

Mailing Date: April 4, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-0936
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

DOUBLE D'S VENANGO HOTEL, : License No. H-3485
INC. :
21750 Cussewago Street :
Venango, PA 16440 :

Counsel for Licensee: Darrel E. Wilcox, Pro Se
30677 Sweeney Road
Cambridge Springs, PA 16403

Counsel for Bureau: Nadia L. Vargo, Esquire
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Bureau of Liquor Control Enforcement
313 Mount Nebo Road
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OPINION

Double D's Venango Hotel, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Roderick Frisk ("ALJ"), wherein the ALJ sustained the citation, imposed a fine of one thousand two

hundred dollars (\$1,200.00), and ordered compliance with the Pennsylvania Liquor Control Board's ("Board") Responsible Alcohol Management Program ("RAMP") within ninety (90) days.

The citation charged Licensee with violating 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 (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).

On appeal, Licensee contends that the ALJ's decision is not based upon substantial evidence and is an abuse of discretion. In support of its contention, Licensee argues that witnesses presented by the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") could not confirm the circumstances surrounding the bottle of beer provided to the patron after he was intoxicated. Licensee also argues that Judge Frisk disregarded numerous discrepancies in the testimony of one of the Bureau officers. Licensee feels that Judge Frisk abused his authority when he appeared to have applied a more stringent standard to Licensee than to the Bureau.

In support of its argument, Licensee notes that, during the course of the hearing, Judge Frisk stated that "we established that Mr. Smithhammer was intoxicated," thereby giving the appearance that Judge Frisk was biased toward the Bureau.

The facts of record demonstrate that, on February 25, 2006, Bureau Officers, Fred Manville and Tennille Dowlin, entered the licensed premises at 9:25 p.m. in an undercover capacity. (N.T. 7, 9-10, 26). Upon entering the premises, the officers ordered drinks (a twelve (12)-ounce bottle of Miller Light for Officer Manville, and a Diet Coke for Officer Dowlin) and sat down at a table near the bar. (N.T. 10-12, 31-33). The officers observed a

female bartender¹ and approximately twenty (20) patrons on the premises. (N.T. 10, 16, 22).

A patron identified as Wayne Smithhammer fell into the officers as he passed their table on the way to a seat at the bar. (N.T. 11-13, 15, 19-20). Officer Manville turned and saw Mr. Smithhammer attempt to balance himself. (N.T. 13). Mr. Smithhammer also attempted to say something like “excuse me,” but his speech was slurred. (N.T. 13). Mr. Smithhammer had approximately three-quarters (3/4) of a twelve (12)-ounce bottle of Busch beer in front of him at the bar. (N.T. 13, 27, 102). A short time later, Mr. Smithhammer got up from his seat at the bar, approximately four (4) feet from the officers’ table, and proceeded to walk around the end of the bar, staggering and out of balance. (N.T. 13, 35).

Mr. Smithhammer then removed a cowboy hat that a patron called “D.A.” was wearing, placed it on his own head and a verbal altercation ensued between the two (2) men. (N.T. 13-14, 27, 38, 49). While hearing the verbal altercation, Officer Manville noticed that Mr. Smithhammer’s speech was slurred. (N.T. 14). During the course of these

¹ Officers Manville and Dowlin indicated that the woman in the hearing room, identified as Denelle Whalen, as the bartender who served the patron on February 25, 2006. (N.T. 10, 24, 71, 75, 90, 92-93,99-100, 104-106). However, later in the hearing, indicated that they were mistaken. (N.T. 90, 92-93,99-100, 104-106). The ALJ did not find this misidentification fatal and, under the circumstances, neither does the Board.

events, Mr. Smithhammer had obvious difficulties in maintaining his balance. (N.T. 14, 28-29, 101). He again fell into Officer Manville while returned to the bar. (N.T. 14). Upon returning to the bar, at approximately 9:55 p.m., Mr. Smithhammer was provided a drink by the bartender as she stated that it was his last beer. (N.T. 14, 16, 27, 29, 33-34, 68, 102-103, 110-115, 118-119).

