

DOCKET NO. 458-03-2119

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner**

V.

**CHARLES LEON WYCHE
D/B/A TREASURE VILLAGE,
Respondent
TARRANT COUNTY, TEXAS
(TABC NO. 601269)**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against Charles Leon Wyche d/b/a Treasure Village (Respondent). Petitioner alleged the following Texas Alcoholic Beverage Code (Code) violations: 1) Respondent or his agent, servant or employee, on or about August 3, 2002, possessed or permitted the possession of distilled spirits or liquor containing alcohol in excess of 17 percent by volume on the licensed premises; and 2) Respondent or his agent, servant or employee, on or about August 3, 2002, acquired an alcoholic beverage for the purpose of resale from another retail permit or license holder. Petitioner requested that Respondent's permit be suspended for a period of ten days, or in lieu of suspension, that Respondent pay a civil penalty in the amount of \$3,500. For reasons discussed in this proposal, the Administrative Law Judge (ALJ) agrees with this recommendation.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 25.04, 25.09, and 61.71. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On February 12, 2003, Petitioner issued its Notice of Hearing, directed to Charles Leon Wyche d/b/a Treasure Village, 6508 Lavano Drive, Fort Worth, TX 76134, which was received by Respondent on February 18, 2003, as evidenced by Respondent's signature on the return receipt. The Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052.



On April 3, 2003, a hearing convened before SOAH ALJ Cindy T. Greenleaf at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent was represented by John Gamboa, Attorney. Evidence was received on that date. The record closed on April 3, 2003.

LEGAL STANDARDS AND APPLICABLE LAW

Section 25.04 of the Code provides that the same provisions for the suspension or cancellation of a retail dealer's on-premise license apply to the suspension or cancellation of a wine and beer retailer's permit.

TABC is authorized under § 61.71(a)(1) of the Code to cancel or suspend a retail dealer's on-premise license for not more than 60 days if a licensee violated a provision of the Code while the license was in existence. Particularly, subsection (9) authorizes said suspension or cancellation if 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, or permitted an agent, servant, or employee to do so" Also, subsection (20) allows said suspension or cancellation if the licensee "acquired an alcoholic beverage for the purpose of resale from another retail dealer of alcoholic beverages."

Section 25.09 of the Code states, "No wine and beer retailer's permittee,¹ nor officer of the permittee, may possess distilled spirits or liquor containing alcohol in excess of 17 percent by volume on the licensed premises."

Pursuant to § 11.64 of the Code, when a license or permit suspension is authorized, the licensee or permittee must be afforded the opportunity to pay a civil penalty in lieu of the suspension. In determining the amount of the penalty, the TABC shall consider the economic impact a suspension would have on the licensee or permittee.

EVIDENCE AND PARTIES' CONTENTIONS

Petitioner alleged that Respondent is the holder of a Wine and Beer Retailer's Permit issued by TABC. Respondent did not dispute this allegation. Licensing records contained in TABC Exhibit Three establish that a Wine and Beer Retailer's Permit, Number BG-413351, was issued to Respondent for the premises located at 6250 Old Hemphill Road, Fort Worth, Tarrant County, Texas on May 30, 1997.

The following evidence was offered through both parties and was undisputed. On August 3, 2002, a joint-effort routine inspection by several city, county, and state agencies was conducted at

¹Section 1.04(11) of the Code defines "permittee" to mean "a person who is the holder of a permit provided for in this code, or an agent, servant, or employee of that person."

Respondent's premises. Among the parties conducting the inspection were Officer Edward Adcock, Fort Worth Police Department Vice Section, and Agent Brent Hardtner, TABC Enforcement. During the inspection, a bottle of José Cuervo Especial Tequila and two boxes of Franzia White Zinfandel Wine were found on the premises by Officer Adcock and taken into custody by Agent Hardtner. The bottle of tequila was located inside an operating refrigerator in a storage area in the main building. Upon request, Respondent's representative provided a Sam's Club receipt to Agent Hardtner for the Franzia White Zinfandel Wine. The receipt (TABC Exhibit Seven), dated 08/02/02 at 13:00 hours, also lists other items bought for the establishment and states, "Member 101-21023641939 Treasure Village."

Petitioner's witness, Officer Adcock, testified that the refrigerator where he located the bottle of tequila also contained other food items which appeared to be of the type the establishment sold to its patrons. He noted that no marks appeared on the bottle indicating that it belonged to any particular individual, and no one claimed to be the owner of the tequila once he found it. Officer Adcock stated that he had inspected the premises in early March 2003 and observed the same refrigerator operating in the same area on the premises. He described finding the boxes of wine as an "unusual observation" because he had never seen this type of wine in this establishment.

