

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE WASHINGTON STATE GAMBLING COMMISSION

RECEIVED
MAY 24 2013
GAMBLING COMMISSION
COMM & LEGAL DIVISION

In The Matter Of:

KOZY TAVERN
Everett, Washington

Number 05-20451

Licensee.

OAH Docket No. 2013-GMB-0009
GMB No. CR 2012-01300

INITIAL ORDER REVOKING
GAMBLING LICENSE

Administrative Law Judge John M. Gray conducted an administrative hearing in this matter on March 26, 2013, at the Gambling Commission Office, 4565 7th Avenue, Lacey, Washington.

Stephanie U. Happold, Assistant Attorney General, appeared and represented the Washington State Gambling Commission ("Commission"). Tam Moen, Deputy City Clerk for the City of Everett and Alan Esparza, a Special Agent with the Commission, appeared and testified as witnesses for the Commission.

Neither Kozy Tavern, nor any representative acting on its behalf, appeared or testified at the March 26 hearing.

On October 19, 2012, the Director of the Commission caused two copies of a Notice of Administrative Charges and Opportunity for an Adjudicative Proceeding ("Notice of Administrative Charges") to be issued against Kozy Tavern, one by regular mail and the other by certified mail. The Director alleges that Kozy Tavern failed to pay its local gambling taxes to the City of Everett for the third and fourth quarters of 2009, all of 2010 and 2011, and the first and second quarters of 2012.

RECEIVED
GAMBLING
COMMISSION

Kozy Tavern signed and dated the Request for Administrative Hearing on November 8, 2012, and filed the Request with the Commission on November 13, 2012, twenty-five (25) calendar days after service of the Notice of Administrative Charges.

The Commission issued the Notice of Hearing on January 4, 2013, to the Commission Staff, the Attorney General's Office, the Office of Administrative Hearings, and to Kozy Tavern, the latter to its mailing address at 1016 Western Avenue, Wenatchee, WA 98801. The Notice of Hearing set the hearing on the merits for March 26, 2013, beginning at 9 AM at the Commission's hearing room in Lacey, Washington.

At the hearing, the Commission offered four exhibits, numbered 1 through 4, all of which were admitted without objection.

Kozy Tavern offered no exhibits.

The Administrative Law Judge, having considered the evidence, now enters the following Findings of Fact:

FINDINGS OF FACT

1. Kozy Tavern operates as a tavern in Everett, Washington. Kozy Tavern also operates punchboards and pull-tabs, an activity for which a gambling license is required.
2. The Commission first issued a punchboard/pull-tab license to Kozy Tavern in 2007, which Kozy Tavern has kept current to the date of this hearing. This license is a type 05, class F. The license number is 05-20451. Without more, the license will expire on September 30, 2013.

3. The City of Everett ("Everett") is a municipal corporation within the State of Washington. Everett has a municipal code, including chapter 3.36 that contains the provisions for Everett's gambling tax. Everett, WA, Code § 3.36.050.5.1 sets the tax rate at four (4) percent for the gross receipts received from punch boards or pull-tabs for commercial stimulant operators.

4. Tam Moen is Everett's Deputy City Clerk. The City Clerk's Office is a division within the Finance Department. Among Ms. Moen's other tasks, she has responsibility for collecting Everett's gambling tax from establishments with the city limits which owe the tax.

5. Kozy Tavern and its delinquent gambling tax problems first came to Ms. Moen's attention in 2009. She saw that Kozy Tavern was behind on its payments and getting further and further behind.

6. Ms. Moen wrote to Kozy Tavern on March 7, 2011 (Exhibit 2, page 8) and May 17, 2011 (Exhibit 2, page 7) informing Kozy Tavern of its delinquent tax liabilities. The May 17 letter referred to Ms. Moen's correspondence with the Commission regarding Kozy Tavern, dated March 5, 2010, August 4, 2010, and March 7, 2011.

7. On May 18, 2011, Michelle M. Pardee, of the Commission's Communications & Legal Division, wrote to Kozy Tavern informing it that Everett had notified the Commission of Kozy Tavern's gambling tax delinquencies and that inaction could lead to suspension or revocation of Kozy Tavern's gambling license. Exhibit 2, page 6.

8. Ms. Moen again wrote to the Commission on June 28, 2011, to inform it of Kozy Tavern's continued gambling tax delinquencies, despite the Commission's May 18 letter to Kozy Tavern. Exhibit 2, page 5.

