DOCKET NO. 618801

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	**BEFORE THE TEXAS**
	§	
	§	
	§	
VS.	§	
	§	
	§	
JONATHAN ANDREW CAYLOR D/B/A GREEN GO DISCOUNT STORE, Respondent	§	**ALCOHOLIC**
	§	
	§	
	§	
PERMIT BQ560945	§	
	§	
	§	
POTTER COUNTY, TEXAS (SOAH DOCKET NO. 458-14-0817)	§	**BEVERAGE COMMISSION**

ORDER

CAME ON FOR CONSIDERATION this 3rd day of October, 2014, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge B.L. Phillips presiding. The hearing convened on March 11, 2014 and the SOAH record closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on April 10, 2014. The Proposal for Decision recommended that the Respondent's permit be suspended for a period of 40 days. The Proposal for Decision does not address whether Respondent should be given the opportunity to pay a civil penalty in lieu of the suspension.

The Proposal for Decision was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were timely filed. However, Respondent filed with SOAH a document dated June 19, 2014 and titled "Content of this Letter is to File an Appeal". Neither Petitioner nor the Administrative Law Judge filed a response to this document. Respondent's June 19, 2014 letter should be considered a late-filed exception. Although not specifically referring to them, the letter challenges the findings of fact made by the Administrative Law Judge. By his silence, the Administrative Law Judge declined to change the findings. It is immaterial whether he declined to do so because the exceptions were late-filed or because he was not persuaded by the exceptions. In any event,

Government Code §2001.058 defines the circumstances in which an agency may change the findings of fact of the Administrative Law Judge. None of those circumstances are present here. Furthermore, the record reflects that the hearing was conducted in accordance with the requirements of due process, and that the findings are neither arbitrary nor capricious.

Alcoholic Beverage Code §11.64(a) provides:

> When the commission or administrator is authorized to suspend a permit or license under this code, the commission or administrator shall give the permittee or licensee the opportunity to pay a civil penalty rather than have the permit or license suspended, unless the basis for the suspension is a violation of Section 11.61(b)(14), 22.12, 28.11, 32.17(a)(2), 32.17(a)(3), 61.71(a)(5), 61.71(a)(6), 61.74(a)(14), 69.13, 71.09, 101.04, 101.63, 106.03, 106.06, or 106.15, the sale or offer for sale of an alcoholic beverage during hours prohibited by Chapter 105, consumption or the permitting of consumption of an alcoholic beverage on the person's licensed or permitted premises during hours prohibited by Chapter 105 or Section 32.17(a)(7), or an offense relating to prostitution, trafficking of persons, or gambling, in which case the commission or administrator shall determine whether the permittee or licensee may have the opportunity to pay a civil penalty rather than have the permit or license suspended.

Since none of the exceptions mentioned in the section applies, Respondent should have the opportunity to pay a civil penalty in lieu of suspension.

After review and due consideration of the Proposal for Decision, and with the following exception only, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

Conclusion of Law No. 7, for the reasons stated herein, is modified to read as follows:

> Based on the foregoing findings of fact and conclusions of law, Respondent's permit should be suspended for a period of 40 days unless Respondent pays a civil penalty in the amount of $300.00 per day.

All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that the privileges granted by the Commission and the activities authorized under the above permit by the Code will be **SUSPENDED beginning at 12:01 a.m. on November 19, 2014** and shall remain suspended **for FORTY (40) CONSECUTIVE DAYS, UNLESS** a civil penalty in the amount of **$12,000.00 is paid ON OR BEFORE November 10, 2014.**

If this Order is appealed and judgment is issued affirming the Order, the privileges granted by the Commission and the activities authorized under the above permit by the Code will be suspended beginning at 12:01 a.m. on the **eighteenth (18th)** day following the date the judgment is signed and shall remain suspended for forty (40) consecutive days, unless a civil penalty in the amount of $12,000.00 is paid on or before the **tenth (10th)** day following the date the judgment is signed.

This Order will become **final and enforceable** on the 28th day of October, 2014, **unless a Motion for Rehearing is filed by the 27th day of October, 2014.**

SIGNED this the 3rd day of October, 2014, at Austin, Texas.

