Mailing Date: DEC 10 2008

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 07-0798
v.	:	Incident No. W01-344845
MARTY MAGEES LLC 1110-12 LINCOLN AVE. PROSPECT PARK PA 19076-2115	:	LID - 56556
DELAWARE COUNTY LICENSE NO. R-AP-SS-EHF-5005	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

JAMES E. DAILEY, ESQ.

FOR THE LICENSEE:

EDWARD B. McHUGH, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on April 17, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Marty Magees, LLC, License Number R-AP-SS-EHF-5005 (hereinafter "Licensee").

An Administrative hearing was held on Tuesday, November 6, 2007, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation. The Licensee did not stipulate to the timeliness of the notice.

The citation charges Licensee with violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1), in that on December 3, 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 (1) female minor, twenty (20) years of age.

FINDINGS OF FACT:

1. Enforcement Officer J. Suppin conducted an investigation of the licensed premises in December of 2006. Officer Suppin visited the licensed premises on December 30, 2006, January 12, 2007 and February 15, 2007. He found no violations on any of these dates (N.T. 5-8).

2. On March 14, 2007, the officer interviewed the complainant and the minor who allegedly was a patron of the licensed premises. The officer took a patron questionnaire from that individual (N.T. 8-9).

3. The officer received a complaint on December 13, 2006, which is considered the date that the investigation was assigned to the officer. Based upon the complaint, an investigation began with regard to sales to minors. The officer spoke to the minor on March 13, 2007 at the minor's home in the presence of her mother and her father. The minor's mother was the complainant. The investigation was closed March 14, 2007 and the notice of violation was sent on March 23, 2007 (N.T. 12-13 and 15 and Exhibit B-1).

4. The Prospect Park Police Department wrote the alleged minor up for underage drinking on December 3, 2006 (N.T. 14-15).

5. The officer did not speak with the Licensee. He does not know whether there was an age declaration card on file at the licensed premises. The officer did not know whether or not there was a scanning device or photocopier on the licensed premises (N.T. 16).

6. The officer was unsuccessful in contacting the minor on his first two attempts. The first time he was successful was in March of 2007 (N.T. 17).

7. Officer George Brown, at the time of hearing, had been with the Prospect Park Police Department for approximately four years and was familiar with the licensed premises. On December 3, 2006, the officer was patrolling the area around the licensed premises at approximately 5:41 p.m. The officer was going southbound on Lincoln Avenue and witnessed a private ambulance company helping a girl seated on the corner of the intersection of 11th and Lincoln, about twenty to twenty-five feet away from the licensed premises. The officer had previous contact with the individual and recognized her immediately (N.T. 21-22).

8. At that time, the officer spoke with the individual who, in the officer's opinion, was highly intoxicated. She was, at that time, slipping in and out of consciousness. He interviewed her and her mother while at the residence before emergency services had to be called for her. She was cited for underage drinking based upon his observations (N.T. 23).

9. The officer transported the minor to her parent's home, but at some point called the emergency services because she was slipping in and out of consciousness. The officer searched her purse and found a full twelve-ounce diet coke bottle. He indicated that there was a strong odor of alcohol coming from the bottle. The officer stated that the young woman told him that there was rum and coke in the bottle (N.T. 25-26 and 31).

10. The officer indicated that he tried to speak to the young woman at the intersection but she was very intoxicated and very aggressive. He put her in the police car and brought her home. While at the house, he questioned her as to whether she had been drinking at Marty Magee's. He stated that she said she brought liquor from the state store (N.T. 27).

11. In response to her mother's question, the young woman told her mother and the officer that she had been drinking at Marty Magee's (N.T. 27-28).

12. While the officer indicated that the minor never told him that she was in the premises, he did contact the Licensee after talking to the individual (N.T. 30-31).

13. Approximately an hour an a half to two hours after the officer spoke with the woman, he conducted an investigation of the licensed premises. He spoke with the bartender and advised him what had happened and asked him if the young woman had been in the establishment. The bartender's name was Joseph Magee. At the time, Mr. Magee informed the officer that the minor had walked into the premises looking obviously intoxicated, she went to the bathroom and was told to leave the establishment (N.T. 23-24).

14. The officer indicated that approximately a month and a half after the December 3, 2006 incident, the young woman's mother called to ask why the police had not cited Marty Magee's for underage drinking. He advised the mother that there was an investigation pending. He also told her that there was not sufficient evidence to cite Marty Magee's for corruption of minors as she had requested. He did advise her that she would be contacted by the Liquor Control Board. The officer found an identification card in the alleged minor's purse, which purported that her age was over twenty-one. The identification card may have belonged to the alleged minor's cousin (N.T. 29-30).

15. The local police never reported the incident to the Liquor Control Board (N.T. 30).

16. The officer went to the establishment and asked them whether or not a young girl had been in the premises. He described as being obviously intoxicated with crazy hair, that is to say her hair was blond with black streaks (N.T. 32).

17. F. A. was born on August 17, 1980 and at the time of hearing had turned twenty-one. On December 3, 2006, she was twenty years of age. She lives approximately three blocks from the licensed premises (N.T. 36).

18. F. A. indicated that she was drinking prior to getting ready to go to a show prior to going to the licensed premises. She missed the train and had some extra time so she decided to go in the bar (N.T. 45-46).

19. F. A. indicated that on December 3, 2006, she entered Marty Magees and went inside the premises and straight to the bar. She recalls that there were two patrons inside the bar, as did the police officer. She stated that there was a man tending bar that she ordered White Russians. She indicated that the White Russian contained vodka or rum and some type of cream. The young woman stated that patrons at the bar paid for the liquor. She did not produce and kind of identification (N.T. 36-38).

20. While inside the premises, she did not produce any identification nor was any identification requested. She signed nothing to indicate that she was twenty-one years of age (N.T. 38).

21. She stated that she was drinking prior to entering the premises. She drank Red Bull before leaving the house. She denied that she was drinking rum prior to entering the premises. She also denied that she has ever been in the bar before that date (N.T. 38-39).

22. She stated that she was in the bar approximately thirty minutes (N.T. 39-40).

23. F. A. indicated that she did not order the White Russians at the same time, but ordered one right after the other. She stated that after consuming a portion of the first drink, she got up and went to the bathroom. She indicated that she was in the bathroom awhile, because she fixed her makeup and hair. When she finished in the bathroom, she returned to the bar and finished drinking (N.T. 41-42).

24. F. A. left the bar to go to a show, but instead passed out at the corner of 11th and Lincoln (N.T. 42).

25. F. A. denied having false identification on her person (N.T. 42).

26. F. A. has no recollection of her conversation with Officer Brown (N.T. 43).

27. F. A. spoke to an Enforcement officer on March 14, 2007 (N.T. 43).

28. Joseph Magee is the owner of the licensed premises. He is a fifty percent shareholder of the premises and an officer and director. He was bartending on December 3, 2006. In Court, Mr. Magee stated that F. A. came in the front door of the premises and walked around. He noticed that she was off balance. There were two other patrons in the bar. He indicated that she ordered a White Russian, but denies that he served her. He recalls giving her a diet coke and offered her a ride or a cab. He also claimed that F. A. went to the restroom, came out of the bathroom and departed the premises in about eight or nine minutes (N.T. 49-50).

29. Mr. Magee looked out and noted that she had walked down the street (N.T. 50).

30. He indicated that Officer Brown did come in and question him with regard to whether the individual had been on the premises (N.T. 50-51).

CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

On December 3, 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 (1) female minor, twenty (20) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1).

PRIOR RECORD:

Licensee has been licensed since July 6, 2006, and has no record of prior violations.

