

Mailing Date: JUN 11 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 06-2599
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W06-337886
v.	:	
	:	LID - 43771
F AND G SHADE MOUNTAIN INN,	:	
INC.	:	
10866 RTE. 104	:	
MIDDLEBURG, PA 17842-9661	:	
	:	
	:	
SNYDER COUNTY	:	
LICENSE NO. R-AP-SS-16988	:	

BEFORE: JUDGE FLAHERTY

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire

For Licensee
Lonnie C. Hill, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on November 16, 2006, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against F AND G SHADE MOUNTAIN INN, INC., License Number R-AP-SS-16988 (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 September 10, 2006, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated female patron and one visibly intoxicated male patron.

The investigation which gave rise to the citation began on August 14, 2006 and was completed on October 17, 2006; and notice of the violation was sent to Licensee by Certified Mail on October 23, 2006. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on March 29, 2007 in the PA Dept. of Agriculture, 2130 County Farms Road, Montoursville, 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. On September 9, 2007, an officer of the Bureau entered the licensed premises at 11:40 p.m. (N.T. 13).
2. Upon entry the officer observed a male bartender and a female bartender rendering service to approximately forty patrons (N.T. 14).
3. The officer observed a male patron and a female patron asleep face down on the bar (N.T. 14).
4. The couple came into the licensed premises about 5:00 p.m. (N.T. 35 and 45).
5. The couple were on the licensed premises until 12:30 or 1:00 a.m. (N.T. 36).
6. At about 7:30 p.m. they both ate steak dinners (N.T. 36).
7. During the course of the evening, the couple had three shots of liquor and four beers (N.T. 37).
8. At 12:40 a.m. the female bartender asked the sleeping male patron if he wanted another drink. When he did not respond she shook him on the shoulder. He sat up and mumbled something incoherently. She then placed two unopened bottles of Budweiser beer in front of him (N.T. 15).
9. About ten minutes later, a regular patron at the licensed premises came up to the couple and said, "Come on guys, its time to go out to your truck and go to sleep." The couple got up, and the three of them walked out of the establishment (N.T. 40).

CONCLUSION OF LAW:

The charge in the citation is **dismissed**.

DISCUSSION:

The record contains insufficient evidence to establish that the two patrons in question were intoxicated.

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.CmwltH 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.CmwltH 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.CmwltH 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

I find the testimony of Licensee’s bartender, Ashley Troup to be straight forward and consistent. I therefore give it great weight. I find that consuming three shots and four beers over a span of time beginning at 5:00 p.m. and lasting until 1:00 a.m. seems too little to render an individual intoxicated, especially when they both had eaten steak dinners during this time. Moreover, speaking incoherently when one has been aroused from a deep sleep is not necessarily caused by intoxication. Moreover, I believe Ms. Troup’s testimony to the effect that the couple walked out of the establishment normally at 12:50 a.m.

Based upon the foregoing, I conclude that the Bureau has failed to meet its burden, and the charge in the citation is dismissed.

ORDER:

IT IS HEREBY ORDERED that Citation No. 06-2599 be **DISMISSED**.

Dated this 30th day of May, 2008.

Daniel T. Flaherty, Jr., J.

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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.