

Mailing Date: NOV 20 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-0783
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-359325
v.	:	
	:	LID - 25700
HEAD'S UP, INC.	:	
T/A LAMP POST INN	:	
101 E. MAIN ST.	:	
MIDDLETOWN, PA 17057-1829	:	
	:	
	:	
DAUPHIN COUNTY	:	
LICENSE NO. H-AP-SS-EHF-2162	:	

**BEFORE JUDGE FLAHERTY  
BUREAU COUNSEL BALLARON  
LICENSEE: WILLIAM J. FULTON, ESQUIRE**

**ADJUDICATION**

**BACKGROUND:**

This proceeding arises out of a citation that was issued on May 8, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against HEAD'S UP, INC., License Number H-AP-SS-EHF-2162 (hereinafter "Licensee").

The citation charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] in that on November 16 and 18, 2007, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated male patron and one visibly intoxicated female patron.

The investigation which gave rise to the citation began on August 13, 2007 and was completed on March 20, 2008; and notice of the violation was sent to Licensee by Certified Mail on March 27, 2008. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on March 24, 2009 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. On November 18, 2007 an officer of the Bureau entered the licensed premises in an undercover capacity at 1:15 a.m. where she observed a male bartender heard to be called Mike Garmen and a female bartender heard to be called Twanette Hoover rendering service to approximately 60 patrons (N.T. 10-11).

2. The officer took a seat at the bar where she observed a male patron who appeared to be napping with his left arm across the bar, his head down, and his right hand holding up his face (N.T. 12).

3. The aforementioned patron had a cigarette in his right hand which was burning. The cigarette burned down to the filter producing an odor. The patron struggled to wake up and put the cigarette out in an ashtray (N.T. 12-13).

4. After he put the cigarette out, the patron swayed on his bar stool (N.T. 13).

5. The patron had a 16-ounce can of Old Milwaukee beer in front of him. He reached out and grabbed the can and brought it to his face. The mouth piece of the can was not matched up to his face, and when he went to take a sip, the beer poured out onto the side of his face. He put the beer down and turned the can. He then brought the beer up toward his face with both hands and beer spilled onto both sides of his face (N.T. 13-14).

6. The patron put the can of beer down and struggled to take a cigarette from a pack. He then struggled to match the cigarette up with the flame from his lighter until he finally lit the cigarette. He then reached out and grabbed his can of beer and, once again spilled beer onto his face (N.T. 14).

7. The patron put down the can of beer and propped his head on the hand which held the cigarette. He nodded off and the cigarette again burned down to the filter (N.T. 15).

8. Another patron yelled across the bar to the patron in question, calling him "Kenny." The other patron said, "Hey Kenny, you got your hair cut off." Kenny replied with speech that was so slurred that he could hardly be understood (N.T. 15).

9. The person sitting between the officer and Kenny left. Kenny saw the officer looking at him and leaned in to speak to her. She could not understand him, so she leaned toward him. Kenny then leaned in farther and nearly fell off his barstool. He recouped and again leaned in to speak to her. She was unable to understand most of what he was saying (N.T. 16).

10. The officer was able to understand that Kenny was complaining about his relationship with his girlfriend, whose name was Evelyn. He tried multiple times to say her name but was unable to pronounce it correctly (N.T. 16).

11. Kenny attempted to tell the officer about his relationship with his girlfriend, but he would stop in mid-sentence and "fade away." He had a vacant expression on his face. At one point the officer was close enough to see that drool was coming down the side of his mouth (N.T. 17).

12. For no apparent reason Kenny started yelling loudly, hollering and whooping. He then tried again to tell the officer about Evelyn, but he never finished the sentence (N.T. 17).

13. Kenny tried several times to drink from the empty beer can in front of him. When he finally realized it was empty. He tried several times to get the attention of Michael Garmen, the male bartender, who at first appeared to ignore him. Kenny then took a \$5.00 bill and began to wave it while he yelled, "Mike, Mike, Mike." (N.T. 18-19).

14. Mike finally asked Kenny what he wanted and Kenny told him he needed another beer. Mike retrieved a 16-ounce can of beer which he opened and serve to Kenny. He then took the \$5.00 from Kenny (N.T. 19).

15. Kenny began drinking from the newly opened can of beer (N.T. 19-20).

#### CONCLUSION OF LAW:

The charge in the citation is dismissed as to the date of November 16, 2007 and **sustained** as to the date of November 18, 2007.

#### DISCUSSION:

The record clearly establishes a violation on the date of November 18, 2007. However, the evidence as to the charge for November 16, 2007 is not of sufficient quality to sustain the charge on that date.

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. *In re Omicron Enterprises*, 449 A.2d 857 (Pa.Cmwlth 1982).

The phrase "preponderance of evidence" has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. *Black's Law Dictionary, Fifth Edition*, West Publishing Company, Copyright 1979, Page 1064.

It is within my province, and is part of my responsibility to determine the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa.Cmwlth 1989). I may give testimony such consideration as it may deserve, and accept it or reject it in whole or in part. *McFarland Landscape Service v. Workmen's Comp. Bd. Of Appeal*, 557 A.2d 816, 817-18 (Pa.Cmwlth 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

In this case, the evidence as to November 18 is clear, precise and complete. It clearly establishes that the patron in question definitely exhibited signs of intoxication before being served a 16 ounce can of beer (See Findings 1 through 15). The charge as to that date is, therefore, sustained.

The charge as to the date of November 16, 2007 is based upon an out of court statement made by a bartender at the licensed premises to a local police detective. The bartender was not present at the hearing and thus not available for cross examination. In an attempt to bolster her testimony, the Bureau presented the testimony of a patron who observed the allegedly intoxicated patron on that night and found her loud and boisterous. She contrasted this with other observations of her at work when she was quiet (See N.T. 62 through 72).

The aforementioned evidence is contradicted by a written statement given by the bartender who spoke to the police detective in which she stated that the patron was not physically intoxicated when she was served (See N.T. L-1). There is also testimony of a second bartender on duty that night which indicated that the patron in question initially seemed "fine" and she would have served her herself (See N.T. 81 and Exhibit L-2).

On the basis of the contradictory testimony, I conclude that the Bureau has failed to establish a violation on the date of November 16, 2007 by a clear preponderance of the evidence.

Based upon the foregoing, I conclude that the charge in the citation is sustained as to November 18, 2007 and dismissed as to November 16, 2007.

PRIOR RECORD:

Licensee has been licensed since June 7, 1990, and has had nine prior violations:

Citation No. 90-2096. Fine \$400.00.

1. Sales to visibly intoxicated persons.

Citation No. 90-2434. Fine \$1,250.00.

1. Used loudspeakers or devices whereby music could be heard outside.
2. Sales to a minor.

Citation No. 91-1710. Fine \$300.00.

1. Used loudspeakers or devices whereby music could be heard outside.

Citation No. 04-1243X. Fine \$150.00.

1. Issued worthless checks in payment for malt or brewed beverages. May 24, 2004.

Citation No. 05-2530X. Fine \$200.00

1. Issued worthless checks in payment for malt or brewed beverages. September 13 and 27, 2005

Citation No. 06-0072X. Fine \$250.00

1. Issued worthless checks in payment for malt or brewed beverages. November 8, 2005

Citation No. 07-0253X. Fine \$350.00

1. Issued worthless checks in payment for malt or brewed beverages. December 12, 2006

Citation No. 07-0739X. Fine \$400.00.

1. Issued worthless checks in payment for malt or brewed beverages. January 29 and 30, 2007

Citation No. 07-2544X. Fine \$500.00.

1. Issued worthless checks in payment for malt or brewed beverages. September 4 and 11, 2007

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.

Under the circumstances of this case, the penalty imposed shall be a fine of \$1,750.00 and RAMP training.

ORDER

THEREFORE, it is hereby ordered that Licensee HEAD'S UP, INC., pay a fine of \$1,750.00 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.

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](http://www.lcb.state.pa.us); Email Address: [LBEducation@state.pa.us](mailto:LBEducation@state.pa.us)) within 30 days of the mailing date of this Adjudication. 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.

Failure to comply with this Order will be grounds for modification of penalty in this case. Failure to comply may also constitute grounds for issuance of a new citation as authorized by Section 471(d) of the liquor Code [47 P.S. §4-471(d)].

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 10<sup>TH</sup> day of November, 2009.



Daniel T. Flaherty, Jr., J.

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**MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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 submit stub with payment**

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The fine must be paid by Treasurer's Check, Cashier's Check or Certified Check. **Personal checks, which includes business-use personal checks, are not acceptable.** Make 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. 08-0783  
Head's Up, Inc.