

Mailing Date: June 11, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1663  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

SWEENEY'S STATION SALOON, : License No. R-4930  
INC. :  
13639-49 Philmont Street :  
Philadelphia, PA 19116-1111 :

Counsel for Licensee: Edward A. Taraskus, Esquire  
1315 Walnut Street, Suite 1002  
Philadelphia, PA 19107-4721

Counsel for Bureau: Erik S. Shmukler, Esquire  
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Bureau of Liquor Control Enforcement  
6901 Woodland Avenue  
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OPINION

Sweeney's Station Saloon, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), wherein the ALJ sustained the citation, imposed a two thousand five hundred dollar (\$2,500.00) fine, and ordered Licensee's participation and certification in the Pennsylvania Liquor Control Board's ("Board")

Responsible Alcohol Management Program (“RAMP”) within ninety (90) days.

The citation consisted of four (4) counts. The first count of the citation charged that, on April 1, 2006, Licensee, by its servants, agents or employees, violated section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

The second count of the citation charged that, on April 15, 2006, Licensee, by its servants, agents or employees, violated section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code § 5.32(a)] by using, or permitting to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The third count of the citation charged that, on June 10, 2006, Licensee, by its servants, agents or employees, violated sections 406(a)(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(2), 4-493(16)] by selling, furnishing and/or giving alcoholic beverages between 2:00 a.m. and 7:00 a.m.

The fourth count of the citation charged that, on June 10, 2006, Licensee by its servants, agents or employees, violated sections 401(a) and 407 of the Liquor Code [47 P.S. §§ 4-401(a), 4-407] by selling malt or brewed beverages in excess of one hundred ninety-two (192) fluid ounces in a single sale to one (1) person for consumption off premises.

On appeal, Licensee contends that the decision of the ALJ was not based on substantial evidence. Licensee raises a list of specific objections as to each count of the citation. Specifically, Licensee contends that there was insufficient evidence regarding the alleged visibly intoxicated patron, as there was no evidence to indicate that the bartender could determine whether or not the patron was intoxicated. Licensee suggests that a factual conclusion could be deduced that the patron was fatigued. Licensee also contends that there was no direct evidence that the source of the music heard by the investigating officer emanated from the licensed premises. Licensee further contends that there was no credible evidence that a sale occurred by Licensee after 2:00 a.m. Licensee finally contends that no credible evidence of a sale of beer in excess of one hundred ninety-two (192) fluid ounces, or of the pricing of the beer was offered by the Commonwealth.

The Board has reviewed the record with Licensee's objections in mind. On April 1, 2006, John Bernesky, an officer with the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), entered the premises at approximately 9:30 p.m. (N.T. 6). While inside, Officer Bernesky observed twelve (12) patrons and one (1) male bartender. (N.T. 6). Officer Bernesky observed a white male patron seated two (2) barstools over, wearing a camouflage hat, gray shirt, blue jeans and tan work boots. (N.T. 6-7, 16-17). The patron was observed to be consuming a pint glass containing draft beer. (N.T. 8-9). The patron exhibited bloodshot and glassy-looking eyes. (N.T. 7). The officer also observed the patron having slurred speech when he spoke to a female patron. (N.T. 7). The patron put his head down on the bar and appeared to be asleep. (N.T. 7). On two (2) occasions, the bartender stated, "Jimmy, wake up" and, on each occasion, the patron sat up, took a sip from his beer and then placed his head back down on his arms on the bar. (N.T. 7-8). After the patron finished his beer, the bartender refilled the glass with beer and said to the patron, "I'll get you another one, but you have to stay awake." (N.T. 8). The bartender then served the beer to the patron and returned the change from a five dollar (\$5.00) bill offered by the patron. (N.T. 8).

The record further reveals that Officer Bernesky continued his investigation with a visit to the licensed premises on Saturday, April 15, 2006. (N.T. 9). Officer Bernesky, accompanied by another Bureau officer, entered the premises at approximately 10:40 p.m. and observed two (2) male bartenders rendering service to approximately twenty-five (25) patrons at the main bar, and another male bartender and a waitress rendering service to approximately twenty (20) patrons at a back bar. (N.T. 9). The officer observed a four (4)-piece band playing music that was piped through two (2) speakers measuring two (2) feet by two (2) feet. (N.T. 9). Upon departing the premises at approximately 11:45 p.m., Officer Bernesky heard the sound of the music emanating from within the bar at a distance of approximately one hundred (100) feet. (N.T. 9-10).

The record reveals that on his last visit to the premises on June 10, 2006, Officer Bernesky arrived at approximately 12:40 a.m. (N.T. 10). After synchronizing his watch to the time announced on KYW News Radio, Officer Bernesky entered the premises at 12:45 a.m. and paid a cover charge of five dollars (\$5.00). (N.T. 10). Upon entering, he observed four (4) male bartenders rendering service to about fifty (50) patrons. (N.T. 10). At approximately 1:45 a.m., a bartender announced last call and asked the

officer if he needed another beer. (N.T. 10). The officer requested another beer. (N.T. 10). At approximately 2:10 a.m. Officer Bernesky observed two (2) white males go to the beer cooler in front of the bar and remove four (4) six (6)-packs of Yuengling Lager and place them on the bar near the register. (N.T. 10-11). The bartender requested thirty-three dollars (\$33.00). (N.T. 11). One (1) male handed the bartender an unknown amount of currency and received an unknown amount of change. (N.T. 11). Officer Bernesky observed thirty-three dollars (\$33.00) as the amount rung up on the cash register. (N.T. 11, 18). The bartender then put the six (6)-packs in individual bags and handed it to the two (2) male patrons who then carried two (2) six (6)-packs each out the front door. (N.T. 11, 18). At approximately 2:13 a.m., Officer Bernesky observed two (2) white females approach the beer cooler. (N.T. 11). The females removed four (4) six (6)-packs of Miller Light and placed them on the bar in front of the bartender. (N.T. 11). The bartender requested thirty-three dollars (\$33.00). (N.T. 11). One (1) of the females gave the bartender an unknown amount of currency and received change. (N.T. 11, 18). The bartender placed the six (6)-packs in individual bags, handed them to the two (2) females, who then carried two (2) six (6)-packs each out the door.

