

Mailing Date: APR 9 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-2391
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-358501
v.	:	
	:	LID - 31413
DI NICK'S OF SNYDER AVE., INC.	:	
1528 SNYDER AVE.	:	
PHILADELPHIA, PA 19145	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-SS-OPS-3828	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Erik S. Shmukler, Esquire
Pennsylvania State Police
6901 Woodland Avenue
Third Floor
Philadelphia, PA 19142

For Licensee
Edward B. McHugh, Esquire
Two Greenwood Square
3331 Street Road
Suite 450
Bensalem, PA 19120

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on October 12, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Di Nick's of Snyder Ave., Inc. (Licensee), License Number R-SS-OPS-3828.

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 August 1, 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 February 25, 2008 at the Philadelphia State Office Building, 1400 Spring Garden Street, 13th Floor, Room #2, Philadelphia, 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 30, 2007 and completed it on September 18, 2007. (Commonwealth Exhibit No. B-1, N.T. 4)

2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on September 21, 2007. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. B-1, N.T. 4)

3. On August 1, 2007, a Bureau Enforcement Officer arrived at the licensed premises at 8:20 p.m., in an undercover capacity. On his way to the rear of the premises, he passed a customer who made eye contact with him. The Officer took a seat approximately six feet to this individual's left. The customer got off his barstool in a clumsy manner. He approached the Officer from behind and patted the Officer on his back. The customer began to shake the Officer's hand and spoke in an incoherent manner. The Officer could not determine what the customer was saying. (N.T. 6-7)

4. The Officer further noted the customer's eyes were bloodshot. The customer was told by a second customer to: "take a seat." The customer did take a seat at a barstool about six feet to the right of the Officer. He was drinking out of a beer mug. For the most part, the customer was seated. However, at certain times, the customer got up and traveled up and down the bar. The customer patted other patrons on the back and attempted to shake their hands and talk to them. One patron became agitated and advised the customer to: "leave me alone." (N.T. 8-9)

5. The customer returned to his seat at 8:35 p.m. The bartender removed the empty mug in front of the customer and filled it with beer from the tap system. The bartender removed money from a pile that was in front of the customer. She then handed the customer the beer. (N.T. 18-19)

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

6. At 8:45 p.m., the customer under observation got up from his barstool in a clumsy manner and went over to the jukebox. He began pressing songs in an apparent attempt to have a second customer pay for the songs. The bartender advised the patron under scrutiny to come over and have a seat. The customer returned to the bar, grabbed the bartender and pulled her closer to him across the bar. The bartender pulled back and told the customer to let go. The customer began to mumble. The Officer understood the words: "forty" and "I might as well." The bartender said: "If I get you this you have to leave." The bartender went to the cooler and retrieved a forty ounce bottle of beer and gave it to the customer. After the bartender took money from the pile, the customer departed the premises. (N.T. 19-21)

7. The Officer made two additional visits to the premises on August 22, 2007 and September 14, 2007. (N.T. 26-27)

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:

Licensee argues the declarations described in Finding of Fact Number 4, constitute inadmissible hearsay. Licensee did not object to the bartender's statement in Finding of Fact Number 6 explaining the statement falls within the vicarious admission exception; objecting would have been futile.

Hearsay is a statement made out of court and offered in evidence to prove the truth of the matter asserted within it. The hearsay rule does not apply to all statements made to or overheard by a witness, but only to those offered as proof of the truth therein expressed. A witness may testify to the fact of a declaration rather than the truth of it (Pennsylvania Law Encyclopedia, Evidence, Section 131). The statements in controversy do not contain any truth within them, so they cannot be hearsay.

Licensee's concern about these statements actually underscores the non-hearsay nature of them. It is not the statements to which Licensee directly objects, but the inference that may be drawn therefrom, i.e., the customer had too much to drink.

Objections based on inadmissible hearsay relate directly to the content of statements, not inferences one may draw from them. Inferences actually deal with relevance. Licensee had the option of arguing the inferences the Bureau would have me draw are inappropriate particularly when we do not actually know the declarant's motivation. Essentially, Licensee's objection is that the opposing side is "scoring some points."

Licensee further argues the Bureau failed to provide in its Pre-Hearing Memorandum the full range of information contained in the Bureau's official report thus rising to a Due Process violation. Licensee had the right to request more complete information prior to the hearing. Licensee apparently did so by letter to Bureau counsel but received nothing. Licensee then could have added the Administrative Law Judge into the equation by formally requesting an Order to direct the Bureau to provide more complete information. Licensee failed to do so. It would now be inappropriate of me to entertain Licensee's Due Process argument when Licensee did not take advantage of every option prior to the hearing.

Our system of jurisprudence is designed to be fundamentally fair not absolutely fair. Due Process is a flexible concept that expands and contracts in direct relationship to the degree of possible deprivation at stake. One gets a low level of Due Process in a parking ticket matter and quite another for a charge of murder. Our legal system does not guarantee litigants a viable case. The truth is one may be unable to present any meaningful case because there is none.

I accord the Officer's observation significant weight.

PRIOR RECORD:

Licensee has been licensed since December 18, 1992, and has had two prior violations:

Adjudication No. 96-1936. Fine \$400.00.
Possessed or operated gambling devices or paraphernalia
Or permitted gambling or lotteries on a licensed premises
(horse bets).

Adjudication No. 00-1921. Fine \$800.00, Sunday Sales Permit revoked and verification conditions corrected.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises (machine).
2. Used loudspeakers or devices whereby music could be heard outside.
3. Sold liquor for consumption off premises.
4. Not a bona fide restaurant in that you failed to provide food upon request and there were insufficient food items and chairs at tables.

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.

That Section further provides for mandatory compliance with Liquor Code Section 471.1 [47 P.S. §4-471.1], pertaining to Responsible Alcohol Management when, as in this matter, Licensee has been found to have violated Section 493(1) as a first offense as it relates to sales to minors or sales to a visibly intoxicated patron.

I impose a \$1,250.00 fine.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$1,250.00 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.

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 is directed to initiate contact with The Bureau of Alcohol Education, Pennsylvania Liquor Control Board (Toll Free Telephone No.: 1-866-275-8237; Web Site: www.lcb.state.pa.us; Email Address: LBEducation@state.pa.us), within 30 days of the mailing date of this Adjudication for assistance in the compliance process. Licensee must receive Certification within 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.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 28th day of March, 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. 07-2391