

Mailing Date: DEC 13 2005

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-1289
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-301952
v.	:	
	:	LID - 43533
HOLLY PIKE TRADING	:	
COMPANY, INC.	:	
T/A MIDWAY INN	:	
1582 HOLLY PIKE	:	
CARLISLE, PA 17013-9103	:	
	:	
CUMBERLAND COUNTY	:	
LICENSE NO. H-AP-SS-4449	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Thomas M. Ballaron, Esquire
Pennsylvania State Police
3655 Vartan Way
Harrisburg, PA 17110

For Licensee
Barbara A. Darkes, Esquire
P.O. Box 1166
100 Pine Street
Harrisburg, PA 17108-1166

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on June 30, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Holly Pike Trading Company, Inc., t/a Midway Inn (Licensee), License Number H-AP-SS-4449.

The citation charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that on April 9, 2005, Licensee, by servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated female patron.

An evidentiary hearing was conducted on November 1, 2005 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on November 29, 2004 and completed it on May 24, 2005. (N.T. 12)

2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on June 13, 2005. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 10)

3. On April 9, 2005, a Bureau Enforcement Officer entered the licensed premises in an undercover capacity at 11:05 p.m. He sat at the bar. He noticed a woman who was seated at the bar. His attention was drawn to her she was attempting to hold her head up. The Officer noticed the customer's eyes were half closed. Her speech was severely slurred. At one point, the customer pushed her seat back from the bar and rose to her feet. She had difficulty keeping steady as she placed her hand on the bar. It appeared to the Officer that the patron was in a "fog." She kept her hand on the edge of the bar and walked towards another patron who was seated two barstools to her right. She was clearly hanging onto the bar in an attempt to keep her balance. She was standing next to a patron swaying and holding onto the bar. At one point, she made her way to the bathroom which was directly behind her. In doing so, she staggered. Instead of pushing the door open, the customer fell into it to open it. She returned to her seat at the bar a few minutes later with the same staggering gait. Several people walked from the dance floor. The customer hugged those patrons. She was yelling and trying to express herself in what appeared to be an exaggerated fashion. At approximately 11:15 p.m., the bartender poured a mixed drink for the customer. (N.T. 15-26)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. The citation is **sustained** as charged.

DISCUSSION:

I find the Officer's observations to be indicative of a patron who was visibly intoxicated while being served.

PRIOR RECORD:

Licensee has been licensed since February 25, 1999, and has had four prior violations (Commonwealth Exhibit No. C-2, N.T. 48):

Adjudication No. 02-1976. Fine \$1,000.00.

1. Permitted lewd, immoral or improper entertainment.
July 25, 2002.
2. Permitted entertainers to contact or associate with patrons for a lewd, immoral, improper or unlawful purpose.
July 25, 2002.

Adjudication No. 03-2035. Fine \$1,500.00.

Sales to a visibly intoxicated person.
May 17, 2003.

Adjudication No. 04-0415. Fine \$1,500.00 and 1 day suspension.

Sales to a visibly intoxicated person.
December 5, 2003.

Adjudication No. 04-1445. Fine \$2,000.00 and 3 days suspension.

Sales to visibly intoxicated persons.
June 24, 2004.

PENALTY:

It is a rare case, indeed, when the Bureau presses for license revocation particularly with such unparalleled fervor as in this matter. Yet, I have been presented with other violations by other licensees which, when coupled with their prior Adjudication history, demand that I revoke the license and the Bureau has hardly been so persistent or vocal in its plea even to the point of recommending penalties other than license revocation.

So, I grow judicially suspicious and ask myself: What is the fuel that stokes this unusual prosecutorial zeal? I believe I have some incite to a response.

The Pennsylvania Liquor Control Board refused to renew the subject license; on appeal to the Court of Common Pleas of Cumberland Count, per Judge Bayley, the refusal to renew was conditionally reversed. Judge Bayley directed the license be held in safekeeping for purposes of transfer to a bona fide third party (Licensee's Exhibit Nos. L-2 through L6). The Bureau also reminded me there were at least seven reports, originated by the Pennsylvania State Police and based on motorists who are stopped for DUI, which somehow implicate Licensee.