(N.T. 12, 18). While the transaction with the two (2) females was occurring the officer also observed one (1) bartender serve a twelve (12)-ounce bottle of Coors Light beer to another bartender who was sitting on the patron side of the bar. (N.T. 12). Officer Bernesky was asked to leave the licensed premises at approximately 2:28 a.m. (N.T. 12).

Terrence Sweeney, Licensee's corporate secretary, was not on the premises during any of the dates on which the officer conducted his investigation. (N.T. 21). Mr. Sweeney stated that Licensee forbids sales to visibly intoxicated patrons and sales after 2:00 a.m. (N.T. 21-22). Licensee has its clocks set ten (10) minutes fast, so last call can be given at five (5) or ten (10) minutes before 2:00 a.m. (N.T. 22). Mr. Sweeney admitted to having a problem in the past with music being heard outside the premises, but felt that Licensee has made great strides to try to change that problem by limiting the noise and reinforcing the walls with more insulation. (N.T. 22). Mr. Sweeney believes the only problem Licensee may have today may be caused by the Philadelphia no-smoking ban, which results in the doors constantly opening and closing as patrons must go outside to smoke. (N.T. 22). Mr. Sweeney denied having any complaints concerning noise of music from any of his neighbors, and stated that Licensee has a doorman that walks

the outside areas of the property to check not only for sound, but also to make sure patrons are not leaving with any bottles or glass. (N.T. 23-24).

Relative to the first count of the citation, 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)].

The ALJ determined that the testimony offered by Officer Bernesky was most credible regarding the April 1, 2006 visit to the licensed premises and, accordingly, the ALJ found that the patron was visibly intoxicated. While Licensee contends that it absolutely forbids service to visibly intoxicated patrons, Mr. Sweeney admits that he was not at the premises on the date in question, and he failed to present the testimony of any employee who might have been. A licensee is responsible for the actions of its employees, servants and agents under section 493(1) of the Liquor Code [47 P.S. § 4-493(1)]. It is well established that, once the Bureau shows proof by a clear preponderance of the evidence that a violation of the Liquor Code or the

Board's Regulations has occurred, a licensee is strictly liable. TLK, Inc. v. Pennsylvania Liquor Control Bd., 518 Pa. 500, 544 A.2d 931 (1988).

As the trier of fact, the ALJ determines the credibility of witnesses and their testimony. Based upon review of the evidence in support of the first count of the citation, the ALJ determined the testimony of Officer Bernesky to be credible. It is well-settled law that matters of witness credibility are the sole prerogative of the ALJ and the ALJ's 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). The Board is in agreement with the ALJ's decision regarding the weight given to the testimony of Officer Bernesky, especially in the absence of any evidence to refute that testimony.

Relative to the second count of the citation, the ALJ's findings of fact are clearly supported by undisputed testimony in the record. Section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)] provides that:

[a] licensee may not use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard on the outside of the licensed premises.

There was no evidence of record to dispute the officer's statement that amplified music emanating from Licensee's premises was heard outside Licensee's premises on April 15, 2006.

Relative to the third count of the citation, sections 406(a)(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(2), 40493(16)] provides that restaurant liquor licensees may sell liquor and malt or brewed beverages only after 7:00 a.m. of any day until 2:00 a.m. of the following day, except Sunday, and on Sunday between midnight and 2:00 a.m. The ALJ's findings of fact relative to the June 10, 2006 sales of alcoholic beverages occurring after 2:00 a.m. are clearly supported by undisputed testimony in the record. While Licensee may very well have a policy which absolutely forbids service of alcoholic beverages after 2:00 a.m., that factor does not change the fact that Licensee is strictly liable for violating the law on June 10, 2006. Therefore, in the absence of evidence to refute the charges set forth in the third count of the citation, the Board finds that the ALJ's findings and conclusions relevant thereto are based upon substantial evidence.

Relative to the fourth count of the citation, sections 401(a) and 407 of the Liquor Code prohibit licensees from selling more than one hundred ninety-two (192) fluid ounces of malt or brewed beverages in a single sale to

one person for off-premises consumption. [47 P.S. §§ 4-401(a), 4-407]. The ALJ's finding of fact relative to the June 10, 2006 sales of beer in excess of one hundred ninety two (192) fluid ounces in a single sale to one (1) person for consumption off premises, are clearly supported by undisputed testimony in the record. While Licensee may very well have policies which absolutely forbid sales of malt beverages in excess of one hundred ninety two (192) fluid ounces in one (1) sale, that factor does not change the fact that Licensee is strictly liable for violating the law on June 10, 2006. In the absence of evidence to refute the charges set forth in the fourth count of the citation, the Board finds that the ALJ's findings and conclusions relevant thereto are based upon substantial evidence.

Based upon 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 has paid the fine related to the enhanced penalty in the amount of two thousand dollars (\$2,000.00).

Licensee must adhere to all conditions set forth in the ALJ's Order dated March 13, 2008.

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Board Secretary