

Mailing Date: SEP 05 2007

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-0167
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W02-343928
v.	:	
	:	LID - 4828
CLARKS SUMMIT BEVERAGE	:	
CENTER, INC.	:	
100 OLD LACKAWANNA TRAIL RD.	:	
CLARKS SUMMIT, PA 18411-9108	:	
	:	
	:	
LACKAWANNA COUNTY	:	
LICENSE NO. D-SS-2881	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Craig A. Strong, Esquire
Pennsylvania State Police
8320 Schantz Road, Second Floor
Breinigsville, PA 18031

For Licensee
Christopher P. Caputo, Esq.
730 Main Street
Moosic, PA 18507

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on February 9, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Clarks Summit Beverage Center, Inc. (Licensee), License Number D-SS-2881.

The citation¹ charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that on November 21, 2006, Licensee, by servants, agents or employes sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) male minor, nineteen (19) years of age.

An evidentiary hearing was conducted on July 25, 2007 at the Scranton State Office Building, PUC Hearing Room 318, 100 Lackawanna Avenue, Scranton, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on November 28, 2006 and completed it on January 3, 2007. The investigation consisted of taking statements from individuals. (N.T. 10-13)
2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on January 10, 2007. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 9)
3. On December 13, 2006, the investigating Officer conducted an administrative inspection of the premises at a time when it was open for business. He arrived at approximately 12:50 p.m. He discovered Licensee used surveillance cameras but the tapes are erased within two weeks. (N.T. 14-15)
4. The Officer was handed an itemized sales record for November 21, 2006. Every sale is logged, via a computer, showing the product type, any miscellaneous items, time of purchase, date of purchase, whether an identification card was swiped. (N.T. 20)
5. The detail tape revealed a sale of two, thirty packs of Keystone Light beer and a carton of USA Gold cigarettes at 7:32 p.m. (N.T. 20-21, 52)
6. During the course of the investigation, the Officer interviewed the minor over the telephone. The minor did not want to be involved and provided the Officer with contrasting information than that the Officer received from a Municipal Police report. The Officer then requested a face-to-face meeting with the minor which occurred on January 3, 2007 at which time the minor provided a written statement. (N.T. 24-26)

1. Commonwealth Exhibit No. C-2, N.T. 9.

7. During the conversation on the telephone, the minor told the Investigating Officer that he just purchased cigarettes at the premises at about 10:00 p.m. He further advised the Officer that he had a friend buy the beer. (N.T. 27)

8. The written statement the minor provided on January 3, 2007, was similar to Municipal Police Officer's report. The minor was warned that if he provided a false report to a police officer, he could be arrested for that. (N.T. 32-33)

9. A Municipal Police Officer was on duty on October 22, 2006 at approximately 8:25 a.m. He was called to a scene where an unoccupied vehicle was situated down an embankment. He was on duty, in uniform and in a marked police vehicle. There were empty Keystone beer cans outside the vehicle. Inside the vehicle there were two cases of Keystone Light beer. One of the cases was finished and the other was open. The vehicle was registered in the name of the minor. The Officer sent another police unit to the address of the owner listed on Penn Dot records. The local Police Officer interviewed the minor. (N.T. 57-58)

10. Once the vehicle was cleared from the scene, the Officer went to the minor's home. He arrived at about 9:30 a.m., at which time the minor provided the Officer a verbal statement. In that statement, the minor admitted he made the purchase. (N.T. 59-60)

11. On November 21, 2006, a nineteen year old (born October 19, 1987) went to the licensed premises sometime in the early evening. He purchased two cases of Keystone Light beer which was served him by Licensee's employe, David Seliga. The minor also purchased a carton of U.S.A. Gold cigarettes. The minor ordered the cigarettes first to see if he would be questioned as to age. He was and produced an identification card. The employe glanced at it. The employe seemed to be preoccupied. The minor saw an opportunity to order the beer. (N.T. 69-71)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. The citation is **sustained** as charged.

DISCUSSION:

Credibility

I find the Bureau's essential witness, the minor, to be credible despite the significant and understandable attempt at impeachment. It is undeniable the minor provided a statement, via telephone, which contradicts his testimony. It is equally true the minor provided statements, both written and oral, that are consistent with his testimony.

While both the prior inconsistent and consistent statements have value, it is my general preference to rely on testimony taken in my presence, under oath, subject to cross-examination and accompanied by an ability to assess demeanor. Moreover, Licensee's records confirm a sale identical to that the minor described, at about the time he remembered.

Fairness

I am a bit apprehensive to discuss this issue because any examination may elevate its significance. In point of fact, there is no element of illegal unfairness here. In order to complete the record, I do find it necessary to provide a brief analysis.

It is Licensee's assertion the Bureau's alleged delay in notifying Licensee about the incident resulted in Licensee's inability to defend this matter. This argument sounds in Due Process with particular emphasis on Prosecutorial Delay.

As the proponent of this defense, it is Licensee's duty to demonstrate specifically how the alleged delay harmed Licensee's ability to provide a defense. *Punxsutawney Army & Navy Club, Inc.*, 25 Sel.Op. ALJ 9. The harm Licensee asserts relates to the video recordings of its security cameras. Licensee retains those recordings for two weeks. So, the argument goes, had the Bureau notified Licensee of the charges within two weeks of the date of the violation, Licensee would have had video tapes that would have exonerated Licensee.

Licensee first became aware that an investigation was afoot on December 13, 2006 (N.T. 22), about three weeks after the incident. Licensee's decision to destroy video recordings after two weeks is one grounded in the exigencies of its business. Had Licensee decided to retain video recordings only for one day, would we now hear argument that notification of an investigation after two days constitutes an unlawful delay?

A licensee's business decisions do not drive Due Process. I am entirely convinced, had Licensee retained video recordings for the violation date, the sale to the minor would have been reviewable consistent with the minor's testimony and Licensee's business records.

PRIOR RECORD:

Licensee has been licensed since June 29, 1987, and has had one prior violation:

Adjudication No. 06-2836. Fine \$250.00.
Delivered malt or brewed beverages in a
vehicle not properly lettered.
September 22, 2006.

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.

That Section further provides for mandatory compliance with Liquor Code Section 471.1 [47 P.S. §4-471.1], pertaining to Responsible Alcohol Management when, as in this matter, Licensee has been found to have violated Section 493(1) as a first offense as it relates to sales to minors or sales to a visibly intoxicated patron.

I impose a \$1,250.00 fine.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee 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.

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, Pennsylvania 17110-9661

R.A.M.P. Requirements

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 for 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.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 24th day of August, 2007.

Felix Thau, A.L.J.

pm

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