

Mailing Date: APR 28 2010

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1353
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W09-391279
v.	:	
	:	LID - 50597
KALAN CORPORATION	:	
T/A TIM'S UGLY MUG	:	
1281 E MAIN ST	:	
DOUGLASSVILLE PA 19518-9113	:	
	:	
BERKS COUNTY	:	
LICENSE NO. R-AP-SS-EHF-18712	:	

JUDGE SHENKLE  
BLCE COUNSEL: Roy Harkavy, Esq.  
LICENSEE: Timothy Dinoto

**ADJUDICATION**

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on June 12, 2009. The citation alleges that Licensee violated §493(1) of the Liquor Code, 47 P.S. §4-493(1), on May 16, 2009, by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated male patron.

A hearing was first held on Friday, December 11, 2009, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation. Licensee requested a further opportunity to present evidence, because a subpoenaed witness did not appear. A second hearing was held on March 5, 2010, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On May 16, 2009, two liquor enforcement officers entered Licensee's premises at about 10:00 p.m. A woman was tending bar for about fifteen patrons. The officers sat at the bottom right-hand corner of the U-shaped bar. They noticed a patron on the other side of the bar who was standing on his chair, screaming for no apparent reason (N.T. 6-7, 24-25).

2. This patron repeatedly kicked, punched and slapped the bar, and banged his bar stool on the floor. He had bloodshot eyes. He staggered when he walked. When he went to the

bathroom he could still be heard at the bar, screaming and crashing around. He punched the bathroom door when he left. This patron attempted to dance in front of the juke box. He stumbled and bumped into one of the officers seated at the bar a couple of times (N.T. 7, 24-25).

3. The bartender was in a position to see this behavior clearly. She joked about it. During the officers' visit, the bartender served at least eight "grape bombs" to this patron. A "grape bomb" is grape vodka and an energy drink dispensed from a soda gun. The patron described here also received a couple of draft beers (N.T. 7-10, 26).

4. The vodka used for the grape bombs was the Purple Wave brand, 30% alcohol by volume. The glass has a shot glass in its bottom center, into which the vodka is poured. The energy drink, Roaring Lion brand, is more than twice the volume of the alcohol. The energy drink is high in sugar and caffeine. The patron described here drank eight of these in an hour and fifteen minutes, chugging them and becoming more visibly intoxicated (N.T. 12-14, 26).

5. There was a baseball game on the establishment's television, and it is possible that the patron described here was excited about the game. The behavior of this patron could have also been a result of the caffeine, in combination with the alcohol. The patron's glassy and bloodshot eyes, however, would not have been caused by the caffeine (N.T. 15-16).

#### CONCLUSIONS OF LAW:

Sustained as charged.

#### DISCUSSION:

Licensee presented additional evidence, not discussed above, to the effect that people are sometimes loud and enthusiastic about sports, and that a number of the people who were in the establishment on the evening of May 16, 2009, were especially happy because of successful horse racing gambling results earlier in the day.

Licensee's president also presented credible evidence as to his good intentions in running the establishment lawfully and improving the atmosphere to better appeal to families.

I have considered this testimony, but it does not cause me to question my conclusions. I have also considered the opinions of my fellow administrative law judges in the cases cited by Licensee, 06-2599 and 08-1520. In the former case, the Honorable Daniel T. Flaherty, Jr., dismissed the citation because he gave greater weight to the evidence presented by the licensee in that case than he did to the evidence presented by the Bureau.

Obviously every case is different, and the fact that in one case a judge found the testimony presented by one side more believable than that presented by the other does not prove anything. This is the same process I have used in this case, and the two cases do not conflict simply because the result is different.

In the latter case, No. 08-1520, the Honorable Felix Thau dismissed the citation, but the Bureau appealed and the Pennsylvania Liquor Control Board reversed. On further appeal to the Court of Common Pleas the decision of the Board was affirmed, with the result that the case was remanded to Judge Thau to enter an appropriate penalty. The various opinions in that case teach a lesson which I think is also applicable to the present case.

The lesson is this: when all of the testimonial descriptions of behavior said to be that of a visibly intoxicated person are in fact accurate descriptions of behavior all reasonable people would recognize as symptoms of intoxication, there is no avoiding the conclusion that the person being described is visibly intoxicated. That there may have been other reasons for boisterousness does not matter. That the licensee's personnel did not actually observe the strange behavior themselves does not matter. That the alcohol served was only 60 proof does not matter. That there was no proof of the person's blood alcohol content does not matter. That the person in question cannot be positively identified does not matter. That the person may not even have been intoxicated, but may have only been acting intoxicated, does not matter. If there are people in the establishment whose behavior would cause any reasonable person to conclude they are intoxicated, those people are visibly intoxicated and may not be served alcohol.

PRIOR RECORD:

Licensee has been licensed since January 30, 2003, and has had no prior violations.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$1,000.00 to \$5,000.00 range, or both, for violations of the type found in this case.

Licensee voluntarily became certified under the provisions of 47 P.S. §4-471.1 on July 29, 2009. 47 P.S. §4-471(d) requires that I order Licensee to remain in compliance with the R.A.M.P. program for one year in these circumstances.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Kalan Corporation, t/a Tim's Ugly Mug, License No. R-AP-SS-EHF-18712, shall pay a fine of one thousand dollars (\$1,000.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

IT IS FURTHER ORDERED that Licensee shall continue to comply with all of the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management, for a period of one (1) year from the mailing date of this adjudication.

Failure to comply with this order will be grounds for modification of penalty in this case. Failure to comply may also constitute grounds for issuance of a new citation as authorized by Section 471(d) of the Liquor Code, 47 P.S. Section 4-471(d).

Dated this 14<sup>TH</sup> day of APRIL, 2010.



David L. Shenle, J.

jb

**NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.**

Detach Here and Return Stub with Payment

-----  
**The fine must be paid by cashier's check, certified check or money order. Personal and business checks are not acceptable unless bank certified. Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:**

PLCB-Office of Administrative Law Judge  
Brandywine Plaza  
2221 Paxton Church Road  
Harrisburg PA 17110-9661

Citation No. 09-1353  
Kalan Corporation