

DOCKET NO. 585411

IN RE JAMES H. PERKINS POST #533	§	BEFORE THE
THE AMERICAN LEGION DEPARTMENT	§	
	§	
D/B/A JAMES H. PERKINS POST #533	§	
THE AMERICAN LEGION DEPARTMENT	§	TEXAS ALCOHOLIC
PERMIT NO. BG-436330	§	
	§	
	§	
BASTROP COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-2759)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 1st day of June, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge . The hearing convened on February 3, 2000, and adjourned February 3, 2000, but the record was held open until March 2, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 28, 2000. 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. 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.

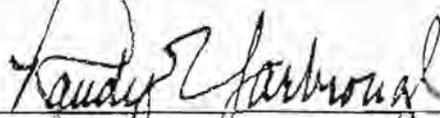
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit No. BG-436330 will be **SUSPENDED** for a period of fourteen (14) days, beginning at 12:01 A.M. on the 3rd day of July, 2000, without the opportunity to pay a civil penalty in lieu of actual suspension, as authorized by Section 11.64(a) of the Code.

This Order will become final and enforceable on June 22, 2000, 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 1st day of June, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Thomas H. Walston
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE: (512) 475-4994

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Bryan McDaniel
Law Offices of Ed Laughlin
ATTORNEY FOR RESPONDENT
710 Water St.
Bastrop, Texas 78602
CERTIFIED MAIL NO. Z 473 037 838

Austin District Office
Licensing Division

of beer while playing golf and while socializing with friends at Post 533 after the golf game. Post 533 is located in Bastrop, and it holds TABC permit No. BG-436330. Staff alleged that Post 533 sold or served alcoholic beverages to Martin when he was intoxicated, or when he was obviously intoxicated to the extent that he presented a danger to himself and others, and that Martin's intoxication caused the one-car accident that resulted in his death.

Staff alleged that Post 533's conduct violated TEX. ALCO. BEV. CODE ANN. §§ 2.02(b) and 11.61(b)(14). If a permittee sells or delivers an alcoholic beverage to an intoxicated person, § 11.61(b)(14) provides that the permittee's liquor permit may be canceled or suspended for not more than 60 days. Section 2.02(b) applies to more serious offenses. It provides that liquor permits shall be revoked if a permittee sells or serves liquor to a person when it was apparent to the provider that the person was obviously intoxicated to the extent he presented a clear danger to himself and others, and the intoxication of the person who received the alcoholic beverage was a proximate cause of damages. Staff requests revocation of Post 533's permit under § 2.02(b) or, alternatively, suspension of its permit for up to 60 days under § 11.61(b)(14).

Post 533 contends that Staff failed to prove that its employees saw or should have seen any conduct by Mr. Martin that indicated he was either intoxicated or obviously intoxicated. Post 533 also argues that Martin left its premises more than an hour before his accident and suggests that he may have consumed additional alcoholic beverages elsewhere. Post 533 contends that this possible later consumption of alcohol could have caused Martin's intoxication and his fatal auto accident.

The ALJ concludes that a preponderance of the evidence proved that Post 533 sold or served alcohol to Tommy Martin when he was intoxicated and that his intoxication was a proximate cause of his death. But the evidence failed to prove that Martin's intoxication was apparent and obvious to Post 533's employees. Therefore, the ALJ does not recommend that the Commission revoke Post 533's license. Instead, the ALJ recommends that the Commission suspend Post 533's license for fourteen days, pursuant to § 11.61(b)(14).

III. THE EVENTS OF APRIL 22, 1999

Tommy Martin was a 36-year-old married man from Bastrop, Texas, who worked for the Lower Colorado River Authority (LCRA) at a nearby power plant. On April 22, 1999, Martin went to work around 4:30 a.m., and he got off work at 1:00 p.m. After work Martin went by his wife's business to get some cash and then bought an 18-pack of beer to drink later that afternoon while playing golf.

Around 3:00 p.m. Martin met five other golfers at the Pine Forest Golf Course in Bastrop. Martin and his friends finished playing golf around 7:30 p.m. Russell Earp golfed with Martin on all eighteen holes. He estimated that Martin drank at least eight or nine beers, and possibly more, while playing golf, and he recalled that Martin drank one additional beer in the golf-course parking lot after they finished the golf game. The men then proceeded to Post 533 for more drinks and recreation.

The witnesses gave conflicting testimony on the amount of beer Martin drank at Post 533. Ray Longoria, one of the golfers, estimated that Martin drank ten or eleven beers at Post 533, and Delores Longoria (his wife) estimated that Martin drank twelve to fourteen beers. But Russell Earp stated that he thought Martin drank only four or five beers at Post 533, and Clyde William Bryant, Post 533's bartender, recalled that the golf group bought only four or five rounds of beer.

