

Mailing Date: FEB 20 2009

[Appeals](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-1298
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W02-372003
	:	
v.	:	LID - 54136
	:	
NORTHEAST CONCESSIONS, L.P.	:	
1280 STATE HWY.	:	
RTE. 315	:	
WILKES-BARRE, PA 18702-7002	:	
	:	
	:	
LUZERNE COUNTY	:	
LICENSE NO. R-AP-SS-EHF-15046	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Craig A. Strong, Esquire
Pennsylvania State Police
7448 Industrial Parkway
Macungie, PA 18062

For Licensee
Curtis Rogers, Esquire
1280 State Highway
Route 315
Wilkes-Barre, PA 18702

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on June 18, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Northeast Concessions, L.P. (Licensee), License Number R-AP-SS-EHF-15046.

The citation¹ charges Licensee with a violation of Section 499(a) of the Liquor Code [47 P.S. §4-499(a)]. The charge is that on March 25, 2008, Licensee, by servants, agents or employes, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 A.M.

An evidentiary hearing was conducted on January 29, 2009 at the Scranton State Office Building, PUC Hearing Room 318, 100 Lackawanna Avenue, Scranton, 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 March 25, 2008 and completed it on May 8, 2008. (Commonwealth Exhibit No. C-1, N.T. 6)
2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on May 15, 2008. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 6)
3. The Gaming Enforcement Office of the State Police maintains a permanent facility and presence at Pocono Downs/Mohegan Sun, Licensee. The facility is there to support Licensee's Security Staff and to deal with unlawful activity. (N.T. 10-12; 5)
4. In that facility, the State Police have the same recording capabilities and the same "burning" capabilities as Licensee. At any given time, the State Police may watch multiple screens, change from camera to camera and reposition any camera by panning, tilting or zooming. Such activity may be done in real time. In addition, the State Police may go back and review prior recordings. (N.T. 18-20)
5. A State Police Sergeant and the Commander of the Gaming Enforcement Office at Pocono Downs/Mohegan Sun, the licensed premises, was on duty in the early morning hours of March 25, 2008. Video recordings reveal that, at 2:26 a.m., two customers were positioned at a video poker machine. Each had two drinks. At 2:28 a.m., one customer went to the bathroom holding two bottles of beer and making no attempt whatsoever to conceal them. The other customer was confronted by Security Staff who required the customer to finish

his alcoholic beverage. The second customer went to the restroom while the Security Staff were engaged in a sweep of the facility to remove any alcoholic beverages at 2:30 a.m. (N.T. 33-37)

1. Commonwealth Exhibit No. C-2.

6. The customer exited the restroom shortly after 2:30 a.m. She walked past Security Staff and housekeeping personnel hiding one bottle of beer. (N.T. 35-36)

7. It was at 2:31 a.m. when the Sergeant saw the customer, on camera in real time, holding a bottle of beer. Being concerned the bottle might be empty, the Sergeant wanted to verify that. He left the State Police facility and went onto the gaming floor. He noticed a Security Officer talking to the customer he saw, on camera. She was holding a bottle of beer. It is normal protocol for the State Police not to remove alcoholic beverages from customers but rather notify Security Personnel. The Sergeant waited for the discussion between the Security Officer and the customer to be completed. He noticed the bottle contained a substantial amount of beer. He advised the Security Officer of the bottle of beer. The Security Officer took the bottle of beer at 2:41 a.m. and discarded it. (N.T. 22-26; 37-39)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. The Bureau has **failed** to prove that on March 25, 2008, Licensee, by servants, agents or employes, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 A.M.

DISCUSSION:

When we speak of justice, one is likely to envision the physical form of a woman, sword firmly gripped in one hand and balance delicately positioned in the other. This is, of course, Lady Justice whose eyes are covered. In keeping with this representation, we say that justice is blind.

What we mean is that true justice ought not to be subject to influence. That statement also suffers from inaccuracy. In our adversarial system, the entire energy of each party is geared to influencing the Good Lady to striking the balance in favor of each and wielding that sword in opposition to the other. What our justice system truly endeavors to avoid is any undue influence.

Justice is not blind; while size ought not to matter, it does. Size, of course, is a reference to a licensee's business volume. We do our best to project a model of fairness by asserting that size does not matter and that we treat all licensees the same. How unavoidably inaccurate is that last assertion.

