

Mailing Date: DEC 29 2006

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 06-0936
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W08-328177
v.	:	
	:	LID - 54246
DOUBLE D'S VENANGO HOTEL INC	:	
21750 CUSSEWAGO STREET	:	
VENANGO PA 16440	:	
	:	
	:	
CRAWFORD COUNTY	:	
LICENSE NO. H-AP-SS-3485	:	

BEFORE: JUDGE RODERICK FRISK

APPEARANCES:

For Bureau of Enforcement
Nadia Vargo, Esquire

For Licensee
Darrel Wilcox, President
Pro Se

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on April 26, 2006, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Double D's Venango Hotel, Inc., License Number H-AP-SS-3485 (hereinafter Licensee).

DOUBLE D'S VENANGO HOTEL, INC.

Citation Number 06-0936

The citation charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)], in that on February 25, 2006, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated male patron.

An administrative hearing was conducted on October 25, 2006, at 2084 Interchange Road, Erie, Pennsylvania. The Bureau was represented by Nadia Vargo, Esquire. Corporate President Darrel Wilcox appeared on behalf of Licensee corporation.

After hearing the testimony presented, and upon review of the evidence submitted, the following Findings of Fact and Conclusions of Law are entered:

FINDINGS OF FACT:

1. The Bureau commenced its investigation of Licensee's premises on February 25, 2006, and completed its investigation on February 25, 2006. (Exhibit C-1)
2. The Bureau notified Licensee of the nature of the alleged violation(s) disclosed by its investigation by letter dated March 17, 2006, which was sent by certified mail and received by Licensee on March 29, 2006. (Exhibit C-2)
3. The citation was issued on April 26, 2006, and was sent by certified mail and received by Licensee on May 9, 2006. (Exhibits C-3, C-4)
4. On February 25, 2006 at 9:25 p.m., Liquor Enforcement Officers F. A. Manville and T. Burnworth Dowlin entered Licensee's premises in an undercover capacity and observed a female bartender rendering service to approximately 20 patrons. (N.T. 9-10)
 5. Upon entering, Officer Manville purchased a 12-ounce bottle of Miller Lite for himself and a Diet Coke for Officer Dowlin. The officers then took a seat at a table located approximately four to six feet from the bar. (N.T. 11, 14-15, 31-35)
 6. A few moments later while still seated at the table, Officer Manville felt someone fall into his back trying to regain balance. Officer Manville turned and attempted to help this male identified at the hearing as Wayne Smithhammer. Upon gaining his balance, Mr. Smithhammer slurred his speech while apologizing to Officer Manville. (N.T. 11-16, 19-20, 26-27)
 7. Mr. Smithhammer returned to his seat at the bar and continued to consume from his 12-ounce bottle of Busch beer. (N.T. 13, 26-27)

8. Several minutes later, Officers Manville and Dowlin noted that Mr. Smithhammer got up from his seat at the bar and walked with a staggered gait towards an unidentified male patron wearing a cowboy hat seated at the far side of the bar. Mr. Smithhammer then removed the cowboy hat from the male patron and placed it on his head. At this time, the patron became agitated and a minor altercation ensued involving some pushing and shoving. In the opinion of Officers Manville and Dowlin, Mr. Smithhammer appeared unsteady on his feet during this brief altercation. (N.T. 13-14, 27)
9. Shortly after this altercation began, the unidentified female bartender and a patron identified as William Young intervened, which ended the altercation. (N.T. 14, 27, 64-65)
10. Officers Manville and Dowlin then observed Mr. Smithhammer walk with a staggered gait towards the bar. Mr. Smithhammer deviated from a direct path to the bar towards the table where the officers were seated and leaned on Officer Manville's back to steady himself. (N.T. 14-15, 29-20, 26-27)
11. During his visit to Licensee's premises, which commenced at approximately 7:30 - 8:00 p.m. on February 25, 2006, Mr. Smithhammer estimated that he consumed approximately six 12-ounce bottles of Busch beer. Mr. Smithhammer further testified that on most visits to Licensee's premises, he would normally consume approximately two to four bottles of beer. (N.T. 49-50)
12. Throughout their visit to the premises, Officers Manville and Dowlin were of the opinion that Mr. Smithhammer was displaying characteristics of visible intoxication. (N.T. 1819, 26-29, 90-91, 101)
13. At approximately 9:55 p.m., Mr. Smithhammer returned to his seat at the bar at which time the female bartender stated, "last beer" as she served him a full 12-ounce bottle of Busch beer purchased by another patron. (N.T. 14-16, 27, 29, 33-34, 50, 110-111, 115, 119-120)
14. Officers Manville and Dowlin departed Licensee's premises at approximately 10:00 p.m. with Mr. Smithhammer seated at the bar continuing to consume from the 12-ounce bottle of Busch beer. (N.T. 29-30, 34)

DISCUSSION:

This court notes at the onset it is well established that the Bureau must prove its case by a fair preponderance of the evidence. *Pennsylvania Liquor Control Board v. Leggens*, 542 A.2d 653 (Pa. Cmwlth. 1988); *Omicron Enterprises*, 449 A.2d 857 (Pa. Cmwlth. 1982).

It has been further established that it is for this court to decide the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robison*, 561 A.2d 82 (Pa. Cmwlth. 1989). Further, this court may accept or reject, in whole or in part, the testimony of any witness. *Kubler v. Yeager*, 150 A.2d 383 (Pa. Super 1959). It is with these principles in mind that further analysis of this case is conducted.

In the present case, Liquor Enforcement Officers Manville and Dowlin conducted an undercover investigation of Licensee's establishment entering at 9:25 p.m. on February 25, 2006, and observed a female bartender rendering service of alcoholic beverages to approximately 20 patrons. Shortly after purchasing beverages and taking seats at a table located near the bar, Officer Manville felt someone fall on his back. Upon turning around, Officer Manville noticed that the male patron identified at the hearing as Wayne Smithhammer apparently lost his balance. Officer Manville attempted to help Mr. Smithhammer regain his balance. While attempting to apologize, Mr. Smithhammer spoke with slurred and unintelligible speech. Mr. Smithhammer returned to his seat at the bar and continued to consume from a bottle of Busch beer. Several minutes later, Mr. Smithhammer got up from his seat at the bar and walked towards another male patron who was wearing a cowboy hat. Mr. Smithhammer removed the cowboy hat and placed it on his head at which time an argument and brief altercation ensued. During this altercation, some minor shoving and pushing occurred between Mr. Smithhammer and the owner of the cowboy hat. During this altercation, Mr. Smithhammer appeared unsteady on his feet. Licensee's bartender and patron William Young promptly intervened and put an end to this altercation.

Upon returning to his seat at the bar, Mr. Smithhammer detoured with a staggered gait towards the table where the officers were seated and briefly leaned on Officer Manville's back in an attempt to regain his balance. Mr. Smithhammer then returned to his seat at the bar at which time Officer Manville heard the bartender state, "last beer" and furnished Mr. Smithhammer with a full 12-ounce bottle of Busch beer that was purchased by an unidentified male patron also seated at the bar. The officers departed the premises approximately five minutes later at 10:00 p.m. with Mr. Smithhammer continuing to consume his beer at the bar.

Licensee's Corporate President Darrel Wilcox argued to this court that the testimony provided by Officer Manville should not be viewed as credible as he initially identified Licensee's Corporate Officer Denelle Whalen as the female bartender on duty during the undercover investigation of February 25, 2006, instead of Angela Flagella who was the actual bartender that evening. Upon further observation of Ms. Whalen during the course of the hearing, counsel for the Bureau requested that Officer Manville retake the stand, as he now believed after further observation that Ms. Whalen was not, in fact, the female bartender on duty during his investigation conducted on February 25, 2006. In view of the totality of the circumstances and the passage of some eight

months from the date of the undercover visit and hearing, this court views Officer Manville's initial mistaken identity to be harmless.

