

Mailing Date: AUG 12 2011

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1381
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W06-387326
v.	:	
	:	LID - 57838
MIKELO, INC.	:	
T/A BULL RUN INN PUIRSEIL IRISH	:	
PUB	:	
607-609 MARKET ST.	:	
LEWISBURG, PA 17837	:	
	:	
UNION COUNTY	:	
LICENSE NO. R-AP-SS-19810	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL PIETRZAK
LICENSEE: BRIAN W. ULMER, ESQUIRE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on June 18, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against MIKELO, INC., License Number R-AP-SS-19810 (hereinafter "Licensee").

The citation charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] in that on January 9, 10 and February 19, 2009, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to two female patrons, seventeen and twenty years of age.

The investigation which gave rise to the citation began on January 12, 2009 and was completed on May 28, 2009; and notice of the violation was sent to Licensee by Certified Mail on May 29, 2009. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on January 19, 2011 and completed on May 5, 2011 in the PA Department of Agriculture, 2130 County Farms Road, Montoursville, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. A.E. was born on March 2, 1991, and on January 9, 2009, she was seventeen years old (N.T. 24).
2. On January 9, 2009, A.E. entered the licensed premises with a friend shortly after 11:00 p.m. (N.T. 25).
3. At the time that A.E. and her friend entered, there was no doorman at the door. A.E. and her friend went and sat at the bar (N.T. 25).
4. Upon sitting at the bar, A.E. ordered a Coors Light beer. The bartender asked her for proof of age and she showed the bartender the driver's license of a female individual who was 21 years old which she had found at a coffee shop down the street earlier in the week. This was a valid driver's license belonging to someone else (N.T. 26).
5. The bartender looked at the driver's license, looked at A.E., and gave the driver's license back to her. He did not ask A.E. to sign anything stating that she was 21 years old and he did not run the license through any type of scanning device (N.T. 27).
6. The bartender then served A.E. a Coors Light beer for which she paid either \$4.00 or \$4.50 (N.T. 27).
7. A.E. purchased and consumed two Coors Light beers on the licensed premises that evening. She also consumed two shots of liquor. One was called "Malibu Rum" and the other was called a "Scooby Snack." (N.T. 28-30).
8. A.E. departed the licensed premises at 2:00 a.m. on January 10, 2009 (N.T. 30).
9. A.E. ordered and paid for one of the shots herself. The other was ordered and paid for by the friend, who entered the licensed premises with her. She was not asked for identification prior to being served either of these shots (N.T. 29-30).
10. K.N. was born on February 18, 1989, and, on February 19, 2009 she was 20 years old (N.T. 40).
11. On February 19, 2009, K.N. entered the licensed premises between 2:00 a.m. and 2:30 a.m. with a friend (N.T. 49).
12. K.N. remained in the foyer area of the licensed premises, and while there she was furnished with a bottle of beer (N.T. 50-51).

13. K.N. left the licensed premises with the bottle of beer. She was observed on the sidewalk outside the licensed premises with the bottle of beer by a member of the Lewisburg Borough Police Department (N.T. 20 and 53).

14. When she was approached by a Lewisburg Borough Police officer, K.N. threw the beer bottle onto a lawn (N.T. 21 and 53).

CONCLUSION OF LAW:

The charge in the citation is **sustained**.

DISCUSSION:

The Bureau has met its burden with respect to both dates charged.

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. *In re Omicron Enterprises*, 449 A.2d 857 (Pa.Cmwlth 1982).

The phrase “preponderance of evidence” has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. *Black’s Law Dictionary, Fifth Edition*, West Publishing Company, Copyright 1979, Page 1064.

It is within my province, and is part of my responsibility to determine the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa.Cmwlth 1989). I may give testimony such consideration as it may deserve, and accept it or reject it in whole or in part. *McFarland Landscape Service v. Workmen’s Comp. Bd. Of Appeal*, 557 A.2d 816, 817-18 (Pa.Cmwlth 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] makes it unlawful for a licensee to sell, furnish or give alcoholic beverages or to permit alcoholic beverages to be sold, furnished or given to any minor.

Further, it has been established that the only valid defense to serving alcoholic beverages to a minor is found in Section 495 of the Liquor Code [47 P.S. §4-495]. This Section provides that such a defense may be established where the licensee accepts a photo identification card of the type enumerated in that Section in good faith and the minor completed a Declaration of Age card; or the licensee retained a photo copy of the identification; or the validity of the identification was established by transaction scan device *Liquor Control Board v. The Upstage Corporation*, 540 A.2d 334 (Pa. Cmwlth 1988).

January 9 and 10, 2009

The uncontested testimony of the minor, as corroborated by her companion on this visit, is that she was served beer and shots of liquor after presenting the valid driver's license of another person, which showed that person to be over 21 years old. Licensee was not able to establish a defense since the minor was not asked to fill out and sign a Declaration of Age card, no photo copy of the license was introduced, and no transaction scanning device was used. I, therefore, conclude that the Bureau has met its burden and no defense has been established. The charge in the citation as to these dates has, therefore, been sustained.

February 19, 2009

The Commonwealth Court has established that a liquor licensee permits alcoholic beverages to be furnished or given to a minor in violation of Liquor Code Section 493(1) (supra) if the licensee acquiesces by failing to prevent such from occurring. *Commonwealth of PA Liquor Control Board v. Abraham*, 541 A.2d 1161 (Pa. Cmwlth, 1988).

The testimony of the minor in question is that she was furnished with a bottle of beer while she was in the foyer area of the licensed premises. Further, she was observed leaving the licensed premises with the beer bottle by a police officer. When she was approached by the officer she threw the bottle onto a lawn. (See Findings 12, 13 and 14). I find this to be sufficient evidence to establish that the minor in question was furnished beer on the licensed premises on this date.

Since the Licensee failed to prevent the minor from being furnished the beer, the Licensee is deemed to have permitted the furnishing to occur. I therefore conclude that the charge in the citation as to this date is sustained.

PRIOR RECORD:

Licensee has been licensed since March 22, 2007, and has had no prior violations. Licensee is, therefore, entitled to be treated as a first time offender.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$1,000.00 or more than \$5,000.00 or both for violations of the type found in this case.

That Section further provides for mandatory compliance with Liquor Code Section 471.1 [47 P.S. §4-471.1], pertaining to Responsible Alcohol Management when, as in this matter, Licensee has been found to have violated Section 493(1) as a first offense as it relates to sales to minors or sales to a visibly intoxicated patron.

Under the circumstances of this case, the penalty imposed shall be a fine of \$1,250.00 and mandatory RAMP training.

ORDER

THEREFORE, it is hereby ordered that Licensee MIKELO, INC., pay a fine of \$1,250.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that Licensee shall comply with the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management in the following manner. Licensee is directed to initiate contact with The Bureau of Alcohol Education, Pennsylvania Liquor Control Board (Toll Free Telephone No.: 1-866-275-8237; Web Site: www.lcb.state.pa.us; Email Address: LBEducation@state.pa.us) within 30 days of the mailing date of this Adjudication. Licensee must receive Certification within 90 days of the mailing date of this Adjudication. Licensee must remain in compliance for a period of one year from the date such Certification is issued.

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. §4-471(d)].

Jurisdiction is retained.

Dated this 10TH day of August, 2011.



Daniel T. Flaherty, Jr., J.

an

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.

IF YOU WISH TO APPEAL THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER, THE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE MAILING DATE OF THE ORDER. PLEASE CONTACT CHIEF COUNSEL'S OFFICE AT 717-783-9454.

Detach here and submit 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.** Make 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. 09-1381
Mikelo, Inc.