

Mailing Date: MAR 03 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-1265
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-345740
v.	:	
	:	LID - 43443
MICHAEL A. RICKARD	:	
T/A MICHAEL'S	:	
1413 11 <sup>TH</sup> AVE.	:	
ALTOONA, PA 16601-4030	:	
	:	
	:	
BLAIR COUNTY	:	
LICENSE NO. R-AP-SS-836	:	

**BEFORE:** JUDGE THAU

APPEARANCES:

For Bureau of Enforcement  
Nadia L. Vargo, Esquire  
Pennsylvania State Police  
313 Mt. Nebo Road  
Pittsburgh, PA 15237-1305

For Licensee  
Thomas M. Dickey, Esquire  
312 Mount Nebo Road  
Altoona, PA 16602

**ADJUDICATION**

BACKGROUND:

This proceeding arises out of a citation that was issued on June 6, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Michael A. Rickard, t/a Michael's (Licensee), License Number R-AP-SS-836.

The citation<sup>1</sup> charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that on January 15, 2007, 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, twenty (20) years of age.

An evidentiary hearing was conducted on October 25, 2007 and continued. The hearing was rescheduled for January 9, 2008 at the Hampton Inn, 180 Charlotte Drive, Altoona, 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 January 2, 2007 and completed it on April 10, 2007. (N.T. 32-33)
2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on April 24, 2007. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 29)
3. On Friday evening, January 12, 2007, a twenty year old (born July 24, 1986) attended an eighteen and over night at the premises. He lost his military issued identification. He returned the following Monday, January 15, 2007 to see if the identification had been returned to Licensee. (N.T. 117-120)
4. The minor approached an employe and asked if anyone had found his identification. The employe responded that no one had returned a military identification card. The minor left the establishment to meet with his friend who was waiting in the car. They both decided to enter the premises to play pool. The two did so. There were two plastic containers of alcoholic beverages at the bar. The minor picked up one which contained a rum and coke. He drank it. He continued to play pool and drank a second rum and coke that was situated at the bar. The minor did not order either drink. He received a third mixed drink which was given to him by a patron. (N.T. 120-123)

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1. Commonwealth Exhibit No. C-2, N.T. 29.

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:

**Attorney Conduct**

This is a hearing where I had difficulty in managing both counsel. It was clear there was some subtext between them which was manifested by verbal jousting, that not only steered counsel away from a smooth and relevant case presentation, but also demanded that I elevate energy to keep the case on track. Unquestionably, my judicial patience was challenged.

Recognizing the need for order, I tried to hold a tight reign on both counsel. It was necessary for me to tug more tightly on Licensee's counsel. He did not abide by a ruling and engaged in a tirade the likes of which I have experienced only one other time in my near twenty-one years as an Administrative Law Judge. Quite frankly, the transcript conveys the words but not the affect or tone (N.T. 139-144).

Had I contempt power, counsel surely would have experienced jail cell bars from the inside. Counsel came precipitously close to being the first attorney to have the provisions of 1 Pa. Code §31.27 and §31.28, relating to contemptuous conduct and suspension or disbarment, applied by the Office of Administrative Law Judge.

I was loud, forceful, and interjected. I am not the first nor will I be the last judicial officer to behave so. Frankly, counsel's unwillingness to abide by a ruling as more fully described below, so put in question my faith in counsel's acceptance of my rulings, that I was concerned he would disregard others.

This case was originally scheduled for October 25, 2007. As we began the case, the minor/witness unexpectedly requested he have an attorney present. The case was continued for that reason. At the continued hearing of January 9, 2008, the minor/witness had not obtained counsel because of cost but was prepared to testify anyway. When I asked Licensee's counsel a question regarding local availability of pro bono counsel for the minor/witness, counsel went into a completely different direction.

Counsel insisted in letting me know the minor/witness had a right to counsel which right I ought to convey to the minor/witness. I responded otherwise; counsel expressed his disagreement (N.T. 7-12). As the record then reflected counsel's request and my ruling in opposition thereto, the issue was preserved for appeal. There was no longer any need to repeat the request. Nonetheless and against my warnings, counsel raised the issue again (N.T. 98-103) which caused me to admonish him roundly and soundly. Both as a judicial officer and a fellow attorney, I was most displeased with counsel's behavior which calls into play fundamental ethical principles.

