent D/B/A BAC Grocery	541 Wyoming Dr. Murphy, TX 75094	174480	
362-17-1252	Jai Jawan Jai Kissan Inc., Agent D/B/A Home Run Food Mart	4506 Schaley Ct Sugar Land, TX 77479	174817	
362-17-1013	Batesville One Stop Inc., Agent D/B/A Batesville One Stop	P.O. Box 343 Batesville, TX 78829	176016	
362-17-0985	Gualberto Anaya, Agent D/B/A Adam's Mini Mart	11022 Oasis Dr. El Paso, TX 79936	177285	
362-17-0987	Campos International LLC, Agent D/B/A Bun Penny Food & Wine	715 Henderson St. Houston, TX 77007	179255	
362-17-1254	American Sunbelt Enterprises I, Agent D/B/A American Sunbelt Enterprises I	801 SE County Rd #25 Corsicana, TX 75110	240000	

CASE SUMMARY

PARTY NAME: Texas Lottery Commission Staff
DOCKET NO./CASE NAME: Docket No. 362-16-4658 – Te-Jo’s Drive In, Inc. d/b/a Te-Jo’s Drive In, License No. 121357, (Respondent)

ISSUE(S): Did the Lottery Operations Division (Division) properly seek revocation of Respondent’s license? [Yes]

KEY FACTS: As part of a standard security review process of lottery retailers, the Division initiated additional investigation of Respondent. An undercover Commission Investigator attempted to redeem \$1,000 lottery ticket at Respondent’s store. Mr. Abdallah Khairallah, an owner of Respondent, offered the investigator \$700 for the ticket. When the investigator asked Mr. Khairallah if he was the store’s owner, Mr. Khairallah answered that he was a clerk, not the owner.

The SOAH Judge found Respondent’s license should be revoked because one of Respondent’s owners, Mr. Khairallah, (1) offered, for compensation, to claim the prize of another person; and (2) intentionally or knowingly made a material and false, incorrect, or deceptive statement to a person conducting an investigation under the State Lottery Act and Lottery Commission rules. The SOAH Judge concluded the Bingo Division reasonably concluded Respondent’s license should be revoked.

LEGAL PRINCIPLES INVOLVED:

- TEX. GOV’T CODE ANN. § 466.310(a)(3) states: A person commits an offense if the person... offers, for compensation, to claim the prize of another person.
- TEX. GOV’T CODE ANN. § 466.311(a)(1) states: A person commits an offense if the person ... intentionally or knowingly makes a statement or entry that the person knows to be false or misleading.
- 16 TEX. ADMIN. CODE § 401.158(b)(34) and(38) states: ...the commission may also suspend or revoke a license for reasons including, but not limited to, any of the following ... (34) licensee induces another person to assign or transfer a right to claim a prize; (38) licensee intentionally or knowingly makes a material and false or incorrect, or deceptive statement, written or oral, to a person conducting an investigation under the State Lottery Act or a rule adopted by the commission.

ACTION REQUESTED: Approve the Proposal for Decision and revoke Respondent’s license.

Commission Order No. 17-0021

Date: FEBRUARY 2, 2017

DOCKET NO. 362-16-4658

TEXAS LOTTERY COMMISSION	§	BEFORE THE TEXAS
PETITIONER	§	
	§	
VS.	§	
	§	
TE-JO'S DRIVE IN, INC. D/B/A	§	
TE-JO'S DRIVE IN	§	
RESPONDENT	§	LOTTERY COMMISSION

ORDER OF THE COMMISSION

TO: Mr. James Kent Schuster
Attorney at Law
504 S. Magnolia Street
Hearne, TX 77859

During open meeting at Austin, Texas, the Texas Lottery Commission finds that, after proper and timely notice was given, the above-styled case was heard by an Administrative Law Judge who made and filed a Proposal for Decision containing the Administrative Law Judge's Findings of Fact and Conclusions of Law. The Proposal for Decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein.

The Texas Lottery Commission, after review and due consideration of the Proposal for Decision, and exceptions and replies filed, if any, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge as if fully set out and separately stated herein. All proposed Findings of Fact and Conclusions of Law not specifically adopted herein are hereby denied.

Commission Order No. 17-0021

Date: FEBRUARY 2, 2017

NOW, THEREFORE, IT IS ORDERED that License No. 121357 issued to Te-Jo's Drive In, Inc. D/B/A Te-Jo's Drive In, of Hearne, Texas is hereby revoked.

Passed and approved at the regular meeting of the Texas Lottery Commission at Austin, Texas, on the 2ND day of FEBRUARY, 2017.

Entered this 2ND day of FEBRUARY, 2017.

J. WINSTON KRAUSE, CHAIRMAN

CARMEN ARRIETA-CANDELARIA,
COMMISSIONER

PEGGY A. HEEG, COMMISSIONER

DOUG LOWE, COMMISSIONER

ROBERT RIVERA, COMMISSIONER

State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

November 16, 2016

Gary Grief
Executive Director
Texas Lottery Commission
611 E. 6th St.
Austin, TX 78701

VIA INTERAGENCY

RE: Docket No. 362-16-4658; Texas Lottery Commission v. Te-Jo's Drive In, Inc., Agent, d/b/a Te-Jo's Drive In, License No. 121357

Dear Mr. Grief:

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 Texas Administrative Code title 1, § 155.507(c), a SOAH rule found at www.soah.texas.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary W. Elkins".

Gary W. Elkins
Administrative Law Judge
State Office of Administrative Hearings

GWE/tt

cc: Kristen Guthrie, Assistant General Counsel, Texas Lottery Commission, P.O. Box 16630, Austin TX 78761 with 1 hearing CD; Certified Evidentiary Record)- **VIA INTERAGENCY-MAIL**
James Kent Schuster, Attorney at Law, 504 S. Magnolia St., Hearne, TX 77859 -**VIA REGULAR MAIL**

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RECEIVED
GENERAL COUNSEL

SOAH DOCKET NO. 362-16-4658

**TEXAS LOTTERY COMMISSION,
Petitioner**

v.

**TE-JO'S DRIVE IN, INC.,
DBA TE-JO'S DRIVE IN,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Lottery Commission (Commission) seeks the revocation of the Texas Lottery sales agent license of Te-Jo's Drive In, Inc., dba Te-Jo's Drive In (Respondent). The requested relief is based on the allegations that one of Respondent's owners, Abdallah Khairallah, (1) offered, for compensation, to claim the prize of another person, in violation of the State Lottery Act (the Lottery Act), Texas Government Code chapter 466; and (2) intentionally or knowingly made a material and false, incorrect, or deceptive statement to a person conducting an investigation under the Lottery Act or a rule adopted by the Commission. Based on the evidence, the Administrative Law Judge (ALJ) concludes that Staff proved its allegations and recommends that Respondent's license be revoked.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Because neither party contested jurisdiction or notice, those matters are addressed solely in the Findings of Fact and Conclusions of Law.

On September 22, 2016, a hearing on the merits convened before ALJ Gary Elkins at the Austin offices of the State Office of Administrative Hearings. Staff appeared and was represented by assistant general counsel Kristen Guthrie. Respondent appeared and was represented by attorney James Schuster. The record closed that day at the conclusion of the hearing.

II. DISCUSSION

A. Undisputed Facts

The pertinent facts relating to Staff's allegations are not disputed. Based on its review of Respondent's lottery sales operations as a part of a standard security review process of lottery retailers, the Commission's investigative staff concluded that an additional investigation of Respondent was warranted. The investigation included the use of an undercover investigator who entered Respondent's store and attempted to redeem a \$1,000 winning ticket. When the investigator presented the ticket, Mr. Khairallah offered him \$700 for it. When the investigator asked Mr. Khairallah if he was the store's owner, Mr. Khairallah answered that he was a clerk, not the owner.

B. Applicable Law and Allegations

Pursuant to § 466.310(a)(3) of the Lottery Act, a person commits a violation if the person "offers, for compensation, to claim the prize of another person." Staff alleges that Mr. Khairallah violated this provision when he offered the undercover investigator money for the winning ticket. Additionally, 16 Texas Administrative Code § 401.158(b) provides that the Commission may suspend or revoke a license for the following reasons:

(34) licensee:

(A) induces another person to assign or transfer a right to claim a prize;

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(38) licensee intentionally or knowingly makes a material and false or incorrect, or deceptive statement, written or oral, to a person conducting an investigation under the State Lottery Act or a rule adopted by the commission.

Staff alleges that, by his actions described above, Mr. Khairallah violated each of these provisions.

C. Evidence**1. Staff**

In support of its allegations, Staff presented the testimony of Otis May, an investigator with the Commission's security division. Mr. May testified that, as a part of his job responsibilities, he generates a report that provides him information regarding individuals who redeem a given amount of tickets over a specified period of time. He generates such reports when evaluating lottery activity of both individuals and lottery retailers. While reviewing a report, Mr. May discovered that Mr. Khairallah had redeemed four winning tickets within a month. In response, Mr. May decided to review Mr. Khairallah's entire claim history. Upon doing so, he discovered that, since 2009, Mr. Khairallah had turned in 21 claims, including 14 scratch-off tickets and 7 draw-game tickets. Mr. May then scrutinized the legitimacy of these claims more closely.

When scrutinizing claims, Mr. May looks at the type of tickets purchased, when they were purchased, and where they were purchased, including whether they were purchased from the same retailer or multiple retailers. He discovered that Mr. Khairallah claimed the 14 winning scratch-off tickets at 12 different retailers. Describing the conduct as a pattern one does not commonly see when a retailer cashes in tickets, he explained that retailers consistently purchase tickets from their own stores because they make money on the sales of the tickets. He acknowledged on cross examination, however, that retailers are not prohibited from buying tickets at other retailers.

Staff also presented the testimony of Anthony Kozak, an investigator with the Commission's enforcement division and a commissioned peace officer. Mr. Kozak testified that he investigates administrative and criminal violations pertaining to the Texas Lottery. He stated that he was assigned to investigate Respondent's operations following the referral of the investigation from the security division. While investigating a retailer, Mr. Kozak considers such matters as the retailer's lottery operations; the owners and the claims they have filed over a period of time; where the claims were filed; and whether other people using the retailer's home address have filed claims.

Mr. Kozak stated that, while investigating Respondent's operations, he discovered that each of its two owners, Mr. Khairallah and his brother, had submitted over \$50,000 in claims since 2009. A third person identified with the same address had filed over \$70,000 in claims.¹ Based on findings like these, Mr. Kozak explained, the Commission's investigative staff will conduct a compliance operation. The operation typically consists of a Commission employee, acting in an undercover capacity, visiting the retailer's store and presenting a winning ticket with a high prize amount—usually \$1,000—to determine whether the clerk will offer to purchase it. Mr. Kozak stated that he and another investigator visited Respondent's store on March 22, 2016. Upon entering the store, Mr. Kozak handed a \$1,000 winning ticket to the clerk. When the clerk ran the ticket through the computer, it was confirmed as a winner. The clerk, who Mr. Kozak later learned was Mr. Khairallah, told him the winning amount was over \$600, which was more than could be paid at the store. The clerk then told Mr. Kozak he would have to redeem the ticket in Austin. When Mr. Kozak asked for clarification, the clerk offered him \$700 for the ticket.

At that point, Mr. Kozak testified, he stepped away to allow customers to conduct their transactions. He then approached the clerk, said he would accept the \$700 offer, and asked the clerk if the winnings would be paid by money order or cash. According to Mr. Kozak, the clerk told him it would be paid in cash, and he opened the cash register, removed seven \$100 bills, and handed them to Mr. Kozak. Mr. Kozak then identified himself as an investigator with the Commission, stated that he was conducting an investigation, and asked the clerk if he was one of the owners of the store. The clerk answered "no" and stated that his name was Jimmy Khairallah. When Mr. Kozak responded that the clerk had the same last name as the owners of the store and asked whether he was related to them, Mr. Khairallah again answered "no" and stated that he was just a clerk. Mr. Kozak then asked him for his identification, and Mr. Khairallah handed Mr. Kozak his driver's license. The license confirmed that the clerk was Abdallah Khairallah, one of Respondent's owners. Then, when Mr. Kozak asked his identity a third time, Mr. Khairallah acknowledged he was one of the owners.

Mr. Khairallah's offer to purchase the winning ticket from Mr. Kozak during the undercover operation not only violated the Lottery Act but also constituted a third degree felony,

¹ Mr. Kozak's findings are reflected in an investigative report dated March 23, 2016. Staff Ex. 7.

according to Mr. Kozak. He added that Mr. Khairallah admitted to having illegally purchased a winning ticket from a customer once before.

Mr. Kozak confirmed that owners of licensed retailers are permitted to purchase lottery tickets at their establishments. When asked whether it is typical for a store owner to redeem a winning ticket purchased at a different location, however, Mr. Kozak characterized the scenario as a “red flag” indication that the ticket might be in the hands of someone other than the person who bought it.

Nancy Guerra, a retailer account examiner in the Commission’s Lottery Operations Division, testified that the division decided to seek the revocation of Respondent’s lottery license because the involvement of Respondent’s owner was “of great concern” to the Commission. She added that business owners “set the tone” for their employees and, despite being an owner, Mr. Khairallah misrepresented his identity. She also characterized the act of “prize discounting” as a nationwide problem that generates many public complaints and negatively impacts the lottery’s reputation and integrity.

2. Abdallah Khairallah

Mr. Khairallah, who with his brother owns Respondent, confirmed that, as alleged by Staff, he offered to buy the winning lottery ticket from Mr. Kozak during the undercover investigation. He explained that the act was the product of bad judgment, he made a bad decision, and he neither intended to violate the law nor knew he was doing so when he offered to buy the ticket. He also affirmed that, following the incident, he instructed his staff not to offer to purchase tickets at a discount. In an apparent effort to explain why tickets purchased in his store were redeemed in such places as Bryan, Hearne, Houston, and Austin, Mr. Khairallah stated that he and his brother often travel around the state, including to those cities. He stated that they often buy lottery tickets while they are traveling because they like to gamble. He also acknowledged that they have won thousands of dollars while doing so.

As for misrepresenting his identity as an owner of Respondent, Mr. Khairallah described it as a product of his being nervous. In regard to Staff's proposed revocation of Respondent lottery license, Mr. Khairallah requested that the Commission consider a lesser penalty in light of Respondent having generated revenue for the State since becoming licensed in 1992.

3. Rebuttal Evidence

In response to Mr. Khairallah's testimony that he did not realize his offer to purchase the lottery ticket at a discount was illegal, Staff re-called Nancy Guerra as a witness to establish that Mr. Khairallah had undergone Commission-sponsored refresher training that would have informed him of prohibited activities, including the purchase of winning lottery tickets at a discount. Mr. Khairallah responded that the training did not address purchasing tickets at a discount. Instead, according to Mr. Khairallah, it addressed only the need to activate scratch-off tickets at the time they are sold. Conceding that the training apparently did not address the prohibition against offering to purchase winning tickets at a discount, Ms. Guerra testified that the Commission nonetheless sought revocation of Respondent's license because Mr. Khairallah's illegal act was a serious violation of the Lottery Act and the Commission's rules. She added that, at the time retailers are licensed, they receive a manual that addresses the type of violation committed by Mr. Khairallah. She also confirmed that retailers are responsible for being aware of prohibited conduct that affects the integrity and security of the state's lottery. Thus, Respondent's long tenure as a lottery sales agent, as described by Mr. Khairallah, did not impact the penalty sought by Staff.

D. Analysis, Conclusion, and Recommendation

Staff proved Respondent committed the violations as alleged. The ALJ was not persuaded by Mr. Khairallah's testimony that he was not aware of the prohibitions against offering to purchase and purchasing a customer's winning ticket at a discount. Also unpersuasive was his testimony that the misrepresentation of his identity to Mr. Kozak was the product of nervousness. The more likely explanation for the misrepresentation was that Mr. Khairallah was aware his actions were illegal and attempted to deceive Mr. Kozak by masking his identity. Considering these conclusions in the context of Ms. Guerra's testimony regarding the vigilance with which the

Commission must protect the integrity of the state's lottery, the ALJ recommends that Respondent's lottery sales agent license be revoked. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT


1. Te-Jo's Drive In, Inc., dba Te-Jo's Drive In (Respondent), located in Hearne, Texas, is a lottery sales agent licensed by the Texas Lottery Commission (the Commission). Respondent holds license number 121357.
2. The Commission's staff (Staff) seeks the revocation of Respondent's license based on the allegations that one of Respondent's owners, Abdallah Khairallah, offered a Commission investigator \$700 cash for a winning scratch-off ticket worth \$1,000, and that, upon being asked if he was the store's owner, Mr. Khairallah answered that he was not the owner, but a clerk.
3. On July 8, 2016, Staff issued a notice of hearing to Respondent, which contained a statement of the time, place, and nature of the hearing; a description 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 factual matters asserted. Respondent received the notice.
4. The hearing convened and closed before Administrative Law Judge Gary Elkins on September 22, 2016, at the State Office of Administrative Hearings (SOAH), located in the William P. Clements Building, at 300 West 15th Street in Austin, Texas.
5. Staff appeared and was represented by Kristen Guthrie, assistant general counsel. Respondent appeared and was represented by attorney James Schuster.
6. On March 22, 2016, an undercover investigator employed by the Commission entered Respondent's store and attempted to redeem a \$1,000 winning ticket. When the investigator presented the ticket to Abdallah Khairallah, Mr. Khairallah ran the ticket through the computer and confirmed it as a winner.
7. Mr. Khairallah offered to purchase the winning ticket from the investigator for \$700.
8. After Mr. Khairallah offered to buy the ticket, the investigator asked him if he was one of the owners of the store. Mr. Khairallah answered that he was not, and that he was a clerk named Jimmy Khairallah. When Mr. Kozak responded that Mr. Khairallah had the same last name as the owners of the store and asked whether he was related to them, Mr. Khairallah answered "no."
9. Mr. Khairallah is an owner of Respondent.

10. At the time he offered to buy the winning lottery ticket at a discount, Mr. Khairallah knew that, as a lottery retailer, he was prohibited from doing so.
11. Mr. Khairallah attempted to conceal his identity from the Commission investigator because he knew his offer to purchase the winning ticket at a discount was illegal.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to the State Lottery Act, Texas Government Code chapter 466.
2. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, as provided by Texas Government Code chapter 2003.
3. Proper and timely notice of the hearing was effected upon Respondent pursuant to Texas Government Code §§ 466.155(b) and 2001.051-2001.052.
4. Through the actions of owner Abdallah Khairallah, Respondent violated Texas Government Code § 466.310(a)(3) by offering, for compensation, to claim the prize of another.
5. Through the actions of owner Abdallah Khairallah, Respondent violated 16 Texas Administrative Code § 401.158(b)(34) by inducing another person to assign or transfer a right to claim a prize.
6. Through the actions of owner Abdallah Khairallah, Respondent violated 16 Texas Administrative Code § 401.158(b)(38) by intentionally or knowingly making a material, false, and deceptive statement to a person conducting an investigation under the State Lottery Act or a Commission rule.
7. Respondent's lottery sales agent license should be revoked.

