

Mailing Date: February 15, 2006

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-0859  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

SWIHART'S HARBOR LOUNGE, INC. : License No. R-17312  
t/a Swihart's Harbor Lounge :  
US Route 422, R.D. #1 :  
Edinburg, PA 16116-9402 :

Counsel for Licensee  
on Appeal:

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New Castle, PA 16105

Counsel for Bureau:

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PENNSYLVANIA STATE POLICE,  
Bureau of Liquor Control Enforcement  
313 Mt. Nebo Road  
Pittsburgh, PA 15237-1305

OPINION

Swihart's Harbor Lounge, Inc. t/a Swihart's Harbor Lounge  
("Licensee") appealed from the Adjudication and Order of Administrative

Law Judge Roderick Frisk (“ALJ”), wherein the ALJ sustained the citation and imposed a one thousand two hundred fifty dollar (\$1,250.00) fine.<sup>1</sup>

The citation charged Licensee with violation of section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that, on February 4, 2005, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

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<sup>1</sup> According to the Order, the fine was to be paid within twenty (20) days of the mailing date of December 12, 2005. On January 19, 2006, the fine having not been paid, the ALJ mailed a Supplemental Order imposing a one (1)-day license suspension to begin February 27, 2006 and to continue thereafter until the fine is paid. (Admin. Notice).

On appeal, Licensee contends that Enforcement Officer Keys' testimony fails to sustain the Bureau's burden of proof, and that the ALJ abused his discretion in accepting the officer's testimony. The Board has reviewed the transcript and the ALJ's adjudication with Licensee's objections in mind.

The record reveals that, on February 3, 2005 at 11:30 p.m., Douglas E. Keys, an enforcement officer with the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), conducted an undercover visit to the licensed premises. (N.T. 5-7). While seated at the bar, Officer Keys observed two (2) males playing pool. (N.T. 7). One of those male patrons, "Tom," who was approximately six (6) feet tall and two hundred (200) pounds, was observed using the pool cue to support and balance himself. (N.T. 7-8). Several times, as he tried to pass the pool cue from one hand to the other, he would drop it and stumble while trying to pick it up. (N.T. 8). "Tom" was also staggering and using the walls and the pool table to support himself. (N.T. 8). At the conclusion of the game, "Tom" was holding onto the seats to keep himself from falling. (N.T. 8).

The patron then took a seat next to Officer Keys and conversed with him. (N.T. 8). During the conversation, Officer Keys observed "Tom's"

eyes to be extremely bloodshot and his eyelids were only half open. (N.T. 8). Officer Keys was able to detect a strong smell of alcohol on “Tom’s” breath. (N.T. 8-9). When the patron conversed, his speech was so slurred that Officer Keys had to ask him to repeat himself over and over again. (N.T. 9).

After approximately ten (10) minutes, at 12:20 a.m. on February 4, 2005, as Officer Keys ordered a beverage from the barmaid, who also took an order from “Tom,” after which she served him a draft beer. (N.T. 9). After pulling out a handful of change and having trouble counting out the right amount, the bartender took the correct amount of money and rang it up on the register. (N.T. 10). In Officer Key’s opinion, “Tom” was still visibly intoxicated at the time of the sale. (N.T. 10).

Section 493(1) of the Liquor Code provides that it shall be unlawful “[f]or any licensee . . . or employe, servant or agent of such licensee . . . to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated... .” [47 P.S. § 4-493(1)].

Officer Keys testified that the male patron, “Tom” was staggering and had extremely red eyes and slurred speech. The officer detected a strong

odor of alcohol on “Tom’s” breath, and saw him struggling to count out the correct amount of money to pay for the beer he was served. In Officer Keys’ opinion, the patron in question was visibly intoxicated at the time Licensee’s bartender served him alcohol.

It is well-settled law that matters of witness credibility are the sole prerogative of the ALJ and his findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm’n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984). Further, “(Bureau) officers are competent to express their opinions as to whether the person served is visibly intoxicated and that opinion is sufficient evidence to find a violation of the [Liquor] Code.” Ashman v. Pennsylvania Liquor Control Bd., 116 Pa. Cmwlth. 580, 542 A.2d 217 (1998); Laukemann v. Pennsylvania Liquor Control Bd., 82 Pa. Cmwlth. 502, 475 A.2d 955 (1984).

The ALJ found the testimony offered by the Bureau officer to be credible and, accordingly, determined that “Tom” was visibly intoxicated at the time he was provided alcoholic beverages by Licensee’s bartender. The Board, therefore, finds that substantial evidence existed to support the ALJ’s findings that Licensee, through its employees, servants or agents, did sell,

furnish or give malt or brewed beverages to one (1) visibly intoxicated male patron on February 4, 2005, in violation of section 493(1) of the Liquor Code. Accordingly, the ALJ's decision is affirmed.

## ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee pay the fine of one thousand two hundred fifty dollars (\$1,250.00) within sixty (60) days of the ALJ's January 19, 2006 Supplemental Order. Failure to do so will result in revocation of Licensee's license.

It is further ordered that Licensee's Restaurant Liquor License No. R-17312 is suspended for one (1) day beginning at 7:00 a.m. on Tuesday, February 28, 2006 and continuing thereafter until the aforementioned fine is paid. Said suspension shall be served consecutively with the suspension imposed at Citation No. 05-1560.

License is directed on Tuesday, February 28, 2006 at 7:00 a.m., to place the enclosed Notice of Suspension placard (Form No. PLCB-1925) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee may not resume operation of the licensed premises until further order by the Office of Administrative Law Judge.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated December 5, 2005 and Supplemental Order dated January 18, 2006.

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Board Secretary