9. Ms. Moen wrote to Kozy Tavern on September 14, 2011, referencing an earlier letter dated July 13, 2011 (not part of the record) regarding its delinquent gambling taxes. The letter also informed Kozy Tavern that, unless Kozy Tavern paid its gambling taxes, Everett would notify the Commission to begin the revocation process. Exhibit 2, page 4.

10. Ms. Moen wrote to Kozy Tavern again on February 8, 2012 (Exhibit 2, page 3) and June 5, 2012 (Exhibit 2, page 2) regarding the delinquent gambling taxes.

11. Finally, on September 12, 2012, Ms. Moen wrote to the Commission, providing the Commission with copies of the correspondence referenced in the Findings of Fact, above, and asking the Commission to revoke Kozy Tavern's gambling license.

12. Kozy Tavern failed to pay its punch board/pull-tab gambling tax in full to Everett for the third and fourth quarters of 2009, all of 2010, all of 2011, and the first and second quarters of 2012. Kozy Tavern reported its taxes and made partial payments (see Finding of Fact no. 13). The amount of delinquent taxes is based on actual figures reported by Kozy Tavern, as shown:

QUARTER / YEAR	TAX (\$)	PENALTY (\$)	TOTAL DUE (\$)
3/2009	3,926.72	981.68	4,908.40
4/2009	3,351.96	837.99	4,189.95
1/2010	3,310.04	827.51	4,137.55

QUARTER / YEAR	TAX (\$)	PENALTY (\$)	TOTAL DUE (\$)
2/2010	3,354.64	838.66	4,193.30
3/2010	3,313.00	828.25	4,141.25
4/2010	2,893.84	723.46	3,617.30
1/2011	2,749.40	687.35	3,436.75
2/2011	3,001.04	750.26	3,751.30
3/2011	4,222.83	1,055.71	5,278.54
4/2011	4,951.53	1,237.88	6,189.41
1/2012	4,221.64	1,055.41	5,277.05
2/2012	4,501.96	675.29	5,177.25
ALL QUARTERS			54,298.05

13. Kozy Tavern made some payments to Everett on its gambling taxes, as shown in the following table:

DATE OF PAYMENT	AMOUNT PAID (\$)
September 7, 2010	931.09
September 20, 2010	700.00
July 15, 2011	500.00
July 22, 2011	500.00
August 12, 2011	500.00
November 8, 2011	500.00

DATE OF PAYMENT	AMOUNT PAID (\$)
November 21, 2011	500.00
November 29, 2011	500.00
December 2, 2011	500.00
December 9, 2011	500.00
December 27, 2011	500.00
February 2, 2012	1,500.00
February 16, 2012	500.00
February 17, 2012	1,500.00
March 2, 2012	500.00
March 22, 2012	1,500.00
April 9, 2012	1,500.00
April 13, 2012	500.00
April 27, 2012	500.00
May 8, 2012	500.00
May 15, 2012	500.00
May 25, 2012	500.00
June 8, 2012	750.00
June 15, 2012	500.00
June 29, 2012	500.00
July 27, 2012	500.00

DATE OF PAYMENT	AMOUNT PAID (\$)
August 22, 2012	1,500.00
TOTAL	19,381.09

14. Kozy Tavern owed \$54,298.05 for the periods at issue. Kozy Tavern paid \$19,381.09 for the same periods at issue. Kozy Tavern still owes \$34,916.96 for the periods at issue.

15. Extrapolating from the amount of tax Kozy Tavern reported as due, at the rate of four percent of gross, Kozy Tavern earned, for example and with reference to the third quarter of 2009, \$98,168 for that third quarter as gross receipts from punchboards and pull-tabs only (i.e., no other source of income is used to compute the tax due). With reference to the fourth quarter of 2009, Kozy Tavern earned \$83,799 for that fourth quarter as gross receipts from punchboards and pull-tabs only. The formula is the amount of reported tax divided by .04.

16. Allen Esparza is a Special Agent employed by the Washington State Gambling Commission in the Financial Investigations Unit. He has worked for the Commission for over ten years. He conducts both pre-licensing and post-licensing investigations regarding licensing applicants, both individuals and businesses.

17. In September 2012, he received the assignment to investigate the city of Everett's request that the Commission revoke Kozy Tavern's license.

