

Mailing Date: MAY 04 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-1730
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-368775
v.	:	
	:	LID - 53757
AROUND THE CORNER, INC.	:	
T/A AROUND THE CORNER	:	
111 CHANDLER AVE.	:	
JOHNSTOWN, PA 15906-2205	:	
	:	
	:	
CAMBRIA COUNTY	:	
LICENSE NO. R-AP-SS-9298	:	

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
David A. Raho, Esquire
131 Market Street
Suite 200
Johnstown, PA 15901

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 28, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Around the Corner, Inc., t/a Around the Corner (Licensee), License Number R-AP-SS-9298.

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 March 1, 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 female patron.

An evidentiary hearing was conducted on March 26, 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 January 30, 2008 and completed it on July 1, 2008. (N.T. 7)

2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on July 11, 2008. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1)

3. On March 1, 2008, a Bureau Enforcement Officer arrived at the premises at approximately 9:10 p.m. The Officer was in an undercover capacity. While the Officer's identification was being verified at the entrance, he noticed a female patron who was acting in a loud and "almost obnoxious" manner. The patron came over to the Officer and asked to see his identification as if she were "putting herself in the middle" of the identification checking process. The Officer noticed "some slurred speech." (N.T. 10)

4. The Officer followed the patron to the bar area. He took a position that was approximately fifteen feet where the patron was sitting. The targeted patron was sitting at a table with six or seven other patrons. The patron moved through the crowd and was "a little unsteady" on her feet. The patron was not staggering or falling left or right. (N.T. 10-11)

5. At 9:30 p.m., the targeted patron approached the bar for service. The Officer was in a position to engage the customer in conversation. He smelled the odor of alcohol on her breath. Her speech was still slurred as it had been before. It was fairly loud in the premises. The Officer had to ask the patron several times what she was saying based on the combination of her speech and because of the loudness of the band. (N.T. 11-12)

1. Commonwealth Exhibit No. C-2.

6. It appeared to the Officer that the patron was fixing her gaze on a fixed point at the back of the bar in an apparent attempt to compose herself. (N.T. 12)

7. At about 9:32 p.m., the patron was served two bottles of beer which she carried back to the table for service to other patrons at the table. The targeted patron sat down at the table and was drinking from her beer which was already there. (N.T. 12)

8. The patron continued her loud and boisterous behavior at the table. She retrieved a personal portable breathalyzer tester (PBT) from her purse and took a reading for herself. The reading registered .29. She announced to the crowd her blood alcohol level was .29%. (N.T. 13)

9. She finished the bottle of beer which she had in front of her sometime after she conducted the breath test. At five to ten minutes after the breath test, which was approximately ten minutes after the first service of beer to her at the bar, the targeted patron made her way back to the bar where she received a service of beer. This time, she was served four bottles of beer and a mixed drink which she took back to the table. (N.T. 16)

10. The Officer did not determine whether the patron drank any further as he left a few minutes after that service. (N.T. 17)

11. One of the barmaids who was rendering service that evening is familiar with the patron who was using the PBT. She was aware the group was using the PBT. She knew the group was laughing and having a good time with the PBT. She saw no reason to make a big issue of the use of that PBT. (N.T. 50-51)

12. Licensee presented a PBT at the hearing. It was virtually identical to the one used that evening. The instructions for use of a PBT clearly indicate that an accurate reading may be compromised by any number of factors which are listed in the instruction manual (Commonwealth Exhibit No. J-1).

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 1, 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 female patron.

DISCUSSION:

I believe the Officer's conclusion that the patron was visibly intoxicated while served was, in some small measure, influenced by the blood alcohol reading the patron announced that evening (N.T. 41). That reading was determined at this hearing to be unreliable.

Additionally, based on my reasoning in *Pleasant Valley Recreation Center, Inc.*, Adjudication No. 08-1520, in which I concluded the proof required in cases such as this must be more than first level observations, I cannot accord the Officer's assessment significant weight.

ORDER:

NOW THEREFORE, it is ordered that Citation No. 08-1730, issued against Around the Corner, Inc., t/a Around the Corner, is DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 22ND day of April, 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.