At the administrative hearing, the individual alleged to have been served while visibly intoxicated at Licensee's premises on the date in question, Wayne Smithhammer, testified that he did not believe that he was intoxicated. Mr. Smithhammer testified that his slurred speech was the result of poorly fitted dentures that has since been corrected, and that his staggered gait was the result of his advanced age and his "old and beat up" knees. (N.T. 44) However, Officers Manville and Dowlin each testified that at the time of the hearing, Mr. Smithhammer's gait and demeanor appeared normal in contrast to his condition exhibited at Licensee's premises on the date in question. Moreover, Mr. Smithhammer testified that during his visit to Licensee's premises on February 25, 2006, he consumed approximately six bottles of beer instead of his normal consumption of two to four bottles. Additionally, Mr. Smithhammer testified that this was the first occasion where he was involved in an altercation of this nature on the premises and that the removal of the other patron's cowboy hat which led to the altercation was unprovoked. Finally, upon questioning, Mr. Smithhammer could not recall the circumstances surrounding the purchase of the bottle of Busch beer that was served to him by bartender Angela Flagella at approximately 9:55 p.m. that evening. Thus, this court concludes that the testimony of Mr. Smithhammer raises significant questions and shall be afforded little weight.

On the other hand, this court concludes that the testimony provided by Officers Manville and Dowlin are credible and shall be afforded significant weight. Therefore, this court believes that the Bureau has established the violation as charged by a clear preponderance of the evidence. *Pennsylvania Liquor Control Board v. Leggens*, supra; *Omicron Enterprises*, supra.

CONCLUSIONS OF LAW:

1. The notice provisions as prescribed by Section 471 of the Liquor Code [47 P.S. §4471] have been satisfied.
2. On February 25, 2006, Licensee, by bartender, furnished a 12-ounce bottle of Busch beer to a male patron identified as Mr. Wayne D. Smithhammer while visibly intoxicated, in violation of Section 493(1) of the Liquor Code.

PRIOR RECORD:

Licensee has been licensed since March 10, 2005, and has had one prior violation, to wit:

Citation No. 06-0376. Fine \$300.00.

DOUBLE D'S VENANGO HOTEL, INC.

Citation Number 06-0936

1. Operated the licensed establishment without a valid health permit or license. July 1 through September 14, 2005.
2. Not a bona fide hotel in that there was no kitchen apart from the public dining room or rooms in which food is regularly prepared for the public. July 1 through September 14, 2005.
3. Not a bona fide hotel where the public may, for a consideration, obtain meals in that you failed to provide food upon request.

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.

The record discloses that this citation represents Licensee's first violation of this type.

For the foregoing reasons, a penalty shall be imposed in the amount of \$1,200.00 and Licensee is directed to participate in mandatory Responsible Alcohol Management (R.A.M.P.) training as set forth in Section 471.1 of the Liquor Code.

ORDER:

THEREFORE, it is hereby ordered that Double D's Venango Hotel, Inc., License Number H-AP-SS-3485, pay a fine of \$1,200.00 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 Section 471.1 of the Liquor Code [47 P.S. §4-471.1], pertaining to Responsible Alcohol Management in the following manner: Licensee is directed to contact the Bureau of Alcohol Education, Pennsylvania Liquor Control Board (Toll Free Telephone No. 1-866-275-8237; Web Site: www.lcb.state.pa.us) within 30 days of the mailing date of this Adjudication in order to seek assistance in the compliance process. 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.

DOUBLE D'S VENANGO HOTEL, INC.

Citation Number 06-0936

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) or (e) of the Liquor Code [47 P.S. §4-471(d) or §4-471(e)].

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 PA 17110-9661

Jurisdiction is retained to ensure compliance with this Order.

Dated this 21st day of December, 2006.

Roderick Frisk, J.

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NOTE: 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.