When I fashion a penalty, not only do I, but must I consider Licensee's business size as an element in that process. For example, I must be cognizant that a \$2,000.00 fine to a small operator, whose profit is marginal, may be significantly less punishment than a one day suspension to a very large operator.

Similarly, as any parent knows, we relate to each of our children in a very special way that is adapted to that child's unique strengths and weaknesses. All things being equal and to the extent humanly possible and as we attempt to do with our children, the goal is to treat all licensees with a large measure of equivalence.

I am one who will not ignore the elephant in the room and pretend it does not exist. Licensee is an extremely high volume operator not only in alcoholic beverage sales but in its primary business of providing gaming facilities. In that endeavor, Licensee is closely regulated by a sister agency, the Pennsylvania Gaming Control Board, whose rules, regulations, and enabling statute are rightfully quite demanding.

Under no circumstances do I suggest that close governmental scrutiny is an excuse to lessen the standard of care we impose on the closely supervised licensee. On the other hand, I deem it supremely unfair to place a higher standard of behavior upon such a licensee than we do others. I neither want to reward nor punish larger operators because of their size. That is equally true for the not-so-large as well as small licensees.

At this point, there must be dozens of Adjudications in which I have reminded the Bureau of the underlying goal to which the provision in controversy is directed. The primary purpose of codifying Liquor Code Section 499 was to address sales of alcoholic beverages after hours. The duty to remove alcoholic beverages at 2:30 a.m. was not, in my opinion, enacted to be applied in a rigid and unbending manner without regard to circumstance.²

Returning to this matter, I am reminded by the Bureau that strict liability constrains me to find a violation. In that vane, a customer who possesses a bottle of beer, regardless of the amount of beer therein, at one second after 2:30 a.m., is sufficient to constitute a breach of the law. In theory, that may be true; in practice, I would question the use of prosecutorial discretion in such a case.

2. As I have additionally commented on multiple occasions, however well intentioned that provision may be, the duty to remove all patrons from a licensed premises at 2:30 a.m. promotes drunks on our highways and sidewalks. Invariably, patrons hurriedly finish their last-call purchases; their sobriety may have been marginal at last-call. Certainly, when they are forced to depart, blood alcohol levels are on the rise; large crowds leaving at once will include unruly individuals whose numbers and behavior become a serious safety issue for local police who are outnumbered.

Strict liability is not a wonder drug. It is not the cure for every prosecutorial infirmity. In fact, when strict liability is over used there is likely an immunity to develop to it. Witness *Pennsylvania State Police v. J.E.K.*, 680 A.2d 53 (Pa.Cmwlth. 1996), in which the licensee was charged with selling to a visibly intoxicated person.

The customer in question was visibly intoxicated. The bartender refused to serve that customer. Later in the evening, the customer grabbed a bottle of beer which was on the bar and drank from it. Noting, that it is not unlawful for a visibly intoxicated person to remain on a licensed premises, the Commonwealth Court ruled the licensee did not violate the Liquor Code.

Obviously, in writing for the Court, Judge Pellegrini avoided applying the law in an inflexible manner. He considered all of the circumstances. Had Judge Pellegrini recited a strict liability mantra, without regard to factual environment, that decision would have gone the other way. I am guided by *J.E.K.*, supra to deconstruct strict liability in order to evaluate its purpose and to apply it in a manner that respects the factual environment to which it is to be applied.

That environment includes:

- a. a licensee which maintains Security and housekeeping staff trained to remove all alcoholic beverages from all customers by 2:30 a.m., along with a diligent attempt to do so;
- b. no indication of any sales after-hours;
- c. a customer who, several minutes before 2:30 a.m., secretes herself in the privacy of a restroom possessing an alcoholic beverage;
- d. a customer who then departs the restroom shortly after 2:30 a.m., hiding the alcoholic beverage from Licensee's staff;

- e. government knowledge of the illegality at 2:31 a.m., without any
input to Licensee until 2:41 a.m., at which time, swift and
immediate corrective measures are taken.

These five, unique factors warrant the application of *J.E.K.* supra to this matter leading to a dismissal.

ORDER:

NOW THEREFORE, it is ordered that Citation No. 08-1298, issued against Northeast Concessions, L.P., is hereby DISMISSED.

Dated this 18th day of February, 2009.


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.