The witnesses also gave inconsistent testimony about when Martin departed Post 533. Ray and Delores Longoria testified that Martin was still at Post 533 when they left between 11:00 and 11:15 p.m., but Russell Earp stated that Martin left Post 533 sometime between 9:30 and 10:00 p.m. An elderly Post 533 patron named James L. "Pete" Yoast initially testified that Martin left around 10:30 p.m., but then conceded that he was just guessing and that he really did not know when Martin left. The bartender Clyde Bryant agreed that the Longorias left the Post between 11:00 and 11:30, but he recalled that Martin left before the Longorias. Finally, Teresa Martin (Tommy Martin's widow) testified that Tommy called her at 9:30 p.m. and said he would be home "in a little while." She paged Martin when he did not come home by 11:00 p.m., but he never returned her call.

No witnesses testified at the hearing about Martin's accident. Instead, the only evidence offered about the accident was the Texas Peace Officer's Accident Report prepared by Texas Department of Public Safety Trooper Tony Thompson. The report states that the accident occurred 3.8 miles east of Bastrop on State Highway 21 at 11:24 p.m. Trooper Thompson determined that Martin was driving a 1988 Buick LeSabre east on Highway 21 at a high rate of speed. Martin drove his car off the road to the right, struck a guardrail, and went airborne. The airborne car struck a large pine tree and disintegrated. Martin was ejected from the car when it hit the pine tree and landed approximately thirty feet away. Trooper Thompson concluded that Martin died instantly from severe trauma. The accident occurred in a dark unlighted area, the weather was clear, and the blacktop pavement was dry. Trooper Thompson listed "speeding over the limit" and "had been drinking" as factors contributing to the accident, but he could not determine whether Martin was wearing a seatbelt due to the extensive damage to the car.

Teresa Martin testified that the location of the accident was about two minutes from Post 533, and it was on the usual route her husband drove when returning home from Post 533. Ms. Martin denied that other bars were located on this route, and she testified that her husband did not frequent other bars. Post 533 offered evidence that this location was also consistent with Martin returning home from other bars near Bastrop, but the record contains no evidence that Martin actually went to any other bar or consumed any additional alcohol after he left Post 533.

IV. MARTIN'S INTOXICATION

Sheryl Peyton testified for TABC concerning Martin's intoxication. She is a forensic toxicologist for the Texas Department of Public Safety Crime Lab - Toxicology Section. She holds a bachelor's degree in biochemistry from the University of Texas at Austin, and a master's degree in forensic science - toxicology.

Peyton testified that a blood-alcohol test performed on blood taken from Martin's body showed a 0.17g/ml blood-alcohol level. The current legal standard for intoxication is 0.08 g/ml, and at the time of the accident the standard was 0.10 g/ml. Peyton explained that a person of Martin's size would adsorb about 0.013 grams of alcohol per milliliter of blood per drink,¹ while his body would eliminate about 0.02 g/ml of alcohol per hour. She also calculated that if Martin drank eight beers at the golf course, then he drank fifteen beers or more at Post 533 to reach a 0.17 blood-alcohol level by 11:24 p.m., when the accident occurred. But she also agreed that if Martin drank more than eight beers at the golf course, then he probably drank fewer beers at the Post 533 to reach a 0.17 blood-alcohol level. Due to the time it takes a body to adsorb alcohol (30 - 60 minutes), Peyton estimated that beer served to Martin as late as 10:45 p.m. would have affected his blood-alcohol level at the time of the accident.

Peyton further testified that alcohol affects people in several ways. First, it affects judgment and self-evaluation. That is, people have problems judging their own level of intoxication. Alcohol also affects the ability to judge another person's intoxication. Thus, Peyton stated that Martin's drinking companions probably underestimated the amount of beer he drank and the extent of his intoxication. Alcohol also adversely affects reaction time, gross coordination, hand-eye coordination, and the ability to perform multitask functions, all of which are essential to safe driving. In Peyton's opinion, Martin's alcohol consumption and his lack of sleep (he went to work at 4:30 a.m.) impaired his ability to drive and were proximate causes of the automobile accident that resulted in his death.

Assuming Martin consumed no additional alcohol after he left Post 533, Peyton testified that Martin had a blood-alcohol level of 0.17 - 0.18 when he was last served at Post 533. She stated that a person with that blood-alcohol level typically has slurred speech, an unsteady gait with stumbling, gregariousness, and other unusual behavior. In Peyton's opinion a person with a 0.17 blood-alcohol level will display obvious signs of intoxication that should be detected by a business selling alcoholic beverages.