Agent Hardtner testified that the tequila and the boxes of wine were located in areas accessible only to employees of the establishment. He stated that the walk-in cooler, where the boxes of wine were found, also contained other inventory of alcoholic beverages sold by the establishment. He testified that Sam's Club is not a holder of a wholesale or distributor's permit, but only holds a retail dealer's permit/license. Agent Hardtner identified TABC's Exhibit Four as the "distilled spirit"² he took into custody from Respondent's premises on August 3, 2002. TABC Exhibit Four is an opened 750 ml bottle labeled "José Cuervo Especial Tequila," 40 percent alcohol by volume. Agent Hardtner identified TABC's Exhibits Five and Six as the two boxes of Franzia White Zinfandel Wine, five liters each, found in the walk-in cooler behind the main bar of the establishment. Agent Hardtner said that when he took custody of the boxes of wine from the premises on August 3, 2002, one (TABC Exhibit Five) was unopened, and the other (TABC Exhibit Six) was opened. TABC Exhibit Six, the opened box of wine, is much lighter than TABC Exhibit Five, the unopened box of wine, appearing to have much of its liquid contents missing.

Respondent argued that prior to the inspection, he had no knowledge of the presence of the tequila or the boxes of wine on his premises. He stated that his establishment does not sell this type of wine and that they do not have containers in which to serve this type of beverage. He testified that he was involved in an ongoing legal dispute with Charles Nelson, an individual to whom Respondent was attempting to sell Treasure Village. Mr. Nelson had worked at Treasure Village prior to the legal

²Although Agent Hardtner referred to the bottle of tequila as a "distilled spirit," Section 1.04(5) defines liquor as meaning "any alcoholic beverage containing alcohol in excess of four percent by weight" and that "[p]roof that an alcoholic beverage is . . . tequila . . . is prima facie evidence that it is liquor."

dispute. Respondent stated that the tequila was discovered in a storage area where all of Mr. Nelson's belongings were kept for his pickup pursuant to a court order. Respondent did not inventory these items. Respondent testified that Mr. Nelson had retrieved all of his belongings from the premises, however, he is uncertain about what date these items were picked up by Mr. Nelson.

Dusty Robertson, Respondent's employee, testified that he is the person who bought the wine at Sam's Club on Respondent's account. Although he stated that he had never purchased alcoholic beverages for the establishment, he indicated that he purchased the wine on August 2, 2002, for Laura Wyche, Respondent's daughter-in-law and "the younger" Mr. Wyche's wife.³ Ms. Wyche testified that she asked Mr. Robertson to purchase the wine for her at Sam's Club for her personal consumption at home. She stated that her request was made because she knew Mr. Robertson would be going to Sam's Club to buy items for the establishment and because the wine is "cheaper" at Sam's Club. Mr. Robertson stated that he was working at the establishment on August 3, 2002.

Regarding the bottle of tequila, Mr. Robertson stated he was aware of the presence of the tequila in this particular storage area because he had seen it on a prior occasion. Mr. Robertson stated that the refrigerator where the tequila was discovered was no longer on the premises and that it had been moved when Mr. Nelson retrieved his property sometime prior to February 2003.

Regarding the proposed penalty, TABC offered evidence of Respondent's violation history. As evidence of the economic impact a suspension might have on his establishment, Respondent testified that he makes between \$300 - \$400 dollars a day from alcoholic beverage sales.

ANALYSIS

It is clear and undisputed from the evidence that Respondent holds a Wine and Beer Retailer's Permit. It is also undisputed that a bottle of José Cuervo Especial Tequila and two boxes of Franzia White Zinfandel Wine were found by Officer Adcock and Agent Hardtner on Respondent's licensed premises on or about August 3, 2002. Additionally, at least one of the boxes of wine was purchased at Sam's Club, a holder of a retail dealer's permit/license, on August 2, 2002, on Respondent's account. The contested issues to be determined in this case are 1) whether the possession of the tequila on Respondent's premises violated the Code under sections 25.09 and 61.71(a)(9); 2) whether the wine was acquired for the purpose of resale; and 3) whether the suspension period or amount of civil penalty to be imposed in lieu of suspension is justified.

1. "Possession of Distilled Spirits or Liquor" Violation

The bottle of tequila found on Respondent's licensed premises was not claimed by any individual at the time of its seizure. Nor were there any marks on the bottle to establish ownership.

³Mr. Robertson stated that "the younger" Mr. Wyche was the Respondent's son who was "running the place."

Although Respondent argues that the bottle was in an area with other items owned by Mr. Nelson, implying that the bottle belonged to him, the evidence established that it was kept in an operating refrigerator which contained other items owned and sold by Respondent. Additionally, the refrigerator was under Respondent's, his agent's, servant's, or employee's control because it was in an area only accessible to Respondent's employees. The evidence established that the refrigerator is still being used by Respondent on the licensed premises, and thus, did not belong to Mr. Nelson. Although Respondent argues that he had no knowledge of the presence of the tequila, his employee, Mr. Robertson, *did* know the tequila was on the licensed premises prior to the inspection. Since the tequila was in an area under Respondent's control, Respondent or his agent, servant, or employee possessed tequila, 40 percent alcohol by volume, on the licensed premises in violation of section 25.09 of the Code. Additionally, Respondent, having only a wine and beer retailer's permit, is not authorized to sell tequila on his licensed premises. Thus, possession of tequila on the licensed premises is prohibited under section 61.71(a)(9) of the Code.

2. "For the Purpose of Resale" Violation

Respondent argued that there is no proof that the wine was purchased for the purpose of resale. However, after Mr. Robertson purchased the wine from Sam's Club on August 2, 2002, the wine was placed in the walk-in cooler behind the main bar and was kept overnight on the licensed premises. Although the receipt from Sam's Club lists only one box of wine, no evidence was offered to determine which box was actually purchased the day before the inspection. Thus, the ALJ can presume it was either box. When Officer Adcock and Agent Hardtner found the two boxes of wine, the bottles were both in the same walk-in cooler alongside other alcoholic beverages sold by the establishment. If the wine was truly for Mrs. Wyche's personal use at her home, there is no logical reason why the wine would be stored in this particular area. The location of the boxes indicates the intention to sell the wine to patrons. Additionally, one of the boxes was open and partially used. Respondent offered no explanation for the opened and partially used box of wine. Obviously, that wine was not for personal consumption at Mrs. Wyche's home. Although Respondent argued that the establishment had no containers with which to sell this type of beverage, this argument fails because the Respondent could have sold the wine by the box or by the cup. Cups or containers are easily obtainable. Further, if this purchase of wine was for Mrs. Wyche's personal use at home, there is no logical explanation why the purchase was made on Respondent's account at Sam's Club. Thus, since an employee of Respondent purchased the wine at Sam's Club on Respondent's account, since the boxes of wine were stored with other alcoholic beverages sold by the establishment, and since one of the boxes of wine was opened and partially used, the ALJ finds that Respondent acquired the wine from Sam's Club for the purpose of resale.

3. The Suspension Period or Amount of Civil Penalty

Respondent argued that the recommended suspension period of ten days or the recommended amount of civil penalty in lieu of suspension, \$3,500, is just "not right." Respondent offered evidence that he makes \$300 - \$400 on alcoholic beverage sales, but offered no compelling mitigating

circumstances. In viewing the standard penalty chart and the range for imposing a civil penalty in lieu of suspension, the ALJ finds that the recommendation is reasonable under the circumstances and based on the evidence. See 16 TEX. ADMIN. CODE § 37.60 and TEX. ALCO. BEV. CODE ANN. § 11.64.

RECOMMENDATION

The ALJ finds: 1) Respondent or his agent, servant or employee, on or about August 3, 2002, possessed or permitted the possession of distilled spirits or liquor, tequila, containing alcohol in excess of 17 percent by volume on the licensed premises; and 2) Respondent or his agent, servant or employee, on or about August 3, 2002, acquired an alcoholic beverage, Franzia White Zinfandel Wine, for the purpose of resale from another retail permit or license holder, Sam's Club. Thus, the ALJ recommends that a permit suspension for a period of ten days be imposed, or in lieu of suspension, that Respondent pay a civil penalty in the amount of \$3,500.

PROPOSED FINDINGS OF FACT

1. Charles Leon Wyche d/b/a Treasure Village, Respondent, is the holder of a Wine and Beer Retailer's Permit, Number BG-413351, issued by the Texas Alcoholic Beverage Commission (TABC) on May 30, 1997, for the premises located at 6250 Old Hemphill Road, Fort Worth, Tarrant County, Texas.
2. On August 3, 2002, during a routine inspection of the licensed premises, Officer Edward Adcock, Fort Worth Police Department, and Agent Brent Hardtner, TABC, found and seized a bottle of José Cuervo Especial Tequila (40 percent alcohol by volume) and two boxes of Franzia White Zinfandel Wine.
3. The tequila and boxes of wine were discovered in areas accessible only to Respondent and his agents, servants, or employees.
4. The bottle of José Cuervo Especial Tequila is liquor in excess of 17 percent by volume.
5. Respondent is not authorized to sell tequila on his licensed premises.
6. One box of Franzia White Zinfandel Wine was purchased by Dusty Robertson, Respondent's employee, at Sam's Club on August 2, 2002, on Respondent's account.
7. Sam's Club is a holder of a retail dealer's permit/license and does not hold a wholesale or distributor's permit.
8. Mr. Robertson was working at the premises on August 3, 2002.