Sherry K-Cook

Sherry K-Cook, Executive Director
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 3rd day of October, 2014.

Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

B.L. Phillips
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, TX 78701
VIA FACSIMILE: (512) 322-2061

Jonathan Andrew Caylor
d/b/a Green Go Discount Store
RESPONDENT
1505 S. Arthur
Amarillo, TX 79102

VIA FIRST CLASS MAIL, CMRRR # 70120470000133008651

Catherine Chamblee
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: *catherine.chamblee@tabc.texas.gov*

SOAH DOCKET NO. 458-14-0817

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
v.	§	OF
JONATHAN ANDREW CAYLOR D/B/A GREEN GO DISCOUNT STORE, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's Staff (Staff/TABC or Commission) brought this disciplinary action against Jonathan Andrew Caylor dba Green Go Discount Store (Respondent). Staff alleged that: (1) Respondent, or Respondent's agent, servant, or employee, possessed on the licensed premises, or an adjacent premises directly or indirectly under his control, an alcoholic beverage not authorized to be sold on the licensed premises, in violation of the Texas Alcoholic Beverage Code (Code) §§ 69.12, 61.71(a)(1), and/or 11.61(a)(9); (2) Respondent, or Respondent's agent, servant, or employee, possessed or permitted others to possess a narcotic on the licensed premises, in violation of Code §§ 104.01(9), 61.71(a)(1), and 16 Texas Administrative Code (TAC) 35.41(b); and (3) Respondent conducted its business in a place or manner which warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, in violation of Code §§ 61.71(a)(17), and 16 Texas Administrative Code (TAC) 35.31(c)(15). Based on the evidence, the Administrative Law Judge (ALJ) recommends Respondent's permit be suspended for a period of 40 days.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

On March 11, 2014, a hearing convened before the State Office of Administrative Hearings (SOAH), at the Justice of the Peace Court, Amarillo, Texas, Administrative Law Judge (ALJ) B. L. Phillips presiding. Staff appeared at the hearing and was represented by Catherine Chamblee, attorney. Respondent Jonathan A. Caylor appeared at the hearing and represented himself. After presentation of evidence and argument, the hearing concluded and the record was closed.

II. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 61.71(a)(1), the Commission may suspend a retail dealer's on- or off-premises license if it is found that the licensee violated a provision of the Code or rule of the commission during the existence of the license.

Pursuant to the Code §§ 61.71(a)(9) and 69.12, the Commission may suspend a retail dealer's on- or off-premises license if it is found that the licensee possessed on the licensed premises, or on adjacent premises directly or indirectly under his control, an alcoholic beverage not authorized to be sold on the licensed premises.

Pursuant to the Code § 104.01(9), no person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, possession of a narcotic or any equipment used or designed for the administering of a narcotic. Pursuant to 16 TAC § 35.41(b), a narcotic includes any substance defined in the Texas Controlled Substances Act, §481.002(5), (6), (7), or (26). Pursuant to 16 Texas Administrative Code (TAC) § 35.31(c)(15), a licensee or permittee violates the Code when the licensee or permittee commits any narcotics related offense described in Chapters 481 and 483 of the Texas Health and Safety Code.

Pursuant to the Code §§ 61.71(a)(17), the Commission may suspend or cancel a retail dealer's on- or off-premises license if it is found that the licensee may conduct its business against the public's general welfare, health, peace, morals, and safety and sense of decency.

III. DISCUSSION AND ANALYSIS

A. Background

The following facts were not disputed at the hearing. Respondent holds a Wine & Beer Retailer's Off-Premise Permit issued by TABC for the licensed premises known as Green Go Discount Store, 1505 S. Arthur, Amarillo, Potter County, Texas. On or about May 24, 2013, TABC agents conducted an inspection of the licensed premises and located a bottle of labeled Jack Daniels which had no TABC tax stamp affixed to it in a back bedroom on the licensed premises. The agents also located a green substance found within jars labeled "legal eagle," "cush," and "bayou blaster." The jars were located in a cabinet on the licensed premises near the cash register. The green substance was field tested and later tested at the Department of Public Safety (DPS) Laboratory to determine its nature.

B. Staff's Evidence and Contentions

Staff presented the testimony of TABC Captain Mark Menn, Agents Abel Siller, Jr. and Randy McCarthy, DPS Chemist Marjorie Robinson, and extensive documentary evidence. Captain Menn testified that he is the TABC Captain in charge of a district comprising 88 counties including Potter County. Regarding the portion of the licensed premises subject to inspection by TABC, Captain Menn stated that the premises include the grounds and adjacent premises which are under the permittee's control and not diagrammed off with TABC. Regarding the bottle found on the licensed premises, Captain Menn testified that any bottle labeled as an alcoholic beverage is prima facie evidence that the contents of the bottle are an alcoholic beverage. The violations alleged by Staff against Respondent include: (1) possession of an alcoholic beverage on the licensed premises when the permit did not allow possession of the substance; (2) possession of narcotics on the licensed premises; and (3) place and manner violation of the Code. Captain Menn recommended that Respondent's permit be suspended for 40 days.

Agent Siller testified that he and Agent McCarthy inspected the licensed premises on May 24, 2013, and located the bottle of Jack Daniels liquor and the synthetic marijuana on the licensed premises. The Jack Daniels bottle did not have a TABC tax stamp affixed to it and was located in the back bedroom which Respondent apparently used for a living quarters on the licensed premises. Siller testified that Jack Daniels was a distilled spirit which was not permitted on the licensed premises under the permit held by Respondent. Siller researched the permit application filed by Respondent and determined that no part of the licensed premises was diagrammed off as personal living space and not a portion of the licensed premises.

Siller testified that jars containing a green substance were located on the licensed premises and that Respondent had previously been given a verbal warning for the sale of synthetic marijuana on the licensed premises. The jars containing the green substance were labeled "legal eagle," "cush," and "bayou blaster," which Siller testified were names associated with types of synthetic marijuana. The substance was field tested and determined to be synthetic marijuana, which was confirmed by testing in the DPS Laboratory.

Agent McCarthy testified regarding the open compliance inspection of the licensed premises conducted by himself and Agent Siller. He located the bottle of Jack Daniels whiskey in the bedroom on the licensed premises and stated that no liquor was permitted even in the bedroom if it was not diagrammed off with TABC. He testified that the bedroom was not diagrammed off and therefore was subject to the rules under which the permittee had to operate, including inspection of the bedroom for Code violations.

Marjorie Robinson testified that she is a Chemist in the DPS Crime Laboratory and performed an analysis of the green substance located by the TABC agents on the licensed premises. The analysis determined that the substance was synthetic cannabinoid, which is subject to Penalty Group 2A as set forth in the Texas Health & Safety Code.

C. Applicant's Evidence and Contentions

Respondent testified on his own behalf and stated that the green substance was potpourri which he purchased from the flea market. He alleged that the potpourri was tampered with before it was tested by the DPS Laboratory. He admitted that he had previously purchased potpourri by mail and was selling it on the licensed premises until he was told by TABC that it was illegal. Regarding the bottle of Jack Daniels, Respondent denied that the bottle contained liquor because he was using it to produce a substance of his own making. He also testified that TABC was aware that he had an apartment on the licensed premises.

D. Analysis

After considering the evidence, the ALJ concludes that Staff has proven that Respondent violated the Code and recommends that Respondent's permit should be suspended for 40 days. Staff proved that Respondent did possess on the licensed premises an alcoholic beverage not authorized to be sold on the licensed premises. The alcoholic beverage, a bottle of Jack Daniels, was located in a portion of the licensed premises which was used as a bedroom but was not diagrammed off to take it out of the licensed premises. Because this was not properly done, the room was subject to inspection and compliance with the Code provisions under which the permit was issued by TABC.

Staff also proved that Respondent possessed synthetic marijuana on the licensed premises, which is a narcotic under the Texas Health & Safety Code. Pursuant to the Code, this is an offense because the Respondent's conduct is lewd, immoral, or offensive to public decency.

