Mailing Date: SEP 9 2008 Appeal

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-2329
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-356911
v.	:	
	:	LID - 48330
KATHY J. WHITEMAN	:	
T/A THE BEAR'S DEN	:	
144-144 ½ VALLEY ST.	:	
LEWISTOWN, PA 17044	:	
	:	
	:	
MIFFLIN COUNTY	:	
LICENSE NO. R-AP-SS-11776	:	

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
Frank C. Sluzis, Esquire
2000 Linglestown Road
Suite 106
Harrisburg, PA 17110

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on October 17, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Kathy J. Whiteman, t/a The Bear's Den (Licensee), License Number R-AP-SS-11776.

This citation[1] contains three counts.

The first count charges Licensee with a violation of Sections 401(a) and 407(a) of the Liquor Code [47 P.S. §4-401(a) and §4-407(a)]. The charge is that on July 6, 2007, Licensee, by servants, agents or employes, sold malt or brewed beverages in excess of 192 fluid ounces in a single sale to one person for consumption off premises.

The second count charges Licensee with a violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that on August 20, 2007, Licensee, by servants, agents or employes, failed to keep records on the licensed premises.

The third count charges Licensee with a violation of Section 404 of the Liquor Code [47 P.S. §4-404]. The charge is that on August 20, 2007, Licensee, by servants, agents or employes, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license.

An evidentiary hearing was conducted on July 10, 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 July 3, 2007 and completed it on September 12, 2007. (N.T. 9)

2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on September 19, 2007. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 4)

Count No. 1:

3. On July 6, 2007, a Bureau Enforcement Officer entered the licensed premises at 11:00 p.m., in an undercover capacity. A patron walked into the establishment and asked for a case of beer. The bartender advised the patron he could not sell her a case but he could sell her

two, twelve packs. The bartender rang up two sales on the cash register with each sale consisting of a twelve pack of twelve ounce bottles of beer. (N.T. 10-12)

1. Commonwealth Exhibit No. C-2, N.T. 4.

Count No. 2:

4. A second Bureau Enforcement Officer visited the subject premises on August 20, 2007 to conduct an administrative inspection. The Officer found Licensee's beer and liquor invoices were not maintained on the licensed premises. Those records were with Licensee's accountant. Licensee further indicated that there were some financial records in her residence next door. The Officer gave Licensee the opportunity to go next door to get those records. Licensee returned indicating that she did not have a very good system of organization and could not actually locate them. (N.T. 15-16)

Count No. 3:

5. Paragraph 6, c of the Conditional Licensing Agreement, third page, states:

"Whiteman shall install and shall utilize a transaction scanning device to scan the identification of all patrons entering the licensed premises. (Judge's Exhibit No. J-1, N.T. 7)

6. During the Officer's administrative inspection, he inquired of Licensee regarding the use of the ID scanner. The Officer noticed there were five patrons seated at the bar during his visit at 8:25 a.m. The Officer asked Licensee whether the five patrons at the premises were checked for identification as required by the Conditional Licensing Agreement. Licensee replied: "God, I hope so." As Licensee had been called to the premises to talk to the Officer, Licensee did not know whether those patrons had been scanned or not. (N.T. 21-22)

7. The Officer further asked Licensee to determine when the last patron's identification had actually been scanned. Licensee showed the Officer the transaction scanning device read out which the Officer interpreted to mean that the last individual actually scanned was from the evening of the day before. (N.T. 22)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

Count No. 1:

2. **Sustained** as charged.

Count No. 2:

3. **Sustained** as charged.

Count No. 3:

4. The Bureau **failed** to prove that on August 20, 2007, Licensee, by servants, agents or employes, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license.

DISCUSSION:

The Bureau's case rests entirely on classic inadmissible hearsay, which is the Officer's repetition of that which he observed on a transaction scan device for the supposed truth of the matter asserted (Pa. Rule of Evidence 801.01). Consequently, the case must be dismissed.

Even more compelling for dismissal is the fact that the display on the transaction scan device, standing alone and without supporting testimony, does not prove the display represents the last transaction. The Officer's description of the display is part fact and part interpretation based on what Licensee may have suggested. Further, I do not have the benefit of observing the transaction scan device to verify its accuracy.[2]

Licensee's conduct of showing the Officer an entry on the transaction scan device, in response to the Officer's question, also presents evidentiary problems. Nonverbal conduct as hearsay is of questionable use. Nonverbal conduct of a party that is not intended as an assertion is frequently, but incorrectly, treated as an admission by conduct. (Ohlbaum on the Pennsylvania Rules of Evidence §801.07[3]).

As the Bureau's case began to sink, there was an attempt to call Licensee to prove the Bureau's case. Since every Liquor Code violation may constitute a crime [47 P.S. §4-494], Licensee's counsel appropriately directed Licensee to invoke her privilege against selfincrimination, which she did.[3]

PRIOR RECORD:

Licensee has been licensed since October 5, 2001, and has had one prior violation:

Adjudication No. 05-1888. Fine $1,200.00.
Sales to a minor.
August 14, 2005.

2. That Licensee stated: "God, I hope so," in response to the Officer's query if her staff "carded" everyone, represents an aspirational declaration rather than one admitting of a failure to "card."

3. I am free to draw a negative inference as a result of Licensee's assertion of her constitutional privilege. I decline to do so.

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 $50.00 or more than $1,000.00 or both for violations of the type found in Count Nos. 1, 2 and 3 in this case.

I impose:

Count No. 1 - $150.00 fine.
Count No. 2 - $150.00 fine.
Count No. 3 – dismissed.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of $300.00 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.

Dismissal of Count No. 3:

IT IS FURTHER ORDERED that Count No. 3 of Citation No. 07-2329, issued against Kathy J. Whiteman, is DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 26th day of August, 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.

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

Citation No. 07-2329

KATHY J. WHITEMAN