As to the latter point, I am surprised that these vague and unsupported assertions would even be uttered as a basis to punish Licensee. Introducing such remote elements offends our system's sense of fundamental fairness.

So far as I know, it is still lawful for a licensee to dispense alcoholic beverages, even to the point of inebriation, so long as no service occurs while the customer is visibly intoxicated. As I have remarked in the past, our law requiring licensees to remove patrons no later than one half hour after the time mandated by law to cease serving, actually promotes public drunkenness. Patrons who choose to purchase several drinks at last call must finish them or lose them within one half hour. My hunch is that most choose to finish their purchases, then leaving, perhaps marginally sober, but with blood alcohol on the rise. It is entirely possible that customers are stopped for DUI without any culpability on the part of a licensee.

What has happened to personal responsibility? Are we to hold licensees culpable for all ills we suffer as a result of excessive consumption of alcoholic beverages? Some may respond in the affirmative to this inquiry. In its authority to grant and renew licenses, the Pennsylvania Liquor Control Board deals with issues and constraints that are not identical to those confronting an Administrative Law Judge. Consequently, it is not outside the realm of possibility that these two administrative agencies would respond differently to a related but not identical set of facts.

I must conform my decision making process to law and legally admissible evidence. I am not permitted to be moved by wind of whim or cry of crowd. It is impermissible for me to respond to what may be popular, expedient, or superficial.¹

If Licensee is the archetypical operation mandating revocation, surely, in the Bureau's nearly six month long investigation where the Bureau made no less than eleven visits to the licensed premises (N.T. 13), more unlawful activity than this one instance would have been discovered. Indeed, during the course of this investigation, Licensee successfully passed an age compliance check, i.e. rebuffed the attempts of a minor, at the direction of the Bureau and pursuant to law, to purchase an alcoholic beverage. During the investigation, the Bureau also conducted an administrative inspection of the licensed premises for unlawful football pools finding no violations.

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$1,000.00 or more than \$5,000.00 or both for violations of the type found in this case.²

Further, Section 471(c) of the Liquor Code [47 P.S. §4-471(c)] requires that the penalty imposed include license revocation or suspension where the violation in question is the third or subsequent violation of any of the offenses referred to in subsection 471(b) of the Liquor Code [47 P.S. §4-471(b)] and/or the Crimes Code within a four year period. The following Adjudications (02-1976-Count 1, 03-2035, 04-0415 and 04-1445), in combination with the charge in this citation, requires that license revocation or suspension must be included as part of the penalty.

As this license is in safekeeping and may only be released for transfer, imposing a lengthy suspension will serve no purpose. Moreover, the Pennsylvania Liquor Control Board may convert the suspension to a fine at the time of transfer. Given all of these considerations, I impose a \$3,500.00 fine and a one day suspension.

1. Those who choose to violate the law and endanger their lives as well as others by driving while intoxicated would have quickly found another watering hole had this license been revoked.

2. Even though Licensee was RAMP (Responsible Alcohol Management Program) certified at the time of the violation, the lower penalty perimeters do not apply because Licensee has been found to have violated the provision in controversy within a period of four years of the date of the instant charge.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$3,500.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

The fine must be paid by Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal checks, which include business-use personal checks, are not acceptable.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, Pennsylvania 17110-9661

Imposition of Suspension

IT IS FURTHER ORDERED THAT Hotel liquor license No. H-AP-SS-4449, issued to Holly Pike Trading Company, Inc., t/a Midway Inn, is hereby suspended for a period of one day. However, the suspension period is deferred pending reactivation of Licensee's license at which time the suspension period will be fixed by further Order.

IT IS FURTHER ORDERED that the Bureau of Licensing is directed to notify the Office of Administrative Law Judge of the reactivation of the license so an Order may be entered fixing the dates for suspension.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 7th day of December, 2005.

Felix Thau, A.L.J.

pm

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.