9. The boxes of wine were located with other alcoholic beverages sold by Respondent. One of the boxes was partially used.

10. The wine was not purchased from Sam's Club for personal consumption at home, but was purchased for the purpose of resale by Respondent.

11. On February 12, 2003, Petitioner issued its Notice of Hearing to Respondent. The Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

12. On April 3, 2003, a hearing convened before SOAH ALJ Cindy T. Greenleaf at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent was represented by John Gamboa, Attorney. Evidence was received on that date. The record closed on April 3, 2003.

PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 25.04, 25.09, and 61.71.

2. SOAH has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was effected upon Respondent. TEX. GOV'T CODE ANN. ch. 2001.

4. Respondent violated the Code by possessing distilled spirits or liquor containing alcohol in excess of 17 percent by volume on the licensed premises. TEX. ALCO. BEV. CODE ANN. § 25.09.

5. Respondent 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, or permitted an agent, servant, or employee to do so. TEX. ALCO. BEV. CODE ANN. § 61.71(a)(9).

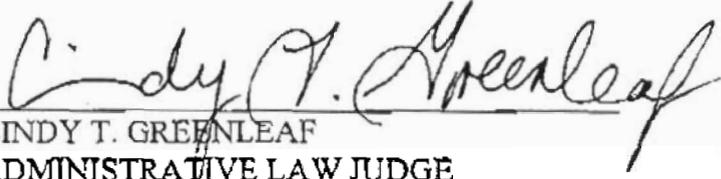
6. Respondent acquired an alcoholic beverage for the purpose of resale from another retail dealer of alcoholic beverages. TEX. ALCO. BEV. CODE ANN. § 61.71(a)(20).

7. Respondent's Wine and Beer Retailer's Permit should be suspended for ten days. TEX. ALCO. BEV. CODE ANN. §§ 25.04, 25.09, and 61.71.

8. Respondent should be permitted to pay a civil penalty of \$3,500 in lieu of suspension of his

permit. TEX. ALCO. BEV. CODE ANN. § 11.64.

SIGNED on this the 30th day of May, 2003.


CINDY T. GREENLEAF
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 601269

IN RE CHARLES LEON WYCHE § BEFORE THE
D/B/A TREASURE VILLAGE §
PERMIT NO. BG413351 § TEXAS ALCOHOLIC
 §
TARRANT COUNTY, TEXAS §
(SOAH DOCKET NO. 458-03-2119) § BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 24th day of June 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Cindy Greenleaf. The hearing convened on April 3, 2003, and adjourned on April 3, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 30, 2003. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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 Permit No. BG413351 is hereby **SUSPENDED** for ten (10) days.

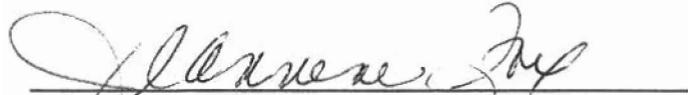
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$3,500.00 on or before the 20th day of August, 2003, all rights and privileges under the above described permit will be **SUSPENDED** for a period of ten (10) days days, beginning at 12:01 A.M. on the 27th day of August, 2003.

This Order will become final and enforceable on July 16, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 24th day of June, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Cindy Greenleaf
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (817) 377-3706

John L. Gamboa
ATTORNEY FOR RESPONDENT
405 Park Plaza, 2501 Parkview Drive
Fort Worth, TX 76102
VIA FAX (817) 885-8504

CHARLES LEON WYCHE
D/B/A TREASURE VILLAGE
RESPONDENT
6508 Lavano Dr.
Fort Worth, TX 76134
CERTIFIED MAIL NO. 7001 2510 0003 8686 9974

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Regulatory Division

Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 601269

REGISTER NUMBER:

NAME: CHARLES LEON WYCHE TRADENAME: TREASURE VILLAGE

ADDRESS: 6250 Old Hemphill Road, Fort Worth, Texas 76134-1417

DATE DUE: August 20, 2003

PERMITS OR LICENSES: BG413351

AMOUNT OF PENALTY: \$3,500.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 20TH DAY OF AUGUST 2003, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711**

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.