SIGNED November 16, 2016.



GARY W. ELKINS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

CASE SUMMARY

PARTY NAME/STATUS: Texas Lottery Commission Staff, Petitioner

DOCKET NO./CASE NAME: 362-16-3697.B, Giorgio Rizzo, Respondent

ISSUE:

Should the Commission adopt the Administrative Law Judge's (ALJ's) recommendation to remove Giorgio Rizzo from the Bingo Worker Registry due to his two convictions for burglary in 2013? [Yes.]

KEY FACTS:

On October 9, 2013, in the 368th Judicial District Court, Williamson County, Texas, Giorgio Rizzo was found guilty of burglary of a building, a state jail felony, and sentenced to one hundred and eighty (180) days confinement in the Williamson County Jail. The date of the offense was September 14, 2013.

On December 20, 2013, in the 147th District Court, Travis County, Texas, Giorgio Rizzo was found guilty of burglary of a building, a state jail felony, and sentenced to one hundred and twenty (120) days in the Travis County Jail. The date of the offense was September 15, 2013.

The ALJ in her Proposal for Decision found that "burglary is a serious crime that relates to charitable bingo work", and that "continued listing [of Mr. Rizzo] on the Registry would offer the opportunity for additional criminal activity similar to that for which Mr. Rizzo pleaded guilty and was convicted." The ALJ concluded "Mr. Rizzo's name should be removed from the Registry...."

LEGAL PRINCIPLES INVOLVED:

Giorgio Rizzo should be removed from the Bingo Worker Registry pursuant to TEX. OCC. CODE ANN. § 2001.054, TEX. OCC. CODE ANN. § 53.021(a) and 16 TEX. ADMIN. CODE § 402.702 due to his two convictions for burglary in 2013. Under Commission Rule 402.702(e), "Because the Commission has a duty to exercise strict control and close supervision over the conduct of Charitable Bingo to ensure that bingo is fairly conducted and the proceeds derived from bingo are used for an authorized purpose, and, because bingo games are largely cash-based operations providing opportunities for individuals to have access to cash and/or products that may be exchanged for cash", the Commission has determined that burglary is a crime that directly relates to the fitness of a person to be listed on the Bingo Worker Registry.

ACTION REQUESTED:

Adopt the ALJ's recommendation that the Commission remove Giorgio Rizzo from the Bingo Worker Registry due to his two convictions for burglary in 2013.

Commission Order No. 17-0028

Date: FEBRUARY 2, 2017

DOCKET NO. 362-16-3697.B

TEXAS LOTTERY COMMISSION	§	BEFORE THE TEXAS
PETITIONER	§	
	§	
VS.	§	
	§	
GIORGIO RIZZO	§	
RESPONDENT	§	LOTTERY COMMISSION

ORDER OF THE COMMISSION

TO: Mr. Giorgio Rizzo
1102 Split Oak Cover
Pflugerville, TX 78660-2863

During open meeting at Austin, Texas, the Texas Lottery Commission finds that, after proper and timely notice was given, the above-styled case was heard by an Administrative Law Judge who made and filed a Proposal for Decision containing the Administrative Law Judge's Findings of Fact and Conclusions of Law. The Proposal for Decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein.

The Texas Lottery Commission, after review and due consideration of the Proposal for Decision, and exceptions and replies filed, if any, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge as if fully set out and separately stated herein. All proposed Findings of Fact and Conclusions of Law not specifically adopted herein are hereby denied.

Commission Order No. 17-0028

Date: FEBRUARY 2, 2017

NOW, THEREFORE, IT IS ORDERED that the Respondent Giorgio Rizzo's name is removed from the Commission's Registry of Approved Bingo Workers.

Passed and approved at the regular meeting of the Texas Lottery Commission at Austin, Texas, on the 2ND day of FEBRUARY, 2017.

Entered this 2ND day of FEBRUARY, 2017.

J. WINSTON KRAUSE, CHAIRMAN

CARMEN ARRIETA-CANDELARIA,
COMMISSIONER

PEGGY A. HEEG, COMMISSIONER

DOUG LOWE, COMMISSIONER

ROBERT RIVERA, COMMISSIONER

SOAH DOCKET NO. 362-16-3697.B

TEXAS LOTTERY COMMISSION,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
v.	§	OF
	§	
GIORGIO RIZZO,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Lottery Commission (the Commission), Charitable Bingo Operations Division, seeks to remove Giorgio Rizzo from the Registry of Approved Bingo Workers (the Registry) because he was convicted of two charges of burglary of a building, a state jail felony. The Administrative Law Judge (ALJ) concludes Mr. Rizzo should be removed from the Registry as requested by Staff.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no contested issues of jurisdiction or notice in this proceeding. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing convened before ALJ Rebecca S. Smith on September 20, 2016. Staff appeared and was represented by assistant general counsel Stephen White. Mr. Rizzo appeared and represented himself. The hearing adjourned and the record closed the same day.

II. DISCUSSION

Mr. Rizzo applied for renewal of registration as an approved bingo worker on January 27, 2016. Mr. Rizzo has the following criminal history:

- On October 9, 2013, in Cause No. 13-1658-K368, in the 368th Judicial District Court of Williamson County, Texas, Mr. Rizzo pleaded guilty to and was convicted of burglary of a building, a state jail felony, and sentenced to 180 days' confinement in the Williamson County Jail. This offense occurred on September 14, 2013.
- On December 20, 2013, in Cause No. D-1-DC-13-301846, in the 147th District Court, Travis County, Texas, Mr. Rizzo pleaded guilty to and was convicted of burglary of a building, a state jail felony, and sentenced to 120 days' confinement in the Travis County Jail. This offense occurred on September 15, 2013.¹

At hearing, Staff presented the testimony of Sherri Lynn Wood, who works in the Commission's licensing department, and Austin Police Department Investigator Jason Jewett.² Mr. Rizzo testified on his own behalf and introduced a reference letter as an exhibit. This letter is from his supervisor at the bingo facility where he has worked since April 2015. Mr. Rizzo testified that he is a changed person, who believes in looking at the future, not the past. He also testified that everybody makes mistakes and that he needs his job to pay child support.

A. Applicable Law

Chapter 53 of the Texas Occupations Code provides the framework for licensing agencies to use in evaluating applicants and licensees who have criminal convictions. Section 53.021(a) of that chapter authorizes a licensing agency, such as the Commission, to deny, suspend, or revoke a license if a person has either been convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation or been convicted of an offense committed less than five years before the date of application.³

When determining whether a criminal offense directly relates to an occupation, the Commission is to consider the following factors:

¹ Both burglaries were committed during the same night—one occurred before midnight and the other after midnight.

² Officer Jewett testified that Mr. Rizzo was a suspect in ten other similar burglaries. Mr. Rizzo was never charged with these burglaries, and at hearing, he denied committing them. Because Mr. Rizzo was never convicted of these other burglaries, the ALJ will not give weight to the testimony about them.

³ Tex. Occ. Code § 53.021(a)(1), (2). The Commission's rule found at 16 Texas Administrative Code § 402.702(c) also addresses this authority.

- (1) the nature and seriousness of the crime;
- (2) the relationship of the crime to the purposes for requiring a license to engage in the occupation;
- (3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and
- (4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.⁴

These same factors, as well as the following ones, should be considered in determining whether a person who has committed a criminal offense is nevertheless fit to be licensed:

- (1) the extent and nature of the person's past criminal activity;
- (2) the age of the person when the crime was committed;
- (3) the amount of time that has elapsed since the person's last criminal activity;
- (4) the conduct and work activity of the person before and after the criminal activity;
- (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and
- (6) other evidence of the person's fitness, including letters of recommendation from:
 - (A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;
 - (B) the sheriff or chief of police in the community where the person resides; and
 - (C) any other person in contact with the convicted person.⁵

The Commission has also set out mitigating factors to consider in determining eligibility for registration despite a conviction. These factors include:

⁴ Tex. Occ. Code § 53.022.

⁵ Tex. Occ. Code § 53.023(a).

- (1) Veteran's status, including discharge status;
- (2) Remoteness in time; *e.g.*, if more than 10 years have elapsed since the last conviction;
- (3) Absence of violation history as a current bingo licensee or bingo worker registrant over an extended period of time;
- (4) Recommendations from law enforcement or community leaders; and
- (5) Whether an arrest resulted in a deferred adjudication rather than a conviction.⁶

B. Analysis

The Commission has concluded that burglary is a crime directly related to being a bingo worker.⁷ In explaining this conclusion, Ms. Wood testified that because bingo is run entirely as a cash business, it is particularly important that people working as bingo workers be honest. Working in a cash business provides opportunities for a dishonest person to steal. Because burglary is directly related to being a bingo worker, the Commission may remove Mr. Rizzo from the Registry.

Additionally, Mr. Rizzo's crimes occurred fewer than five years ago, which provides the Commission with a separate basis to remove him from the Registry.

Given that the Commission may remove Mr. Rizzo from the Registry, the question is whether it should. Answering this question requires examining the relevant factors. To begin with, Mr. Rizzo committed two burglaries within a few hours of each other. Both of these burglaries were recent, having occurred approximately three years before the hearing in this matter. Mr. Rizzo's age was not in evidence, but the police report states that he was between 30 and 49 years old at the time of the offense.⁸ The only evidence about Mr. Rizzo's work history was his testimony that he had

⁶ 16 Tex. Admin. Code § 402.702(h).

⁷ 16 Tex. Admin. Code § 402.702(e)(1).

⁸ Staff Ex. 7 at 4.

been fired from two restaurant jobs⁹ and the reference letter stating that he has worked at Ben White Bingo Unit since April 2015.¹⁰ Mr. Rizzo's evidence of rehabilitation was his statement that he had changed and believed in looking forward, not back. Mr. Rizzo presented a letter of recommendation from his current employer, praising him as dependable, courteous, hardworking, and honest. On the other hand, because Mr. Rizzo has only been working at that job for about a year and a half, he does not have a long clean history as a bingo worker. There was no evidence that Mr. Rizzo was a veteran. Finally, he was convicted of burglary, not just placed on deferred adjudication.

In light of all the factors, the evidence in this case supports Staff's recommendation that Mr. Rizzo be removed from the Registry. Both burglaries are recent, and Mr. Rizzo did not present credible evidence in support of his rehabilitation. The ALJ concludes Mr. Rizzo should be removed from the Registry as requested by Staff.

III. FINDINGS OF FACT

1. Giorgio Rizzo was listed on the Registry of Approved Bingo Workers (the Registry) by the Texas Lottery Commission (the Commission), Charitable Bingo Operations Division.
2. Mr. Rizzo applied for renewal of his registration on January 27, 2016.
3. On February 24, 2016, the Commission's Staff notified Mr. Rizzo of its intention to remove him from the Registry.
4. Mr. Rizzo requested a hearing before the State Office of Administrative Hearings (SOAH).
5. Notice of the hearing was sent to Mr. Rizzo at his address on record with the Commission on April 25, 2016, by first class and certified U.S. Mail, return receipt requested.
6. The notice of hearing 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

⁹ Officer Jewett testified that during his investigation, he was told that Mr. Rizzo had been fired from one job for stealing alcohol and the other for adding tips without customers' knowledge. Mr. Rizzo admitted being fired from both jobs, but denied that he was fired for those reasons. Given the hearsay nature of the statements about the reasons for termination, the ALJ will give them no weight.

¹⁰ Resp. Ex. 1.

reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted.

7. Staff appeared and was represented by assistant general counsel Stephen White. Mr. Rizzo appeared and represented himself. The hearing adjourned and the record closed the same day.
8. On October 9, 2013, in Cause No. 13-1658-K368, in the 368th Judicial District Court of Williamson County, Texas, Mr. Rizzo pleaded guilty to and was convicted of burglary of a building, a state jail felony, and sentenced to 180 days' confinement in the Williamson County Jail. This offense occurred on September 14, 2013.
9. On December 20, 2013, in Cause No. D-1-DC-13-301846, in the 147th District Court, Travis County, Texas, Mr. Rizzo pleaded guilty to and was convicted of burglary of a building, a state jail felony, and sentenced to 120 days' confinement in the Travis County Jail. This offense occurred on September 15, 2013.
10. Burglary is a serious crime that relates to charitable bingo work.
11. Continued listing on the Registry would offer the opportunity for additional criminal activity similar to that for which Mr. Rizzo pleaded guilty and was convicted.
12. Mr. Rizzo was convicted of two burglaries that occurred on the same night, a little over three years before the date of the hearing.
13. Mr. Rizzo was between 30 and 49 years old when he committed the burglaries.
14. Mr. Rizzo has a letter of recommendation from his current employer.
15. Mr. Rizzo did not present any evidence of rehabilitation.
16. Mr. Rizzo is currently employed, but had been fired from at least two previous jobs.

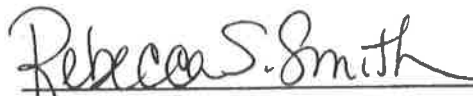
IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Texas Occupations Code § 2001.313(e).
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code ch. 2003.

3. Timely and adequate notice of the hearing was provided in accordance with Texas Government Code §§ 2001.051 and 2001.052.
4. The Commission, may deny, suspend, or revoke a license if a person has been either convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation or convicted of an offense committed less than five years before the date of application. Tex. Occ. Code § 53.021(a)(1), (2); 16 Tex. Admin. Code § 402.702(c).
5. The Commission has concluded that burglary is a crime directly related to being a bingo worker. 16 Tex. Admin. Code § 402.702(e).
6. Under Texas Occupations Code § 53.023(a), the following factors should be considered in determining whether a person who has committed a criminal offense is fit to be licensed:
 - (1) the extent and nature of the person's past criminal activity;
 - (2) the age of the person when the crime was committed;
 - (3) the amount of time that has elapsed since the person's last criminal activity;
 - (4) the conduct and work activity of the person before and after the criminal activity;
 - (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and
 - (6) other evidence of the person's fitness, including letters of recommendation from:
 - (A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;
 - (B) the sheriff or chief of police in the community where the person resides; and
 - (C) any other person in contact with the convicted person.
7. In 16 Texas Administrative Code § 402.702(h), the Commission set out additional mitigating factors it will consider in determining eligibility for registration. These factors include:
 - (1) Veteran's status, including discharge status;
 - (2) Remoteness in time; *e.g.*, if more than 10 years have elapsed since the last conviction;
 - (3) Absence of violation history as a current bingo licensee or bingo worker registrant over an extended period of time;
 - (4) Recommendations from law enforcement or community leaders; and

- (5) Whether an arrest resulted in a deferred adjudication rather than a conviction.
8. Staff has the burden of proof to show a basis for removing Mr. Rizzo from the Registry, and Mr. Rizzo has the burden to show why he should not be removed from the Registry despite his convictions. 1 Tex. Admin. Code § 155.427.
9. Mr. Rizzo's name should be removed from the Registry pursuant to Texas Occupations Code § 53.021(a) and 16 Texas Administrative Code § 402.702.

SIGNED November 8, 2016.

A handwritten signature in cursive script that reads "Rebecca S. Smith". The signature is written in dark ink and is positioned above a horizontal line.

REBECCA S. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

CASE SUMMARY

PARTY NAME/STATUS: Texas Lottery Commission Staff, Petitioner

DOCKET NO./CASE NAME: 362-16-5598.B, Kori Clark, Applicant

ISSUE:

Should the Commission adopt the Administrative Law Judge's (ALJ's) recommendation to deny the application of Kori Clark to be listed on the Bingo Worker Registry, based on Clark's 1997 criminal fraud conviction? [*Yes, a conviction for criminal fraud is a "permanent bar" to a person being listed on the Bingo Worker Registry.*]

KEY FACTS:

On February 7, 1997, in the Criminal District Court, Dallas County, Texas, Kori Clark was found guilty of defrauding another by passing a forged check in violation of TEX. PENAL CODE § 32.21, a state jail felony, and sentenced to two (2) years confinement in the Texas Department of Criminal Justice State Jail Division. Imposition of sentence was suspended and Mr. Clark was placed on Community Supervision for a period of three (3) years.

The ALJ concluded that "Mr. Clark's crime of fraud falls within the lifetime prohibition for listing as a bingo worker", and that "Mr. Clark's application to be listed on the Commission's registry of Approved Bingo Workers should be denied."

LEGAL PRINCIPLES INVOLVED:

Under the Commission's rules at TEX. ADMIN. CODE § 402.702(b)(2), a violation of TEX. PENAL CODE § 32.21 is a crime of fraud. In accordance with TEX. OCC. CODE ANN. §§ 2001.105(a)(6), 2001.105(b) and 2001.313(e); and TEX. ADMIN. CODE § 402.702(b), a conviction for criminal fraud is a "permanent bar" to a person being listed on the Bingo Worker Registry.

ACTION REQUESTED:

Adopt the ALJ's recommendation that the Commission deny Kori Clark's application to be listed on the Bingo Worker Registry due to Clark's conviction for criminal fraud.

Commission Order No. 17-0029

Date: FEBRUARY 2, 2017

DOCKET NO. 362-16-5598.B

TEXAS LOTTERY COMMISSION	§	BEFORE THE TEXAS
PETITIONER	§	
	§	
VS.	§	
	§	
KORI CLARK, SR.	§	
RESPONDENT	§	LOTTERY COMMISSION

ORDER OF THE COMMISSION

TO: Mr. Kori Clark, Sr.
1112 Saturn Dr.
Cedarhill, TX 75104

During open meeting at Austin, Texas, the Texas Lottery Commission finds that, after proper and timely notice was given, the above-styled case was heard by an Administrative Law Judge who made and filed a Proposal for Decision containing the Administrative Law Judge's Findings of Fact and Conclusions of Law. The Proposal for Decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein.

The Texas Lottery Commission, after review and due consideration of the Proposal for Decision, and exceptions and replies filed, if any, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge as if fully set out and separately stated herein. All proposed Findings of Fact and Conclusions of Law not specifically adopted herein are hereby denied.

Commission Order No. 17-0029

Date: FEBRUARY 2, 2017

NOW, THEREFORE, IT IS ORDERED that the Respondent's application to be listed on the Commission's Registry of Approved Bingo Workers is denied.

Passed and approved at the regular meeting of the Texas Lottery Commission at Austin, Texas, on the 2ND day of FEBRUARY, 2017.

Entered this 2ND day of FEBRUARY, 2017.

J. WINSTON KRAUSE, CHAIRMAN

CARMEN ARRIETA-CANDELARIA,
COMMISSIONER

PEGGY A. HEEG, COMMISSIONER

DOUG LOWE, COMMISSIONER

ROBERT RIVERA, COMMISSIONER

SOAH DOCKET NO. 362-16-5598.B

**APPLICATION OF
KORI CLARK, SR.
FOR BINGO REGISTRY**

§
§
§
§
§

**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Staff of the Texas Lottery Commission (Commission), Charitable Bingo Operations Division, seeks to deny the application of Kori Clark, Sr. to be placed on the Registry of Approved Bingo Workers (Registry). Mr. Clark was convicted of theft over \$20 and under \$500 and was convicted of forgery by passing a check. The Administrative Law Judge (ALJ) agrees that Mr. Clark's application should be denied.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Notice and jurisdiction were not contested and are further discussed only in the Findings of Fact and Conclusions of Law.