Finally, Staff also proved that the Respondent conducted his business against the public's general welfare, health, peace, morals, safety, or sense of decency. The evidence proves that Respondent violated two Code provisions set forth above, one of which is an offense against the public decency.

IV. RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence proves that Respondent (1) possessed on the licensed premises, or an adjacent premises directly or indirectly under his control, an alcoholic beverage not authorized to be sold on the licensed premises, in violation of the Texas Alcoholic Beverage Code (Code) §§ 69.12, 61.71(a)(1), and/or 11.61(a)(9); (2) possessed or permitted others to possess a narcotic on the licensed premises, in violation of Code §§ 104.01(9), 61.71(a)(1), and 16 Texas Administrative Code (TAC) 35.41(b); and conducted its business in a manner which is a violation of the general welfare, health, peace, morals of the people and public sense of decency, in violation of Code §§ 11.61(b)(7) and 16 TAC § 35.31(c)(12). The ALJ recommends that Respondent's permit be suspended for a period of 40 days pursuant to the recommendations of TABC and based on the range of suspensions appropriate for each violation.

V. FINDINGS OF FACT

1. Respondent Jonathan Andrew Caylor holds a Wine & Beer Retailer's Off Premises Permit issued by the TABC for the premises known as Green Go Discount Store, located at 1505 S. Arthur, Amarillo, Potter County, Texas.

2. Respondent received proper and timely notice of the hearing from the Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) in a notice of hearing dated November 14, 2013. The hearing was continued to March 11, 2014.

3. The hearing on the merits convened March 11, 2014, before the State Office of Administrative Hearings, at the Justice of the Peace Courtroom, Amarillo, Texas. Staff was represented by attorney Catherine Chamblee. Applicant represented himself. The record closed on the same day.

4. On or about May 24, 2103, TABC Agents Siller and McCarthy conducted an open compliance inspection of the licensed premises.

5. Agent McCarthy located a bottle labeled "Jack Daniels" in the bedroom of the licensed premises which Respondent apparently used as a living quarters.

6. Agent Siller researched the permit application filed by Respondent and determined that no part of the licensed premises was diagrammed off as a personal living space and not as a portion of the licensed premises.

7. Agents Siller and McCarthy located jars containing a green substance on the licensed premises which were field tested and determined to be synthetic marijuana.

8. The jars were labeled "legal eagle," "cush," and "bayou blaster," which are names associated with types of synthetic marijuana.

9. The green substance was tested by the Department of Public Safety (DPS) laboratory and confirmed to be synthetic cannabinoid, defined as a narcotic covered under Penalty Group 2A of the Texas Health & Safety Code.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).

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. 2001.

3. Notice of the hearing was provided as required by the Texas Government Code §§ 2001.051 and 2001.052.

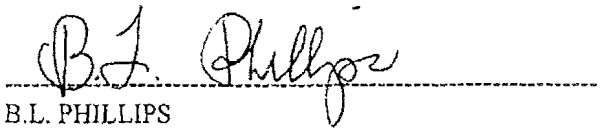
4. On or about May 24, 2013, Respondent, or Respondent's agent, servant, or employee, possessed on the licensed premises, or an adjacent premises directly or indirectly under his control, an alcoholic beverage not authorized to be sold on the licensed premises, in violation of the Texas Alcoholic Beverage Code (Code) §§ 69.12, 61.71(a)(1), and/or 11.61(a)(9).

5. On or about May 24, 2013, Respondent, or Respondent's agent, servant, or employee, possessed or permitted others to possess a narcotic on the licensed premises, in violation of Code §§ 104.01(9), 61.71(a)(1), and 16 Texas Administrative Code § 35.41(b).

6. On or about May 24, 2013, Respondent conducted its business in a place or manner which warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, in violation of Code §§ 61.71(a)(17), and 16 Texas Administrative Code § 35.31(c)(17).

7. The ALJ recommends that Respondent's permit be suspended for a period of 40 days.

Signed APRIL 10, 2014



B.L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICEOF ADMINISTRATIVE HEARINGS