

**DOCKET NO. 587872**

IN RE LAN TUYET TANG	§	BEFORE THE
D/B/A LUCKY STAR	§	
PERMIT NO. Q-430933 & BF-430934	§	
	§	TEXAS ALCOHOLIC
	§	
JEFFERSON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-0025)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 28th day of February, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Carrie L. McLarty. The hearing convened on November 17, 2000, 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 January 9, 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. Exceptions were filed were filed by Petitioner on January 22, 2001.

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**.

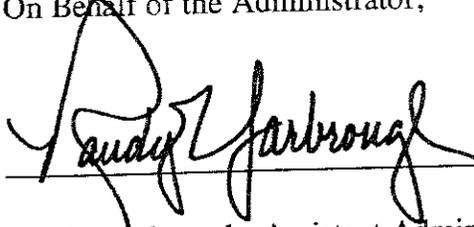
**IT IS FURTHER ORDERED** that Respondent is hereby **WARNED** that the items referred to in a "Brown Bag Special" are drug paraphernalia and further sales will result in suspension or cancellation of the permits.

This Order will become final and enforceable on March 20, 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 28th day of February, 2001.

On Behalf of the Administrator,

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

Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Carrie L. McLarty  
Administrative Law Judge  
State Office of Administrative Hearings, Houston  
**VIA FACSIMILE: (713) 812-1001**

Bruce N. Smith,  
**ATTORNEY FOR RESPONDENT**  
2914 Eastex Freeway #102  
Beaumont, Texas 77703  
**CERTIFIED MAIL NO. Z 473 042 729**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Houston District Office

DOCKET NO. 458-01-0025

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE
VS.		OF
LAN TUYET TANG D/B/A LUCKY STAR, Respondent		ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (Petitioner) seeks a thirty day suspension of a permit and a license held by Lan Tuyet Tang d/b/a Lucky Star (Respondent), for allegedly selling drug paraphernalia to an undercover police officer. Alternatively, Petitioner seeks a civil penalty against Respondent in the amount of \$150 per day of violation for a total of \$4,500. The Administrative Law Judge (ALJ) recommends that no action be taken against Petitioner's license or permit because Petitioner failed to sustain its burden of proof in this case.

**Procedural History, Notice, and Jurisdiction**

On September 11, 2000, notice of the hearing was sent by certified mail, return receipt requested, to Respondent through her attorney. A telephonic hearing in this case was convened on November 17, 2000, at the State Office of Administrative Hearings in Houston, Texas, before Carrie L. McLarty, ALJ. Petitioner appeared by and through Dewey A. Brackin, Staff Attorney. Respondent appeared by and through her attorney of record, Bruce N. Smith. After evidence was received, the hearing was concluded on the same day.

**Reasons for Decision**

**A. Legal Standard**

**Possession or Sale of Drug Paraphernalia.** Pursuant to TEX. ALCO. BEV. CODE ANN. §11.61 (Vernon 2000), the Texas Alcoholic Beverage Commission may suspend a permit or license if equipment used or designed for administering a narcotic is possessed on the premises.

## **B. Evidence**

The parties stipulated to the admission of exhibits comprising the written testimony of their respective witnesses in the case, then made closing arguments. No other documentary evidence was submitted and no live testimony was presented.

### **1. Officer Kelly D. Cole**

Officer Kelly D. Cole is employed by the Beaumont Police Department and is assigned to the narcotics unit. Officer Cole stated that, on January 7, 2000, he was working in an undercover capacity and, on two occasions on that date, he entered Respondent's place of business and requested a "brown bag special." Officer Cole stated that a brown bag special is a paper sack containing items commonly used as drug paraphernalia. On each occasion following Officer Cole's request for a brown bag special, Respondent took a paper bag from under the counter and filled it with a glass tube containing an artificial rose, a scouring pad, and a disposable lighter. Officer Cole paid Respondent \$2.50 for each purchase.

