

Mailing Date: August 12, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 08-2550
ENFORCEMENT	:	
	:	
vs.	:	
	:	
R L FAKE, LLC	:	License No. E-3012
T/A FAKEYS	:	
204 HELLAM STREET	:	
WRIGHTSVILLE, PA 17368-1238	:	

Counsel for Licensee: Renee Fake, *Pro Se*  
Member/Manager

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Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
3655 Vartan Way  
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**OPINION**

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), appeals the dismissal of Citation No. 08-2550 as set forth in the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), dated May 29, 2009.

The citation in the present matter alleged that on August 31, 2008, R L Fake, t/a Fakeys (“Licensee”) furnished alcoholic beverages to one (1) visibly intoxicated female patron, in violation of section 493(1) of the Liquor Code. [47 P.S. § 4-493(1)].

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/her 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, 484 A.2d 413 (Pa. Cmwlth. 1984).

On appeal, the Bureau submits the following issue for the Board’s review:

As in Pleasant Valley Recreation Center<sup>1</sup>, the specific issue presented in the current appeal is whether the ALJ committed an error of law in concluding that the Bureau failed to prove that the

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<sup>1</sup> In Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Pleasant Valley Recreation Center, Inc., Citation No. 08-1520, Judge Thau dismissed the Bureau’s citation for service to a visibly intoxicated person. Judge Thau held that the observations of a trained Bureau officer, though uncontradicted, were insufficient to establish that the Licensee’s untrained employees provided alcohol to a visibly intoxicated patron, when the Licensee’s employees had not conceded the point.

Licensee served a visibly intoxicated patron and whether the ALJ based his findings of fact upon substantial evidence. The broader inquiry, shared in Pleasant Valley Recreation Center, is whether the ALJ functionally altered both the Commonwealth's burden of proof as well as the elements of the underlying Liquor Code offense.

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the Notes of Testimony from the hearing of April 14, 2009, and the ALJ's Adjudication and Order, with the Bureau's contention in mind, and has concluded that the ALJ committed an error of law when he dismissed the citation. Accordingly, we reverse.

The only witness to testify regarding the incident in question was Officer Christopher M. Keisling, a nine (9)-year veteran of the Bureau. [N.T. 7]. The Bureau's uncontradicted evidence in the present matter established that on August 31, 2008, Officer Keisling entered Licensee's premises and observed a female patron seated at the bar with a bottle of Miller Lite beer. [N.T. 11, 14]. The officer's attention was drawn to this particular patron because she was screaming louder than the music coming from the jukebox in an attempt to sing along. [N.T. 11]. The officer observed that her speech was slurred and garbled and often she mumbled. [N.T. 11]. None of the other ten (10) patrons

in the bar were singing. [N.T. 13, 18]. When the music stopped, the patron would continue to speak in an extremely loud voice. [N.T. 14]. The patron was seated at the bar and the officer observed her swaying in her seat, leaning into the person next to her to stay in her seat, and holding her head in her hands. [N.T. 15]. After making all of these observations, the officer saw the bartender serve the patron a new bottle of Miller Lite. [N.T. 16]. The patron consumed the beer in fifteen (15) minutes. The screaming along with the music, the slurred and garbled speech, the loud talking, and the swaying on the seat continued. The patron was served a second twelve (12)-ounce bottle of Miller Lite. [N.T. 19]. All of the above described behaviors continued until the patron left the bar, approximately twenty-five (25) minutes later. [N.T. 19]. It was the officer's opinion that the patron was "extremely intoxicated." [N.T. 20].

The Bureau has the burden of proof in a citation proceeding and it must prove its case by a clear preponderance of the evidence. Omicron Enterprises, 449 A.2d 857 (Pa. Cmwlth. 1982). The preponderance of the evidence standard requires the bearer of the burden to show that it is "more likely than not" that the alleged event occurred. Agostino v. Township of Collier, 968 A.2d 258 (Pa. Cmwlth. 2009).

Section 493(1) of the Liquor Code provides in pertinent part that “[i]t shall be unlawful...[f]or any licensee...or any employe, servant or agent of such licensee...to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated....” [47 P.S. § 4-493(1)]. Therefore, in order to meet its burden, the Bureau must prove that it is more likely than not that, 1) Licensee or its employee, servant or agent furnished an alcoholic beverage to a patron, and 2) at the time of the service, the patron was visibly intoxicated.

In the instant case, there is no dispute that Licensee served the patron two (2) bottles of a malt or brewed beverage. The officer testified, and Licensee did not disagree, that the bartender served the patron two (2) twelve (12)-ounce bottles of Miller Lite while the officer was present on August 31, 2008.

The only remaining issue is whether the patron was visibly intoxicated at the time Licensee served her two (2) bottles of Miller Lite. In Laukemann v. Commonwealth, 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. Officer Keisling stated on the record that it was his opinion that the female patron was extremely intoxicated. [N.T. 20]. The record indicated that the patron was swaying in her seat, had trouble keeping her head up, was the only person in the bar screaming over the music on the jukebox in an attempt to sing along, and she continued to speak loudly after the music ended.

In dismissing the citation, the ALJ does not dispute that the behaviors observed by the officer are signs of intoxication. Rather, he contends that the number of signs is insufficient for him to "accord the officer's assessment significant weight." [Adjudication & Order, May 29, 2009]. The ALJ points out that there is no evidence of the patron's ability to walk and the remaining behaviors are insufficient to conclude that the patron was visibly intoxicated. The ALJ then cites to his recent decision in Pleasant Valley in support of his decision to dismiss the appeal.

In Pleasant Valley, the ALJ dismissed a citation brought by the Bureau when the Bureau's evidence consisted solely of the testimony of its officer. The ALJ held that while a Bureau officer can testify to what he or she observes, those observations are being made by an officer trained to look for signs of

visible intoxication. The ALJ essentially held that absent evidence that Licensee's employees also observed or should have observed the same behavior, the Bureau has failed in its burden of production, as set forth more fully in Pleasant Valley. The error in the ALJ's decision is that it focuses on what Licensee's employees saw or should have seen, and not on the observable behavior of the patron in question. Laukemann clearly states that an enforcement officer's observations of the behavior of a visibly intoxicated patron are sufficient to establish that the patron is, in fact, visibly intoxicated. To require collaborative evidence of the observations of Licensee's employee's observation is an error of law.

Accordingly, the ALJ committed an error of law by improperly expanding the burden of proof imposed on the Commonwealth. The decision of the ALJ is, therefore, vacated.

However, in that the evidence presented is less than the evidence presented in Pleasant Valley, this matter is being remanded to the ALJ to determine whether the evidence is legally sufficient to establish that the patron in question was visibly intoxicated, under the appropriate legal standing.

**ORDER**

The decision of the ALJ is vacated.

The appeal of the Bureau is affirmed.

The case is hereby remanded to the ALJ for further consideration consistent with this Opinion.

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Board Secretary