

DOCKET NO. 548097

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	ALCOHOLIC
JMNI INC.	§	
D/B/A JAKE'S SPORTS CAFE	§	
PERMIT/LICENSE NO(s). MB533746, LB,	§	
PE, C	§	
LUBBOCK COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-07-0612)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this day, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened on March 28, 2007 and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 11, 2007. 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. 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 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 Respondent's permits not be suspended.

This Order will become final and enforceable on June 25, 2007, unless a Motion for Rehearing is filed **before** that date.

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

SIGNED on May 29, 2007, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

Hon. B. L. Phillips
Administrative Law Judge
Lubbock, Texas
VIA FAX (806) 792-0149

JMNI INC.
RESPONDENT
d/b/a JAKE'S SPORTS CAFE
5025 50TH ST 'A'
LUBBOCK, TX 79414
VIA REGULAR MAIL

Christopher G. Gee
ATTORNEY FOR PETITIONER
TABC Legal Services

Licensing Division
Lubbock District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

April 11, 2007

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

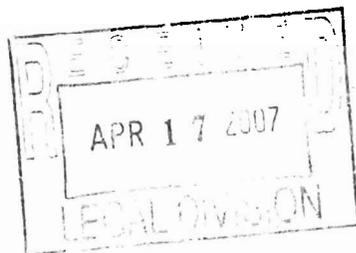
VIA REGULAR MAIL

RE: Docket No.458-07-0612; JMNI INC. d/b/a Jake's Sports Cafe`

Dear Mr. Steen:

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 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.



Sincerely,

A handwritten signature in black ink that reads "B.L. Phillips".

B.L. Phillips
Administrative Law Judge

BLP/vu

Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Christopher G. Gee, Licensing Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
JMNI Inc., 5025 50th 'A', Lubbock, TX.79414-**VIA REGULAR MAIL**

Megaron Building
8212 Ithaca, Suite W3 ♦ Lubbock, Texas 79423
(806) 792-0007 Fax (806) 792-0149
<http://www.soah.state.tx.us>

SOAH DOCKET NO. 458-07-0612

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	
	§	
JMNI, INC.	§	OF
D/B/A JAKE'S SPORTS CAFÉ,	§	
LUBBOCK COUNTY, TEXAS	§	
(TABC CASE NO. 548097),	§	ADMINISTRATIVE HEARINGS
Respondent	§	

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Commission) brought this enforcement action against JMNI, Inc. d/b/a Jake's Sports Café (Respondent), alleging that Respondent violated Texas Alcoholic Beverage Code (the Code) § 11.61(b)(7), and/or Commission Rules 16 Texas Administrative Code (TAC) § 35.31(b)(14). Based on the evidence, the Administrative Law Judge (Judge) finds the Petitioner did not prove the allegations by a preponderance of the evidence and recommends that the Respondent's permit not be suspended.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The Commission and the State Office of Administrative Hearings (SOAH) have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute protest action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. HEARING AND EVIDENCE

On March 28, 2007, a hearing was convened before Judge B. L. Phillips, at SOAH, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner was represented by Christopher G. Gee, attorney. Respondent appeared and represented himself. The record closed that same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 11.46 (b)(7) , the Commission may suspend a permit if it finds that the place or manner in which the permittee conducts his business warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. A permittee violates the provisions of § 11.46 (b)(7) if any gambling offense described in Chapter 47 of the Texas Penal Code is committed, according to 16 TAC §35.31(b)(14). Pursuant to Texas Penal Code § 47.02(a)(1), a person commits an offense of gambling if he makes a bet on the results of a game. “Bet” is defined in Penal Code § 47.01(1) as an agreement to win or lose something of value by chance. “Permittee” is defined in § 1.04 (11) of the Code as the person who is the holder of the permit or an agent, servant, or employee of that person.

IV. EVIDENCE

A. Documentary Evidence

Petitioner admitted into evidence exhibits including Respondent’s permit history and a report made by TABC Agent Chris Schultz regarding the allegations of gambling on the licensed premises made against Petitioner. According to the report, Agent Schultz and Agent Bobby Castillo were conducting an open inspection at a special event at the Lone Star Amphitheater where they wrote three citations for gambling. Lone Star Amphitheater is located at 602 East 19th Street, Lubbock, Texas, and was operating under a caterer’s permit, with the primary permit carrier for the location being Jake’s Sports Bar.

Agent Schultz observed three individuals inside a building located on the north side of the licensed premises who appeared to be playing a card game for money. He also observed two individuals, who he identified as Respondent’s employees, enter the building to get bags of ice. They did not intervene and stop the activity. When agents Schultz and Castillo made contact with the three individuals, they observed playing cards and miscellaneous change in the form of nickels and pennies. Agent Schultz asked one of the individuals, Tomas Alvarado, if he worked at the

licensed premises for the permittee, and Mr. Alvarado stated that he did some work for him. He explained that his father had a recycling plant next door and they let the permittee use their forklift in exchange for concert tickets. When Respondent was contacted, he identified Mr. Alvarado and stated that they used the recycling plant's forklift to move items on the licensed premises. When Mr. Alvarado was asked if he had a ticket to get in for the concert, he showed the agent a Lone Star Amphitheater VIP Pass apparently signed by Respondent.