But all the eyewitnesses testified that Martin did not display obvious signs of intoxication when he was at Post 533. Ray Longoria testified that Martin played pool and "looked happy," but he did not appear intoxicated. Delores Longoria stated that everyone laughed and had a good time, but she did not hear Martin slur his speech and did not see him stumble or show other signs of intoxication. Pete Yoast recalled that Martin spoke clearly, walked steadily, and played darts and pool without any apparent problems. And Russell Earp testified that Martin did not slur his speech or stumble, and that Martin's coordination "seemed okay." Earp added that he has seen Martin intoxicated in the past when he drank hard liquor, but Martin did not appear intoxicated on this night at Post 533.

¹ A 12-ounce beer is considered one drink.

V. ALJ's Analysis

The ALJ finds that a preponderance of the evidence proved that on April 22, 1999, American Legion Post 533 sold or served alcoholic beverages to Tommy Martin when he was intoxicated, and that Martin's intoxication was a proximate cause of the automobile accident that resulted in his death. But the ALJ also finds that the evidence failed to establish that Martin was obviously intoxicated to the extent he presented a clear danger to himself and others when Post 533's employees served him alcoholic beverages.

It was undisputed that Tommy Martin drank a large amount of beer while playing golf and while socializing at Post 533. It was also undisputed that Martin's body had a 0.17 g/ml blood-alcohol level at the time of his one-car accident. And although the witnesses gave conflicting testimony concerning the amount of beer Martin consumed at Post 533, even Post 533's witnesses testified that he drank at least four beers there.

Ray Longoria, Delores Longoria, Russell Earp, and Pete Yoast all testified that Martin did not appear intoxicated to them when he was at Post 533. Yet Ray Longoria, Earp, and Yoast also testified that they were intoxicated themselves, and Delores Longoria stated that she drank eight to ten beers at Post 533. Considering these witnesses' state of intoxication and Peyton's testimony that alcohol inhibits a person's ability to judge another person's level of intoxication, the ALJ gives little weight to their assessment of Martin's intoxication. Instead, the ALJ relies on the blood-alcohol test that showed Martin had a 0.17 g/ml blood-alcohol level when the accident occurred at 11:24 p.m. and Peyton's testimony that Martin had a similar blood-alcohol level when he was last served alcoholic beverages at Post 533.

Post 533's suggested that Martin may have become intoxicated while drinking elsewhere, after leaving Post 533. But the ALJ finds this suggestion unconvincing. First, there is no direct or circumstantial evidence that Martin consumed alcoholic beverages anywhere but Post 533 on the evening of April 22. In addition, Martin's car wreck occurred at approximately 11:24 p.m., and both Ray and Delores Longoria remembered Martin still being at Post 533 when they left between 11:00 and 11:15. If the Longorias' testimony is correct, Martin would only have had ten to twenty minutes to go elsewhere. Post 533 attempted to impeach the Longorias' credibility due to unrelated disputes they have had with Post 533, but the ALJ finds the Longorias' testimony is credible. In addition, the bartender confirmed that the Longorias left Post 533 between 11:00 and 11:30 (although he thought Martin left before the Longorias), and Teresa Martin testified that her husband did not frequent other bars. Based on the evidence presented, the ALJ concludes that Martin departed Post 533 after 11:00 p.m. on April 22, 1999, and that he did not consume additional alcoholic beverages after leaving Post 533.

On the other hand, the ALJ finds that the evidence failed to prove that Martin was obviously intoxicated to the extent he presented a clear risk of harm to himself and others when he was served alcoholic beverages at Post 533. Although Peyton testified that a person with a 0.17 g/ml blood-alcohol level could display signs of intoxication, all of the eyewitnesses at Post 533 testified that

Martin did not appear intoxicated to them. The ALJ has not given much weight to this eyewitness testimony due to the witnesses' own intoxication, but the record is devoid of any other testimony or evidence that Martin actually displayed obvious signs of intoxication at Post 533. Staff cited *Perseus, Inc. v. Canody*, 995 S.W.2d 202 (Tex. App. - San Antonio 1999, no writ) for the argument that it is not an actual observation of intoxicated conduct by a bar's employees that makes the conduct "apparent." But in that case several witnesses testified that the patron exhibited clear and blatant signs of intoxication while the bar staff testified that they did not see any such signs. The court in *Canody* held that the bar could not escape liability by "merely turning a blind eye to signs of intoxication that are plain, manifest, and open to view." In the present case, however, none of the witnesses testified that Martin displayed obvious signs of intoxication. Therefore, the ALJ finds that *Canody* is distinguishable and does not compel a finding that Martin was obviously intoxicated to the extent he presented a clear risk of harm to himself or others when Post 533 served him alcoholic beverages.

In summary, the ALJ finds that Tommy Martin was intoxicated when Post 533 served him alcoholic beverages on the evening of April 22, 1999, but Martin was not obviously intoxicated to the extent he presented a clear danger to himself and others.

