

Mailing Date: JAN 22 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-1375
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W02-350651
v.	:	
	:	LID – 54136
NORTHEAST CONCESSIONS, L P	:	
1280 STATE HWY. RTE. 315	:	
WILKES-BARRE, PA 18702-7002	:	
	:	
	:	
	:	
LUZERNE COUNTY	:	
LICENSE NO. R-AP-SS-EHF-15046	:	

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
Francis X. O'Brien, Esquire
411 Walnut Street
Harrisburg, PA 17101

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 2, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Northeast Concessions, L P (Licensee), License Number R-AP-SS-EHF-15046.

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 March 21, 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) visibly intoxicated male patron.

An evidentiary hearing was conducted on November 8, 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 February 21, 2007 and completed it on April 17, 2007. (N.T. 88)
2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on May 2, 2007. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, 07-1375, N.T. 85)
3. On March 21, 2007, a customer approached a serving bar along with a friend at 12:02 a.m. The bartender served the customer a glass of wine at about 12:03 a.m. The customer received a second service of a glass of wine at 12:45 a.m. (45-78)
4. At 1:14 a.m., the customer was served a third glass of wine. (N.T. 98)
5. At 1:33 a.m., the customer leaned on the barstool. His right leg was on the ground with his left leg resting on the barstool. The customer fell backwards. He picked himself up. After the customer righted himself, he picked up his glasses. (N.T. 111-112)
6. At 1:47 a.m., the bartender positioned a glass of wine in front of the customer. This is the fourth service to that customer. (N.T. 65)

1. Commonwealth Exhibit No. C-2, 07-1375, N.T. 85.

7. At 2:08 a.m., the customer was served a fifth glass of wine. (N.T. 117)
8. At 2:34 a.m., the customer left the bar area.
9. A State Police Trooper assigned to the Gaming Enforcement Office at Pocono Downs issued a citation a little after 2:30 a.m., to the customer in the parking lot of the premises for public drunkenness. (N.T. 23-25; 71)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. The Bureau has **failed** to prove Licensee, by servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

DISCUSSION:

If it is true that one picture is worth a thousand words then six hours of video ought to be equivalent to a library. I learned quite quickly that the informational worth of videos is limited by camera angle, lighting conditions, field of view, and the lack of sound.²

2. Licensee argued the videos were not the best evidence. Ohlbaum on the Pennsylvania Rules of Evidence §1002.01 instructs us, in order to prove the content of a writing, recording or photograph, the original must be produced (Pennsylvania Rule of Evidence 1002). Rule 1002 corresponds to the common law “Best Evidence Rule,” which is applied only to a writing. Case law is not entirely clear when a party is trying to prove the content of writing, recording or photograph. Rule 1002 is inapplicable to business records, such as the videos in this matter. Videos are generally not subject to Rule 1002 because they are ordinarily produced at trial, and offered to illustrate and support testimony.

In this matter, I was called upon to review hours of video recorded by Licensee as part of its security system. With both counsel and a stenographer present and subject to a cumbersome and methodical procedure, I verbalized what I saw as significant moments in the videos. Counsel had the option of raising challenges to my observations to preserve objections on the record. Thankfully, we were able to avoid watching all six hours as the parties agreed that certain video sections contained nothing pertinent.

This case rests entirely on the interpretation given the videos' depictions as the Bureau called no eyewitnesses to the events in question. Viewed with the Bureau's filter, the videos purportedly show an individual who swayed any number of times and fell as a result of visible intoxication, which fall was followed by a fourth service of a glass of wine. Of course, Licensee's filter places an entirely different spin on the event. I, however, must analyze the videos with no filter, to the extent any human being can do so.

The multiple incidences of swaying the Bureau pointed me to were hardly anything remarkable. I did see the customer fall, but that event was such that I could not conclude his fall was caused by visible intoxication. The patron's behavior was entirely consistent with a loss of balance. Moreover, the patron righted himself and picked up a pair of glasses with coordinated movements.

It is true the patron was drunk and issued a citation for same. But, as I have remarked on multiple occasions, after service conduct, while relevant, is still problematic. Reachback/retrograde analysis is speculative. We do not know the patron's tolerance for alcohol, condition prior to entry, when he last ate, whether he took medication and etc.³

3. The customer was served no more than three glasses of wine in approximately one hour and fifteen minutes.

ORDER:

NOW THEREFORE, it is ordered that Citation No. 07-1375 issued against Northeast Concessions, L.P., License No. R-AP-SS-EHF-15046 is DISMISSED

Dated 15th day of January, 2008.

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.