

Mailing Date: JUN 26 2008

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-0351
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-345574
	:	
v.	:	LID - 48102
	:	
OPC MINING CO., INC.	:	
T/A BANANA MAX BAR & GRILL	:	
2650 EASTERN BLVD.	:	
YORK, PA 17402-2904	:	
	:	
	:	
YORK COUNTY	:	
LICENSE NO. R-AP-19541	:	

**BEFORE: JUDGE FLAHERTY**

APPEARANCES:

For Bureau of Enforcement  
Andrew J. Lovette, Esquire

For Licensee  
L.C. Heim, Esquire

**ADJUDICATION**

BACKGROUND:

This proceeding arises out of a citation that was issued on March 1, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against OPC MINING CO., INC., License Number R-AP-19541 (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 January 12, 2007, 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 male patron.

The investigation which gave rise to the citation began on December 27, 2006 and was completed on January 12, 2007; and notice of the violation was sent to Licensee by Certified Mail on February 6, 2007. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on October 3, 2007 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, 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 January 11, 2007 at 11:40 p.m., two officers of the Bureau entered the licensed premises (N.T. 8 and 28).
2. After paying a cover charge, the officers went into the interior of the licensed premises towards the dance floor (N.T. 10 and 28).
3. The attention of the officers was drawn to a patron on the dance floor who was dancing in an uncoordinated manner. He was stumbling. He was swaying back and forth and from side to side. He approached a female patron who was on the dance floor. He came up behind her and tried to dance with her in a very intimate way. He bumped into her on several occasions and took stutter steps in an attempt to maintain his balance (N.T. 11 and 29).
4. The female patron became very agitated and went to another portion of the dance floor to get away from him (N.T. 29).
5. Another male patron approached the individual in question and led him towards and outside bar area. He staggered as he was being led to this area (N.T. 11-12 and 29-30).
6. The officers followed the staggering patron to the outside bar area, and one of the officers stood next to the patron in question. This patron would stagger and bump into the officer occasionally (N.T. 13).
7. The aforementioned patron swayed from side to side. He grabbed the bar as he started to fall backwards to maintain his balance.
8. At 12:05 a.m., now January 12, 2007, the aforementioned patron placed an order with the bartender at the outside bar. The bartender poured Jagermeister liquor and two other liquids into

a mixer. She then poured the contents of the mixer into two shot glasses. She brought these two shot glasses to the patron in question (N.T. 13-14 and 31).

9. One of the officers asked the patron what drink he had ordered. He tried to tell the officer, but his speech was so slurred that the officer could not understand him. The officer asked an additional time and still couldn't understand what the patron was saying. The officer then asked a third time and was still unable to understand what the patron was saying (N.T. 14).

10. At this time a friend of the patron explained to the officer the name of the drink. The patron in question then offered to order the officer one. He declined but the bartender served the officer the same drink that the other two patrons were drinking. The officer drank the shot while the other two patrons drank their shots. He was able to taste the Jagermeister liquor in it (N.T. 14-15 and 31).

#### CONCLUSION OF LAW:

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

#### DISCUSSION:

The preponderance of the evidence indicates that a bartender on the licensed premises served a patron, who was staggering and whose speech was unintelligible, a shot containing Jagermeister liquor. The charge in the citation is, therefore, sustained.

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

The testimony of the two officers who conducted this investigation clearly indicates that the patron in question who had been bumping into a female patron while attempting to dance on the dance floor and who was staggering on his way to the bar and whose speech was unintelligible was served a mixed shot containing Jagermeister liquor by a female bartender at an outside bar.

The testimony of the two officers in question corroborate each other, and I give their testimony great weight. Based on the foregoing, I conclude that the Bureau has met its burden and the charge in the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since October 12, 2001, and has had no prior violations. Licensee is, therefore, entitled to be treated as a first time offender.

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.

Under the circumstances of this case, the penalty imposed shall be a fine of \$1,250.00 and mandatory RAMP training.

ORDER

THEREFORE, it is hereby ordered that Licensee OPC MINING COMPANY, INC. 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.

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](http://www.lcb.state.pa.us); Email Address: [LBEducation@state.pa.us](mailto:LBEducation@state.pa.us)) within 30 days of the mailing date of this Adjudication. 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.

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

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 13<sup>th</sup> day of June, 2008.

Daniel T. Flaherty, Jr., J. an

**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.**

**Detach here and submit stub with payment**

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The fine must be paid by Treasurer's Check, Cashier's Check or Certified Check. **Personal checks, which includes business-use personal checks, are not acceptable.** Make 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

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