VI. Recommended Sanction

Because the evidence did not establish that Post 533 violated TEX. ALCO. BEV. CODE § 2.02, the ALJ does not recommend that the Texas Alcoholic Beverage Commission revoke Post 533's permit. Post 533 did, however, violate TEX. ALCO. BEV. CODE § 11.61(b)(14) by selling or serving alcoholic beverages to an intoxicated person. That section authorizes suspension of Post 533's permit for up to 60 days.

In evaluating an appropriate sanction, the ALJ has considered the Commission's standard penalty chart found at 16 TEX. ADMIN. CODE § 37.60. Staff offered no evidence that Post 533 has previously violated the Alcoholic Beverage Code, and the Commission's penalty chart provides for a seven-day suspension for a first violation of § 11.61(b)(14). But the penalty chart is not binding, and facts of a particular case may justify a penalty different from the penalty suggested by the chart. The present case involves the tragic death of Tommy Martin, a patron of Post 533 who was served alcoholic beverages when he was intoxicated. The evidence also established the Martin's death was caused at least in part by his intoxication. Therefore, the ALJ concludes that the sanction against Post 533 should be increased and recommends that the Commission suspend Post 533's permit for a period of fourteen days.

VII. Findings of Fact

1. Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) provided notice of hearing to Respondent James H. Perkins Post #533 / The American Legion Department of Texas d/b/a James Perkins Post #533 (Post 533) on November 30, 1999.

2. A hearing on the merits convened in this case on February 3, 2000, at the State Office of Administrative Hearings, 1700 N. Congress Avenue, Austin, Texas. All parties appeared and participated in the hearing. The hearing concluded the same day, but the ALJ held the record open until March 2, 2000, to allow the parties to file post-hearing briefs. The parties timely filed their briefs and the record closed on March 2, 2000.
3. Post 533 is located in Bastrop, Texas, and holds TABC permit No. BG-436330.
4. On April 22, 1999, Tommy Martin (Martin) worked from 4:30 a.m. until 1:00 p.m. for the Lower Colorado River Authority at a power plant located near Bastrop, Texas.
5. From approximately 3:00 p.m. until 7:30 p.m. on April 22, 1999, Martin played golf with five other men at the Pine Forest Golf Course in Bastrop, Texas. While playing golf, Martin drank at least eight beers, and probably more.
6. After the golf game, Martin and the other golfers went to Post 533 for more drinks and recreation. At Post 533, Martin drank at least ten beers, and probably more, between 7:30 p.m. and approximately 11:00 p.m.
7. Martin left Post 533 between 11:00 and 11:20 p.m. on April 22, 1999.
8. While he was at Post 533, Martin looked happy, laughed, and had a good time, but he did not slur his speech, stumble, or appear unsteady. Martin also was able to play pool and darts without any apparent problem.
9. While he was at Post 533, Martin did not display signs of obvious intoxication to the extent that he presented a clear danger to himself and others.
10. The record contains no evidence that Martin consumed any additional alcoholic beverages after he left Post 533.
11. On April 22, 1999, at approximately 11:24 p.m., Martin was involved in a one-car accident 3.8 miles east of Bastrop on Highway 21. Martin was ejected from the car during the accident and was killed instantly.
12. Blood samples taken from Martin's body showed that he had a blood-alcohol level of 0.17 g/ml.
13. At the time of the fatal accident, Martin was intoxicated with a blood-alcohol level greater than 0.10 g/ml.
14. Martin's intoxication and his lack of sleep were proximate causes of his fatal one-car accident.

15. Post 533 sold or served alcoholic beverages to Martin when he was intoxicated.
16. Martin was not obviously intoxicated to the extent that he presented a clear danger to himself and others when Post 533 served him alcoholic beverages.

VIII. Conclusions of Law

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE §§ 2.02, 5.35, 6.01, and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of the hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Staff provided notice of hearing in accordance with the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. The hearing in this proceeding was conducted according to the requirements of the Administrative Procedure Act, the rules of the State Office of Administrative Hearings (1 TEX. ADMIN CODE, Ch. 155), and the Commission's rules on contested cases (16 TEX. ADMIN CODE, Ch. 37).
5. Based on Finding of Fact No. 15, Post 533 violated TEX. ALCO. BEV. CODE § 11.61(b)(14) by serving Tommy Martin on April 22, 1999.
6. Based on Finding of Fact No. 16, Post 533 did not violate TEX. ALCO. BEV. CODE § 2.02 by serving Tommy Martin on April 22, 1999.
7. Based on Conclusion of Law No. 5, Post 533's liquor permit should be suspended for 14 days.

Signed April 28, 2000.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE