

Mailing Date: SEP 22 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-2906
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-355201
v.	:	
	:	LID - 55152
MOLLY'S PUB, INC.	:	
T/A MOLLY'S PUB	:	
253 E. CHESTNUT ST.	:	
LANCASTER, PA 17602-2742	:	
	:	
	:	
LANCASTER COUNTY	:	
LICENSE NO. R-AP-SS-8779	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire
Pennsylvania State Police
3655 Vartan Way
Harrisburg, PA 17110

For Licensee
Melvin H. Hess, Esquire
41 East Orange Street
Lancaster, PA 17602

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on December 20, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Molly's Pub, Inc., t/a Molly's Pub (Licensee), License Number R-AP-SS-8779.

The citation¹ charges Licensee with violations of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that on April 4 and 5, 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, eighteen (18) years of age.

An evidentiary hearing was conducted on August 8, 2008 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

Investigation

1. The Bureau began its investigation on June 5, 2007 and completed it on October 29, 2007. (N.T. 12-13)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on November 21, 2007. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 6)
3. During the course of the investigation, on June 7, 2007, a Bureau Enforcement Officer conducted an undercover visit to the premises finding no violations. On June 12, 2007, a Bureau Enforcement Officer interviewed a witness to the events in controversy. On June 19, 2007, the Officer retrieved information from the Lancaster Police Department regarding an incident that occurred on the subject premises on the date in question. On June 25, 2007, the Officer interviewed a Lancaster Police Officer. On July 18, 2007, the Officer conducted an undercover visit to the premises. On August 22, 2007, the Officer contacted two potential witnesses to schedule an interview with them. (N.T. 12-15)
4. On September 22, 2007, the Officer conducted another undercover visit to the premises finding no violations. On October 22, 2007, two Bureau Enforcement Officers entered the premises at approximately 3:00 p.m. to conduct an unannounced administrative inspection. The Officer asked the bartender whether Licensee maintained a Declaration of Age Card file. The Officer also conducted a search to determine whether Licensee maintained a transaction scan device but found none. The device was stored in a closet in a "downstairs liquor room" when not in use during October, 2007. (N.T. 15-17; 162)

1. Commonwealth Exhibit No. C-2, N.T. 6.

5. The Officer conducted a second administrative inspection of the premises on October 29, 2007, pursuant to arrangements made with Licensee's Sole Corporate Officer. The Officer discussed with Licensee's Sole Corporate Officer the nature of the ongoing investigation. (N.T. 20-24)

6. The Officer found no transaction scan device on the premises. The Officer did not inquire of Licensee's Sole Corporate Officer whether such a device was presently in use in addition to the date of the alleged violation. (N.T. 27)

Substantive Events

7. During the evening of April 4, 2007, an eighteen year old (born July 8, 1988) attended college earlier in the day. He was contacted by a friend to go out with a third person. The three went to the local Red Lobster arriving between 5:00 p.m. and 6:00 p.m. In addition to eating dinner, the nineteen year old was served and consumed four to five mixed drinks as well as four to five shots of liquor in an approximate two hour period. (N.T. 31-36)

8. After dinner, the three went to the licensed premises. The three entered somewhere between 10:00 and 11:00 p.m. The nineteen year old sat at the bar with the other two and ordered a mixed drink. The nineteen year old is a bartender at another licensed premises. During the course of his visit which extended to April 5, 2007, beyond midnight and very close to closing time, the nineteen year old consumed anywhere from six to eight mixed drinks. When the minor received the bill for the festivities of the evening, he used a stolen credit card to pay. (N.T. 40-48)

9. At approximately closing time, Licensee's Sole Corporate Officer called the local Police as he was suspicious about the true ownership of the credit card used by the minor to settle his account. When the local Police Officers arrived, they were directed to the nineteen year old. The minor was drunk and hostile. One Officer asked the minor for his name and date of birth. He provided three different dates of birth. The Officer removed the Pennsylvania Driver's license from the minor's wallet. The minor became belligerent stating that he wanted his lawyer and that he was going to have the Police Officer's job. The minor further stated that he was going to sue the Officer for removing his identification card from his wallet. (N.T. 94-99)

Affirmative Defense

10. On the date the minor was served, Licensee did have a functional transaction scan device which was in use. The minor was challenged as to age. Licensee's doortender scanned the Pennsylvania Driver's license presented by the minor and scanning results showed him to be an adult. (N.T. 133-135)

11. The doortender compared the photograph on the identification to the likeness of the minor. The doortender also used a "black light" to evaluate the hologram on the reverse side of the driver's license. (N.T. 135-137)

12. The transaction scan device employed that day displayed the following information: the date of birth, first name, last name, address. The transaction scan device does have a memory card which can be connected to a computer. It had a capacity to record about 1,000 swipes. (N.T. 137-139; 150-155)

13. Licensee's bartender also challenged the minor as to age particularly because the minor was behaving suspiciously. The minor presented a valid Pennsylvania Driver's license which the bartender visually reviewed. (N.T. 116-120)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. The Bureau has established that 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, eighteen (18) years of age.
3. Licensee has established an affirmative defense thus leading to the charge's dismissal.

DISCUSSION:

Investigation

The Bureau was alerted to the need to investigate some three months after the events in controversy. At the very outset, the Bureau was faced with a rather delicate balance between the need for a thorough investigation as against information that was becoming stale. In the nearly five months investigation which followed, it cannot be said the Bureau was inactive. However, the first attempt to talk to someone on behalf of Licensee occurred on October 22, 2007, seven to eight months after the incident, during an unsuccessful, unannounced administrative inspection.

These unannounced administrative inspections, while a useful tool, are occasionally resource draining without any real return on investment. Obviously designed to catch a licensee unawares so that no doctoring of records may occur and so that no "stories" are concocted, the surprise visit may be so successful in its timing that no employe is able to respond to the Bureau's questions, thus requiring a follow up scheduled visit.²

One week later, the Bureau engaged in a scheduled visit. During that visit, not one question was directed at Licensee's Sole Corporate Officer regarding the use, whether present or past, or existence of a transaction scan device.³

Merits

There is no question there were multiple services of alcoholic beverages to a minor. I also have little doubt, at some point in the evening, the minor and his two companions must have been served while visibly intoxicated. I comfortably draw that conclusion given the number of drinks served in relationship to the period of time the three were on the licensed premises. While Licensee has not been charged with serving visibly intoxicating patrons, I would be neglecting my duties were I not to encourage Licensee to be more careful.

Affirmative Defense

The clarity of my thinking ought to be challenged were I to accept the testimony by the Bureau's witnesses that they were not required to show any proof of age. I am not a truth machine but I can say I cannot trust the credibility or the ability of the Bureau's witnesses to recall events accurately when one witness is a drunken, arrogant, thief who admits his memory was impaired by drink.

What remains is the testimony on behalf of Licensee supporting the affirmative defense. It is testimony which I have no reason to disbelieve and which the Bureau's modest attempt to derail during the second administrative inspection, must be rejected particularly because no one questioned Licensee's Sole Corporate Officer about the transaction scan device. I therefore accord that testimony substantial weight.

2. What is the harm if a licensee has an opportunity to get up to standard? After all, isn't that what we all want?

3. Based entirely on anecdotal observations and without any scientific support, I perceive an inclination to interview Licensee's very late in the investigative process and after the conclusion has been drawn that a citation will issue. The major purpose of the visit is therefore not to gather more information in furtherance of deciding whether a citation should issue but rather to disarm a licensee from presenting a defense. In that process, valuable sources of information may be disregarded.

Independent of these findings, the Bureau argues Liquor Code Section 495(g) [47 P.S. §4-495(g)], relating to the use of a transaction scan device, requires there be documentary evidence supporting such use. The Bureau has no choice but to acknowledge there are no words in that provision requiring documentary evidence. As is always the case when words are absent, the proponent argues the missing language is somehow implied.

Statutory construction by implication is dangerous. It is bereft of standards allowing the interpreter to respond to any whim or fancy. Unless the words of a statute are unclear, implication is prohibited.

The provision in question has no ambiguity. In fact, the alternative affirmative defenses is embodied in Liquor Code Section 495(e)(f) [47 P.S. §4-495(e)(f)], relating to the use of a declaration of age card (e) or a photograph, photocopy or other visual or video representation (f) obviously mandates presenting documentary evidence.

If the Legislature intended there be documentary evidence required when applying Liquor Code Section 495(g), these necessary words would have been included. The Bureau argues if no documentary evidence is required then any witness on behalf of Licensee might commit perjury without repercussion, i.e. testify that a transaction scan device was employed when it was actually not.

First, the meaning of clear and ambiguous law ought never to yield to issues of burden of proof. Secondly, the Bureau forgets the factfinder must assess the credibility of those who would interpose the affirmative defense. Lastly, had the Bureau's investigation been more thorough, perhaps the Bureau might have been in a better evidentiary position to challenge the credibility of Licensee's witnesses.⁴

4. See: 03-1654, *So Young, Inc. II*, www.lcb.state.pa.us, regarding the use of this affirmative defense. Also see 01-1088, *Ellis Beer Distributors, Inc.*, www.lcb.state.pa.us, regarding the definition of a "valid" identification card. Given the process in Pennsylvania where a photo driver's license issued to a minor may still be valid upon majority, it is understandable that a licensee might accept such a photo driver's license.

ORDER:

NOW THEREFORE, it is ordered that Citation No. 07-2906 issued against Molly's Pub, Inc., t/a Molly's Pub, is DISMISSED.

Dated this 16th day of September, 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.