

Mailing Date: NOV 06 2007

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-2397
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-308293
	:	
v.	:	
	:	LID - 48415
BRUBAR, INC.	:	
228-234 N. 2 ND STREET	:	
HARRISBURG, PA 17101-1422	:	
	:	
	:	
	:	
DAUPHIN COUNTY	:	
LICENSE NO. R-AP-SS-15865	:	

BEFORE: JUDGE FLAHERTY

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire

For Licensee
Paul M. Good, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on November 17, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against BRUBAR, INC., License Number R-AP-SS-15865 (hereinafter "Licensee").

The citation charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] in that on April 13 and 14, 2005, Licensee, by its servants, agents or employes, sold,

furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to two female minors, nineteen years of age.

The investigation which gave rise to the citation began on March 24, 2005 and was completed on October 5, 2005; and notice of the violation was sent to Licensee by Certified Mail on October 25, 2005. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on May 9, 2006 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. S.M.S. was born on September 29, 1985, and, in April of 2005, she was 19 years old (N.T. 18-19).
2. On April 13, 2005, S.M.S. entered the licensed premises at around 11:00 p.m. with a friend (N.T. 19-20). Upon entry S.M.S. and her friend went downstairs in the licensed premises to an area where there was a sectional couch (N.T. 21-22).
3. Upon reaching this area, S.M.S. went to the bar where she encountered some male patrons who asked her what she would like to drink. These male patrons purchased and supplied S.M.S. and her friend with mixed alcoholic drinks containing Malibu rum and pineapple juice (N.T. 22).
4. S.M.S. and her friend sat on the couch and were supplied with one other mixed alcoholic drink of Malibu rum and pineapple juice. They were also brought shots of alcoholic beverage by the aforementioned male patrons (N.T. 22-23).
5. Neither S.M.S. nor her friend were questioned as to age nor were they asked for identification (N.T. 23).

CONCLUSION OF LAW:

The charge in the citation is **sustained** as to one female minor and is dismissed as to the second female minor.

DISCUSSION:

The evidence in the record establishes that the minor S.M.S. was supplied with alcoholic beverages while on the licensed premises. Further, the record does not establish a defense to the furnishing of alcoholic beverages to this minor. Consequently, the charge in the citation is sustained as to the minor S.M.S. The charge in the citation is dismissed as to the second minor due to the fact that there is no evidence concerning this minor in the record as to her age.

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. *In re Omicron Enterprises*, 449 A.2d 857 (Pa.Cmwltth 1982).

The phrase “preponderance of evidence” has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. *Black’s Law Dictionary, Fifth Edition*, West Publishing Company, Copyright 1979, Page 1064.

It is within my province, and is part of my responsibility to determine the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa.Cmwltth 1989). I may give testimony such consideration as it may deserve, and accept it or reject it in whole or in part. *McFarland Landscape Service v. Workmen’s Comp. Bd. Of Appeal*, 557 A.2d 816, 817-18 (Pa.Cmwltth 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

In this case the minor in question clearly testified that she was not questioned as to age nor was she asked to produce identification before being served alcohol. Licensee has attempted to establish that the minor in question must have been required to show identification because of their security set up which would require everyone to show identification. I find the testimony of the minor in this case that she was not required to show identification nor was she questioned concerning her age to be more convincing.

It has been well established in this Commonwealth that a Licensee permits alcohol to be furnished or given to a minor if Licensee acquiesces by failing to prevent such from occurring. *Commonwealth of Pennsylvania, Liquor Control Board v. Abraham*, 541 A.2d 1161 (Pa. Cmwltth 1988). In this case it is clear that Licensee by failing to prevent the male patrons from supplying the minor S.M.S. with alcoholic beverages including mixed drinks containing rum and pineapple juice permitted the minor to be furnished such in violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)].

The appellate courts have held that the only defenses to providing for serving or permitting the service of alcohol to a minor are found in Section 495 of the Liquor Code [47 P.S. §4-495]. *Churma v. Commonwealth of Pennsylvania, Liquor Control Board*, 540 A.2d 982 (Pa. Cmwltth 1988).

Licensee in this case claims to have established a good faith defense under the rulings of the Commonwealth Court found in *Skoritowski v. Pennsylvania State Police, Bureau of Liquor Control Enforcement*, 742 A.2d 704 (Pa. Cmwlth 1999) and *CSC Enterprises, Inc. v. Pennsylvania State Police, Bureau of Liquor Control Enforcement*, 782 A.2d 57 (Pa. Cmwlth 2001).

It should be noted that Section 495 of the Liquor Code (supra) was amended following the two aforementioned cases with the intention of eliminating the good faith defense. In any case, however, the law before and after the amendment to the Liquor Code provides that Licensee must view valid and prescribed identification in order to avail himself of a defense. As I have previously indicated, I find the testimony of the minor to the effect that she was not questioned as to age and did not provide identification to be the credible evidence in this case.

Consequently, in view of the above, I conclude that Licensee has not established a defense under Section 495 of the Liquor Code (supra) or the *Skoritowski* and *CSC* cases (supra).

As I have previously stated, there is no evidence in the record to establish the age of Licensee's companion. Consequently the charge as to the second minor in this case will be dismissed.

In view of the foregoing, I conclude that the Bureau has met its burden with respect to one minor in this case and Licensee has failed to establish a defense under Section 495 of the Liquor Code (supra).

PRIOR RECORD:

Licensee has been licensed since November 14, 2001, and has had two prior violations:

Citation No. 03-1304. Fine \$2,000.00.

1. Permitted entertainers to contact or associate with patrons. May 7 and 22, 2003.
2. Permitted lewd, immoral or improper entertainment. May 7 and 22, 2003.
3. Sales to minors. August 30, 31, 2002, June 26 and 27, 2003.
4. Minors frequenting. August 30, 31, 2002, June 26 and 27, 2003.

Citation No. 04-1133. Fine \$2,250.00.

1. Engaged in unlawful discrimination in that you admitted female patrons free of charge while charging an admission fee to male patrons. March 19, 2004.

2. Sales to a minor. April 23, 2004.

PENALTY:

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.

Under the circumstances of this case, the penalty imposed shall be a fine of \$1,250.00 and RAMP training.

ORDER

THEREFORE, it is hereby ordered that Licensee BRUBAR, INC., pay a fine of \$1,250.00 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.

IT IS FURTHER ORDERED that Licensee shall comply with the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management in the following manner. Licensee is directed to initiate contact with The Bureau of Alcohol Education, Pennsylvania Liquor Control Board (Toll Free Telephone No.: 1-866-275-8237; Web Site: www.lcb.state.pa.us; Email Address: LBEducation@state.pa.us) within 30 days of the mailing date of this Adjudication. Licensee must receive Certification within 90 days of the mailing date of this Adjudication. Licensee must remain in compliance for a period of one year from the date such Certification is issued.

Failure to comply with this Order will be grounds for modification of penalty in this case. Failure to comply may also constitute grounds for issuance of a new citation as authorized by Section 471(d) of the liquor Code [47 P.S. §4-471(d)].

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 24th day of October, 2007.

Daniel T. Flaherty, Jr., J. an

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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.

Detach here and submit stub with payment

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

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

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