B. Chris Schultz, TABC Agent

Agent Schultz testified that he observed the three individuals located in a building on the Lone Star Amphitheater premises playing cards for change and that they acknowledged playing for money. He also testified that Jake's Sports Café was in charge of liquor sales on the premises of the Lone Star Amphitheater. When Agent Schultz asked Mr. Alvarado about his presence on the licensed premises, he explained that his father let Respondent use his forklift and that he had a VIP pass to enter the concert.

C. Mike Lockhart, TABC Agent

Agent Lockhart testified that he arrived at the Lone Star Amphitheater on the night of the incident and that his agents told him that he had a gambling case. Mr. Alvarado told Agent Lockhart that he was working for Respondent earlier operating the forklift. Agent Lockhart recommended that Respondent's permit be suspended for a period of 30 days or that he pay a fine.

D. Tommy Alvarado

Mr. Alvarado testified that he attends concerts at the Lone Star Amphitheater and gets his tickets from his brother-in-law. He admitted that he arrived at that location, which he described as a large place, on the date in question and got into a card game with some other employees of American Fiber, the owner of the forklift. He stated that he did not think that they were doing any

harm and that the money used in the game was split up among all the players at the beginning of the next game. The only money utilized was less than three dollars in change.

E. Scott Stephenson, Respondent

Respondent testified that the Lone Star Amphitheater consists of approximately 32 acres and that the building where the concert was held that night was not the same building where the card game was being played. He was not aware of the card game as he was taking care of the large crowd in the concert building. Regarding the alleged employees who were going into the building to get ice, he denied that it could be his employees because their ice was located elsewhere. He stated they could have been employees of another employer working for the concert that night.

V. ANALYSIS

Under the Code, the Commission may suspend a permit if it if it finds that the place or manner in which the permittee conducts his business warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, which includes any gambling offense described in Chapter 47 of the Texas Penal Code is committed.

The evidence is uncontested that Mr. Alvarado was on the licensed premises on the night in question playing a card game where the players would utilize change in the form of pennies and nickels to determine who was winning. However, the evidence does not show that the money was “won” by any individual but that it was divided up by the players after each game for use in the next game. A bet was not made in this case because the players did not agree to win or lose something of value but instead used the money as a form of scoring. This does not appear to be gambling as envisioned by the Texas Penal Code.

The preponderance of the evidence does not support the finding that Mr. Alvarado was the agent, servant, or employee of Respondent on the night in question. Mr. Alvarado was on the licensed premises under a VIP pass issued by Respondent but which he testified was given to him by his brother-in-law, not Respondent. The only evidence that he was an agent, servant, or employee of Respondent is the testimony of Agent Lockhart that Mr. Alvarado told him he was working for Respondent earlier operating a forklift. The evidence is that Mr. Alvarado's father let Respondent use the forklift on the licensed premises in return for concert tickets. However, this is insufficient evidence to show what sort or extent of work that Mr. Alvarado was doing for Respondent or that it was sufficient to call him an agent, servant, or employee. It is just a likely that he was merely delivering the forklift to the licensed premises for Respondent's use pursuant to the agreement between his father and Respondent and that he was acting instead as the agent, servant, or employee of his father in that capacity.

The evidence was insufficient to prove that Respondent violated the Code and his permit should not be suspended.

VI. FINDINGS OF FACT

1. JMNI, Inc. dba Jake's Sports Café, Lubbock County, Texas, holds Permit No. MB-533746, issued by the TABC for the premises located at 5025 50th Street "A", Lubbock, Lubbock County, Texas.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated December 11, 2006. The case was continued to March 28, 2007.
3. The hearing on the merits convened March 28, 2007, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by Christopher G. Gee, attorney. Respondent appeared and represented himself. The record closed that same day.
4. Respondent is the operator of the Lone Star Amphitheater located on 602 East 19th Street, Lubbock, Texas, which he operates under a caterer's permit, with the primary permit carrier for the location being Jake's Sports Bar.
5. On March 29, 2006, Respondent was holding a concert at the Lone Star Amphitheater, and Jake's Sports Café was in charge of the liquor sales on the premises.

6. On that date, Tomas Alvarado was on the licensed premises to attend a concert when he and two other individuals engaged in a card game in which they used pennies and nickels to determine who was ahead in the game.
7. Mr. Alvarado and the others involved in the card game were not playing for the right to keep the money used to score the card game.
8. Mr. Alvarado had a VIP pass to enter the licensed premises which had been given to him by his brother-in-law and which Respondent gave in exchange for use of a forklift.
9. Petitioner did not prove that Mr. Alvarado was the agent, servant, or employee of Respondent on the night in question.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71, and 61.73.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on Findings of Fact No. 4-9, the Commission did not prove that Respondent violated a provision of the Code.
5. Based on the foregoing, suspension of Respondent's permit for the grounds set forth above is not warranted.

SIGNED: April 11th, 2007



B. L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS