

Mailing Date: August 12, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 08-1520
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

PLEASANT VALLEY RECREATION : License No. R-828
CENTER, INC. :
1817-19 LOGAN AVENUE :
ALTOONA, PA 16602 :

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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ dismissed the citation.

The citation charged that, on June 8, 2008, Licensee, by its servants, agents or employees violated section 493(1) of the Liquor Code [47 P.S. § 4-

493(1)] by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal, the Bureau contends that the ALJ committed an error of law in concluding that the Bureau failed to prove that Licensee served a visible intoxicated patron. The Bureau further suggests that the ALJ's analysis in reaching its conclusion, functionally altered both the Commonwealth's burden of proof as well as the elements of the underlying Liquor Code offense.

The record reveals that, on June 8, 2008, at approximately 12:10 a.m., Jeffrey Butler, a Bureau enforcement officer, paid a cover charge and entered the downstairs bar area of the licensed premises. (N.T. 12). Approximately five

(5) minutes after entering, the officer's attention was drawn to a young man, approximately late twenties, blonde, athletic build, medium height, blue jeans, black shirt, who was having a hard time maintaining his balance as he stumbled around the bar area. (N.T. 13). While leaning against the support pillars near the bar, the patron's eyes were closing as if he were falling asleep. The officer stood beside the patron and detected a strong odor of alcohol coming from his person and observed the male patron's eyes to be bloodshot and glassy. Upon his attempt to engage in conversation with the patron, the officer observed the male's speech to be slurred. (N.T. 13). The officer observed the patron stumble around the bar area for approximately half an hour or so before the patron returned to the bar and set down an empty twelve (12)-ounce bottle of Yuengling beer. A bartender served the patron another twelve (12)-ounce bottle of Yuengling beer and returned his change to him. (N.T. 14).

In defense of the charge, Licensee presented the testimony of Mr. Robert Diventura, corporate principal, bartenders Michael David Allison and William Weible, and doorman, Robert Mirenda. Mr. Diventura stated that the majority of Licensee's employees have been through the TIPS training and Licensee did complete the RAMP requirement for the licensing period May 9, 2007 to May 9, 2009, pursuant to a previous ALJ adjudication. (N.T. 39-40).

Licensee employs at least two (2) door persons, three (3) bartenders, two (2) waitresses, and three (3) to four (4) security persons on each night the premises is operating. (N.T. 42, 55). Some of Licensee's bartenders have twenty (20) or more years of employment with Licensee. (N.T. 44). Mr. Diventura explained Licensee's procedure for handling potential visibly intoxicated patrons (VIPs) as having the waitress point out any VIPs to a bartender or door person, who then attempts to turn the VIP over to a friend and make it known that there will be no more service to that individual. (N.T. 45-46). Mr. Diventura, who was at the premises on June 7-8, 2008, subsequently attempted to find out who the person was that was described by Officer Butler as being a VIP by speaking with employees but was unsuccessful. (N.T. 50-51).

Michael David Allison, Licensee's bartender, has been employed by Licensee for twenty-two (22) years and is not RAMP-certified. (N.T. 66-67). Mr. Allison identified himself as the bartender identified by Officer Butler as the person who served the VIP. (N.T. 67). Mr. Allison did not have a specific recollection of seeing anyone appearing to be intoxicated on the date in question. (N.T. 67-68).

Robert Mirenda, a doorman at the licensed premises, stated that he did not see anybody fitting the description of the person described by the Bureau officer on the evening in question. (N.T. 72).

William Weible, also a bartender, stated that he does not have any specific recollection of being on the licensed premises on the date in question, nor does he recall seeing any visibly intoxicated person being served on that occasion. (N.T. 70).

Section 493(1) of the Liquor Code provides that it shall be unlawful for any licensee...or servant, agent or employee of such licensee...to sell, furnish and/or give or permit such sale, furnishing or giving of alcoholic beverages to a visibly intoxicated patron. [47 P.S. § 4-493(1)].

In the instant case, the record contains uncontradicted evidence that the male patron in question was displaying visible symptoms of intoxication including stumbling, a strong odor of alcohol, bloodshot and glassy eyes and slurred speech. (N.T. 13). Notwithstanding his acknowledgement of those factors, the ALJ went on to conclude that:

“the standard for visible intoxication cannot be based on the trained observations of one who 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." Opinion p. 3.

On appeal, the Bureau argues that the ALJ has erred as a matter of law because he is requiring the Bureau to produce more than the testimony of a Bureau officer in order to sustain its burden of proof and because – notwithstanding the ALJ's claims to the contrary – the ALJ has evaluated this matter using a standard other than the strict liability standard required by law.

In Laukemann v. Pennsylvania Liquor Control Bd., 475 A.2d 955 (Pa. Cmwlth. 1984), the Commonwealth Court enunciated the longstanding rule that evidence of intoxication is a matter of common observation and that the testimony of a liquor enforcement officer is sufficient to sustain the Commonwealth's burden of proof. In Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988), the Pennsylvania Supreme Court stated that licensees are strictly liable for violations of the Liquor Code. Thus, the Bureau, in its appeal, has correctly enunciated the law.

Further, a review of the ALJ's Opinion reveals that the Bureau has accurately described the ALJ's decision as a misapplication of the law. Specifically, the ALJ erred by focusing on whether there was any evidence that the Licensee's employees observed the signs of visible intoxication observed

by the Bureau officer, and whether those employees would have recognized what he or she observed as signs of visible intoxication. However, the relevant inquiry is not whether the Licensee's employees observed or should have observed behavior that was evidence of visible intoxication but whether such behavior was being exhibited by the patron prior to being served alcohol. The uncontradicted testimony by the Bureau officer was that the patron was exhibiting signs of being visibly intoxicated prior to being served alcohol and, thus, the ALJ should have sustained the citation.

Accordingly, the Board finds that the decision of the ALJ in dismissing the citation was an error of law. Therefore, the decision of the ALJ is reversed and this matter is remanded to the ALJ for imposition of an appropriate penalty.

ORDER

The decision of the ALJ is reversed.

The appeal of the Bureau is affirmed.

The matter is remanded back to the Administrative Law Judge for purposes of determining a penalty that is consistent with this Opinion.

Board Secretary