Herein lies the rub. Counsel persisted in asking me to provide what amounts to "Miranda" warnings to the minor/witness to the point of suggesting it would be unethical for counsel to do otherwise (N.T. 9). There being no attorney-client relationship between counsel and the minor/witness, in my opinion, counsel had no business in raising or suggesting the rights of a non-client be protected (Pennsylvania Rule of Professional Conduct 4.3 and Explanatory Comments). Indeed, counsel's motivation for making such a request is transparent. Counsel engaged in a tactic that promoted his client's interest by attempting to cause delay and/or refusal of a witness to testify.

### **Merits**

Counsel for Licensee points me to *Appeal of Old Exp. Ltd. From Pa. Liquor Control*, 453 A.2d 679 (Pa.Cmwlth. 1982) as a basis to dismiss the charge because the minor was not directly served any alcoholic beverages by Licensee. I am quite familiar with that case. It is invariably trotted out in matters such as this. Of course, if one looks no farther than the head notes, one might be lead to dismiss this matter.

In my experience, this is not the first time that head notes have not presented an accurate or complete synopsis of a decision. A long time ago, I learned to read the decision that stands behind its head notes. After all, head notes are no more than an editor's attempt at a brief description.

In reality, in *Old Express*, supra, the Commonwealth Court reiterated the principal that a licensee violates the Liquor Code by permitting a minor to obtain an alcoholic beverage. Permitting is defined as acquiescing in failing to prevent. More particularly, I quote at page 681 of 453 A.2d:

...it was properly held that the fact of licensee's permission may be established circumstantially by, for example, proof that an adult entered the licensed establishment with minors and purchased and was served alcoholic drinks for each member of the party including the minors.

Farther along on page 681 of 453 A.2d, when distinguishing his reasoning from Judge MacPhail's dissent, Judge Rogers remarks:

...relied on by the dissent in this case for the proposition that a licensee who fails to prevent the provision of beer to minors by unidentified third persons is thereby proved to have permitted the unlawful act,... seems to stand only for the now familiar and unexceptional principle... that a licensee is strictly accountable for violations committed by employees.

The fact that distinguished *Old Express*, supra was the lack of evidence that the minors received alcoholic beverages on the licensed premises as more particularly explained by Judge Doyle's concurring Opinion.

PRIOR RECORD:

Licensee has been licensed since August 5, 1999, and has had four prior violations:

Adjudication No. 01-0169. Fine \$200.00.  
Served an unlimited or indefinite amount of alcoholic beverages for a fixed price.  
December 31, 2000.

Adjudication No. 03-1464. Fine \$1,000.00.  
Sales to minors.  
August 8, 2003.

Adjudication No. 04-0800. Fine \$1,000.00.  
Sales after your Restaurant liquor license expired on January 31, 2004 and had not been renewed and/or validated.  
February 6, 2004.

Adjudication No. 06-2693. Fine \$1,250.00,  
1 day suspension and R.A.M.P. Training mandated.  
Sales to a minor.  
October 7, 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.

Further, Section 471(c) of the Liquor Code [47 P.S. §4-471(c)] requires that the penalty imposed include license revocation or suspension where the violation in question is the third or subsequent violation of any of the offenses referred to in subsection 471(b) of the Liquor Code [47 P.S. §4-471(b)] and/or the Crimes Code within a four year period. The following Adjudications (03-1464, 04-0800 and 06-2693), in combination with the charge in this citation, requires that license revocation or suspension must be included as part of the penalty.

I impose a \$1,500.00 fine and a one day suspension.

As Licensee has complied with Liquor Code Section 471.1 [47 P.S. §4-471.1] relating to R.A.M.P. and has been certified effective March 28, 2007 for a period of two years, I further order Licensee to remain in compliance for a period of one year from the mailing date of this Adjudication.

ORDER:

**Imposition of Fine**

THEREFORE, it is hereby ordered that Licensee pay a fine of \$1,500.00 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.

**Imposition of Suspension**

IT IS FURTHER ORDERED that the Restaurant liquor license (including all permits) of Michael A. Rickard, t/a Michael's, License No. R-AP-SS-836, be suspended for a period of one day, **BEGINNING** at 7:00 a.m., on Monday, May 5, 2008, and **ENDING** at 7:00 a.m., on Tuesday, May 6, 2008.

Licensee is directed, on Monday, May 5, 2008, at 7:00 a.m., to place a placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised, if replacement placards are needed for any reason, they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized, on Tuesday, May 8, 2008, at 7:00 a.m., to remove the placard of suspension and return his license to its original wall location.

**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 must remain in compliance for a period of one year from the mailing date of this Adjudication.

**Retaining Jurisdiction**

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 15<sup>th</sup> day of February, 2008.

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Felix Thau, A.L.J.

pm

Detach Here and Return Stub with Payment

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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

Citation No. 07-1265