The hearing on Mr. Clark's application convened before ALJ Sarah G. Ramos on October 18, 2016, at the State Office of Administrative Hearings, 300 West Fifteenth Street, Austin, Texas. Assistant General Counsel Stephen White represented Staff, and Mr. Clark, who appeared via telephone, represented himself. The hearing was adjourned and the record closed the same day.

II. DISCUSSION

A. Background

Mr. Clark's application for listing on the Registry was submitted April 4, 2016. Because of his criminal convictions, Staff denied his application, and he sought a hearing.

B. Evidence

Sheri Wood, a licensing coordinator with the Commission's Charitable Bingo Division, testified that charitable bingo is primarily a cash business that can allow opportunities for theft. Thus, she implied, the Commission is particularly concerned about persons who have committed offenses involving theft.

On February 19, 1997, in County Court at Law No. 2, Brazos County, Texas, Cause No. 3170-95, Mr. Clark was convicted of theft over \$20 and under \$500 for which he was sentenced to 60 days confinement in the Brazos County Jail. The offense was committed on December 21, 1992.

On February 7, 1997, in the Criminal District Court, Dallas County, Texas, Case No. F-9653186-LH, Mr. Clark was found guilty of defrauding another by passing a forged check on December 4, 1996. This offense is listed in Texas Penal Code § 32.21 as a crime of fraud. For this crime, Mr. Clark was sentenced to two years of confinement in the Texas Department of Criminal Justice State Jail Division, but the court suspended imposition of sentence and placed Mr. Clark on community supervision for a period of three years. Mr. Clark testified that he successfully completed his community supervision.

Mr. Clark testified that he committed the last violation when he was 19 years old and is now 41 years old. He said he was young and not acting intelligently when he committed the crimes. Since then, Mr. Clark has worked to build a good life for himself and his family. At the present time, he is working as a security guard outside a bingo hall, and his employers have offered him a job working inside the establishment.

Mr. Clark's wife, Teresa Clark, wrote a letter of support for him.¹ She described him as being a loving and caring father, husband, and son through their 10-year marriage. He took care of

¹ Staff Ex. 2.

his parents during their final illnesses, she said. Ms. Clark also mentioned her husband's work ethic, motivation, determination, and perseverance as qualities that would assist his employer if Mr. Clark is listed on the Registry.

Mr. Clark's friend and neighbor, Todd Atkins, also wrote a letter of recommendation for Mr. Clark.² Mr. Atkins has known Mr. Clark for almost 10 years. They attend the same church and have worked together on neighborhood events. Mr. Atkins admires Mr. Clark's commitment to their community. He also mentioned Mr. Clark's hard work and the kindness he has shown to Mr. Atkins and his family.

C. Arguments

Staff argued that Mr. Clark's crime of fraud falls within the lifetime prohibition for listing as a bingo worker. According to Staff, the Commission has no discretion but to deny Mr. Clark's application.

III. ANALYSIS

Texas Occupations Code § 2001.105(a) requires the Commission to issue or renew a license to conduct bingo provided certain conditions are met. One of those conditions is that no person working at the proposed bingo operation has been convicted of criminal fraud. Commission rule 16 Texas Administrative Code (TAC) § 402.702(b) defines a violation of chapter 32 of the Penal Code as an offense involving criminal fraud. Unfortunately for Mr. Clark, his good conduct for the past 20 years does not overcome these legal limitations.

If Mr. Clark had only the theft conviction, his conduct since that offense would have enabled him to become listed. Commission rule 16 TAC § 402.702(e) defines any conviction under Penal Code chapter 31 regarding theft as directly related to the duties and responsibilities of licensee's

² Staff Ex. 2.

activities under the Bingo Enabling Act. However, the factors listed in 16 TAC § 402.702(h) and Texas Occupations Code chapter 53 weigh in favor of Mr. Clark's listing. These include the length of time since his convictions and the young age at which he committed the crimes. In addition, Mr. Clark has been employed, supported his family, been involved in his community, and demonstrated good conduct.³

Nevertheless, Mr. Clark's fraud conviction is an absolute bar to his being listed in the Registry. A change in Texas Occupations Code § 2001.105 would be required before he could be considered for listing. Therefore, the evidence in this case supports Staff's recommendation that Mr. Clark's application be denied.

IV. FINDINGS OF FACT

1. On April 4, 2016, Kori Clark, Sr., applied to be listed on the Texas Lottery Commission's (the Commission's) Registry of Approved Bingo Workers.
2. The Staff of the Commission's Charitable Bingo Operations Division denied the application, and Mr. Clark requested a hearing on the matter.
3. On July 13, 2016, Staff sent notice of the hearing to Mr. Clark. The notice stated the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and the factual matters asserted.
4. The hearing on Mr. Clark's application convened before Administrative Law Judge Sarah G. Ramos on October 18, 2016, at the State Office of Administrative Hearings (SOAH), 300 West Fifteenth Street, Austin, Texas. Assistant General Counsel Stephen White represented Staff, and Mr. Clark, who appeared via telephone, represented himself. The hearing was adjourned and the record closed the same day.
5. On February 7, 1997, in the Criminal District Court, Dallas County, Texas, Case No. F-9653186-LH, Mr. Clark was found guilty of defrauding another by passing a forged check. The offense was committed on December 4, 1996.
6. The offense for which Mr. Clark was convicted is listed in Texas Penal Code § 32.21 as a crime of fraud.

³ Tex. Occ. Code § 53.023.

7. For the crime of fraud, Mr. Clark was sentenced to two years of confinement in the Texas Department of Criminal Justice State Jail Division, but the court suspended imposition of the sentence and placed Mr. Clark on community supervision for a period of three years.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to Texas Occupations Code ch. 2001.
2. SOAH has jurisdiction over this proceeding pursuant to Texas Government Code ch. 2003.
3. Mr. Clark received proper and timely notice of the hearing pursuant to the Administrative Procedure Act, Texas Government Code ch. 2001.
4. Texas Occupations Code § 2001.105(a) requires the Commission to issue or renew a license to conduct bingo provided certain conditions are met. One of those conditions is that no person working at the proposed bingo operation has been convicted of criminal fraud.
5. Commission rule 16 Texas Administrative Code § 402.702(b) defines a violation of chapter 32 of the Penal Code as an offense involving criminal fraud.
6. Mr. Clark's crime of fraud falls within the lifetime prohibition for listing as a bingo worker.
7. Mr. Clark's application to be listed on the Commission's Registry of Approved Bingo Workers should be denied.

SIGNED December 15, 2016.



SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

CASE SUMMARY

PARTY NAME/STATUS: Texas Lottery Commission Staff, Petitioner

DOCKET NO./CASE NAME: 362-15-1666.B and 362-15-3696.B; East Plano Bingo, Inc., Respondent

ISSUES: 1. Did illegal gambling devices at East Plano Bingo Hall operated by Respondent award entry into bingo games as prizes in violation of the Bingo Enabling Act and Commission rules? [*Yes*]
2. Does it matter whether the illegal gambling devices were on or off the bingo premises? [*No*]

KEY FACTS: East Plano Bingo, Inc. is a commercial lessor. The sole owner/officer, Edwin Branom, operated illegal gambling devices in a room inside or adjoining East Plano Bingo hall at two locations. Players could exchange points won on the devices for entry into bingo games. As a result of operating these devices, in 2005 Branom pleaded guilty to keeping a gambling place at the first location and in 2011 pleaded guilty to organized crime through gambling promotion at the second location.

The Judge found the gambling devices were not on the bingo premises at the first location, and thus erroneously found no violation of Bingo Enabling Act § 2001.416 and Commission Rule 402.211(f), which prohibit unauthorized games of chance during a bingo occasion and awarding bingo equipment or entry into bingo games as prizes. The Judge found a violation at the second location, and recommended a 5-year probated license suspension and \$600 fine (the Commission's standard penalty at the time of the violations).

LEGAL PRINCIPLES INVOLVED: The Judge did not properly apply the Commission's rule and prior Commission decisions. Rule 402.211(f) prohibits the awarding of bingo equipment or entry into bingo games as prizes in any game of chance other than charitable bingo, charitable raffles and door prize games, regardless of where the games of chance are conducted. This is because bingo equipment and entry into bingo games can only be claimed as prizes on bingo premises during a bingo occasion. In the *Julam Investments* and *Nathan Bullard* cases, SOAH and the Commission held it is "irrelevant" whether gambling devices that award such prizes are on or off the bingo premises because (as in this case) the prize award occurs on bingo premises during a bingo occasion, using bingo employees and bingo equipment. By allowing such transactions, Respondent allowed illegal games of chance during a bingo occasion in violation of Bingo Enabling Act § 2001.416 and Rule 402.211(f).

ACTION REQUESTED: Modify the Judge's findings and conclusions as follows to accurately reflect Commission policy and precedent, and otherwise adopt the Judge's proposal and recommended sanction:

Finding of Fact No. 5: "The game room at 2504 14th Street was not on the bingo premises, but adjacent to the bingo premises. However, the exchange of points won on the illegal gambling devices for entry into bingo games occurred on the bingo premises while bingo was being conducted, using bingo employees and bingo equipment to record the exchange. By allowing these transactions to occur on the bingo premises, East Plano allowed the conduct of under the direct control of the Trust, and therefore East Plano did not allow Mr. Branom to conduct illegal games of chance during a bingo occasion at a bingo premises at that location."

Conclusion of Law No. 6: "The illegal gambling operations occurred in part during a bingo occasion on the bingo premises at the location at 2504 14th Street because the illegal gambling machines awarded points as prizes that were then exchanged for entry into bingo games on the bingo premises while bingo was being conducted, using bingo employees and bingo equipment was not an area or location subject to the direct control of and actual use by a licensed authorized organization or group of licensed authorized organizations to conduct bingo. Code § 2001.002(22)."

Conclusion of Law No. 7: "East Plano did not conducted or allowed a game of chance other than bingo or raffle at a bingo premises at 2504 14th Street during a bingo occasion in violation of the BEA and Commission rules. Code §2001.416; 16 Tex. Admin. Code § 402.211(b) (eff. May 7, 2014)."

CASE SUMMARY

PARTY NAME/STATUS: East Plano Bingo, Inc. ("EPB")/licensed commercial lessor

DOCKET NO./CASE NAME: 362-15-1666.B and 362-15-3696.B; Texas Lottery Commission v. East Plano Bingo, Inc.

ISSUE(S): Whether EPB allowed the operation of illegal gaming devices on the bingo premises during bingo occasions.

KEY FACTS: [Click here to enter text.](#)

- 1) East Plano Bingo, Inc. ("EPB") is a licensed commercial lessor; there is no evidence that EPB ever operated one illegal device; the only evidence is that illegal devices were operated by Edwin Branom or another company he owned; there is simply no evidence that a bingo charity ever used the game room where the devices were located to conduct any game of bingo. All evidence shows there never were any such devices on the bingo premises. There is no evidence that any bingo customer ever played bingo in any game room where illegal devices were located.
- 2) EPB has never been charged with or convicted of any crime.
- 3) During 2007 to 2009, Edwin Branom or a company owned by him conducted a game room business with illegal gambling devices at 2550 14th Street, Suite B.
- 4) Customers of the game room could win tickets or points that could be exchanged in the bingo hall, Suite A, to play bingo.
- 5) Only Suite A of 2550 14th Street was under the direct control of and actual use of the charities to conduct bingo.
- 6) It has been six years since Mr. Branom was charged with illegal gambling and five years since he was discharged from community service.
- 7) The Staff offered no testimony during the hearing on any recommended penalty.
- 8) After considering mitigating and aggravating factors, the ALJ recommends the Commission suspend EPB's commercial lessor license for five years, probate the suspension with appropriate conditions and restrictions allowing the Commission to closely supervise EPB's operations, and assess a \$600 administrative fine.

LEGAL PRINCIPLES INVOLVED:

- 1) The statute defines bingo premises as "the area subject to the direct control of and actual use by" a charity to conduct bingo. Section 2001.002(22).
- 2) The Commission's rule prohibits one from operating a prohibited game of chance on the bingo premises during a bingo occasion, which was adopted long after the 2007-2009 infractions occurred. 16 TAC S 402.211(c).
- 3) At the time of the infractions, the Commission's recommended penalty was for a monetary penalty; on August 1, 2016, the Commission specifically changed its penalty formula to include revocation of a license. 16 TAC S 706(c).[Click here to enter text.](#)

ACTION REQUESTED: EPB requests that no penalty be assessed and that the commercial lessor license be renewed; alternatively, EPB accepts the ALJ's recommended penalty, given the circumstances.

Commission Order No. 17-0030

Date: FEBRUARY 2, 2017

DOCKET NOS. 362-15-1666.B and 362-15-3696.B

TEXAS LOTTERY COMMISSION	§	BEFORE THE TEXAS
PETITIONER	§	
	§	
VS.	§	
	§	
EAST PLANO BINGO, INC.	§	
RESPONDENT	§	LOTTERY COMMISSION

ORDER OF THE COMMISSION

TO: Mr. Stephen Fenoglio
Attorney at Law
713 W. 14th St.
Austin, TX 78701

During open meeting at Austin, Texas, the Texas Lottery Commission (Commission) finds that, after proper and timely notice was given, the above-styled case was heard by an Administrative Law Judge (ALJ) who made and filed a Proposal for Decision (PFD) containing the ALJ's proposed Findings of Fact and Conclusions of Law, and the PFD was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein.

The Commission adopts the ALJ's proposed Findings of Fact and Conclusions of Law, with the exception of proposed Finding of Fact No. 5 (which in substance reflects a legal conclusion), and Conclusions of Law Nos. 6 and 7. In accordance with TEX. GOV'T CODE ANN. § 2001.058(e), the Commission does not adopt Finding of Fact No. 5 and Conclusions of Law Nos. 6 and 7, because the Commission has determined the ALJ did not properly apply or interpret applicable law, agency rules and prior administrative decisions in proposing this Finding and these Conclusions.

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Proposed Finding of Fact No. 5 states, “The game room at 2504 14th Street was not under the direct control of the Trust, and therefore East Plano did not allow Mr. Branom to conduct illegal games of chance at a bingo premises at that location.”

Proposed Conclusion of Law No. 6 states, “The location at 2504 14th Street was not an area or location subject to the direct control of and actual use by a licensed authorized organization or group of licensed authorized organizations to conduct bingo. [Tex. Occ.] Code § 2001.002(22).”

Proposed Conclusion of Law No. 7 states, “East Plano did not conduct or allow a game of chance other than bingo or raffle at a bingo premises at 2504 14th Street during a bingo occasion in violation of the BEA and Commission rules. [Tex. Occ.] Code § 2001.416; 16 Tex. Admin. Code § 402.211(b) (eff. May 7, 2014).”

Even if the gambling devices at 2504 14th Street were not on the bingo premises, Respondent nevertheless allowed unauthorized games of chance to occur on the bingo premises during a bingo occasion. It was undisputed, and the parties stipulated, that the gaming devices allowed players to win credits that then were exchanged for bingo equipment, including bingo pull-tabs, and entry into bingo games.¹ The exchange of credits accumulated on the gaming device “Players Card” for the prize of bingo equipment or entry into bingo games took place, and could only take place, during a bingo occasion on a bingo premises, using bingo employees and bingo equipment. Under Texas law, gambling consists of the elements of (1) consideration, (2) chance, and (3)

¹ Joint Ex. 1. Proposal for Decision dated October 20, 2016, in the instant case, at p. 6.

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prize.² Because the bingo equipment/entry prize could only be claimed and awarded during a bingo occasion on the bingo premises, under the facts of this case the operation of the gaming devices constituted an unauthorized game of chance during a bingo occasion and was prohibited under TEX. OCC. CODE ANN. § 2001.416.

The ALJ's erroneous interpretation that the *entire* illegal gambling operation must occur on the bingo premises for there to be a violation of TEX. OCC. CODE ANN. § 2001.416 is contrary to the Commission's rules at 16 TEX. ADMIN. CODE § 402.211(f), and prior State Office of Administrative Hearings PFDs and Commission orders. The Commission's previous rulings in the similar eight-liner game room cases of *TLC v. Bullard, et al.*³, and *TLC v. Julam Investments, Inc.*⁴ established that a person who operates, or allows operation of, an illegal gambling device that awards points exchangeable for bingo equipment is in violation of TEX. OCC. CODE ANN. § 2001.416, regardless of whether the gambling devices are on or off the premises.⁵ In both *Bullard* and *Julam*, the ALJ and the Commission held that the location of illegal gambling devices is "irrelevant" when the gambling involves the awarding of bingo equipment as prizes.⁶

² See *Hoffman v. State*, 219 S.W.2d 539, 542 (Tex. Civ. App.—Dallas 1949, no writ).

³ *Texas Lottery Commission v. Nathan Bullard d/b/a Golden Belle Bingo Hall; Nathan Bullard d/b/a Brazos Bingo Hall; House of Isaiah Athletes for a Drug Free America, Inc.; Mary Queen of Heaven Knights of Columbus, Inc.; Gun Barrel City Volunteer Fire Department; Humane Society of Cedar Creek Lake, Inc.; and Payne Springs Volunteer Fire Department*, 2013 WL 2146391 (Date of PFD: Feb. 11, 2013; Date of Commission Decision: August 5, 2013).

⁴ *Texas Lottery Commission v. Julam Investments, Inc.*, 2016 WL 3568903 (Date of PFD: June 27, 2016; Date of Commission Decision: October 13, 2016).

⁵ It should be noted that in the case of *Julam Investments, Inc.*, the violations occurred after the Commission adopted 16 TEX. ADMIN. CODE § 402.211.

⁶ *Texas Lottery Commission v. Julam Investments, Inc.*, 2016 WL 3568903, at *7 and *Texas Lottery Commission v. Nathan Bullard, et al.* 2013 WL 2146391, at *12.

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The prohibition in 16 TEX. ADMIN. CODE § 402.211(f) against awarding bingo equipment or entry into a bingo game as a prize in a game of chance is not based on the location of gaming devices, but rather whether the game of chance itself is lawful. The Texas Attorney General has repeatedly held that a gaming device that awards bingo equipment, regardless of its value, is an illegal gambling device.⁷ Bingo equipment, or entry into a bingo game, can only be claimed as a prize during a bingo occasion, and thus is in violation of the statute and the rule.

For the above reasons, and in accordance with TEX. GOV'T CODE ANN. § 2001.058(e), the Commission hereby changes proposed Finding of Fact No. 5 to read as follows:

The game room at 2504 14th Street was not on the bingo premises, but adjacent to the bingo premises. However, the exchange of points won on the illegal gambling devices for entry into bingo games occurred on the bingo premises while bingo was being conducted, using bingo employees and bingo equipment to record the exchange. By allowing these transactions to occur on the bingo premises, East Plano allowed the conduct of illegal games of chance during a bingo occasion at a bingo premises at that location.

