DOCKET NO. 591978

IN RE THI CAM LIEN LE	§	BEFORE THE
D/B/A L&P MARKET	§	
PERMIT NO. Q-239634	§	
LICENSE NO. BF288841	§	TEXAS ALCOHOLIC
	§	
JEFFERSON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-1790)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 9th day of July 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Stephen J. Burger. The hearing convened and adjourned on April 5, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 7, 2001. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

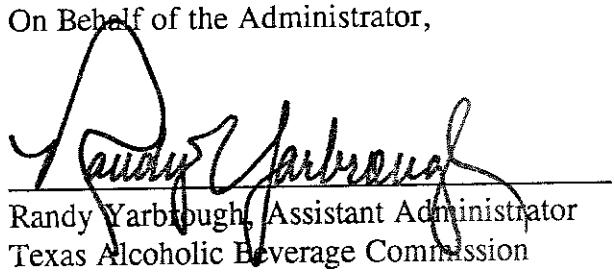
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED with prejudice.**

This Order will become final and enforceable on July 30, 2001, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 9th day of July, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/bc

The Honorable Stephen J. Burger
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (713) 812-1001

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TABC Legal Section

Licensing Division
Beaumont District Office

State Office of Administrative Hearings

JUN 11

Shelia Bailey Taylor
Chief Administrative Law Judge

June 7, 2001

Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

VIA REGULAR MAIL

RE: Docket No. 458-01-1790; *TABC vs. Thi Cam Lien Le d/b/a L&P Market*

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Christopher Burnett, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Theodore R. Johns, Sr., attorney for the Respondent. For reasons discussed in the Proposal for Decision, this proposal finds that the Respondent did not possess a gambling device on the licensed premises.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

S J Burger

Stephen J. Burger
Administrative Law Judge

SJB\mc
Enclosure
xc: Christopher Burnett, Staff Attorney, *TABC*, 5806 Mesa, Suite 160, Austin, Texas - **VIA REGULAR MAIL**
Theodore R. Johns, Sr., Johns & Johns, 330 Liberty St., Suite 808, Beaumont, Texas 77701-2328 - **VIA REGULAR MAIL**

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DOCKET NO. 458-01-1790

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
VS.	§	OF
	§	
THI CAM LIEN LE	§	
d/b/a L&P MARKET	§	
PERMIT NOS. Q-239634	§	
LICENSE NO. BF288841	§	
JEFFERSON COUNTY, TEXAS	§	
(TABC CASE NO. 591978)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Commission) brought this enforcement action against Thi Cam Lien Le, d/b/a L&P Market (Respondent) alleging that Respondent, on September 19, 2000, possessed a gambling device on the licensed premises, thereby violating TEX. ALCO. BEV. CODE ANN. § 61.71 (a)(17), (Code), and 16 TEX. ADMIN. CODE (TAC) § 35.31 (b)(14). Respondent appeared at the hearing through counsel and, after both sides rested, asserted that the evidence presented was insufficient to support the Commission's allegation. This proposal for decision finds that Respondent did not possess a gambling device on the licensed premises.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

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

Administrative Law Judge (ALJ) Stephen J. Burger convened the hearing on April 5, 2001, at the offices of the State Office of Administrative Hearings in Houston, Harris County, Texas. The Commission was represented by counsel, Christopher Burnett. The Respondent was present and represented by counsel, Theodore R. Johns, Sr.

II. THE ALLEGATION AND APPLICABLE STATUTORY PROVISIONS

There was one allegation in this proceeding, asserting that on September 19, 2000, Respondent possessed a gambling device on the licensed premises, thereby violating § 61.71 (a)(17) of the Code, and 16 TAC § 35.31 (b)(14). According to the Commission, such a violation may be punished by a 30 day license suspension, or a $150.00 per day fine, pursuant to §§ 11.61 and 11.64 of the Code.

III. STATEMENT OF THE EVIDENCE AND DISCUSSION

A. The Commission's Evidence

The Commission's documentary evidence consisted of:

Exhibit No. 1: Affidavit of Brian L. Guenthner, Licensing Department Director for the TABC, regarding Respondent's Permit and License.

The Commission's witnesses were Patrick L. O'Quinn, Beaumont Police Department; John C. Kolander, Jefferson County Sheriff's Department, and Reginald C. Boykin, Sr., Jefferson County Sheriff's Department. The following is the ALJ's brief summary of the witness' testimony and is not intended to be a complete transcription, but only a summary recitation of what the ALJ deemed particularly relevant to his decision.

Officer O'Quinn testified that prior to the date in question, the Beaumont Police Department had received complaints about gambling in city businesses. The police contacted over 90 businesses in Beaumont regarding the illegal use of gambling devices, and informed them of the legal uses of various devices. About two weeks thereafter, the police conducted undercover operations at the various businesses, and filed cases on about 19 businesses. Officer O'Quinn did not personally conduct on-site investigations.

