

DOCKET NO. 593336

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	ALCOHOLIC
LUIS ELY TREVINO	§	
D/B/A ELY'S CAR WASH DRIVE-INN	§	
PERMIT NO. BQ261171	§	
FRIO COUNTY, TEXAS	§	
(SOAH Docket No. 458-01-2307)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 8th day of November, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge . The hearing convened on July 6, 2001 , 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 . 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 September 25, 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.

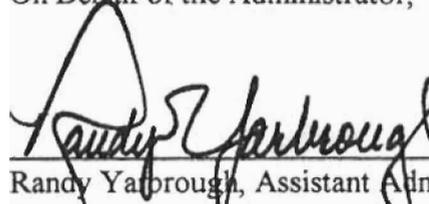
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED with prejudice**.

This Order will become final and enforceable on November 27, 2001, unless a Motion for Rehearing is filed **before** that date.

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

WITNESS MY HAND AND SEAL OF OFFICE on this the 8th day of November, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Leah Bates, ALJ
State Office of Administrative Hearings
San Antonio, Texas
VIA FACSIMILE: (210) 308-6854

Luis Ely Trevino
d/b/a Ely's Car Wash Drive-Inn
RESPONDENT
311 S. Mulberry
Pearsall, Texas 78061
REGULAR MAIL

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission

San Antonio District Office
Licensing Division

DOCKET NO. 458-01-2307

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

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§

BEFORE THE STATE OFFICE

VS.

OF

**LUIS ELY TREVINO
D/B/A ELY'S CAR WASH
PERMIT NO. BQ261171
BEXAR COUNTY, TEXAS
(TABC CASE NO. 593336)**

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ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against Luis Ely Trevino, D/B/A Ely's Car Wash (Respondent) alleging that Respondent acquired an alcoholic beverage for the purpose of resale from another retail permit or license holder. The Respondent denied the allegation. Finding the evidence insufficient to prove that the alcoholic beverage was acquired from another retail permit or license holder or that the alcoholic beverage was for the purpose of resale, this proposal recommends no action be taken against Respondent.

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.

The hearing in this matter convened on July 6, 2001, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. The Staff of the Commission (Staff) was represented by its counsel, Dewey Brackin. The Respondent represented himself.

II. ALLEGATIONS AND EVIDENCE

A. Allegations

There was one allegation in this proceeding, asserting that on June 6, 1998, the Respondent acquired an alcoholic beverage for the purpose of resale from another retail permit or license holder, in violation of TEX. ALCO. BEV. ANN. (Code) §§11.61(b)(2), 61.71(a)(20), 69.09, and 71.05. Such a violation may be punished by cancellation or a maximum 60 day suspension of a permit pursuant to (Code) §§11.61(b)(2) and 61.71(a)(20).

B. Evidence

Agent Philip Montgomery of the Texas Alcoholic Beverage Commission (TABC) testified that his office had received a complaint that Ely's Car Wash was involved in an illegal arrangement with the Beverage Barn (both establishments are owned by Respondent) and the Coors distributorship. On June 6, 1998, Agent Montgomery parked outside Ely's Car Wash to observe the

business and validate or invalidate the claim. He saw Respondent enter the car wash and then later saw Mr. Martinez and Mr. Richardson, beer delivery men for Hill Country Budweiser, arrive in a beer delivery truck. He observed Mr. Martinez and Mr. Richardson unload cases of beer at the car wash, then get back into the truck and proceed to the Beverage Barn approximately one block away and unload cases of beer. He then saw Respondent leave the car wash and travel to the Beverage Barn where Respondent briefly spoke with Mr. Martinez and Mr. Richardson. Mr. Martinez and Mr. Richardson then left the Beverage Barn. As the beer truck drove off, Agent Montgomery stopped it and asked Mr. Martinez and Mr. Richardson to see their load and also any drop tickets, or invoices, they had. Mr. Martinez produced one drop ticket which was written out to the Beverage Barn and when questioned, told Agent Montgomery that the only stops he had made that day were to Ely's Car Wash and the Beverage Barn. Agent Montgomery asked Mr. Martinez if he was aware of the violation that had occurred and he stated that Mr. Martinez said yes. Additionally, Mr. Martinez said that Respondent was the one who had requested the action and that it was common practice. Agent Montgomery and both Mr. Martinez and Mr. Richardson went back to the car wash where Respondent was advised of the violation and the beer was seized. On cross-examination, Agent Montgomery testified that no person associated with the store was seen helping unload or help in the delivery of the beer.

Mr. Adrian Martinez was the second witness called by the Staff. Mr. Martinez testified that on June 5, 1998, Mr. Richardson told him that Respondent wanted 500 cases and that he told Mr. Richardson he would deliver them the next day. The next morning he went to the car wash to deliver the beer. Mr. Richardson showed up to help him and Respondent told them to take some of the beer to the Beverage Barn. Mr. Martinez testified that he and Mr. Richardson then went to the Beverage Barn and unloaded beer at that location, received a check, and left. Respondent received a discount from Hill Country Budweiser for a 500 case order which he would not have received if he had made two separate orders for less than 500 cases. However, at the time he was a new employee and was not familiar with all of the policies. He did state he was the one who wrote up the drop ticket or invoice. Mr. Martinez thought he received the check from Respondent. During cross-examination of Mr. Martinez, he stated he did not know, prior to delivery, how many cases were to be unloaded at the car wash, but was told by Mr. Richardson to take 500 cases to the car wash. He spoke with the Respondent at the car wash and Respondent told him to take some of the beer to the Beverage Barn. Mr. Martinez has had prior dealings with Respondent in which Respondent changed his mind about his order at the time of delivery. He wrote the invoice at the Beverage Barn and there was some discussion with a female employee as to how to invoice the beer. The employee did not know which establishment the beer should be charged to, so she said just charge it to the Beverage Barn. Respondent was not present when the invoice was written. He was pretty sure that Respondent gave him the check for payment of the beer, but did not remember seeing anyone write the check. Mr. Martinez did not discuss with Respondent how to invoice the beer.

The Staff offered into evidence, without objection, four exhibits. Exhibit No. 1 is a copy of the Wine and Beer Retailer's Off-Premise Permit issued to Respondent for Ely's Car Wash and its violation history. Exhibit No. 2 is a copy of the drop ticket or invoice that Mr. Martinez gave to Agent Montgomery. Exhibit No. 3 is a copy of the check that was given to Mr. Martinez to pay for the beer and was seized at the time of the stop. Exhibit No. 4 is an affidavit from Mr. Richardson describing his version of the events.

Respondent offered into evidence, without objection, 1 exhibit. Respondent's exhibit is an affidavit from Lisa McDow, a store manager at both Ely's Car Wash and the Beverage Barn, describing her version of the events on June 6, 1998, and the process in which the stores purchase beer. The affidavit stated that the order received on that day was a special order and the store normally does not receive beer on Saturdays. It also stated since the delivery was out of the ordinary, Leroy did not produce an invoice for Ely's Car Wash.

III. APPLICABLE STATUTORY PROVISIONS

The Texas Alcoholic Beverage Commission (TABC) may suspend for not more than 60 Days or cancel a permit if it is found that the permittee violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §11.61(b)(2).

The Code states at Section 61.71(a)(20):

- (a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:
 - (20) acquired an alcoholic beverage for the purpose of resale from another retail dealer of alcoholic beverages.

The Code states at Section 69.09:

No holder of a retail dealer's on-premise license may borrow or acquire from, exchange with, or loan to any other holder of a retail dealer's on-premise license or holder of a retail dealer's off-premise license any alcoholic beverage for the purpose of resale.

The Code states at Section 71.05:

No holder of a retail dealer's off-premise license may borrow or acquire from, exchange with, or loan to any other holder of a retail dealer's off-premise license or holder of a retail dealer's on-premise license any alcoholic beverage for the purpose of resale.

V. ANALYSIS AND RECOMMENDATIONS

The Staff had the burden of proof in this case. The Staff failed to show that the alcoholic beverages were borrowed from, acquired from, exchanged with, or loaned to another retail dealer. The court gives virtually no weight to a key piece of evidence the Staff relied on to prove which establishment actually purchased the beer, Exhibit number 2, the drop ticket or invoice. Mr. Martinez testified that he was the one who wrote up the drop ticket and then also testified that he did not know how to invoice the beer and that he was new on the job at the time of the occurrence. He could not testify as to what Respondent had actually ordered, only that he was told Respondent wanted 500 cases. The only evidence that the Staff produced as to what order was placed was contained in Exhibit number 4, the affidavit of Mr. Richardson. The Statement in the affidavit is, "One Friday 6/5/98 I went to get an order ate (sic) Ely Car Wash talk to Ely and he wanted 500 2/12

NR." No further information or evidence was given regarding the order, other than the Staff's contention that the drop ticket proved the order. However, as stated above, Mr. Martinez did not know how to invoice the beer and discussed this with an employee of Respondent's.

The court further finds the drop ticket carries no weight based upon the fact that it was apparently typed out for another retailer and then altered and used for the Beverage Barn. On the top of the ticket is typed the name of another establishment, "El Tropicano", along with an address. Both are marked through and "Beverage Barn (Pearsall)" has been handwritten. Also typed on the ticket is "License #BG298677" which does not match the license number of either Ely's Car Wash or the Beverage Barn. There is no date visible on the ticket except for "1998". The amount of beer is handwritten along with the price. This does match the amount of the check confiscated as does the invoice number on the check and ticket, however, due to the irregularities that are present on the ticket the court does not find that it proves what order was placed by which establishment.

Furthermore, even if the Staff could prove the alcoholic beverages were borrowed from, acquired from, exchanged with, or loaned to another retail dealer, the evidence is insufficient to prove they were for the purpose of resale. The testimony from Agent Montgomery was that the beer was confiscated almost immediately after it was delivered. There was no evidence the beer was put out for sale or even moved from where Mr. Martinez and Mr. Richardson had unloaded it. The mere fact that the beer was delivered to the car wash is insufficient to prove that it would be sold from that location.

VI. PROPOSED FINDINGS OF FACT

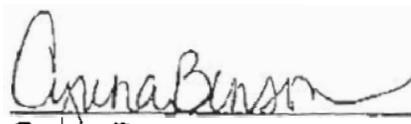
1. Luis Ely Trevino, D/B/A Ely's Car Wash holds Wine and Beer Retailer's Off Premise Permit BQ261171 for the premises known as Ely's Car Wash, located at 311 S. Mulberry Street, Pearsall, Frio County, Texas.
2. On March 16, 2001, the Staff sent the notice of hearing to Respondent by certified mail and all parties appeared.
3. The hearing on the merits was held on July 6, 2001, at the offices of the State Office of Administrative Hearings, San Antonio, Bexar County, Texas. The Staff was represented by Dewey Brackin. The Respondent represented himself.
4. On June 6, 1998, beer was delivered to Ely's Car Wash, an establishment owned by Respondent..
5. On June 6, 1998, beer was delivered to the Beverage Barn, also an establishment owned by Respondent.
6. Agent Montgomery observed the two deliveries.
7. Agent Montgomery stopped the delivery truck and questioned Mr. Martinez and Mr. Richardson.
8. One drop ticket was produced by Mr. Martinez and confiscated by Agent Montgomery

9. One check was produced by Mr. Martinez and confiscated by Agent Montgomery.
10. The beer delivered to Ely's Car Wash was confiscated by TABC.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to Chapter 5, §§ 6.01, 11.61, and 61.71 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. GOVT CODE ANN, §2001.051 and §2001.052.
4. Staff bore the burden of proof in the proceeding.
5. There was insufficient evidence to prove a violation of TEX. ALCO. BEV. CODE ANN. §61.71(a)(20), concerning alcoholic beverages for the purpose of resale.
6. There was insufficient evidence to prove a violation of TEX. ALCO. BEV. CODE ANN. §59.09, concerning borrowing, acquiring from, exchanging with, or loaning to another retail dealer.
7. There was insufficient evidence to prove a violation of TEX. ALCO. BEV. CODE ANN. §71.05, concerning borrowing, acquiring from, exchanging with, or loaning to another retail dealer.
8. Based on the above Findings of Fact and Conclusions of Law, no disciplinary action should be taken against the Respondent.

SIGNED THIS 30th day of August, 2001



Cyrena Benson
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS