

Mailing Date: MAR 30 2010

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1408
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-391294
v.	:	
	:	LID - 58598
DGM OF CEDAR CLIFF, INC.	:	
T/A GULLIFTYS	:	
CEDAR CLIFF MALL	:	
1104 CARLISLE RD.	:	
CAMP HILL, PA 17011-6203	:	
	:	
CUMBERLAND COUNTY	:	
LICENSE NO. R-AP-SS-19986	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL BALLARON
LICENSEE: STEPHEN M. GREECHER, JR., 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 DGM OF CEDAR CLIFF, INC., License Number R-AP-SS-19986 (hereinafter "Licensee").

The citation contains two counts.

The first count charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] in that on March 26, 2009, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated male patron.

The second count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 637.6(a)(2) of the Clean Indoor Air Act [35 P.S. §637.6(a)(2)] in that on March 26, 2009, Licensee, by its servants, agents or employes, permitted smoking in a public place where smoking is prohibited.

On July 20, 2009, counsel for the Bureau filed a Motion to Withdraw Count 2 of the Citation. The Motion was granted.

The investigation which gave rise to the citation began on March 23, 2009 and was completed on May 6, 2009; and notice of the violation was sent to Licensee by Certified Mail on June 3, 2009. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on December 17, 2009 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, 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:

COUNT 1

1. On March 26, 2009 at 11:08 p.m., an officer of the Bureau entered the licensed premises in an undercover capacity (N.T. 13).

2. The officer took a seat at the middle of the bar and observed a female bartender, later identified as Sara Watkins, rendering service to 15 patrons (N.T. 14).

3. At 11:50 p.m., the officer's attention was drawn to a male patron who was departing from the pool room area and who was walking toward the bar top. This patron staggered, and had to stutter-step to regain his balance. He had trouble walking in a straight line (N.T. 15).

4. The aforementioned patron, heard to be called Mr. Zerrance, arrived at the bar top approximately six feet to the left of the officer (N.T. 15-16).

5. Upon reaching the bar counter, Zerrance rested his left arm on the bar top in order to maintain his balance. While he was standing there, he was swaying from side to side. His eyes appeared to be heavy, and he had trouble keeping his eyelids open (N.T. 16).

6. The bartender, Ms. Watkins, approached Zerrance, and asked him what he wanted to drink. Zerrance's speech was so slurred and unintelligible that the officer could not understand what he was saying. Ms. Watkins waited a few moments before asking, "Do you just want what you had before?" Mr. Zerrance nodded yes.

7. Ms. Watkins acquired a clear plastic cup and filled it with ice. She then acquired a 750 ml bottle of Stolli Vodka from the speed rack, filled the cup with vodka and topped it with an unknown clear mixer (N.T. 18 and Exhibit C-3).

8. Mr. Zerrance looked down at the cup containing the vodka, ice and mixer. He opened his hand as if to grab the cup, but reached too high. He quickly moved his arm and pushed through the cup spilling the contents on the bar top (N.T. 19).

9. Ms. Watkins cleaned the bar top. While she was cleaning she said to Mr. Zerrance, "You better be getting a ride home." Mr. Zerrance replied in slurred speech, "No." A patron in the bar offered Zerrance a ride home. Zerrance indicated he did not need a ride home, and the patron disagreed. Mr. Zerrance replied, "No, I'm not an asshole." (N.T. 24).

10. Ms. Watkins asked Mr. Zerrance if he wanted another drink, to which he nodded yes. She acquired another clear, plastic cup, filled it with ice, and poured Stoli vodka into it from a 750 ml bottle she obtained from the speed rack. She filled the glass two-thirds full, and topped it off with an unknown clear mixer (N.T. 25-26).

11. Watkins asked Zerrance if he wanted to pay his tab. She then acquired the tab and brought it back over to him. Zerrance asked her if it was really "that much." Ms. Watkins replied, "Yes, I wouldn't lie to you." Zerrance's speech was still very slurred (N.T. 26).

12. Zerrance had trouble acquiring money from his pocket. He pulled an unknown number of bills from his pocket and was fumbling through the change and spilling it upon the bar top. He had trouble counting out how much he needed to provide Ms. Watkins and finally handed her an unknown amount of U.S. currency. She placed it into the cash register and gave him his change (N.T. 26-27).

13. After the exchange of money, Zerrance began to consume from the second alcoholic beverage.

14. The officer observed Mr. Zerrance finish the remainder of his drink (N.T. 28).

15. At 12:08 a.m., the officer departed the premises.

16. The officer observed Zerrance and Watkins exit the licensed premises from a door in the bar room section of the licensed premises. The officer had exited out of a different exit (N.T. 28-29).

17. The officer went to his State vehicle and began to look up the telephone number for the local police department in order to notify them of a potential DUI (N.T. 29). While he was looking at the list, the officer observed Mr. Zerrance come out to his motor vehicle and enter it. At that time the officer called the 911 emergency center and relayed the information that he observed so that contact could be made with the local police department (N.T. 29).

18. Subsequently, the officer followed Mr. Zerrance at a safe distance merely to inform the local police department of his location. He observed the vehicle Zerrance was driving weaving in and out of his lane, crossing the center line. At one point Zerrance's vehicle went two feet into the other lane. He went for approximately one-half mile to three-quarters of a mile before he arrived at his residence.

CONCLUSION OF LAW:

Count 1 of the citation is **sustained**.

DISCUSSION:

The preponderance of the credible evidence indicates that the Licensee served alcoholic beverages to a patron who was exhibiting clear signs of intoxication. Consequently, the charge in the citation is sustained.

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).

I find the testimony of the witness for the Bureau of Enforcement to be more credible than that of the witnesses for Licensee. I, therefore, give it greater weight than the testimony given by the witnesses for Licensee. The officer's testimony establishes that Mr. Zerrance, the patron in question, staggered when he walked, exhibited slurred, unintelligible speech, and heavy eyelids. He spilled a drink which had just been served to him, and was subsequently served a second alcoholic beverage (See Findings 3, 5, 6, 7, 8 and 10).

Based on the foregoing, I conclude that the Bureau has met its burden and the charge in the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since August 23, 2007, and has had two prior violation(s) since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

Citation No. 09-0233X. Fine \$150.00.

1. Issued worthless checks in payment for malt or brewed beverages. November 24, 2008.

Citation No. 09-1170X. Fine \$250.00

1. Issued worthless checks in payment for malt or brewed beverages. March 27, 2009.

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 DGM OF CEDAR CLIFF, 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 pending final resolution of the penalty in this matter.

Dated this 11TH day of March, 2010.



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.

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. 09-1408
DGM of Cedar Cliff, Inc.