

Mailing Date: February 15, 2006

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-1560
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :
 :
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 vs. :
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 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 Jonathan Solomon, Esquire
on Appeal: 421 East Moody Avenue
New Castle, PA 16105

Counsel for Bureau: Nadia Vargo, Esquire
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.¹

The citation charged Licensee with violation of section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that, on May 14, 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).

¹ According to the Order, the fine was to be paid within twenty (20) days of the mailing date of the December 8, 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 was 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 May 14, 2005 at 1:25 a.m., Douglas 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. 6-7, 13-14). While seated at the bar, Officer Keys observed a male patron also seated at the bar, with an empty beer mug in front of him, resting his head on his crossed arms. (N.T. 8). Officer Keys noticed that this patron's eyes were very bloodshot and not completely open. (N.T. 8). The patron exhibited slurred speech while talking to the patrons seated next to him and, every so often, he would attempt to drink from his empty beer mug. (N.T. 8-9).

The patron made several unsuccessful attempts to get the attention of the bartender. (N.T. 9). Having failed in his attempts to do so, the patron then shoved his beer mug off the bar top, causing it to fall into the service well behind the bar. (N.T. 9). Thereafter, the patron was observed

staggering into the men's room, holding on to the bar and walls for support. (N.T. 10). Officer Keys followed the patron into the restroom, where the patron spoke to Officer Keys using slurred speech and had an extreme odor of alcohol. (N.T. 10). Once the patron returned to the bar room, he was approached by the bartender, who then served him a draft beer. (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 in question had bloodshot eyes and half-closed eyelids. The officer observed the patron staggering, using slurred speech, and exhibiting the odor of alcohol from his person. 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. Cmwlt. 580, 542 A.2d 217 (1998); Laukemann v. Pennsylvania Liquor Control Bd., 82 Pa. Cmwlt. 502, 475 A.2d 955 (1984).

The ALJ found the testimony offered by the Bureau officer to be credible and, accordingly, determined that the subject male patron 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 May 14, 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 Monday, February 27, 2006 and continuing thereafter until the aforementioned fine is paid. Said suspension shall be served consecutively with the suspension imposed at Citation No. 05-0859.

Licensee is directed on Monday, February 27, 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 2, 2005 and Supplemental Order dated January 18, 2006.

Board Secretary