

Mailing Date: MAY 04 2009

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-1520
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-375399
	:	
v.	:	LID - 9631
	:	
PLEASANT VALLEY RECREATION	:	
CENTER, INC.	:	
1817-19 LOGAN AVENUE	:	
ALTOONA, PA 16602	:	
	:	
	:	
BLAIR COUNTY	:	
LICENSE NO. R-AP-SS-828	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Emily L. Gustave, Esquire
Pennsylvania State Police
313 Mt. Nebo Road
Pittsburgh, PA 15237-1305

For Licensee
Terry W. Despoy, Esquire
109 Byron Avenue
Altoona, PA 16602

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on June 30, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Pleasant Valley Recreation Center, Inc. (Licensee), License Number R-AP-SS-828.

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 June 8, 2008, Licensee, by servants, agents or employees, 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 March 25, 2009 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 May 31, 2008 and completed it on June 16, 2008. (N.T. 9)
2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on June 18, 2008. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 8)
3. On Sunday, June 8, 2008, at 12:10 a.m., a Bureau Enforcement Officer made his way to the downstairs bar after paying a cover charge. (N.T. 12).
4. Approximately five minutes after entering, the Officer's attention was drawn to a young man who was having a difficult time maintaining his balance. He stumbled around the area near the bar. The patron's eyes were closing as if he were falling asleep. The Officer positioned himself closer to the patron. The Officer detected a strong odor of alcohol coming from the patron. The patron's eyes were bloodshot and glassy. The Officer attempted to engage the patron in conversation but the patron's speech was broken and slurred to the point where the Officer could not understand what the patron was saying. (N.T. 13)
5. The patron continued to stumble around the bar area for approximately twentyfive minutes. At 12:41 a.m., the patron approached the bar and sat down an empty twelve ounce bottle of beer. One of the bartenders served the patron a beer. (N.T. 13-14)

1. Commonwealth Exhibit No. C-2, N.T. 8.

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 June 8, 2008, 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.

DISCUSSION:

After taking testimony, I volunteered the Bureau has met its burden of proof. After reviewing the transcript and upon deeper reflection, I now conclude otherwise.

As I have said on more than one occasion, precisely when a customer crosses the line from marginal sobriety to visible intoxication is virtually impossible to identify. That is the drawback to the visible intoxication standard. It is not quantitatively discernable. On the positive side, the Liquor Code requires no more of a licensee than to be guided by what is apparent, recognizable or conspicuous.²

Follow-up questions now arise: Visible to whom and under what circumstances? It is well settled, the law does not require expert testimony regarding visible intoxication. We all know a drunk when we see one. Nonetheless, there is a zone of behavior in which reasonable people might differ as to whether the behavior of an individual is caused by visible intoxication.

Given the above thoughts, the standard for visible intoxication cannot be based on the trained observations of one who is keenly focused on any behavior, however slight, that may be demonstrative of visible intoxication. Rather, the Liquor Code must contemplate a standard that one may attribute to what a reasonable person might conclude, if that person were to observe an individual's behavior.

I am also mindful that a charge of serving to a visible intoxicated patron is one of the more serious in our system, subjecting a licensee to higher fines. Of course, that awareness does not allow me to raise the quantum of proof necessary to find a violation.

2. I use “apparent,” “recognizable” and “conspicuous” as Merriam Webster’s Collegiate Dictionary, Tenth Edition defines “visible” using these terms.

Moreover, these cases are generally incapable of defending because it is difficult to find and produce witnesses who were present. It surely may be, the impossibility to defend derives from the lack of any true defense. Nevertheless, the general impossibility, when considered with all other factors as discussed herein, beg for careful and close scrutiny of testimony.

I must evaluate testimony offered by the Bureau with great care as I must rely entirely on the observations and opinion of an Enforcement Officer. Accordingly, when observations are brief and limited in detail, it becomes more difficult to side with the Bureau. When observations do not include statements by the targeted customer or by employees recognizing the customer’s condition, it also becomes more difficult to side with the Bureau.

I am certainly not suggesting the paragraph immediately above defines a new standard of proof. What I am saying is the descriptive testimony which supports the charge must be as thorough and detailed as possible. It is not enough for an Enforcement Officer to conclude a customer is visibly intoxicated. The Enforcement Officer must be satisfied her observations are sufficient to convince an Administrative Law Judge to accord her testimony sufficient weight.

In this matter, I conclude the Officer’s observations are thin and therefore accord that testimony insufficient weight to sustain the charge.

ORDER:

NOW THEREFORE, it is ordered that Citation No. 08-1520, issued against Pleasant Valley Recreation Center, Inc., is DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 23RD day of April, 2009.

A handwritten signature in cursive script, reading "Felix Thau", written over a horizontal line.

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.