For the above reasons, and in accordance with TEX. GOV'T CODE ANN. § 2001.058(e), the Commission hereby changes proposed Conclusion of Law No. 6 to read as follows:

The illegal gambling operations occurred in part during a bingo occasion on the bingo premises at the location at 2504 14th Street because the illegal gambling machines awarded points as prizes that were then exchanged for entry into bingo games on the bingo

⁷ TEX. ATTY. GEN. OP. NO. GA-0812 (October 22, 2010); and TEX. ATTY. GEN. OP. NO. GA-0913 (February 27, 2012).

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premises while bingo was being conducted, using bingo employees and bingo equipment.

For the above reasons, and in accordance with TEX. GOV'T CODE ANN. § 2001.058(e), the Commission hereby changes proposed Conclusion of Law No. 7 to read as follows:

East Plano conducted or allowed a game of chance other than bingo or raffle at a bingo premises at 2504 14th Street during a bingo occasion in violation of the BEA and Commission rules. TEX. OCC. CODE ANN. § 2001.416; 16 TEX. ADMIN. CODE § 402.211(b) (eff. May 7, 2014).

All proposed Findings of Fact and Conclusions of Law not specifically adopted herein are hereby denied.

NOW, THEREFORE, IT IS ORDERED that the commercial lessor license of East Plano Bingo, Inc., is suspended for a period of five years, but such suspension will be probated for a period of five years under the following conditions:

- a. East Plano Bingo, Inc., shall not operate or allow the operation of any electronic gaming devices, other than (i) authorized card-minding devices or other authorized bingo equipment as defined in Occupations Code § 2001.002(5), or (ii) amusement devices that are not gambling devices as defined by Penal Code § 47.01 (or that otherwise are lawful under any new or amended law), and that do not award bingo equipment or entry into a bingo game as a prize, or coupons, tickets or other indicia of winning exchangeable for bingo equipment or entry into a bingo game.
- b. The Charitable Bingo Operations Division shall monitor all bingo activities conducted by East Plano Bingo, Inc., and all organizations that lease bingo premises from East Plano Bingo, Inc. The monitoring will be in the form of unscheduled inspections of any premises leased by East Plano Bingo, Inc. East Plano Bingo, Inc., shall reimburse the Charitable Bingo Operations Division for all costs associated with such inspections, including travel, for up to two (2) inspections per year during the monitoring period. Reimbursable costs for each individual inspection will not exceed \$750.00. East Plano Bingo, Inc., shall submit payment for the inspections within thirty (30) days of written notification of the cost from

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the Charitable Bingo Operations Division. The Charitable Bingo Operations Division may conduct additional inspections, but East Plano Bingo, Inc., will not be responsible for such inspection costs.

IT IS FURTHERED ORDERED that East Plano Bingo, Inc., is assessed an administrative penalty in the amount of \$600.00, which shall be due within sixty (60) days from the date this Order is signed by the Commission.

IT IS FURTHERED ORDERED that if, after a hearing conducted in accordance with TEX. GOV'T CODE Chapter 2001, on the sole issue of compliance with this Order, it is found that East Plano Bingo, Inc., has failed to comply with the terms of this Order, the Commission may seek any and all available remedies, including revocation of East Plano Bingo, Inc.'s, commercial lessor license.

Commission Order No. 17-0030

Date: FEBRUARY 2, 2017

Passed and approved at the regular meeting of the Texas Lottery Commission at Austin, Texas, on the 2ND day of FEBRUARY, 2017.

Entered this 2ND day of FEBRUARY, 2017.

J. WINSTON KRAUSE, CHAIRMAN

CARMEN ARRIETA-CANDELARIA,
COMMISSIONER

PEGGY A. HEEG, COMMISSIONER

DOUG LOWE, COMMISSIONER

ROBERT RIVERA, COMMISSIONER

SOAH DOCKET NOS. 362-15-1666.B AND 362-15-3696.B

TEXAS LOTTERY COMMISSION,
Petitioner

v.

EAST PLANO BINGO, INC.,
TAXPAYER NO. 30116918381,
Respondent

§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Respondent in these consolidated cases is East Plano Bingo, Inc. (East Plano), a licensed commercial bingo hall lessor. The staff (Staff) of the Texas Lottery Commission (Commission) alleges in both cases that East Plano allowed the operation of illegal gaming devices on the premises of a bingo hall during bingo occasions in violation of Texas Occupations Code (Code) § 2001.416.¹ In Docket No. 362-15-1666.B, Staff seeks revocation of Respondent's license in addition to administrative penalties. In No. 362-16-3696.B, Staff seeks to deny Respondent's application for renewal of its license and administrative penalties.

The Administrative Law Judge (ALJ) finds that the preponderance of the evidence proved that East Plano allowed or conducted unauthorized games of chance at a bingo premises during a bingo occasion in violation of Code § 2001.416 and 16 Texas Administrative Code § 402.211. However, after considering the law in effect at the time of the violation and mitigating and aggravating factors, the ALJ recommends a \$600 fine, as well as a probated suspension of East Plano's license.

¹ Staff has the burden to prove its allegations by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427. Staff argues that the burden should be on East Plano and cites as support 16 Texas Administrative Code § 401.226, which was repealed on March 31, 2010. Staff's Closing Argument at fn. 10. The former rule states that the agency has the burden of proving a prima facie case, and the burden of proof then shifts to the licensee. The Administrative Law Judge finds that the repeal of the rule renders it inapplicable to this case because it was a procedural rule that did not affect vested rights, and was repealed prior to the institution of enforcement proceedings in this case. *Tyra v. City of Houston*, 822 S.W.2d 626, 627 fn.1 (Tex. 1991) (Changes in laws affecting remedies or procedures, but not vested rights, may be applied retroactively.).

I. NOTICE AND JURISDICTION

The hearing convened on July 7 through July 8, 2016, before ALJ Joanne Summerhays at the State Office of Administrative Hearings in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The Commission was represented by attorney Stephen White. East Plano was represented by attorney Stephen Fenoglio. The record closed on August 31, 2016, after the parties filed post-hearing briefs.

II. BACKGROUND

East Plano is licensed by the Commission as a commercial bingo lessor. Edwin Branom is the sole owner, sole officer, sole director, and sole business contact of East Plano. In 2005 through 2007, East Plano subleased bingo premises to licensed bingo conductors at the East Plano Bingo Hall, located at 2502 14th Street, Plano, Texas, and in 2007 through 2009, leased bingo premises located at 2550 14th Street, Plano, Texas, to licensed bingo conductors. During the same periods of time, Mr. Branom or a company owned by Mr. Branom owned and operated gaming devices (which it is undisputed were illegal gambling devices) at a game room located at 2504 14th Street, Plano, Texas (2005), and then at 2550 14th Street, Plano, Texas (2007-2008).

III. APPLICABLE LAW

The Bingo Enabling Act (BEA)² authorizes the Commission to “exert strict control and close supervision over all bingo” conducted in Texas.³ Section 2001.416 of the BEA states that a “game of chance other than bingo or a raffle conducted under Chapter 2002 of the Code may not be conducted or allowed during a bingo occasion.”⁴ “Bingo occasion” is defined in the BEA as “a single gathering or session at which a bingo game or a series of bingo games, including selling

² Tex. Occ. Code (Code) § 2001.001 *et seq.*

³ Code § 2001.051(a).

⁴ Code § 2001.416.

and redeeming pull-tab bingo tickets, are conducted on the day and at the times listed on the license issued to a licensed authorized organization.”⁵ A “licensed authorized organization” is “an authorized organization that holds a license to conduct bingo.”⁶ Only organizations that are exempt from taxes under 501(c) of the Internal Revenue Code (charities) are eligible to hold a license to conduct bingo.⁷

The BEA directs the Commission to adopt rules governing the implementation of Code § 2001.416.⁸ The Commission’s rule implementing section 2001.416 tracks the statutory language, but adds the phrase “bingo premises” to the statutory prohibition: “a person may not conduct or allow a game of chance *at a bingo premises* during a bingo occasion *at the premises*.”⁹ “Bingo premises” is defined by the BEA as “the area subject to the direct control of and actual use by a licensed authorized organization or group of licensed authorized organizations to conduct bingo. The term includes a location or place.”¹⁰ A “person” means “an individual, partnership, corporation, or other group.”¹¹

⁵ Code § 2001.002(6). The definition of “bingo occasion” in effect at the time of the events at issue in this case was revised effective October 1, 2009. However, the revision did not substantially alter the definition as applied to the facts in this case, and therefore the parties and the ALJ relied on the current statute as revised.

⁶ Code § 2001.002(14).

⁷ Code § 2001.101. The description of authorized organizations in effect at the time of the events at issue in this case was revised effective October 1, 2009. However, the revision did not substantially alter the description as applied to the facts in this case and therefore the parties and the ALJ relied on the current statute as revised.

⁸ Code § 2001.416(c).

⁹ 16 Tex. Admin. Code § 402.211(b) (eff. May 7, 2014) (emphasis added). In adopting the rule, the Commission pointed out that the statute failed to clarify a geographic location for the prohibition against games of chance and that its rule remedied that lack of clarity: “While § 2001.416 prohibits most games of chance during a bingo occasion, it does not specify where that prohibition is applicable. Section 2001.416 authorizes the Commission to determine the geographic scope of the prohibition. In subsection (b) of the proposed rule, the Commission has determined that the prohibition will apply at the bingo premises.” 39 Tex. Reg. 1320 (Feb. 28, 2014). Although this rule was adopted after the events at issue in this case, it was adopted before the contested case was filed. Furthermore, the rule merely clarifies the authority of the Commission. The constitutional prohibition against retroactively applying rules only applies in cases where the rule adversely affects a person’s vested right. *Grocer Supply Company, Inc. v. Sharp*, 978 S.W.2d 638, 643 (Tex. App.—Austin 1998, pet. denied). The adoption of the rule in this case does not limit the rights of licensees or expose them to additional enforcement actions. Rather it limits the power of the Commission to take enforcement actions under the statute to situations in which the game of chance is played on the bingo premises. Therefore, the ALJ finds that the rule does not affect vested rights and is applicable to this case.

¹⁰ Code § 2001.002(22).

¹¹ Code § 2001.002(20).

Charities may lease a bingo premises from a “licensed commercial lessor” which is “a person licensed to lease premises and act as a commercial lessor.”¹² The Commission may only issue a commercial lessor license to a person if the Commission determines that bingo is to be conducted on the premises in accordance with the BEA.¹³ The Commission may suspend, revoke, deny, or refuse to renew a license for any violation of the BEA or the Commission rules, or for any reason that would allow or require the Commission to refuse to issue or renew a license.¹⁴ The Commission may place on probation a person whose license is suspended and require the person (1) to report to the Commission on a regular basis, (2) to limit the person’s activities under the license, or (3) to take any other action the Commission finds reasonable.¹⁵ The Commission may also assess monetary administrative penalties against any person who violates the BEA or the Commission’s rules.¹⁶

Pursuant to the BEA mandate, the Commission has adopted a schedule of sanctions addressing the appropriate sanctions for particular violations.¹⁷ Staff alleged that, according to the Commission’s current schedule of sanctions, which was amended effective August 1, 2016, the appropriate sanction for the first violation of allowing or conducting a game of chance involving gambling devices at a bingo premises on a bingo occasion is an administrative fine up to \$1,000 and/or license suspension, revocation, or denial.¹⁸ However, at the time of some of the

¹² Code § 2001.002(15).

¹³ Code § 2001.159(a) states: “The [C]ommission shall issue or renew a commercial lessor license if the [C]ommission determines that . . . (6) the applicant will lease the premises for the conduct of bingo in accordance with this chapter . . .”. The words “or renew” were added effective October 1, 2009, which did not substantially change the application of the statute to the facts in this case.

¹⁴ Code §§ 2001.353(a), .554(a)(5). Section 2001.353(a) was revised effective September 1, 2013, by adding the words “refuse to renew.” The revision did not substantially change the applicability of the statute to this case.

¹⁵ Code § 2001.353(b), (d). The BEA requires the Commission to adopt written guidelines to ensure that probation is administered consistently and to develop a system to track compliance with probation requirements. Both sections 2001.353(b) and (d) were added effective September 1, 2013. As neither of the new subdivisions of the statute affects vested rights, the changes may be applied retroactively. *Grocer Supply Company, Inc. v. Sharp*, 978 S.W.2d 638, 643 (Tex. App.—Austin 1998, pet. denied). Furthermore, the parties agreed that the current version of the Code applies in this case.

¹⁶ Code § 2001.601.

¹⁷ Code § 2001.358 (eff. Sept. 1, 2013); 16 Tex. Admin. Code § 402.706. Section 402.706 was amended effective August 1, 2016.

¹⁸ 16 Tex. Admin Code § 402.706(c) (Category 1, Violation No. 6) (eff. August 1, 2016).

events at issue in this matter, the Commission's prior graphic, which was adopted effective April 25, 2006, provided that the appropriate range of sanctions for the same violation was "\$0 (Warning) to \$600 for the 1st offense."¹⁹ The Commission rule 402.706(f) states generally, "Additional remedies may be imposed along with or in lieu of an administrative penalty which may include . . . suspension, revocation, or denial of a license."²⁰

To determine the correct sanction, the Commission considers the following factors:

- (1) seriousness of the violation which includes the nature, circumstances, extent and gravity of the prohibited acts;
- (2) history of previous violations which includes:
 - (A) the number of previous violations; and
 - (B) the number of repeated violations;
- (3) the action(s) necessary to deter future violations;
- (4) efforts to correct the violation after awareness of the violation through personal knowledge or notification by the commission;
- (5) any other matter that justice may require, including:
 - (A) whether the violation was intentional, inadvertent, simple negligence, gross negligence, or the unavoidable result of a related violation;
 - (B) cooperation with the Commission during its examination, audit, or investigation of the person;
 - (C) length of time the licensee has held a license;
 - (D) risk to the public or state;
 - (E) whether the organization or person has acknowledged a violation and agreed to comply with the terms and conditions of remedial action through an agreed settlement with the Commission; and
 - (F) the cost of the investigation, examination or audit associated with the violation.²¹

¹⁹ 16 Tex. Admin. Code § 402.706(c) (Category 2, Violation No. 11) (adopted Apr. 25, 2006).

²⁰ 16 Tex. Admin. Code § 402.706(f) (adopted Apr. 25, 2006).

²¹ 16 Tex. Admin. Code § 402.706(j).

The Commission may consider other mitigating factors as well.²²

IV. DISCUSSION

A. Evidence

Staff called as witnesses Grant Harp and Alfredo Garcia, Plano, Texas police officers; Desira Glenn, the licensing and accounting services manager of the Charitable Bingo Operations Division of the Commission; and Jana Barch, the corporative representative of East Plano. In addition, Staff submitted 25 exhibits which were admitted into evidence.²³ East Plano called as witnesses Alfonso D. Royal, III, the director of the Charitable Bingo Operations Division of the Commission; and Jerry Holman Stobaugh, employed by the East Plano Bingo Unit Trust charities as the East Plano Bingo Hall manager. East Plano submitted two exhibits, which were admitted into evidence.²⁴ In addition, the parties submitted stipulations.²⁵

The facts were basically undisputed. East Plano subleased the location at 2502 14th Street to a group of charities known as the East Plano Bingo Unit Trust (Trust) to conduct bingo from 2005 to 2007.²⁶ In 2005, East Plano also allowed Mr. Branom or an entity owned by Mr. Branom to conduct business as a gaming room at the location next door to the bingo hall, which had a separate address: 2504 14th Street, a property leased by East Plano. At the gaming room, customers could play machines known as 8-liners and win bingo equipment²⁷ to play bingo at the bingo hall next door. There were separate outside entrances to the bingo hall and

²² 16 Tex. Admin. Code § 402.706(l) (added eff. Aug. 1, 2016).

²³ Staff's Exhibits are numbered 1 through 35. Staff submitted and then withdrew Staff Exhibits 21 through 30. Tr. Vol. I at 285-86.

²⁴ East Plano's Exhibits are numbered Respondent Exhibit 7 and Exhibit 18.

²⁵ The parties' stipulations were admitted as Joint Exhibit 1. Following the hearing, the parties resubmitted the stipulations as they were not signed at the time of the hearing. The signed stipulations have been substituted for the unsigned stipulations in the record as Joint Exhibit 1.

²⁶ A "unit" is a group of charities that come together for accounting purposes so that they only have to file one quarterly statement for the unit, instead of one for each individual charity. Tr. Vol. I at 95.

²⁷ "Bingo equipment" means equipment used, made, or sold for the purpose of use in bingo. Code § 2001.002(5).

game room. Once inside either the game room or the bingo hall, there was a swinging door through which customers from the game room could enter the bingo premises and play bingo, and vice versa. The sign over the bingo hall stated "East Plano Bingo Hall" but there was no signage identifying the game room.²⁸

In 2005, Officer Harp began an investigation of the gaming room located at 2502 14th Street. Through his investigation, it was determined that the 8-liners owned and operated by Mr. Branom were illegal gambling devices. In July, 2005, Mr. Branom was charged with a misdemeanor of keeping a gambling location.²⁹ On November 10, 2005, in County Court at Law No. 4, Collin County, Texas, he pleaded guilty and was placed on deferred adjudication and community supervision for one year.³⁰ On April 17, 2006, the court entered an order releasing Mr. Branom early from community supervision and dismissing the charges against him.³¹

In approximately 2007, East Plano leased 2550 14th Street, a building which East Plano owned, to the Trust to conduct bingo. The premises were originally one large room housing a skating rink, and a wall was erected which divided the room into two areas or rooms with doors connecting the two areas on either end of the dividing wall.³² The Trust conducted bingo on one side of the wall. On the other side, at the same address, East Plano allowed Mr. Branom or an entity owned by him to conduct a game room business with illegal gambling devices. As in the prior location, customers of the game room could win bingo equipment in the game room and go through either of the two doors leading into the bingo hall to play bingo. There were also two outside doors, one leading to the game room and one to the bingo hall.³³ This location had one

²⁸ Tr. Vol. I at 38-40.

²⁹ Staff Ex. 16 at 425-35.

³⁰ Tr. Vol. I at 48-50; Staff Ex. 11.

³¹ Staff Ex. 11 at 64.

³² Jana Burch, East Plano's corporate representative, referred to the two rooms as separate suites designated as suite A and B, but no other evidence was submitted corroborating this designation.

³³ Tr. Vol. I at 162-65, 227.

street address, one electric meter, and one water meter.³⁴ No lease existed between East Plano and Mr. Branom or another entity to run a game room on the 2550 14th Street premises.³⁵

Another police investigation was initiated in December 2008 concerning the operation of the game room. In March 2009, as a result of Officer Garcia's investigation, three individuals were arrested: Mr. Branom, Willie Jenkins (the game room manager and an employee of the bingo hall), and Jerry Stobaugh (the bingo hall manager and the designated agent for the Trust).³⁶ Because of the prior charge, Mr. Branom was charged with felony organized crime of gambling. Mr. Stobaugh and Mr. Jenkins were also charged with felony organized crime of gambling.³⁷ On or about May 24, 2011, Mr. Branom pleaded guilty to engaging in organized crime through gambling promotion in Cause No. 429-81285-10, in the 366th Judicial District Court, Collin County, Texas. On or about May 24, 2011, Mr. Stobaugh pleaded guilty to engaging in organized crime through gambling promotion in Cause No. 429-81287-10, in the 366th Judicial District Court, Collin County, Texas. On or about May 17, 2011, Mr. Jenkins pleaded guilty to a misdemeanor A of keeping a gambling place in Cause No. 429-81286-10, in the 366th Judicial District Court, Collin County, Texas.³⁸

Mr. Branom was placed on community supervision for four years. However, the court granted early discharge and dismissal of the proceedings against Mr. Branom on February 21, 2012.³⁹

³⁴ Tr. Vol. I at 224-25.