18. Following his investigation, Special Agent Esparza prepared Case Report No. 2012-01300. He confirmed the delinquent tax obligations as reported by the City of

Everett and the tax debt owed in the amount of \$34,916.96. He recommends that Kozy Tavern's license be revoked because of Kozy Tavern's failure to pay its local gambling taxes.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Administrative Law Judge now enters the following Conclusions of Law:

1. The Commission filed and served the Notice of Administrative Charges on October 19, 2012, by mailing two copies to Kozy Tavern, one by regular mail and the other by certified mail. Kozy Tavern requested a hearing on the form provided by the Commission, dated November 8, 2012, which the Commission received on Tuesday, November 13, 2012. The twenty-third day after service of the Notice of Administrative Charges was Sunday, November 11, 2012. The next day, Monday, November 12, 2012, was a state holiday (Veteran's Day observed). The final date for filing a timely appeal with the Commission was the next business day, Tuesday, November 13, 2012. WAC 10-08-080. Thus, Kozy Tavern timely filed its request for a hearing on the issues raised in the Notice of Administrative Charges.

2. The Office of Administrative Hearings has jurisdiction to hear and initially decide this matter in an adjudicative proceeding. RCW 9.46.140; 34.05.413, 34.12.030(1), and WAC 230-17-025.

3. The Commission bases its proposed revocation of Kozy Tavern's gambling license on the provisions of RCW 9.46.075(1) and (8); RCW 9.46.153(1); and WAC 230-03-085(1), (3), and (4).

4. RCW 9.46.075 is the Commission's Legislative grant of authority to deny, suspend, or revoke gambling licenses or permits. "The commission may deny an application, or suspend or revoke any license or permit issued by it, for any reason or reasons, it deems to be in the public interest. These reasons shall include, but not be limited to, cases wherein the applicant or licensee, or any person with any interest therein:

(1) has violated, failed or refused to comply with the provisions, requirements, conditions, limitations or duties imposed by chapter 9.46 RCW and any amendments thereto, or any rules adopted by the commission pursuant thereto, or when a violation of any provision of chapter 9.46 RCW, or any commission rule, has occurred upon any premises occupied or operated by any such person or over which he or she has substantial control;

(8) fails to prove, by clear and convincing evidence, that he, she or it is qualified in accordance with the provisions of [chapter 9.46 RCW][.]

5. RCW 9.46.153(1) declares that "[i]t shall be the affirmative responsibility of each applicant and licensee to establish by clear and convincing evidence the necessary qualifications for licensure of each person required to be qualified under this chapter, as well as the qualifications of the facility in which the licensed activity will be conducted[.]"

6. "Clear and convincing evidence" is a higher burden of proof than "preponderance of the evidence." See, *Ongom v. Department of Health*, 159 Wn.2d 132, 137, 148 P.3d 1029 (2006).

7. RCW 9.46.270 provides, "[t]his chapter shall constitute the exclusive legislative authority for the taxing by any city, town, city-county or county of any gambling activity and its application shall be strictly construed to those activities herein

permitted and to those persons, associations or organizations herein permitted to engage therein."

8. WAC 230-06-150 defines "gross gambling receipts":

(1) "Gross gambling receipts" means the amount due to any operator of a gambling activity for:

- (a) Purchasing chances to play a punch board or pull-tab series; and
- (b) Purchasing chances to enter a raffle; and
- (c) Fees or purchase of cards to participate in bingo games; and
- (d) Fees to participate in an amusement game, including rent or lease payments paid to licensees or franchisers for allowing operation of an amusement game on their premises; and
- (e) "Net win" from a house-banked card game; and
- (f) Tournament entry fees; and
- (g) Administrative fees from player-supported jackpots; and
- (h) Fees to participate in a nonhouse-banked card game (for example, time, rake, or per hand fee).

(2) The amount must be stated in U.S. currency.

(3) The value must be before any deductions for prizes or other expenses.

(4) "Gross gambling receipts" does not include fees from players to enter player-supported jackpots. However, any portion of wagers deducted for any purpose other than increasing current prizes or repayment of amounts used to seed prizes are "gross gambling receipts."

9. Everett, WA Code § 3.36.050.5.1 provides, "there is hereby levied upon and shall be collected from and paid by every commercial stimulant operator utilizing punch boards or pull-tabs, a tax in an amount of four (4) percent of the gross receipts received from punch boards or pull-tabs."

10. Kozy Tavern is a commercial stimulant operator within the meaning provided in WAC 230-03-175.

11. Everett, WA Code § 3.36.070(A) addresses "quarterly payments." It provides:

Payment of tax imposed by this chapter shall be due and payable in quarterly installments, and remittance therefor shall be made on or before the fifteenth day

of the month next succeeding the end of the quarterly period in which the tax accrued. The remittance shall be made by bond draft, certified check, cashier's check, money order or in cash and shall be accompanied by a return on a form to be provided and prescribed by the city treasurer. The taxpayer shall be required to swear or affirm that the information given on the tax return is full and true and that the taxpayer knows the same to be so.

12. Everett, WA Code § 3.36.180(C) addresses violations of the gambling tax code, and it provides, "[f]ailure to comply with any provision of this chapter shall constitute a violation of the provisions of Chapter 9.46 RCW."

13. The Commission also relies on its administrative rules. WAC 230-03-085 states in plain language when the Commission will deny, suspend, or revoke an application, license or permit. "We [referring to the Commission] may deny, suspend, or revoke any application, license or permit, when the applicant, licensee, or anyone holding a substantial interest in the applicant's or licensee's business or organization:

(1) commits any act that constitutes grounds for denying, suspending, or revoking licenses or permits under RCW 9.46.075;

(3) has demonstrated willful disregard for complying with ordinances, statutes, administrative rules, or court orders, whether at the local, state, or federal level; or

(4) has failed to pay gambling taxes to local taxing authorities and the local taxing authority has petitioned us to take action[.]

14. The Commission has proved by a preponderance of the evidence that Kozy Tavern has failed to pay its local gambling taxes to the City of Everett from the third and fourth quarters of 2009 to the first and second quarters of 2012. Kozy Tavern expressly failed to comply with RCW 9.46.075 and WAC 230-03-085 when it failed to comply with the City of Everett's gambling tax ordinances. On this basis, Kozy Tavern's license should be revoked.

15. Kozy Tavern has failed to prove by clear and convincing evidence that it should continue to be licensed by the Commission.

16. With regard to the Commission's alternative relief, a default order, I note that RCW 34.05.440(2) provides, in relevant part: "If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding . . . the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order." The language in the Notice of Hearing identified the consequences of default: revocation of the gambling license. I conclude that revoking based upon Kozy Tavern's failure to appear at the hearing is appropriate. Therefore, in the alternative, I conclude that the Licensee, Kozy Tavern, is in DEFAULT for its failure to appear for the March 26, 2013, hearing, and its license no. 05-20451 is revoked.

From the foregoing conclusions of law, NOW THEREFORE,

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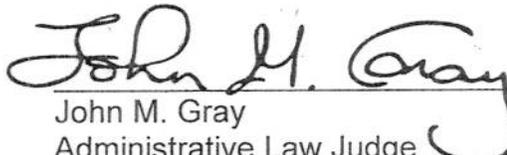
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INITIAL ORDER

IT IS ORDERED That Kozy Tavern's punchboard and pull tab license, no. 05-20451, is REVOKED.

Alternatively, the Licensee, Kozy Tavern, is in DEFAULT and its Punchboard/Pull-Tab license is REVOKED. A request that this order be vacated must be filed within seven days of service of this order, stating the grounds relied upon. RCW 34.05.440(3).

DATED at Tacoma, Washington, this 23 day of May, 2013.


John M. Gray
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO THE PARTIES

Initial orders must be entered in accordance with RCW 34.05.461(3). WAC 230-17-085(1). An initial order becomes the final order unless a party files a petition for review of the initial order as explained in WAC 230-17-090. WAC 230-17-085(2). Petitions for review are governed by WAC 230-17-090:

"RCW 34.05.464 governs the review of initial orders." WAC 230-17-090(1).

"Any party to an adjudicative proceeding may file a petition for review of an initial order. "Parties must file the petition for review with us within twenty days of the date of service of the initial order unless otherwise stated. Parties must serve copies of the petition to all other parties or their representatives at the time the petition for review is filed." WAC 230-17-090(2).

"Petitions must specify the portions of the initial order the parties disagree with and refer to the evidence in the record on which they rely to support their petition." WAC 230-17-090(3).

"Any party to an adjudicative proceeding may file a reply to a petition for review of an initial order. Parties must file the reply with us within thirty days of the date of

service of the petition and must serve copies of the reply to all other parties or their representatives at the time the reply is filed." WAC 230-17-090(4).

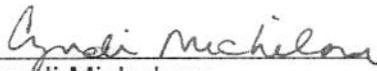
"Any party may file a cross appeal. Parties must file cross appeals with us within ten days of the date the petition for review was filed with us." WAC 230-17-090(5).

"Copies of the petition or the cross appeal must be served on all other parties or their representatives at the time the petition or appeal is filed." WAC 230-17-090(6).

"After we receive the petition or appeal, the commissioners review it at a regularly scheduled commission meeting within one hundred twenty days and make a final order." WAC 230-17-090(7).

Certification of Mailing

I certify that I mailed true and correct copies of the **Initial Order Revoking Gambling License and Alternative Default Order** to the following parties, postage prepaid this 23 day of May 2013 at Tacoma, Washington.


Cyndi Michelena
Legal Secretary

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