

Mailing Date: MAY 12 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-1570C
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-355514
v.	:	
	:	LID - 47820
2729 INC	:	
2729 W GIRARD AVE	:	
PHILADELPHIA PA 19130-1212	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. E-SS-OPS-283	:	BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: James Dailey, Esq.
For Licensee: Donald Moser, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on July 24, 2007. The citation alleges that Licensee violated §493(1) of the Liquor Code, 47 P.S. §4-493(1), on June 7, 2007, by selling, furnishing, and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one female minor, nineteen years of age.

A hearing was held on February 20, 2008, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On June 7, 2007, a woman whose birth date was November 17, 1987, entered the licensed premises at about 7:45 p.m. and took her place in a line of customers waiting to be served (N.T. 4-5, 8, 16-17).

2. When her turn came the woman asked the man waiting on customers for a can of Heineken beer. He delivered it to her in a brown paper bag. She gave him four dollars and he returned 75¢ in change. The woman left the premises with the beer. Her age was not questioned (N.T. 8-9, 17-19).

CONCLUSIONS OF LAW:

Sustained as charged.

DISCUSSION:

Licensee presented evidence from its president to the effect that all activity in the premises is recorded on videotape, that upon learning from his employee of the incident

described in the findings of fact he retrieved the videotape which was in use at the relevant time, and that a review of the tape does not show the activities of the liquor enforcement officer and the "Underage Buyer" who participated in this compliance check and testified before me.

I have reviewed the videotape, which was left in my possession after the hearing, and it is true that no one resembling the minor witness or the liquor enforcement officer who preceded her into the premises appears in it.

In order to lend credit to this evidence, I would have to assume that (1) the date and times covered by the tape were unquestionably the date and times about which the witnesses testified and (2) two witnesses, a liquor enforcement officer and a minor civilian, manufactured their testimony out of whole cloth rather than go to the trouble of actually entering the premises.

I am not persuaded that the videotape accurately depicts the activities in Licensee's establishment at the relevant time because Licensee's president seemed to think that his tape machine knows of its own accord how to tell time:

Q. Who sets the time?

A. The time --- the machine is automatic, it's all there. The time is there already. Every time it is original. Every day when you pull it up, that's the time over there. It's automatic. It's in there already.

-- (N.T. 40)

There would have to be highly convincing proof, in my mind, that the date and times shown on the videotape are absolutely accurate, before I could accept the tape as more credible than the evidence of two sworn witnesses, sequestered from each other during the hearing. The evidence of Licensee's president did not rise to that level. He did not witness the events himself, but seeks to persuade me that the tape machine is a better witness than he.

Weighed against the Bureau's entirely routine and ordinary evidence of a common investigative procedure, I have no difficulty in resolving the supposed conflict against Licensee.

PRIOR RECORD:

Licensee has been licensed since August 3, 2001, and has had prior violations, as follows:

Citation No. 01-2038. \$1,200.00 fine.

1. Sales to minors. September 8, 2001.
2. Minors frequenting. September 8, 2001.

Citation No. 02-2169. \$2,000.00 fine and verification conditions corrected.

1. Operated another business on the licensed premises without Board approval. November 4, 2002.
2. Not a *bona fide* eating place (insufficient seating). October 26 and November 4, 2002.
3. Sales to a minor. October 26, 2002.
4. Minor frequenting. October 26, 2002.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$1,000.00 to \$5,000.00 range, or both, for violations of the type found in this case.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, 2729, Inc., License No. E-SS-OPS-283, shall pay a fine of one thousand five hundred dollars (\$1,500.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

Dated this 5th day of May, 2008.

David L. Shenkle, J.

jb

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.

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 to:

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