³⁵ Staff Ex. 16 at 279-81.

³⁶ Both Mr. Jenkins and Mr. Stobaugh were hired by Mr. Branom for their respective positions. Joint Ex. 1.

³⁷ Tr. Vol. I at 172-73; Staff Exs. 10, 15.

³⁸ Joint Ex. 1.

³⁹ Staff Ex. 10 at 59-61.

B. Staff's Position and Argument

Staff asserts that East Plano violated the Code and Commission rules by allowing games of chance to be conducted during a bingo occasion at the bingo premises for two reasons: (1) regardless of whether the gaming devices were operated on the bingo premises, the bingo operations were so intertwined with the illegal gambling operations that the operation was a violation of Code § 2001.416, and (2) the operation of the gaming machines occurred on the actual bingo premises.⁴⁰

C. East Plano's Position and Argument

East Plano argues that it did not allow games of chance to be conducted during a bingo session on a bingo premises in violation of Code § 2001.416(a) because (1) Staff failed to meet its burden to prove that games of chance occurred in the game room of East Plano Bingo Hall and the game room was not on the bingo hall's premises in either of the two locations at issue,⁴¹ and (2) Staff failed to prove that East Plano operated the gaming devices at issue.

D. ALJ's Analysis

1. Violation of Code § 2001.416

As East Plano pointed out, the Commission explained that its rule was intended to remedy the statute's failure to clarify a geographic location for the prohibition against games of chance:

⁴⁰ Code § 2001.002(22) ("Premises" means the area subject to the direct control of and actual use by a licensed authorized organization or group of licensed authorized organizations to conduct bingo. The term includes a location or place.").

⁴¹ The Stipulations state that the gaming machines were "in a room adjacent to, or in, the East Plano Bingo Hall." The parties agreed that they did not intend to stipulate that the gaming machines were on the bingo premises. Joint Ex. 1 at par. 6, 7, 8.

While § 2001.416 prohibits most games of chance during a bingo occasion, it does not specify where that prohibition is applicable. Section 2001.416 authorizes the Commission to determine the geographic scope of the prohibition. In subsection (b) of the proposed rule, the Commission has determined that the prohibition will apply at the bingo premises.⁴²

After reviewing the arguments and legal authorities cited by the parties, the ALJ agrees with East Plano that the Commission's rule at 16 Texas Administrative Code § 402.211(b) requires that, in order to prove a violation of the statute, Staff must prove that a person allowed or conducted games of chance during bingo occasions *at the bingo premises*.

Staff's evidence failed to prove that games of chance were allowed or conducted at the bingo premises at 2402 14th Street. However, the preponderant evidence established that games of chance were allowed and conducted at the bingo premises at 2550 14th Street between 2007 and 2009. Furthermore, the evidence was sufficient to establish that East Plano allowed the games of chance to be conducted during bingo occasions at the bingo premises at 2550 14th Street.

It was stipulated by the parties that the gaming devices in issue were illegal gambling devices involving a game of chance and did not qualify for any exception found in Texas Penal Code § 47.01(4)(B). Therefore, if the gaming devices were played at the premises of the bingo hall during a bingo occasion, any person who "conducted or allowed" the gaming devices to be played violated the BEA and the Commission's rules.

The definition of bingo premises states that it must be "under the direct control and actual use" of the charities conducting bingo.⁴³ The evidence did not show that games of chance were conducted at the bingo premises located at 2502 14th Street because the game room had a different address, and the evidence did not establish that the property at 2504 14th Street was under the direct control of the charities conducting bingo.

⁴² 39 Tex. Reg. 1320 (Feb. 28, 2014). *See*, fn.9.

⁴³ Code § 2001.002(11).

However, the evidence shows that illegal games of chance occurred during a bingo occasion at a bingo premises at 2550 14th Street. The evidence established that the game room and the bingo hall had the same address; they were in one room that had been partitioned to form two rooms; and there was only one water meter and one gas meter for the premises. It was undisputed that the Trust leased the premises at 2550 14th Street from East Plano to conduct bingo. East Plano's 2015 commercial lessor license application identified 2550 14th Street as the "bingo premises."⁴⁴ No separate lease between East Plano and Mr. Branom or another entity was submitted into evidence, and it was undisputed that no such lease existed.⁴⁵ The evidence also established that the Trust had access to the game room from the bingo hall and its employees and customers moved between the game room and the bingo hall at will during bingo occasions. This evidence proved that the Trust had direct control of and actually used the entire premises at 2550 14th Street including the area in which the games of chance were played. Therefore, the preponderant evidence established that illegal games of chance were allowed and conducted on bingo occasions at the bingo premises.

In addition, the evidence established that East Plano allowed the games of chance on the bingo occasions at the bingo premises. East Plano owned 2550 14th Street, the premises on which the bingo hall and game room were located, leased 2550 14th Street to the Trust to conduct bingo, and permitted the game room to operate at 2550 14th Street during bingo occasions. Mr. Branom was the undisputed owner of the gaming devices and operated the gaming devices, either personally or through another entity, and was also the sole owner of East Plano. This evidence proved that East Plano "allowed" the games of chance to be conducted at the bingo premises.

⁴⁴ Staff Ex. 2.

⁴⁵ Staff Ex. 16 at 279-81.

2. Appropriate Sanction

Under the BEA, East Plano's lessor license is subject to revocation or suspension and its renewal application is subject to denial for a violation of the BEA and Commission rules.⁴⁶ An administrative penalty is also allowed under the BEA.⁴⁷ The Commission rules provide a list of aggravating and mitigating factors to consider in assessing a penalty, including seriousness of the violation, history of violations, deterrence of future misconduct, efforts to correct violations, and any other matter that justice may require.⁴⁸

After considering the mitigating and aggravating factors, the ALJ recommends that East Plano's lessor license be suspended for five years and the suspension be probated, with appropriate conditions allowing the Commission to closely monitor the locations and operations leased by East Plano. In addition, the ALJ recommends a fine of \$600, the maximum recommended under the rules in effect at the time of the violation. Mr. Branom, the owner of East Plano, had knowledge that the gaming devices at issue were illegal from his prior indictment and deferred adjudication proceeding in 2005. Despite his knowledge, he opened another game room with the same illegal devices on the premises of a bingo hall in 2007. This factor shows intent and weighs against East Plano.

However, the evidence did not indicate any previous enforcement action was taken against East Plano or Mr. Branom. The evidence proved that Mr. Branom satisfactorily completed his deferred adjudication. The violation at issue took place in 2007 through 2009, approximately nine to seven years ago. No evidence was submitted that East Plano has been involved in any other violations since that time. These mitigating factors suggest that a less onerous penalty than revocation would be appropriate. A probated suspension of East Plano's license would allow the Commission to require any additional reporting and oversight that is

⁴⁶ Code §§ 2001.353(a)(2), .554(a)(5).

⁴⁷ Code § 2001.601.

⁴⁸ 16 Tex. Admin. Code § 402.706(j).

necessary to ensure that East Plano does not violate the BEA or Commission rules in the future and to impose other conditions, including that any future violations could result in revocation.

Furthermore, a \$600 administrative fine, the maximum penalty allowed under the Commission's rules in effect at the time of the violation, would signal the seriousness of the offense and hopefully deter East Plano and others from future violations of the BEA and Commission rules. Although Staff has requested \$1,000 as an administrative penalty under the current sanctions guidelines, the guidelines in effect at the time of the violation stipulated that the appropriate maximum penalty for the violation alleged was \$600. The Code Construction Act applies to both statutes and rules adopted under a code.⁴⁹ Texas Government Code § 311.031, which is entitled "Saving Provisions," pertinently provides:

- (a) Except as provided by Subsection (b), the reenactment, revision, amendment, or repeal of a statute does not affect:
 - (3) any violation of the statute or any penalty, forfeiture, or punishment incurred under the statute before its amendment or repeal; or
 - (4) any investigation, proceeding, or remedy concerning any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.
- (b) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

In this case, the Commission's revision of the penalty schedule increased the amount of the recommended penalty from \$600 to \$1,000, and therefore the amended schedule should not be applied retroactively under the provisions of § 311.031.

⁴⁹ Tex. Gov't Code § 311.002(4).

In summary, the ALJ recommends the maximum penalty of \$600 and a probated suspension of East Plano's commercial lessor license.

V. FINDINGS OF FACT

1. Respondent East Plano Bingo, Inc. (East Plano) is a commercial bingo hall lessor licensed by the Texas Lottery Commission (Commission). In 2005 through 2007, East Plano subleased a bingo premises at 2402 14th Street, Plano, Texas, to licensed bingo conductors. In 2007 through 2009, East Plano leased a bingo premises at 2550 14th Street, Plano, Texas, to licensed bingo conductors.
2. During the time periods in issue, Edwin Branom was the sole owner, sole officer, sole director, and sole business contact of East Plano.
3. In 2005, Mr. Branom or entities controlled by him operated illegal gambling devices at 2504 14th Street, which was leased by East Plano. The bingo hall located next door at 2502 14th Street, also leased by East Plano and subleased to the East Plano Bingo Unit Trust (Trust) to conduct bingo, had interior doors that connected directly to the game room operated by Mr. Branom. Employees and customers of the bingo hall were able to move freely between the two premises. Some of the gaming machines allowed players to obtain bingo equipment or entries into bingo games. Each business also had separate exterior doors, but no signage identified the game room as a separate business.
4. On November 10, 2005, in County Court at Law No. 4, Collin County, Texas, Mr. Branom pleaded guilty to a misdemeanor of keeping a gambling location at 2504 14th Street and was placed on deferred adjudication and community supervision for one year. On April 17, 2006, the court entered an order releasing Mr. Branom early from community supervision and dismissing the charges against him.
5. The game room at 2504 14th Street was not under the direct control of the Trust, and therefore East Plano did not allow Mr. Branom to conduct illegal games of chance at a bingo premises at that location.
6. In approximately 2007, East Plano leased 2550 14th Street, a building that East Plano owned, to the Trust to conduct bingo. The bingo premises were originally one large room with a skating rink, and a wall was erected that divided the room into two areas or rooms with doors connecting the two areas on either end of the dividing wall.
7. During 2007 to 2009, East Plano allowed Mr. Branom or an entity owned by him to conduct a game room business with illegal gambling devices at 2550 14th Street.

8. Customers of the game room could win bingo equipment in the game room and go through either of the two doors leading into the bingo hall to play bingo. Bingo hall employees moved freely between the bingo hall and the game room. The illegal gaming devices were played during bingo occasions.
9. The 2550 14th Street game room and bingo hall had one street address, one electric meter, and one water meter.
10. No separate lease existed between East Plano and Mr. Branom or another entity to run a game room on the 2550 14th Street premises.
11. The entire building located at 2550 14th Street, including the area in which Mr. Branom operated illegal gambling devices, was under the direct control and actual use of the Trust to conduct bingo.
12. East Plano allowed Mr. Branom to conduct illegal games of chance at the bingo premises at 2550 14th Street during bingo occasions.
13. Another police investigation was initiated in December 2008 concerning the operation of the game room at 2550 14th Street. In March 2009, as a result of the investigation, three individuals were arrested: Mr. Branom, Willie Jenkins (the game room manager and an employee of the bingo hall), and Jerry Stobaugh (the bingo hall manager and the designated agent for the East Plano Bingo Unit Trust).
14. Because of the prior charge against him, Mr. Branom was charged with felony organized crime of gambling. Mr. Stobaugh and Mr. Jenkins were also charged with felony organized crime of gambling.
15. On or about May 24, 2011, Mr. Branom pleaded guilty to engaging in organized crime through gambling promotion in Cause No. 429-81285-10, in the 366th Judicial District Court, Collin County, Texas.
16. On or about May 24, 2011, Mr. Stobaugh pleaded guilty to engaging in organized crime through gambling promotion in Cause No. 429-81287-10, in the 366th Judicial District Court, Collin County, Texas.
17. On or about May 17, 2011, Mr. Jenkins pleaded guilty to a misdemeanor of keeping a gambling place in Cause No. 429-81286-10, in the 366th Judicial District Court, Collin County, Texas.
18. Mr. Branom was placed on community supervision for four years. The court granted early discharge from community supervision and dismissal of the proceedings against Mr. Branom on February 21, 2012.


19. Mr. Branom was aware that the gaming machines he operated on the bingo premises at 2550 14th Street from 2007 to 2009 were illegal gambling devices.
20. Neither East Plano nor Mr. Branom have had any enforcement actions brought against them by the Commission previously.
21. It has been six years since Mr. Branom was charged with illegal gambling and five years since he was discharged from community service.
22. On May 24, 2016, Staff served a notice of hearing that included: 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 factual matters asserted.
23. The hearing convened on July 7 to 8, 2016, before Administrative Law Judge (ALJ) Joanne Summerhays at the State Office of Administrative Hearings (SOAH) in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The Commission was represented by attorney Stephen White. East Plano was represented by attorney Stephen Fenoglio.
24. The record closed on August 31, 2016, after the parties filed post-hearing briefs.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to the Bingo Enabling Act (BEA), Texas Occupations Code (Code) ch. 2001.
2. SOAH has jurisdiction over this matter pursuant to Texas Government Code Ch. 2003.
3. Notice of the hearing was provided as required. Tex. Gov't Code §§ 2001.051-.052.
4. Staff had the burden to prove the allegations by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
5. The gaming machines at 2504 14th Street were illegal gambling devices as defined under Texas Penal Code § 47.01(4).
6. The location at 2504 14th Street was not an area or location subject to the direct control of and actual use by a licensed authorized organization or group of licensed authorized organizations to conduct bingo. Code § 2001.002(22).
7. East Plano did not conduct or allow a game of chance other than bingo or raffle at a bingo premises at 2504 14th Street during a bingo occasion in violation of the BEA and

- Commission rules. Code § 2001.416; 16 Tex. Admin. Code § 402.211(b) (eff. May 7, 2014).
8. The gaming machines at 2550 14th Street were illegal gambling devices as defined under Texas Penal Code § 47.01(4).
 9. The entire building located at 2550 14th Street was an area or location subject to the direct control of and actual use by a licensed authorized organization or group of licensed authorized organizations to conduct bingo. Code § 2001.002(22).
 10. East Plano conducted or allowed a game of chance other than bingo or raffle on the bingo premises at 2550 14th Street during a bingo occasion in violation of the BEA and Commission rules. Code § 2001.416; 16 Tex. Admin. Code § 402.211(b) (eff. May 7, 2014).
 11. As a sanction for the first violation of allowing or conducting a game of chance involving gambling devices at a bingo premises on a bingo occasion, East Plano's commercial lessor license may be revoked or suspended, and the suspension may be probated; East Plano's license renewal application may be denied; and East Plano may be assessed an administrative fine up to \$600. Code §§ 2001.353(a)(1), (b) (eff. Sept. 1, 2013), .554(a)(5); 16 Tex. Admin. Code § 402.706(c) (adopted Apr. 25, 2006).
 12. The Commission has adopted factors it must consider in determining the appropriate sanction for a violation of the BEA or Commission rules. 16 Tex. Admin. Code § 402.706(j).
 13. After considering mitigating and aggravating factors, the ALJ recommends the Commission suspend East Plano's commercial lessor license for five years, probate the suspension with appropriate conditions and restrictions allowing the Commission to closely supervise East Plano's operations, and assess a \$600 administrative fine.

SIGNED October 20, 2016.



JOANNE SUMMERHAYS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SOAH DOCKET NOS. 362-15-1666.B and 362-15-3696.B

TEXAS LOTTERY COMMISSION,
Petitioner

v.

EAST PLANO BINGO, INC.
Respondent

§
§
§
§
§
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§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

TEXAS LOTTERY COMMISSION'S EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE JOANNE SUMMERHAYS:

The Texas Lottery Commission, Charitable Bingo Operations Division (Commission), files these *Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision* (PFD) in the referenced dockets, respectfully excepting to the ALJ's Finding of Fact No. 5 and Conclusions of Law Nos. 6 and 7, and Conclusions of Law Nos. 4 and 13, as follows:

I. Exceptions to Finding of Fact No. 5 and Conclusions of Law Nos. 6 and 7.

1. The Commission excepts to Finding of Fact No. 5, which states:

The game room at 2504 14th Street was not under the direct control of the Trust, and therefore East Plano did not allow Mr. Branom to conduct illegal games of chance at a bingo premises at that location.

2. The Commission excepts to Conclusion of Law No. 6, which states:

The location at 2504 14th Street was not an area or location subject to the direct control of and actual use by a licensed authorized organization or group of licensed authorized organizations to conduct bingo. [Tex. Occ. Code § 2001.002(22).

3. The Commission excepts to Conclusion of Law No. 7, which states:

East Plano did not conduct or allow a game of chance other than bingo or raffle at a bingo premises at 2504 14th Street during a bingo occasion in violation of the BEA and Commission rules. [Tex. Occ.] Code § 2001.416; 16 Tex. Admin. Code § 402.211(b) (eff. May 7, 2014).

4. Finding of Fact No. 5 is, at least in part, a legal conclusion based on the erroneous Conclusions of Law Nos. 6 and 7. In arriving at Finding of Fact No. 5, and Conclusions of Law Nos. 6 and 7, the ALJ “did not properly apply or interpret applicable law, agency rules ... or prior administrative decisions”¹.

5. Even assuming the gambling devices at 2504 14th Street were not on the bingo premises, illegal gambling did occur on the bingo premises during a bingo occasion. It was undisputed, and in fact the parties stipulated, that the gaming machines allowed players to obtain bingo products or entries into bingo games.² The exchange of credits accumulated on the gaming machine “Players Card” for the prize of bingo products and entry into bingo games took place, and could only take place, during a bingo occasion on a bingo premises, using bingo employees and bingo equipment to record the transactions. Under Texas law, gambling consists of the three elements of (1) consideration, (2) chance, and (3) prize.³ Because the bingo product prize could only be claimed and awarded during a bingo occasion on the bingo premises, the operation of the eight-liners under these facts constituted an unauthorized game of chance during a bingo occasion and was prohibited under TEX. OCC. CODE ANN. § 2001.416.

6. The ALJ’s interpretation that the *entire* illegal gambling operation must occur on the bingo premises for there to be a violation of TEX. OCC. CODE ANN. § 2001.416 is contrary to 16 TEX. ADMIN. CODE § 402.211(f), and prior SOAH and Commission rulings. The Commission’s previous rulings in the similar eight-liner game room cases of *TLC v. Bullard, et*.