Licensee's premises was not particularly crowded when the officers were there. (N.T. 10, 16). The officers did not observe any other patrons have balance or speech problems like those exhibited by Mr. Smithhammer that night. (N.T. 16-17, 28). The officers felt that Mr. Smithhammer was visibly intoxicated when he was served a beer by Licensee's bartender on February 25, 2006. (N.T. 18-19, 90-91, 98, 101).

Mr. Smithhammer stated he was having difficulty with his lower dentures on February 25, 2006 which caused the slurred speech, and his difficulty walking was due to his "old knees." (N.T. 39-44). He also stated that he was upset because his wife died of cancer in 2004, and "D.A." made a comment about cancer. (N.T. 45-46). He believes he may have had six (6) beers and nothing to eat at Licensee's premises after 7:30 or 8:00 p.m. on February 25, 2006. (N.T. 49-50, 53).

Licensee's assistant manager, William Young, was at the licensed premises between 9:20 or 9:30 p.m. until after 10:00 p.m. on February 25, 2006. (N.T. 60-62, 66). He vaguely recalls seeing Officer Manville at the premises that night. (N.T. 63). He recalls that Mr. Smithhammer was seated approximately ten (10) feet from where Officer Manville was seated. (N.T. 64). He saw Mr. Smithhammer's altercation with "D.A." and knew he was upset, but did not see him incomprehensible or staggering, and he felt Mr. Smithhammer's speech was okay. (N.T. 64-65, 69-70). He heard the bartender give Mr. Smithhammer a bottle of beer and say it was his last beer, but he understood that to mean that it was the one he had already been drinking, but since he got up and someone sat in his seat, the bartender was simply moving to him. (N.T. 68).

Licensee's employees were not RAMP-certified on February 25, 2006. (N.T. 132-134).

Licensee's contentions on appeal focus on the fact that the Bureau officers could not confirm the circumstances surrounding the service of alcohol to Mr. Smithhammer after he showed signs indicative to the officers of intoxication, and on the ALJ's handling of the hearing before him.

As to the merits of the case, section 493(1) of the Liquor Code provides in pertinent part that “[i]t shall be unlawful...[f]or any licensee...or any 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)]. There is substantial evidence of record that the Bureau officers observed an individual staggering, losing his balance, taking a hat off another patron and getting into an altercation with him. This individual admittedly had at least six (6) beers, nothing to eat, and he was upset about his wife’s death. After having displayed this behavior, Licensee’s bartender gave the patron an alcoholic beverage.

Testimony as to a lay observer’s opinions and beliefs is admissible to prove a state of intoxication of an individual whose conduct was described when being served alcoholic beverages. Laukemann v. Commonwealth of Pennsylvania, Pennsylvania Liquor Control Bd., 82 Pa. Cmwth. 502, 475 A.2d 955, (citing, Turner v. Pennsylvania Liquor Control Bd., 161 Pa. Super. 16, 53 A.2d 849 (1947)). Intoxication is a matter of common observation on which the opinions of non-experts are generally admissible. [Id.].

While Licensee challenges the credibility of the Bureau's witnesses, matters of credibility are the sole prerogative of the fact finder. Borough of Ridgway vs. Pa. Public Utilities Comm'n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984). Licensee contends that the ALJ erred in determining the Bureau officers' testimony to be more credible than that of Licensee's witnesses. Because the ALJ has the discretion on this point, and there appears to be substantial evidence to support his decision, the Board will not disturb the decision of the ALJ.

Applying section 493(1) to the record of this proceeding before the ALJ and applicable case law to the citation, it is the Board's opinion that substantial evidence is of record to support the ALJ's findings that Licensee served alcohol to a visibly intoxicated patron on February 25, 2006.

Based on the foregoing, the ALJ's decision in this matter is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee must adhere to all other conditions set forth in the ALJ's
Order dated December 21, 2006.

Board Secretary