DISCUSSION:

Counsel for the Licensee argued that the notice of violation was untimely. An officer from the Bureau of Enforcement conducted an undercover investigation over a period of several months, that is to say from December 13, 2006 to March 14, 2007. During that time, he also tried to contact the complainant and also the minor who was involved. The officer's behavior was reasonable. Notice was sent by the Bureau on March 23, 2007. In addition, Mr. Magee had actual notice on December 3, 2006 that there might be pending charges against him, when he was given that notice by the local police.

Under the circumstances, it is believed that the investigation was not conducted over an unreasonable amount of time and the Licensee certainly was put on timely notice of the possible charges against him. Licensee then argues that the testimony should be dismissed because it is not credible.

In this matter regarding the officer from the Bureau of Enforcement, the Court finds portions of all the witnesses' testimony to not be credible. However, the Court finds that notwithstanding portions of the testimony that were found incredible, there were portions of all individuals testimony found to be credible. In this instance, the Court believes it is more likely than not that this individual did consume alcoholic beverages while in the licensed premises.

There was an early indication to Officer Brown that the young woman had been drinking in Marty Magee's. It is unknown whether Officer Brown's suspicion or concern was raised because of the location where he found F. A. or because of F. A.'s own statement. But clearly, the officer questioned and in fact warned Mr. Magee that there might be some allegations or accusations.

The local police did not, for whatever reason, pass that information along to the Bureau of Enforcement. The Bureau of Enforcement was brought into the matter by way of the minor's mother. There had been nothing in the testimony of the minor that would indicate any motivation for pointing the finger at the Licensee. The minor clearly stated that she was in possession of alcoholic beverages before she arrived at Marty Magee's. She was in the area, seemingly because she missed the train and was waiting for another train. The minor admits to consuming alcoholic beverages even before going to the licensed premises. The minor was headed to a concert and had a full bottle of rum and coke in her possession, supposedly for later consumption. The Court believes that she also consumed alcoholic beverages while at Marty Magee's.

By both Mr. Magee's testimony and the minor's testimony, she was on the premises for more than the minute it should have taken for her to have come in and be refused service. If the Licensee found that she was intoxicated and that he wished to offer her some assistance, then he should have done so and not allowed her to loiter or linger on the premises. It is believed that she came on the premises, bought a drink, was permitted to drink while on the premises and left shortly thereafter. It is also clear that the youthful patron has issues with the local police and issues with alcohol abuse.

Under these circumstances, the Licensee is believed to have violated the law in allowing this individual to drink on the premises. Therefore, a monetary penalty shall be imposed and the Licensee will be required to attend the Responsible Alcohol Management Program.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of 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.

Accordingly, we issue the following

ORDER:

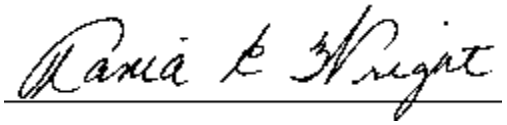
THEREFORE, it is hereby Ordered that Licensee, Marty Magees, LLC, License Number R-AP-SS-EHF-5005, pay a fine of One Thousand Two Hundred Fifty Dollars ($1,250.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from 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. The Licensee is directed to contact the Bureau of Alcohol Education, Pennsylvania Liquor Control Board (Toll Free Telephone No.: 1-866-275-8237; Web Site: www.lcb.state.pa.us) within thirty (30) days of the mailing date of this Adjudication in order to receive assistance in the compliance process. Licensee must receive Certification within ninety (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. The Bureau of Liquor Control Enforcement is further directed to monitor compliance with this Adjudication.

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. Section 4-471(d).

In order to insure compliance with this Order, jurisdiction of this matter is retained.

Dated this __24TH_ day of __NOVEMBER__, 2008.



Tania E. Wright, J.

NOTE: 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.

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Marty Magees, LLC
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Detach Here and Return Stub with Payment

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, along with any required documentation, to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

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