Officer Kolander testified that on September 19, 2000, he entered the Respondent's premises as part of an undercover operation . He spent $20.00 to play an "eight-liner" machine, and "won" three coupons, worth $5.00 each. He then selected a six-pack of beer and presented the beer and the coupons to Respondent, Ms. Le.

Officer Kolander testified that Respondent told him that he could receive more merchandise, as apparently, to the Officer's understanding at the time, the three $5.00 coupons represented more than the six-pack of beer was worth. He then selected a baseball cap, and left with it and the six-pack. Significantly, on cross-examination, he denied giving any money to Respondent at the time he was redeeming the coupons.

Officer Boykin, Sr., testified that he witnessed Kolander's actions on the date in question. On cross-examination, he "did not recall" any cash being exchanged at the time of the coupon redemption.

B. Respondent's Evidence

Respondent's documentary evidence consisted of:

Exhibit No. 1: Cash register receipt dated September 19, 2001.

Respondent testified that she is a proprietor of the L&P Market. She further testified that on the date in question, Officer Kolander presented three $5.00 coupons. She told Kolander that she could not give cash for the coupons, and he would have to buy something. Kolander then selected a six-pack of beer, which she rang up at $5.49. She again told Kolander that she could not give cash back for the beer, but that he must select other merchandise for the coupons.

Respondent then testified that Kolander gave her a $20.00 bill, and picked out a baseball cap. Respondent presented a cash register receipt, which was admitted into evidence over the Commission's objection. Respondent stated that the beer was exchanged for the cash. She also stated that she knew that it was illegal to give beer in exchange for the coupons.

Officer O'Quinn was recalled, and stated that a video of the transaction that day was made, but he had not reviewed it.

Officer Kolander was recalled, and stated that he now remembers that about $7.00 in cash was given to Respondent, because she told him the cap and beer cost more than the coupons alone. He did not recall giving Respondent $20.00.

Officer Boykin was recalled, and he essentially reiterated Kolander's testimony.

C. Discussion

After considering all the evidence, the ALJ finds insufficient evidence that Respondent exchanged cash or beer for coupons from an eight-liner machine. The testimony of the Officers differs with Respondent's; however, some amount of cash was exchanged, as admitted by the Officers, although belatedly after they were recalled. The evidence indicates that the cash exchanged was for the beer.

Additionally, there may have been a failure to communicate between Respondent, with whom English is not a native language, and the Officers.

The cash register receipt supports the Respondent's version of what occurred on the date in question. I also note that although there was a video of the event in question, at the hearing it was conspicuously not offered.

The ALJ is of the opinion that in view of the credibility of Respondent, and all the other evidence and attendant circumstances, the Commission has not proved its case by a preponderance of the evidence.

Although all the evidence presented at the hearing was not discussed in this Proposal For Decision, all of the evidence was considered by the ALJ in preparing this Decision.

IV. PROPOSED FINDINGS OF FACT

1. Thi Cam Lien Le, d/b/a L&P Market, (Respondent), located at 2855 Washington Boulevard, Beaumont, Jefferson County, Texas, holds a Wine Only Package Store Permit, Q-239634, and Beer Retailer's Off-Premise License, BF-288841, issued by the Texas Alcoholic Beverage Commission (Commission).

2. On or about January 26, 2000, the Commission sent a notice of hearing to Respondent by certified mail, return receipt requested.

3. The hearing on the merits was held April 5, 2001, at 10:00 a.m., at the offices of the State Office of Administrative Hearings, Houston, Harris County, Texas. The Commission was represented by Christopher Burnett, attorney. The Respondent was represented by counsel, Theodore R. Johns, Sr.

4. On September 19, 2000, Officer Chad Kolander played a gaming device ("eight-liner"), and won three coupons, worth $5.00 each.

5. Officer Kolander attempted to purchase from Respondent, Ms. Le, a six-pack of beer in exchange for the three coupons.

6. Ms. Le refused to allow Officer Kolander to purchase the six-pack of beer for only the three coupons.

7. Officer Kolander then selected a cap to purchase, and also presented cash to Ms. Le.

8. Ms. Le totaled the prices of the cap and the beer, and gave change back to Officer Kolander.

9. Ms. Le did not give cash to Officer Kolander for the three eight-liner coupons.

10. Ms. Le did not give beer to Officer Kolander for the three eight-liner coupons.

11. Ms. Le did not possess a gambling device on the licensed premises.

V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to §§ 6.01 and 11.61 of the Code.

2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOVT. CODE ANN., Chapter 2003 .

3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN, §2001.051 and §2001.052 .

4. Pursuant to the Findings of Fact, Respondent did not possess a gambling device on the licensed premises.

5. Pursuant to the Findings of Fact, Respondent did not violate § 61.71 (a)(17) of the Code, nor did Respondent violate 16 TAC § 35.31 (b)(14).

SIGNED this 7th day of June, 2001.

S.J. Burger

Stephen J. Burger
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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