¹ TEX. GOV’T CODE ANN. § 2001.058(e)(1).

² Joint Ex. 1.

³ *Hoffman v. State*, 219 S.W.2d 539, 542 (Tex. Civ. App.—Dallas 1949, no writ).

*al.*⁴, and *TLC v. Julam Investments, Inc.*⁵ established that established that a person who operates, or allows operation of, an illegal gambling device that awards points exchangeable for an entry into a bingo game is in violation of TEX. OCC. CODE ANN. § 2001.416, regardless of whether the gambling devices are on or off the premises.⁶ It is important to note that in the case of *Julam Investments, Inc.*, the violations and the hearing occurred after the Commission adopted 16 TEX. OCC. CODE § 402.211, which defeats Respondent's argument that the adoption of 16 TEX. OCC. CODE § 402.211 nullified the Commission's ruling in *TLC v. Bullard, et. al.* In both *Bullard* and *Julam*, the ALJ and the Commission held that the location of the illegal gambling is "irrelevant" when the illegal gambling involves the awarding of entries into bingo games as prizes.⁷

7. The prohibition in 16 TEX. ADMIN. CODE § 402.211(f) against awarding bingo equipment or entry into a bingo game as a prize in a game of chance is not based on the location of gaming machines, but rather whether the game of chance itself is lawful. The Texas Attorney General has held on multiple occasions a gaming device that awards that any bingo product, regardless of its value, is an illegal gambling device.⁸ And, as noted in paragraph 5, a bingo product can only be claimed as a prize during a bingo occasion, in violation of the statute and the rule.

⁴ *Texas Lottery Commission v. Nathan Bullard d/b/a Golden Belle Bingo Hall; Nathan Bullard d/b/a Brazos Bingo Hall; House of Isaiah Athletes for a Drug Free America, Inc.; Mary Queen of Heaven Knights of Columbus, Inc.; Gun Barrel City Volunteer Fire Department; Humane Society of Cedar Creek Lake, Inc.; and Payne Springs Volunteer Fire Department*, 2013 WL 2146391 (Date of PFD: Feb. 11, 2013; Date of Commission Decision: August 5, 2013).

⁵ *Texas Lottery Commission v. Julam Investments, Inc.*, 2016 WL 3568903 (Date of PFD: June 27, 2016; Date of Commission Decision: October 13, 2016).

⁶ It should be noted that in the case of *Julam Investments, Inc.*, the violations occurred after the adoption of 16 TEX. ADMIN. CODE § 402.211(f).

⁷ *Texas Lottery Commission v. Julam Investments, Inc.*, 2016 WL 3568903, at *7 and *Texas Lottery Commission v. Nathan Bullard. Et. al.* 2013 WL 2146391, at *12.

⁸ TEX. ATTY. GEN. OP. NO. GA-0812 (October 22, 2010); and TEX. ATTY. GEN. OP. No. GA-0913 (February 27, 2012).

8. For the above reasons, the Commission requests that the ALJ change Finding of Fact No. 5 to read as follows:

The game room at 2504 14th Street was not on the bingo premises, but adjacent to the bingo premises. However, the exchange of points won on the illegal gambling devices for entry into bingo games occurred on the bingo premises while bingo was being conducted using bingo employees and bingo equipment to record the exchange. In allowing these transactions to occur on the bingo premises, Respondent East Plano Bingo, Inc. allowed the conduct of illegal games of chance during a bingo occasion at a bingo premises at that location.

9. For the above reasons, the Commission also requests that the ALJ change Conclusion of Law No. 6 to read as follows:

The illegal gambling operations occurred in part during a bingo occasion on the bingo premises at the 2504 14th Street location because the illegal gambling machines awarded credits as prizes that were then exchanged for entry into bingo games on the bingo premises while bingo was being conducted using bingo employees and bingo equipment.

10. For the above reasons, the Commission also requests that the ALJ change Conclusion of Law No. 7 to read as follows:

East Plano Bingo, Inc. conducted or allowed a game of chance other than bingo or raffle at a bingo premises at 2504 14th Street during a bingo occasion, in violation of BEA and Commission rules. TEX. OCC. CODE ANN. § 2001.416; 16 TEX. ADMIN. CODE § 402.211(b) (eff. May 7, 2014).

II. Exception to Conclusion of Law No. 4.

1. The Commission excepts to Conclusion of Law No. 4, which states:

Staff had the burden to prove the allegations by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
2. This case involves two matters – one is a disciplinary case, Docket No. 362-15-1666.B; and the other is an application denial case, Docket No. 362-15-3696.B. In the application denial case, the burden of proof is on the Applicant, East Plano Bingo, Inc., per TEX.

OCC. CODE ANN. § 2001.352(b), which states: “The burden of proof is on the applicant to establish by a preponderance of the evidence its eligibility for a license.”

3. Additionally, TEX. OCC. CODE ANN. § 2001.311 states the issuance of a license by the commission does not grant a vested right in the license. See also TEX. OCC. CODE ANN. § 2001.159(a)(6) which provides that the commission shall issue a commercial lessor license to a person only if it is determined that “the applicant will lease the premises for the conduct of bingo that is in accordance with the [Bingo Enabling Act].”

4. The ALJ’s reference to SOAH Rule 155.427 supports the Commission’s position on this issue. It states in part: “In determining which party bears the burden of proof, the judge shall first consider the applicable statute...” In this instance, TEX. OCC. CODE ANN. §§ 2001.352(b), 2001.311, and 2001.159(a)(6) clearly place the burden of proof on Respondent.

5. Prior SOAH decisions and Commission rulings have consistently held the burden of proof is on the applicant for a bingo license, even when the application is a renewal application, and the denial is based upon previous violations of the Bingo Enabling Act: “The Division’s proposed denial of RMT’s application for renewal of its bingo license was based on violations of the Bingo Enabling Act (Act)... Pursuant to § 2001.352, the burden of proof is on the applicant to establish by a preponderance of the evidence its eligibility for a license.” *Texas Lottery Commission v. Red Men Tribe 14 Caddo*.⁹ See also *Southwest VFD, Inc. v. Texas Lottery Commission*,¹⁰ and *Texas Lottery Commission v. Houston Spring Branch Lions Club*.¹¹

6. Respondent acknowledged in its written closing argument that it had the burden of proof in Docket No. 362-15-3696.B. “Respondent has the burden of proof to establish by a

⁹ *Texas Lottery Commission v. Red Men Tribe 14 Caddo*, 2000 WL 35361816, at p.1 (December 2000).

¹⁰ *Southwest VFD, Inc. v. Charitable Bingo Division, Texas Lottery Commission*, 2003 WL 24973759, at p. 4 (April 30, 2003). (Date of PFD: April 30, 2003; Date of Commission Decision: June 30, 2003).

¹¹ *Texas Lottery Commission v. Houston Spring Branch Lions Club*, 2015 WL 9426192, at p.1 (December 8, 2015).

preponderance of the evidence that it is eligible for its license, TEX. OCC. CODE ANN. § 2001.352(b)).¹²

7. For the above reasons, Staff requests that the ALJ change Conclusion of Law No. 4 to read as follows:

Staff had the burden to prove the allegations in Docket No. 362-15-1666.B by a preponderance of the evidence. Respondent East Plano Bingo, Inc. had the burden of proof “to establish by a preponderance of the evidence its eligibility for a license.” TEX. OCC. CODE ANN. § 2001.352(b).

III. Exception to Conclusion of Law No. 13

1. The Commission excepts to Conclusion of Law No. 13, which states:

After considering mitigating and aggravating factors, the ALJ recommends the Commission suspend East Plano’s commercial lessor license for five years, probate the suspension with appropriate conditions and restrictions allowing the Commission to closely supervise East Plano’s operations, and assess a \$600 administrative fine.

2. While the Commission welcomes the ALJ’s recommendation as to an appropriate penalty, it is a well-established principle that a recommendation for final agency action in a contested case is not a Conclusion of Law.¹³ Accordingly, the Commission asks the ALJ to delete Conclusion of Law No. 13 and characterize it as a recommendation only.

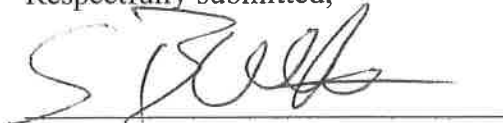
¹² Respondent’s Written Closing Argument at 2.

¹³ See F. Scott McCown & Monica Leo, When Can an Agency Change the Findings or Conclusions of an ALJ? Part Two, 51 Baylor L. Rev. 63, 89 (1999) (“a recommendation for sanctions is not a finding of fact or conclusion of law”); *Tex. State Bd. of Dental Exam’rs v. Brown*, 281 S.W.3d 692, 699 (Tex. App. - Corpus Christi, 2009, pet. denied) (“(T)he ALJ’s proposed conclusions of law were not conclusions but recommended sanctions and while the ALJ may recommend a sanction, it is up to the medical board to determine appropriate sanctions”); *Fay-Ray Corp. v. Tex. Alcoholic Beverage Comm’n*, 959 S.W.2d 362, 369 (Tex. App. - Austin, 1998, no pet. h.) (“An Agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency’s oversight”); and *Froemming v. Texas State Bd. of Dental Examiners*, 380 S.W.3d 787, 793 (Tex. App. 2012) (upholding the Dental Board’s decision to revoke a license over the ALJ’s recommendation of probation stating, “the Board has wide discretion to determine what constitutes an appropriate sanction in individual contested cases.”)

IV. Prayer

For the reasons stated above, the Commission respectfully requests that the ALJ modify proposed Finding of Fact No. 5 and Conclusions of Law Nos. 4, 6, and 7, and delete Conclusion of Law No. 13 and characterize it as a recommendation, as discussed above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. White', written over a horizontal line.

STEPHEN WHITE

Assistant General Counsel

Texas Lottery Commission

P.O. Box 16630

Austin TX 78761

Tel. 512-344-5465

Fax 512-344-5189

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, a true and correct copy of *Texas Lottery Commission's Exceptions to the Administrative Law Judge's Proposal for Decision* was served on the following individuals at the locations and in manners listed below, pursuant to 1 TEX. ADMIN. CODE § 155.103 and TEX. R. CIV. P. 21.

Via Facsimile: (512) 322-2061

Administrative Law Judge Joanne Summerhays
State Office of Administrative Hearings
300 West 15th St.
Austin TX 78701

Via Facsimile: (512) 482-8095

Stephen Fenoglio
713 W. 14th St.
Austin, TX 78701

A handwritten signature in black ink, appearing to read 'S. White', written over a horizontal line.

Stephen White
Assistant General Counsel

DOCKET NOS. 362-15-1666.B and 362-15-3696.B

TEXAS LOTTERY COMMISSION	§	BEFORE THE STATE OFFICE
	§	
v.	§	OF
	§	
EAST PLANO BINGO, INC.	§	ADMINISTRATIVE HEARINGS

**RESPONDENT'S EXCEPTIONS
TO PROPOSAL FOR DECISION**

TO THE HONORABLE STATE OFFICE OF ADMINISTRATIVE HEARINGS:

COMES NOW, East Plano Bingo, Inc. ("Respondent" or "East Plano Bingo"), and files this its Exceptions to the Honorable Administrative Law Judge's (the "ALJ") Proposal for Decision ("PFD") pursuant to 1 TEX. ADMIN. CODE §155.507(c), and as grounds therefor would show as follows.

I.

INTRODUCTION

The Texas Lottery Commission's ("Commission") case against Respondent fails because the Commission did not establish any prohibited games of chance were operated on the bingo premises; accordingly, Respondent's bingo license should remain in effect.

This is a relatively simple case that comes down to: 1) Were the 8 liner devices (the "Devices") a game of chance other than charitable bingo or charitable raffles? The answer is yes; 2) Were the Devices operated by Respondent? The answer is no, they were operated by Edwin Branom or a separate company owned by him; 3) Were the Devices operated on the bingo premises (as defined by law)? The answer is no; 4) Was the room where the Devices were located ever subject to the direct control of and actual use by a licensed authorized organization to conduct bingo? The answer is no; and 5) Did the Commission or any of its staff ever issue a

364843

warning to the licensed authorized organizations, their employees, or to Respondent that the Devices should be removed from the room adjacent to the bingo premises? The answer is no.

The answers to these questions are pivotal to determining whether Respondent's commercial lessor license should be subjected to a sanction, or whether a monetary penalty should be imposed on Respondent. Respondent submits that there is no evidence to justify a penalty to Respondent or its license. These matters will be addressed below.

II.

EXCEPTIONS

The ALJ did a commendable job of following the hit and miss arguments of Staff. Importantly, Your Honor recognizes that a correct analysis of this case turns on the definition of bingo premises and the application of the Commission's own rule, 16 TAC 402.211, concerning where a prohibited second game of chance is prohibited. The answer is not on the bingo premises, which is the area subject to the direct control of and actual use by a licensed authorized organization to conduct bingo. (Texas Occupations Code Section 2001.002(22)). But, the ALJ did not follow the direct evidence that unquestionably shows that East Plano Bingo did not operate any illegal gambling devices on the bingo premises located at 2550 14th Street, Suite A (Respondent's Exhibit 7, admitted on July 8, 2016). None of the Staff's witnesses testified that there was ever an illegal gambling device on the bingo premises. And none of the witnesses ever described a situation where bingo patrons were playing bingo in the game room (Suite B). Here is what Staff's own witnesses stated.

Plano Police Officer Alfredo Garcia never saw any Devices on the bingo premises, and he never saw any bingo patron playing bingo in the game room. Tr. Vol. I at pp. 201-203. Alfonso Royal testified that the Devices were not on the bingo premises. Mr. Royal did not

believe any of the licensed authorized organizations leased the game room at 2550 14th Street, Suite B, and knew of no evidence showing that any bingo patron played bingo in Suite B. Tr. Vol. II at pp. 31-32. In fact, Mr. Royal was asked the following question and responded as follows:

- Q: And as a part of this investigation, did you ask that someone with the Division speak with any of the licensed authorized organizations that conduct bingo at 2550 14th Street, Suite A, to determine if in fact they leased the Suite B premises?
- A: No. The only records search that was done was who actually owned that particular location, and that was through the police report, and that was Edwin Branom.
- Q: Are you sure that Edwin Branom actually owns that or a company that he controls owns the space?
- A: A company whereby, I guess, he was the sole owner or sole shareholder.

Tr. Vol. II at p. 32.

Jerry Stobaugh testified in a similar fashion that bingo was never conducted in the game room located at 2550 14th Street, Suite B. Tr. Vol. II at p. 50. Likewise, the licensed authorized organizations never used or controlled Suite C, the storage room at 2550 14th Street. Id. at 50-51.

The evidence shows that Mr. Branom (and not East Plano Bingo) owned and leased the entire building at 2550 14th Street (Tr. Vol. I at p. 222), which was formerly used as an indoor skating rink. Prior to bingo being conducted, Mr. Branom converted the building and subdivided it into three (3) separate rooms – Suites A, B, and C.

The bottom line is there was never a prohibited game of chance (the illegal Devices) on the licensed bingo premises (Tr. Vol. I at p. 229); the game room location 2550 14th Street, Suite B, was never under the direct control of and actual use by the licensed authorized organizations to conduct bingo. It is irrelevant that bingo patrons and any member of the public could move between the game room and the bingo premises. To so hold that because patrons can do so and it

follows that the game room automatically becomes part of the bingo premises would mean that every store in a shopping mall (for example, all stores in Barton Creek Mall, Austin, Texas) are all part of the same premises and, therefore, every business in the mall becomes responsible for what goes on in the other stores. That is hardly the case in busy shopping malls and is not the case here, given what the facts establish.

In summary, the Commission had years to develop its case and never offered any credible evidence that the game room (Suite B) of 2550 14th Street was ever controlled by or used by the licensed authorized organizations to conduct bingo.

Accordingly, Respondent excepts to the ALJ's Findings of Fact Nos. 6-8, 11-12, and 19 and Conclusions of Law Nos. 8-10, 11, and 13. Here is how the referenced Findings of Fact and Conclusions of Law should read, given the evidence and the Commission's statute and rule.

Finding of Fact No. 6

In approximately 2007, ~~East Plano~~ Edwin Branom leased 2550 14th Street, a building that ~~East Plano~~ Edwin Branom owned, to the Trust to conduct bingo. The ~~bingo premises were~~ building was originally one large room with a skating rink, and a wall was erected that divided the room into ~~two~~ three areas or rooms with doors connecting the first two areas on either end of the dividing wall.

Finding of Fact No. 7

During 2007 to 2009, ~~East Plano~~ allowed Mr. Branom or an entity owned by him to conducted a game room business with illegal gambling devices at 2550 14th Street, Suite B.

Finding of Fact No. 8

The game room was located at 2550 14th Street, Suite B. Customers of the game room could win bingo equipment in the game room and go through either of the two doors leading into tickets or points that could be exchanged in the bingo hall, Suite A, to play bingo. Bingo hall employees moved freely between the bingo hall and the game room. The illegal gambling devices were played during bingo occasions.

Finding of Fact No. 11

The entire building located at Only Suite A of 2550 14th Street, including the area in which Mr. Branom operated illegal gambling devices, was under the direct control and actual use of the Trust to conduct bingo.

Finding of Fact No. 12

~~East Plano~~ allowed Mr. Branom to conducted illegal games of chance at the bingo premises in Suite B at 2550 14th Street during bingo occasions.

Finding of Fact No. 19

Mr. Branom was aware that the gaming machines he operated ~~on the bingo premises in Suite B~~ at 2550 14th Street from 2007 to 2009 were illegal gambling devices.

Conclusion of Law No. 8

The gaming machines at 2550 14th Street, Suite B, were illegal gambling devices as defined under Texas Penal Code §47.01(4).

Conclusion of Law No. 9

The ~~entire building~~ bingo hall located at 2550 14th Street, Suite A, was an area or location subject to the direct control of and actual use by a licensed authority organization or group of licensed authorized organizations to conduct bingo. Code §2001.002(22).

Conclusion of Law No. 10

~~East Plano~~ Edwin Branom conducted or allowed a game of chance other than bingo or raffle on the bingo game room premises at 2550 14th Street, Suite B, during a bingo occasion ~~in violation of the BEA and Commission rules. Code §2001.416; 16 TEX. ADMIN. CODE §402.211(b) (eff. May 7, 2014).~~ The game room was not subject to the actual conduct or use by the licensed authorized organizations to conduct bingo.

Accordingly, since there is no violation, the ALJ's Conclusions of Law Nos. 11 and 13 are incorrect and should be eliminated.

III.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, East Plano Bingo, Inc. requests: 1) the entry of new Findings of Fact Nos. 6-8, 11-12, and 19 and Conclusions of Law Nos. 8-10; 2) the

elimination of Findings of Fact Nos. 11 and 13; 3) that no penalty be assessed against Respondent; 4) the renewal of Respondent's commercial lessor license; and 5) such other and further relief to which Respondent is justly entitled.

Respectfully submitted,

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713 W. 14th Street
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Facsimile: 512.482.8095
E-mail: jsfenoglio@fenogliolaw.com

By: /s/ Stephen Fenoglio
STEPHEN FENOGLIO
State Bar No. 06904600

*Attorney for Respondent
East Plano Bingo, Inc.*

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Respondent East Plano Bingo, Inc.'s Exceptions of Proposed for Decision has been served on this the 4th day of November, 2016 in the manner described to the person(s) listed below:

Stephen White, Esq.
Texas Lottery Commission
P. O. Box 16630
Austin, Texas 78761-6630

VIA FACSIMILE
512.344.5189

/s/ Stephen Fenoglio
Stephen Fenoglio

SOAH DOCKET NOS. 362-15-1666.B and 362-15-3696.B

TEXAS LOTTERY COMMISSION,
Petitioner

V.

EAST PLANO BINGO, INC.
Respondent

§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

TEXAS LOTTERY COMMISSION'S REPLY TO RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE JOANNE SUMMERHAYS:

The Texas Lottery Commission, Charitable Bingo Operations Division (Commission), files this *Reply to Respondent's Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision* (PFD) in the above referenced dockets.

I.

Respondent filed exceptions to the ALJ's Findings of Fact Nos. 6, 7, 8, 11, 12, 19, and to Conclusions of Law Nos. 8, 9, and 10. The basis for all of the Respondent's exceptions was the assertion that the illegal gambling devices were not located on the bingo premises; therefore, there is no violation of TEX. OCC. CODE ANN. § 2001.416 and 16 TEX. ADMIN. CODE § 402.211(f). Respondent is wrong both legally and factually. A person who operates or allows the operation of illegal gambling devices that award players with bingo equipment or entry into bingo (or points or credits redeemable for bingo equipment or entry into bingo games) violates both TEX. OCC. CODE ANN. § 2001.416 and 16 TEX. ADMIN. CODE § 402.211(f), regardless of the location of the illegal gambling devices. Since part of the illegal gambling scheme, i.e. the award of the prize and the exchange of illegal gambling proceeds, can only take place while

bingo is being conducted, the award of bingo product necessarily results in a violation of law. Further, the findings of fact that the gambling devices at the 2550 14th Street location were on the bingo premises are correct.

III.

Respondent asserts the illegal gambling devices at 2550 14th Street were not on the bingo premises, and therefore, the illegal gambling did not occur on the bingo premises during a bingo occasion, even though the illegal gambling devices awarded points exchangeable for bingo equipment such as pull-tabs. It was undisputed that this exchange occurred on the bingo premises, during licensed bingo occasions while bingo was being conducted.¹ Under Texas law, gambling consists of the three elements of (1) consideration, (2) chance, and (3) prize.² Because the bingo product prize could only be claimed and awarded during a bingo occasion on the bingo premises, the operation of the eight-liners under these facts constituted an unauthorized game of chance during a bingo occasion and was prohibited under TEX. OCC. CODE ANN. § 2001.416 and 16 TEX. ADMIN. CODE § 402.211(f).

The Commission's previous rulings in the similar eight-liner game room cases of *TLC v. Bullard, et al.*³, and *TLC v. Julam Investments, Inc.*⁴ established that a person who operates, or allows operation of, an illegal gambling device that awards points exchangeable for an entry into a bingo game is in violation of TEX. OCC. CODE ANN. § 2001.416, regardless of whether the gambling devices are on or off the premises. It is important to note that in the case of *Julam*

¹ Joint Ex. 1.

² *Hoffman v. State*, 219 S.W.2d 539, 542 (Tex. Civ. App.—Dallas 1949, no writ).

³ *Texas Lottery Commission v. Nathan Bullard d/b/a Golden Belle Bingo Hall; Nathan Bullard d/b/a Brazos Bingo Hall; House of Isaiah Athletes for a Drug Free America, Inc.; Mary Queen of Heaven Knights of Columbus, Inc.; Gun Barrel City Volunteer Fire Department; Humane Society of Cedar Creek Lake, Inc.; and Payne Springs Volunteer Fire Department*, 2013 WL 2146391 (Date of PFD: Feb. 11, 2013; Date of Commission Decision: August 5, 2013).

⁴ *Texas Lottery Commission v. Julam Investments, Inc.*, 2016 WL 3568903 (Date of PFD: June 27, 2016; Date of Commission Decision: October 13, 2016).

Investments, Inc., the violations and the hearing occurred after the Commission adopted 16 TEX. OCC. CODE § 402.211, which defeats Respondent’s argument that the adoption of 16 TEX. OCC. CODE § 402.211 nullified the Commission’s ruling in *TLC v. Bullard, et al.* In both *Bullard* and *Julam*, the ALJ and the Commission held that the location of the illegal gambling is “irrelevant” when the illegal gambling involves the awarding of entries into bingo games as prizes.⁵ Commission policy is clear on this legal point. Courts “defer to the agency’s interpretation unless it is plainly inconsistent with the language of the rule”.⁶

The prohibition of an unauthorized game of chance awarding bingo equipment or entry into a bingo game in 1 TEX. ADMIN. CODE § 402.211(f) states:

A game of chance, other than bingo conducted under Chapter 2001 of the Occupations Code, a charitable raffle conducted under Chapter 2002 of the Occupations Code and a door prize game conducted under § 2001.420(c) of the Occupations Code, **may not award bingo equipment, as defined in § 2001.002(5) of the Occupations Code, or entry into a bingo game as a prize** [emphasis added].

This prohibition is not limited in geographic scope, unlike the prohibition of other unauthorized games of chance that do not involve the awarding of bingo equipment or entry into a bingo game. *Compare* 1 TEX. ADMIN. CODE § 402.211(b) (“a person may not conduct or allow a game of chance at a bingo premises”) *with* 1 TEX. ADMIN. CODE § 402.211(f) (“A game of chance . . . may not award bingo equipment”) and agency interpretation as stated in their decision in the *TLC v. Bullard, et al.*, and *Julam Investments, Inc.* cases.

In addition to the undisputed fact that part of the illegal gambling scheme occurred on the bingo premises while bingo was being conducted, i.e. the exchanging of points for entry into

⁵ *Texas Lottery Commission v. Julam Investments, Inc.*, 2016 WL 3568903, at *7 and *Texas Lottery Commission v. Nathan Bullard, et al.*, 2013 WL 2146391, at *12.

⁶ *Zimmer US, Inc. v. Combs*, 368 S.W.3d 579, 583 (Tex. App.—Austin 2012, no pet.) citing *BFI Waste Sys. of N. Am., Inc. v. Martinez Env’tl. Group*, 93 S.W.3d 570, 575 (Tex. App.—Austin 2002, pet. denied).

bingo games, other facts show the gambling devices themselves were on the bingo premises, including the fact that the room containing the gambling devices was in the same building as the bingo hall and had the same address, to wit: 2550 14th St., Plano, Texas.⁷ Respondent specifically designated 2550 14th St., Plano, Texas, as its bingo premises on its application for licensure.⁸ And, Respondent admitted 2550 14th St. Plano, Texas was the address of the East Plano Bingo hall and bingo premises at the second location.⁹

IV. Prayer

For the reasons stated above, the Commission respectfully requests that the ALJ not to change Findings of Fact Nos. 6, 7, 8, 11, 12, 19, and Conclusions of Law Nos. 8, 9, and 10 as suggested by Respondent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. White", is written over a horizontal line.

STEPHEN WHITE
Assistant General Counsel
Texas Lottery Commission
P.O. Box 16630
Austin TX 78761
Tel. 512-344-5465
Fax 512-344-5189

⁷ Tr. Vol. 1 at 163.

⁸ Staff Ex. 16 at TLC000280.

⁹ Vol. II at 72.

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2016, a true and correct copy of *Texas Lottery Commission's Reply to Respondent's Exceptions to the Administrative Law Judge's Proposal for Decision* was served on the following individuals at the locations and in manners listed below, pursuant to 1 TEX. ADMIN. CODE § 155.103 and TEX. R. CIV. P. 21.

Via Facsimile: (512) 322-2061

Administrative Law Judge Joanne Summerhays
State Office of Administrative Hearings
300 West 15th St.
Austin TX 78701

Via Facsimile: (512) 482-8095

Stephen Fenoglio
713 W. 14th St.
Austin, TX 78701

A handwritten signature in black ink, appearing to read 'S. White', is written over a horizontal line.

Stephen White
Assistant General Counsel

SOAH DOCKET NOS. 362-15-1666.B AND 362-15-3696.B

TEXAS LOTTERY COMMISSION	§	BEFORE THE STATE OFFICE
	§	
v.	§	OF
	§	
EAST PLANO BINGO, INC.	§	ADMINISTRATIVE HEARINGS

**RESPONDENT'S REPLY TO THE COMMISSION'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE STATE OFFICE OF ADMINISTRATIVE HEARINGS:

COMES NOW, East Plano Bingo, Inc. ("Respondent"), and files this its Reply to the Texas Lottery Commission's (the "Commission") Exceptions to the Proposal for Decision ("PFD"), and as grounds therefor would show as follows.

I.

THE COMMISSION'S EXCEPTIONS

The Commission claims that the Administrative Law Judge's (the "ALJ") Findings of Fact No. 5 and Conclusions of Law Nos. 6 and 7 are in error because the ALJ "did not properly apply or interpret applicable law, agency rules ... or prior administrative decisions". This is simply not true.

A. Second Game of Chance Rule

The agency's policy concerning the location of prohibited games of chance is found in its rule, 16 TAC §402.211(b) and applicable provisions of the Bingo Enabling Act. It is undisputed that the licensed authorized organizations had no control over the game room located at 2504 14th Street and the evidence clearly shows the game room was not used by the licensed authorized organizations to conduct bingo. In fact, the Commission has never offered any evidence to show the game room was under the control or used by the licensed authorized organizations or the Trust to conduct bingo or any activity.

The *Julam Investments* case¹ does not help the Commission. It is apparent that no one discussed or argued in that Commission Rule 402.211(b) should or should not be considered and Rule 402.211(b) did not impact the ALJ's discussion or recommendations or was dispositive in *Julam Investments*. And Rule 402.211 was not in existence at the time of the *TLC v. Bullard* case.²

The Commission's argument in the pending case that the prohibition in Rule 402.211(f) is not based on the location of the gaming machines is plainly incorrect. As pointed out in the ALJ's PFD, the reason the Commission stated in adopting the language in 402.211 was to clarify the geographic location where prohibited games of chance could or could not be located. Here is what the Commissioners stated in adopting Rule 402.211:

While §2001.416 prohibits most games of chance during a bingo occasion, it does not specify where that prohibition is applicable. Section 2001.416 authorizes the Commission to determine the geographic scope of the prohibition. In subsection (b) of the proposed rule, the Commission has determined that the prohibition will apply at the bingo premises.

(Emphasis added.)

B. Burden of Proof

The Commission argues that the ALJ is wrong in finding the Commission has the burden of proof. This is wrong for several reasons. First, the Commission stated in the beginning of its case that it bears the burden of proof on the primary case, Docket No. 362-15-1666.B, Tr. Vol. I, p. 11. Indeed, the very case that the Commission trumpets loudly (*Julam Investments*) held that the Commission had the burden of proof in that case, PFD at p. 17, Conclusion of Law No. 4,

¹ *Texas Lottery Commission v. Julam Investments, Inc.*, 2016 WL 3568903, Final Order dated October 13, 2016.

² *Texas Lottery Commission v. Nathan Bullard d/b/a Golden Belle Bingo Hall; Nathan Bullard d/b/a Brazos Bingo Hall; House of Isaiah Athletes for a Drug Free America, Inc.; Mary Queen of Heaven Knights of Columbus, Inc.; Gun Barrel City Volunteer Fire Department; Humane Society of Cedar Creek Lake, Inc.; and Payne Springs Volunteer Fire Department*, 2013 WL 2146391, Final Order dated August 5, 2013.

which states, "Then Commission had the burden to prove the allegations by a preponderance of the evidence. 1 TEX. ADMIN. CODE §155.427". Reviewing the entirety of Rule 155.427, it is appropriate to place the burden of proof on the Commission in the current action.

C. Recommended Penalty

The Commission's arguments about the recommended penalty is wrong. After two days of hearing, one would reasonably conclude that if the Commission staff had a recommended penalty in this proceeding, the Staff and Commission counsel would have announced it during the hearing. Yet, there is not a single word from any Commission witness as to the appropriate sanction, and there was never any opportunity for Respondent to address any recommended penalty argument by the Commission. Indeed, the Commission's own penalty rule as of the beginning of these proceedings until the end of the 2nd day of trial provided that the penalty for the first violation of a second game of chance was simply a monetary penalty. It was not until the Commission amended its rule that a licensee was put on notice that revocation of a license was a possible sanction for violating the second game of chance rule. *See*, 41 Tex. Reg. 5505 where the Commissioners adopted this new policy; the rule change was effective August 1, 2016.

Here is what the Commissioners adopted regarding the new changes to the Commission's administrative penalty rule, as it appears in the Texas Register:

§402.706 (Schedule of Sanctions): The amendments to §402.706 implement §2001.358 of the Bingo Enabling Act, **which requires the Commission to adopt a schedule of sanctions that defines and summarizes statutory and rule violations to ensure that sanctions imposed are appropriate to the violation.** The amendments add to the schedule those violations that could result in license suspension, revocation or denial, or bingo worker registry removal or denial.

COMMENT SUMMARY: The VFW opposes the **increased sanction of possible revocation of license for a first violation of the Other Game of Chance rule (§402.211)**. The VFW stated this penalty is harsh, and noted the Commission's primary responsibility is to administer and regulate bingo so that bingo is fairly conducted and the proceeds derived from bingo are used for an authorized purpose. The VFW stated the Commission should focus on violations of the Bingo Enabling Act and rules that directly relate to this responsibility.

COMMISSION RESPONSE: **Based on a Sunset Commission recommendation**, the Texas Legislature amended the Bingo Enabling Act, at §2001.358(b)(2), to **require the Commission to include in its rules those violations which may result in license revocation, denial, or suspension, or removal from or denial for the registry of bingo workers. The adopted amendments comply with this directive.** (Emphasis added.)

This case began on September 5, 2014 when the Commission issued its first Notice of Opportunity to Show Compliance, Staff Ex. 1. Accordingly, it is entirely appropriate for the ALJ to issue a penalty recommendation in the form of Conclusion of Law No. 13.

II.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent East Plano Bingo, Inc. requests that the Honorable Administrative Law Judge deny the Texas Lottery Commission's Exceptions and for such and further relief to which Respondent is justly entitled.

Respectfully submitted,

STEPHEN FENOGLIO
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Austin, Texas 78701-1707
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Facsimile: 512.482.8095
E-mail: jsfenoglio@fenogliolaw.com

By: /s/ Stephen Fenoglio
STEPHEN FENOGLIO
State Bar No. 06904600

*Attorney for Respondent
East Plano Bingo, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Respondent's Reply to the Commission's Exceptions to the Proposal for Decision has been served on this the 22nd day of November, 2016, in accordance with the Texas Rules of Civil Procedure by fax transmission on the following:

Administrative Law Judge Joanne Summerhays
State Office of Administrative Hearings
300 W. 15th Street
Austin, Texas 78701

Via Facsimile
512.322.2016

Stephen White, Esq.
Texas Lottery Commission
P. O. Box 16630
Austin, Texas 78761-6630

Via Facsimile
512.344.5189

/s/ Stephen Fenoglio
Stephen Fenoglio

CASE SUMMARY

PARTY NAME: Texas Lottery Commission Staff

DOCKET NO./CASE NAME: Docket Nos. 362-16-4456.B; 362-16-4457.B; 362-16-4458.B; 362-16-4459.B; and 362-16-4460.B; *Pilot Club of Tyler Foundation; VFW Post 4002 Longview; American Legion Post 296; VFW Post 7523; Pilot Club of Mineola, Inc.* (Respondents)

ISSUE(S): Did the Bingo Division properly deny the Respondents' request for a waiver of the net proceeds requirement, warranting revocation of Respondents' licenses? [*Yes*]

KEY FACTS: Respondents (members of a bingo accounting unit) failed to generate net proceeds for four quarters of 2015, thus violating the Bingo Enabling Act (BEA) net proceeds requirement. Respondents requested a waiver of the requirement and, in support, submitted a business plan. The Bingo Director found the plan was not a credible plan to generate net proceeds and notified Respondents he intended to deny the waiver and seek to revoke Respondents' licenses.

Respondents' business plan included the following items:

- Decrease in security to Friday and Saturday nights only;
- Decrease number of workers to five on weekdays and six on weekends;
- Increase electronic machine price from \$15.00 to \$25.00 each; and
- Increase the price per ticket to take care of busy days.

Bingo staff requested more information regarding projected cash flow, market analysis, an explanation why business fell off, the lease agreement and explanations for attendance and expenses. Respondents then provided dates changes were made, amount of savings, a letter from the lessor suspending rent with no expectation of repayment and an explanation there is no lease agreement.

The SOAH Judge found Respondents' licenses should be revoked for failure to generate positive net proceeds and found that Respondents' failed to prove they were entitled to a waiver. The Judge noted Respondents presented testimony that eight-liner machines were the source of its income problems, but Respondents offered no business plan to specifically deal with these machines. In fact, Respondents' witness (the commercial licensed lessor) testified he in fact owns some of the eight-liners causing net proceeds problem for the bingo hall. The lessor gave no indication he intends to remove the machines. The Judge also questioned the reliability of the lessor's testimony that he could absorb rent and other costs for an extended period of time. The Judge concluded the Bingo Division reasonably concluded the business plan was not credible.

LEGAL PRINCIPLES INVOLVED:

- BEA §2001.451(g)(1) states in part: "The bingo operations of a licensed authorized organization must: (1) result in net proceeds over the organization's license period...."
- 16 TEX. ADMIN. CODE §402.452(a) states: "Net proceeds from the conduct of bingo must result in a positive amount over the organization's license period...."
- BEA §2001.451(k)(2) provides that a licensed organization may apply for a waiver of the net proceeds requirement. "The commission may grant the waiver on a showing of good cause by the organization.... An organization ... establishes good cause by providing ... a credible business plan for the organization's conduct of bingo or the organization's existing or planned charitable purposes."
- 16 TEX. ADMIN. CODE §402.452(e) states: "A licensed authorized organization may apply for a waiver from the net proceeds requirement by showing good cause that compliance is detrimental to the organization's existing or planned charitable purposes. Waiver applications must be submitted in accordance with §402.450 of this chapter (relating to Request for Waiver)."

ACTION REQUESTED: Approve the Proposal for Decision and revoke Respondents' licenses.

Commission Order No. 17-0031

Date: FEBRUARY 2, 2017

DOCKET NOS. 362-16-4456.B; 362-16-4457.B; 362-16-4458.B;
362-16-4459.B; AND 362-16-4460.B

TEXAS LOTTERY COMMISSION	§	BEFORE THE TEXAS
PETITIONER	§	
	§	
VS.	§	
	§	
PILOT CLUB OF TYLER FOUNDATION;	§	
VFW POST 4002 LONGVIEW;	§	
AMERICAN LEGION POST 296; VFW	§	
POST 7523; AND PILOT CLUB OF	§	
MINEOLA, INC.	§	
RESPONDENTS	§	LOTTERY COMMISSION

ORDER OF THE COMMISSION

TO: Mr. Stephen Fenoglio
Attorney at Law
713 W. 14th St.
Austin, TX 78701

During open meeting at Austin, Texas, the Texas Lottery Commission finds that, after proper and timely notice was given, the above-styled cases were heard by an Administrative Law Judge who made and filed a Proposal for Decision containing the Administrative Law Judge's Findings of Fact and Conclusions of Law. The Proposal for Decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein.

The Texas Lottery Commission, after review and due consideration of the Proposal for Decision, and exceptions and replies filed, if any, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge as if fully set out and separately stated herein. All proposed Findings of Fact and Conclusions of Law not specifically adopted herein are hereby denied.

Commission Order No. 17-0031

Date: FEBRUARY 2, 2017

NOW, THEREFORE, IT IS ORDERED that the licenses to conduct bingo issued to Pilot Club of Tyler Foundation, of Longview, Texas; VFW Post 4002 Longview, of Longview, Texas; American Legion Post 296, of Longview, Texas; VFW Post 7523, of Longview, Texas; and Pilot Club of Mineola, Inc., of Longview, Texas are hereby revoked.

Passed and approved at the regular meeting of the Texas Lottery Commission at Austin, Texas, on the 2ND day of FEBRUARY, 2017.

Entered this 2ND day of FEBRUARY, 2017.

J. WINSTON KRAUSE, CHAIRMAN

CARMEN ARRIETA-CANDELARIA,
COMMISSIONER

PEGGY A. HEEG, COMMISSIONER

DOUG LOWE, COMMISSIONER

ROBERT RIVERA, COMMISSIONER

SOAH DOCKET NO. (VARIOUS, LISTED BELOW)

TEXAS LOTTERY COMMISSION,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
v.	§	OF
	§	
VARIOUS PARTIES (LISTED BELOW),	§	
Respondents	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Attorney Stephen Fenoglio represented the Respondent in each case listed below. Assistant General Counsel Kristen Guthrie represented the staff (Staff) of the Texas Lottery Commission (Commission).

SOAH Docket No.	Respondent
362-16-4456.B	Pilot Club of Tyler Foundation
362-16-4457.B	VFW Post 4002 Longview
362-16-4458.B	American Legion Post 296
362-16-4459.B	VFW Post 7523
362-16-4460.B	Pilot Club of Mineola, Inc.

Staff (Staff) of the Commission proposes to revoke the licenses of the above-listed Respondents, all members of Rose City Association (Rose City), to conduct charitable bingo operations. Staff proposes to revoke the licenses because Rose City failed to have positive net proceeds during the four quarters of 2015, in violation of the Bingo Enabling Act (the Act).¹ Respondents filed an Application of Waiver with the Commission requesting exemption from the net proceeds requirement. The Administrative Judge Law Judge (ALJ) concludes Staff established that Respondents failed to have positive net proceeds during the applicable period and that Respondents failed to prove they are entitled a waiver. Therefore, the ALJ recommends revocation of the licenses.

¹ Tex. Occ. Code ch. 2001.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this matter pursuant to Texas Occupations Code ch. 2001. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code ch. 2003. The Commission has the burden of establishing that Rose City failed to have positive net proceeds during the periods in question, and Rose City has the burden of proof in establishing it is entitled to the waiver pursuant to 1 Texas Administrative Code § 155.427.

On February 9, 2016, Staff sent a letter notifying Rose City that each of its members were ineligible to hold licenses to conduct bingo. On February 25, 2016, Rose City filed its request for a waiver. On April 19, 2016, the Commission notified Rose City that the request for a waiver had been denied, and Rose City appealed the proposed denial and requested a hearing. After the parties were unable to resolve the matter, a notice of the hearing was sent to Rose City on July 7, 2016. The adequacy of the notice is not in dispute.

The hearing was convened before ALJ John H. Beeler on October 11, 2016. Kristen Guthrie represented Staff; Stephen Fenoglio represented Rose City. The hearing was adjourned and the record closed the same day.

II. APPLICABLE LAW

When an “authorized organization” wishes to conduct charitable bingo operations in Texas, it must first apply for and obtain a license from the Commission.² The application must be on a form prescribed by the Commission.³ Licenses are generally effective for 1 year, requiring the holder to

² Tex. Occ. Code § 2001.101(a).

³ Tex. Occ. Code § 2001.102(a).

annually apply for renewal.⁴ The Commission may deny a license renewal application or revoke a license if the applicant has violated any provision of the Act or any Commission rules adopted pursuant to the Act.⁵

Two or more licensed organizations that conduct bingo at the same location joining together to share revenues, authorized expenses, and inventory related to bingo operations may operate a unit.⁶ Each member of a unit is jointly and severally liable for compliance with the Act.⁷

Among many other requirements, the bingo operations of a licensed authorized organization must result in “net proceeds [as opposed to net losses] over the organization’s license period” (the Net Proceeds Requirement).⁸ The net proceeds of a license holder with a 1-year license must be calculated based on the license holder’s quarterly reports for the four calendar quarters immediately preceding the license expiration date.⁹

A licensed authorized organization may apply to the Commission for a waiver of various requirements, including a waiver of the Net Proceeds Requirement.¹⁰ The Commission “may” grant such a waiver if the applicant shows “good cause . . . that compliance with [the requirement for which a waiver is sought] is detrimental to the organization’s existing or planned charitable purposes.”¹¹ Good cause may be proved by providing to the Commission:

- (1) credible evidence of circumstances beyond the control of the organization, including force majeure; or

⁴ Tex. Occ. Code § 2001.105(c).

⁵ Tex. Occ. Code § 2001.353(a).

⁶ Tex. Occ. Code § 2001.431.

⁷ Tex. Occ. Code § 2001.438(f).

⁸ Tex. Occ. Code § 2001.451(g)(1).

⁹ 16 Tex. Admin. Code § 402.452(b).

¹⁰ Tex. Occ. Code § 2001.451(k); 16 Tex. Admin. Code § 402.450(b).

¹¹ Tex. Occ. Code § 2001.451(k).

- (2) a credible business plan for the organization's conduct of bingo or the organization's existing or planned charitable purposes.¹²

The Commission has adopted a rule specifying detailed and extensive requirements for a waiver application.¹³

III. EVIDENCE PRESENTED

The relevant facts in this case are not in dispute. Rose City is a unit composed of Pilot Club of Tyler Foundation, VFW Post 4002 Longview, American Legion Post 296, VFW Post 7523, and Pilot Club of Mineola, Inc., all authorized organizations operating bingo in Tyler, Texas. In order to continue to operate bingo, Rose City is required to obtain a waiver from the Commission.

Rose City is required to submit quarterly accounting reports to the Commission. According to the quarterly reports for the year 2015, its net proceeds were as follows:

2015 Q1	\$33,042
2015 Q2	(\$4,727)
2015 Q3	(\$42,116)
<u>2015 Q4</u>	<u>\$5,166</u>
Annual Total	(\$8,950)

Based on the accounting, Staff notified Rose City that it was proposing to revoke its license and Rose City applied for waivers from the Net Proceeds Requirement on behalf of its members. The waiver request set out the following changes made as a business plan to ensure the net proceeds requirement would be met in the future:

- decrease in security to Friday and Saturday nights only;
- decrease number of workers to five on weekdays and six on weekends;

¹² Tex. Occ. Code § 2001.451(k).

¹³ 16 Tex. Admin. Code § 402.450(b).

- increase electronic machine price from \$15.00 to \$25.00 each; and
- increase the price per ticket to take care of busy days.

On March 10, 2016, Staff asked the unit trust for more details. Specifically, Staff asked Rose City to:

- provide a projected cash flow statement;
- provide a market analysis;
- provide an explanation of why business fell off;
- provide specific dates changes set out in the waiver application were made;
- provide the dollar amount of cost reductions for changes set out in the waiver application;
- provide the per quarter increase in price for electronics;
- state whether fewer electronic sales are anticipated due to the price increase;
- identify tickets referenced in application for waiver as increasing in price, including the amount of increase and dollar amount of the increase for the quarter;
- provide the lease agreement and an explanation of how rent is handled;
- explain how Rose City was able to decrease advertising expenses, premise expenses, and costs of electronics and other goods during the fourth quarter of 2015;
- explain why employee expenses were so high during the fourth quarter of 2015; and
- explain why attendance steadily decreased form the fourth quarter of 2014 through the fourth quarter of 2015, and set out the plan to increase attendance.

Rose City provided a response that included the dates of the changes, the amounts of savings, and other information requested. Rose City also explained that there is currently no lease agreement and that the lessor is paying all premises and advertising expenses. A letter from the lessor was

included in the response. The letter stated that rent had been suspended and no repayment was expected.

The Commission presented the testimony of Joy Bishop, the Commission's Bingo Division Accounting Services Coordinator. Ms. Bishop testified that the Commission denied the application for waiver because Rose City offered only a stop-gap proposal that failed to provide a plan to show future positive net proceeds on an ongoing basis. Most of the savings set out by Rose City involved the lessor absorbing costs, such as abating rent. This, she said, could not work as a long-term solution.

Ms. Bishop also presented the quarterly accounting reports provided by Rose City for the first three quarters of 2016, showing net proceeds as follows:

2016 Q1	\$23,228
2016 Q2	\$612
2016 Q3	(\$17,817)

Ms. Bishop expressed concern that Rose City had provided no written agreement with the lessor establishing that the lessor had, in fact, agreed to forego rent payments and would not expect the back rent to be paid in the future. After a copy of such an agreement was pointed out to her in the documents the Commission had offered into evidence, Ms. Bishop agreed that it did exist. However, she still maintained that the rental abatement could not continue indefinitely and was not a long-term solution. She further noted that the above accounting showed a net loss for the most recent quarter reported.

Bookkeeper and designated agent Deborah Peck testified for Rose City. She stated that changes were made in Rose City's operation to assure it would be able to generate positive net proceeds in the future. These include reduction of the bookkeeping fees paid for her services. For the first three quarters of 2015, her fees totaled \$13,941, but these were reduced to \$3,320 for the first three quarters of 2016. The other major cost reduction in the business plan was that the lessor

has agreed to not charge rent until Rose City is back on its feet. Ms. Peck acknowledged that these are not permanent reductions. She also agreed that even with the changes implemented, Rose City lost \$17,817 in the third quarter of 2016, the last quarter reported.

David Daniels testified that he is the commercial lessor for Rose City and has agreed to forgo rent and cover other costs for Rose City until business picks up for the hall. According to Mr. Daniels, the reason Rose City is not making positive net proceeds is because of illegal eight-line gambling machines in the area. He admitted, however, that he has installed eight-line machines in the hall.

IV. ANALYSIS

There is no dispute that, based on Rose City's quarterly reports for the four calendar quarters of 2015, it failed to generate positive net proceeds over its license period, thereby violating the Net Proceeds Requirement set forth in the Act and the Commission's rules.¹⁴ For this reason, the Commission is entitled to revoke Rose City's license.¹⁵

The only question is whether Rose City proved it was entitled to a waiver of the Net Proceeds Requirement. The statute provides that the Commission "may" grant a waiver if good cause is shown. The use of the word "may" indicates that the Commission may also choose not to grant a waiver even if good cause is shown. Stated differently, the statute gives the Commission a substantial amount of discretion in its decisions on waiver applications.¹⁶

The waiver statute provides that good cause may be proved by one of two methods. First, a waiver applicant can offer "credible evidence of circumstances beyond the control of the organization."¹⁷ At the hearing, Rose City argued that illegal eight-line machines in the Tyler area are

¹⁴ Tex. Occ. Code § 2001.451(g)(1); 16 Tex. Admin. Code § 402.452(a).

¹⁵ Tex. Occ. Code § 2001.353(a).

¹⁶ Tex. Gov't. Code § 311.015(1).

¹⁷ Tex. Occ. Code § 2001.451(k)(1).

the cause of its income problems. However, Rose City offered no business plan to specifically deal with the eight-line machines, and the landlord who asserts he is abating rent in an effort to help Rose City get back on its feet has actually installed illegal eight-line machines in the hall.

Rose City's waiver application was based on the second method, whereby an applicant can seek a waiver by providing "a credible business plan for the organization's conduct of bingo or the organization's existing or planned charitable purposes" (a Credible Business Plan Waiver).¹⁸ The plan in this case does not offer a permanent or even reasonable long-term solution to the situation. Ms. Peck admitted that the cost saving measures are not meant to be permanent. Although Mr. Daniels asserted he could absorb rent and other costs for an extended period of time, the ALJ finds this assertion suspect. Mr. Daniels testified that the reason Rose City is losing money is due to illegal eight-line machines, but acknowledged he has installed eight-line machines in the hall itself. The ALJ also notes that Mr. Daniels gave no indication that he is planning to remove the machines. Nothing in the record indicates that he intends to take action that would result in long-term net proceeds.

Because the business plan submitted by Rose City does not provide for a long-term solution, the ALJ concludes the Commission acted reasonably when it: (1) concluded that the business plan submitted by Rose City was not credible; (2) concluded that the waiver application did not establish good cause for excusing compliance with the Net Proceeds Requirement; and (3) proposed to deny the waiver application. Consequently, Rose City's licenses to operate bingo should be revoked.

V. FINDINGS OF FACT

1. Rose City Association (Rose City) operates bingo as a unit consisting of Pilot Club of Tyler Foundation, VFW Post 4002 Longview, American Legion Post 296, VFW Post 7523, and Pilot Club of Mineola, Inc., all charities licensed to conduct charitable bingo operations.
2. Rose City did not generate positive net proceeds during 2015.

¹⁸ Tex. Occ. Code § 2001.451(k)(2).

3. On February 9, 2016, the Charitable Bingo Operations Division of the Texas Lottery Commission (Commission) notified Rose City that it would revoke the licenses of the members of Rose City for failure to generate positive net proceeds in 2015.
4. Rose City filed an application for a waiver of the net proceeds requirement.
5. The business plan included in the application for waiver does not contain a credible business plan that is likely to result in net proceeds in the future.
6. Staff (Staff) of the Commission notified Rose City that it was proposing to deny its application for waiver and revoke its license to operate bingo.
7. February 25, 2016, Rose City appealed the proposed denial and requested a hearing.
8. A Notice of Hearing was sent to all the members of Rose City on July 16, 2016. 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 factual matters asserted.
9. The hearing was held before ALJ John H. Beeler on October 11, 2016. Kristen Guthrie represented Staff; Stephen Fenoglio represented Rose City. The hearing was adjourned and the record closed the same day.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter. Tex Occ. Code ch. 2001.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
3. The Commission has the burden of establishing that Rose City failed to have positive net proceeds during the date in question and Rose City has the burden of proof in establishing it is entitled to a waiver. 1 Tex. Admin. Code § 155.427.
4. Adequate and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051-.052.
5. By failing to have net proceeds in 2015, the members of Rose City violated Tex. Occ. Code § 2001.451(g)(1) and 16 Tex. Admin. Code § 402.452(a).

6. The members of Rose City failed to prove that they are entitled to a waiver of the requirement in Tex. Occ. Code § 2001.451(g)(1) and 16 Tex. Admin. Code § 402.452(a).
7. The licenses of the members of Rose City to operate bingo should be revoked.

SIGNED December 9, 2016.



JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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December 27, 2016

The Honorable John H. Beeler
Administrative Law Judge
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, Texas 78701

Via Facsimile
512.322.2061


Re: Docket No. 362-16-4458.B; *Texas Lottery Commission v. American Legion Post 296*; Docket No. 362-16-4460.B; *Texas Lottery Commission v. Pilot Club of Mineola, Inc.*; Docket No. 362-16-4456.B; *Texas Lottery Commission v. Pilot Club of Tyler Foundation*; Docket No. 362-16-4459.B; *Texas Lottery Commission v. VFW Post 7523*; Docket No. 362-16-4457.B; *Texas Lottery Commission v. VFW Post 4002 Longview*; Before the State Office of Administrative Hearings

Dear Judge Beeler:

I represent American Legion Post 296, Pilot Club of Mineola, Inc., Pilot Club of Tyler Foundation, VFW Post 7523, and VFW Post 4002 Longview (collectively, "Respondents") concerning the referenced matters.

Respondents do not have the resources to continue fighting the Texas Lottery Commission on this matter, so Respondents will not be filing Exceptions; however, we do wish to point out one error in the Proposal for Decision (the "PFD"). Contrary to the ALJ's statement in the PFD (top of page 8), the landlord did not state that he installed any illegal machines. We note that there is no Finding of Fact or Conclusion of Law on this matter.

Very truly yours,


Stephen Fenoglio

cc: American Legion Post 296
Pilot Club of Mineola, Inc.
Pilot Club of Tyler Foundation
VFW Post 7523
VFW Post 4002 Longview

The Honorable John H. Beeler
December 27, 2016
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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been served pursuant to the Texas Rules of Civil Procedure and the Texas Administrative Code on this the 27th day of December, 2016 in the manner described to the persons listed below:

Kristen Guthrie, Esq.
Texas Lottery Commission
P. O. Box 16630
Austin, Texas 78761-6630

Via Facsimile
512.344.5189



STEPHEN FENOGLIO



Texas Lottery Commission

Commissioners:

J. Winston Krause, Chairman • Carmen Arrieta-Candelaria

Peggy A. Heeg • Doug Lowe • Robert Rivera



Alfonso D. Royal III
Director

January 9, 2017

The Honorable John H. Beeler
Administrative Law Judge
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, TX 78701

Via Facsimile (512) 322-2061

RE: Docket Nos. 362-16-4456.B; 362-16-4457.B; 362-16-4458.B; 362-16-4459.B; and 362-16-4460.B; *Texas Lottery Commission v. Pilot Club of Tyler Foundation*; *Texas Lottery Commission v. VFW Post 4002 Longview*; *Texas Lottery Commission v. American Legion Post 296*; *Texas Lottery Commission v. VFW Post 7523*; and *Texas Lottery Commission v. Pilot Club of Mineola, Inc.*; Before the State Office of Administrative Hearings.

Dear Judge Beeler:

I write on behalf of the Texas Lottery Commission concerning the above-referenced matters in response to Respondents' letter dated December 27, 2016. Specifically, Respondent says that "the landlord did not state that he installed any illegal machines." However, at the October 11, 2016 hearing, Mr. Daniels, the commercial bingo licensed lessor landlord answered multiple questions about his ownership of "gaming devices" causing net proceeds problems for the bingo hall. Mr. Daniels testified that "[we] do have some [gaming devices] in the snack bars in Rose City" (page 95) and that he receives income from those devices (page 96). Given this testimony, the Proposal for Decision's statement is correct.

Sincerely,

Kristen Guthrie
Assistant General Counsel

cc: Alfonso D. Royal III, Charitable Bingo Operations Division Director

Mr. Stephen Fenoglio
Attorney and Counselor at Law
713 W. 14th Street
Austin, TX 78701-1707

Via Facsimile (512) 482-8095