### **2. Defendant Lan Tuyet Tang**

Respondent operates a business in Beaumont, Texas, known as Lucky Star. Respondent made two sales to Officer Cole on January 7, 2000, but did not know that the items were to be used for ingesting drugs or narcotics. When Respondent purchased the business she was informed by the previous owner that, should someone ask for a brown bag special, they wanted a brown paper bag containing a copper scouring pad, a disposable lighter, and a glass tube containing an artificial rose. The tube containing the rose is a gift item maintained in stock by the store. Respondent stated that her English is limited and that she is unfamiliar with drugs, narcotics, or the mechanics by which these are ingested.

## **C. Analysis**

The events of January 7, 2000, as related by Officer Cole and Respondent, are not disputed by the parties. However, Respondent contends that the evidence is insufficient to prove that the items she sold to Officer Cole were drug paraphernalia. Petitioner contends that Respondent sold drug paraphernalia because there is no other use for the three items purchased except to ingest drugs or narcotics.

The evidence in this case does not support Petitioner's position. Although Officer Cole went into Respondent's store, asked for a brown bag special and received a brown bag containing three items, there is no evidence that the items he received were the items that he anticipated receiving as part of the brown bag special. Petitioner did not establish that the simultaneous possession or sale of a glass tube containing an artificial rose, a scouring pad, and a disposable lighter constituted drug paraphernalia, since no explanation was given as to how these items could be used for the ingestion of drugs or narcotics. There is no support for Officer Cole's conclusory statement that a brown bag special is commonly known to be drug paraphernalia, since there is no evidence as to the community to which this is known, the manner of use of the items involved, or the drugs or narcotics associated with the items.

### **Proposed Findings of Fact**

1. A telephonic hearing in Docket No. 458-01-0025 was convened on November 17, 2000, before Administrative Law Judge Carrie L. McLarty at the State Office of Administrative Hearings in Houston, Texas. Dewey A. Brackin, Staff Attorney, appeared on behalf of the Texas Alcoholic Beverage Commission (Petitioner). Bruce N. Smith, Attorney at Law, appeared on behalf of Respondent, Lan Tuyet Tang d/b/a Lucky Star (Respondent).
2. Respondent was notified of the date, time, and location of the scheduled hearing and of the matters to be asserted by Petitioner by Notice of Hearing dated September 11, 2000.
3. Respondent holds a Wine Only Package Store Permit and a Retail Dealer's Off-Premise License, issued by the Texas Alcoholic Beverage Commission.
4. On January 7, 2000, at approximately 2:17 p.m. and again at approximately 7:12 p.m., Officer Kelly Cole of the Beaumont Police Department entered Respondent's store and asked Respondent for a brown bag special.
5. In response to each of Officer Cole's request, Respondent took a brown bag from under the counter and placed inside the bag a glass tube containing an artificial rose, a scouring pad, and a disposable lighter.
6. Officer Cole paid for each transaction and left Respondent's store.

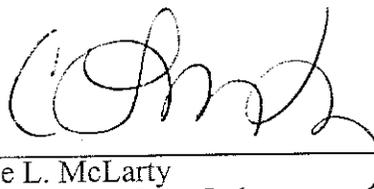
### **Proposed Conclusions of Law**

1. Petitioner has jurisdiction over this case pursuant to TEX. ALCO. BEV. CODE ANN. §11.61 and §11.71 (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including issuing this Proposal for Decision with proposed findings of fact and proposed conclusions of law, pursuant to TEX. GOV'T CODE ANN. §2003.021(b) and §2003.042(5) (Vernon 2000).
3. Respondent received proper and timely notice of the hearing in this case, pursuant to TEX. GOV'T CODE ANN. §2001.051 (Vernon 2000).
4. Based on the above Findings of Fact, no penalty should be assessed against Respondent.

**Recommendation**

The Administrative Law Judge recommends that no adverse action be taken against Respondent's license or permit by the Texas Alcoholic Beverage Commission.

**SIGNED** January 9, 2001.



---

Carrie L. McLarty  
Administrative Law Judge  
State Office of Administrative Hearings