

Mailing Date: May 26, 2010

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1414
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-378579
	:	
THE FLYING PIG SALOON INC.	:	
123-125 E. KING ST.	:	LID - 43665
MALVERN PA 19355-2515	:	
	:	
	:	
CHESTER COUNTY	:	
LICENSE NO. R-AP-SS-16399	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

**ERIK S. SHMUKLER, ESQ.**

FOR THE LICENSEE:

**EDWARD B. McHUGH, ESQ.**

**BEFORE: JUDGE WRIGHT**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on June 16, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against The Flying Pig Saloon, Inc., License Number R-AP-SS-16399 (hereinafter "Licensee").

An Administrative hearing was held on Wednesday, October 21, 2009, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

The citation contains three 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 August 3, 2008 and January 21, 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 (1) visibly intoxicated female patron and two (2) visibly intoxicated male patrons.

The second count charges Licensee with violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), in that on August 2, 30 and December 20, 2008, Licensee, by its servants, agents or employes, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The third count charges Licensee with violation of Section 467 of the Liquor Code, 47 P.S. §4-467, in that on January 17, 2009, Licensee, by its servants, agents or employes, failed to constantly and conspicuously expose Restaurant Liquor License under a transparent substance on the licensed premises.

COUNT NOS. 1, 2 AND 3

FINDINGS OF FACT:

1. The Bureau of Enforcement conducted an investigation which was assigned to the officer on July 25, 2008. The investigation concluded on May 5, 2009. A notice of violation letter was sent to the licensed premises on May 21, 2009. It was signed as received at the licensed premises. The Bureau issued an Amended Notice of Violation letter to change the date for the charge of serving a visibly intoxicated person from August 3 to August 2, 2008. Also, an alleged violation involving possession of a controlled substance on the licensed premises was deleted. The Bureau submitted a track and confirm notice which indicates that the Post Office attempted to deliver the item at 2:14 p.m. on June 5, 2009; a notice was left, but no further information was available for that item. A citation was issued by the Bureau dated June 16, 2009. That item was signed as received at the licensed premises (N.T. 28-34 and Exhibits B-1 and B-2).

2. An officer from the Bureau of Enforcement visited the licensed premises in Malvern, Pa., Chester County. The investigation was assigned to the officer on July 25, 2008. He made the first visit to the premises on Saturday, August 2, 2008 at approximately 11:55 p.m. (N.T. 5-6).

3. On August 2, 2008 at 11:55 p.m., the officer parked his state vehicle near the intersection of Channel and East King Street. The officer walked east on East King Street towards the licensed premises. When the officer was approximately thirty feet from the main entrance, he was able to hear music emanating from the licensed premises over the noise of the street traffic. He described the music as alternative rock (N.T. 7).

4. Upon entering the licensed premises, the officer noted a bar in front of him and saw a restaurant style seating area to his left. He heard music playing on the premises, which was the same music that he had heard outside (N.T. 7-8).

5. The officer observed one male bartender and two female bartenders, along approximately thirty patrons on the premises. The officer proceeded to the bar area and sat down (N.T. 8-9).

6. The officer noted that the music was coming from a jukebox known as a Touch Tune Music Player. The jukebox was attached to a wall near the main entrance. The music was amplified through two speakers. He saw one speaker above the door and another in a corner. He believed that there were other speakers, but could not see them from the area where he was seated (N.T. 9-10).

7. The officer noted a white female patron, approximately five feet, four inches, weighing about 100 pounds and wearing a dark tank top and blue jeans. She was carrying a green and tan bag. The officer observed a male patron seated next to her, who was wearing a McDonald's hat, dark shirt and dark pants with a Cintas "emblem" on the pants. The patrons were seated right beside the officer and to his left. There was approximately one patron between them (N.T. 10).

8. The officer observed these two patrons consuming alcoholic beverages and overheard them as they were speaking. The officer was not able to hear every word but did note that their voices were slurred. He also noted that when speaking they sped up and slowed down erratically. They started and stopped between sentences. The male started talking to the undercover officer with regard to the music that was being played on the jukebox. His speech was slurred and his eyes were bloodshot, but the officer was able to understand what the individual was saying to him (N.T. 11).

9. The patron stood up and walked to another area of the premises and began conversing with other patrons. The female patron, previously identified by the officer, was still seated at the bar and began conversing with the other patrons. The conversation with the female patron became heated. As she continued speaking, her sentences were slurred. As the female talked to others, she came off of her seat. The officer noted that she swayed a bit as she talked, especially as she complained about the male patron talking to other women (N.T. 12-13).

10. The bar personnel were serving patrons throughout the bar (N.T. 14).

11. The female patron began fumbling through her bag, attempting to open it, and fumbling through it once she got inside the bag. She then stood up and walked to the main entrance and he noted that she staggered as she walked (N.T. 14).

12. When the female patron got to the door and opened it, she crunched herself in the doorway, i.e. she had one hand against the frame and her buttocks against the other side of the doorway. She was hunched over. She asked the male patron in a loud voice if he was ready to go (N.T. 14).

13. The male patron asked the female patron to rejoin him and they both walked back over to the bar. Both of them were staggering as they approached the bar. The two of them talked about what they were going to drink. The bartender approached and asked if they would like a drink. Two shot glasses were placed in front of them. The bartender pulled out a bottle of Jose Cuervo and poured liquor from it into each shot glass. The bartender stated to the female that the only way she was going to serve her the drink was if she was not going to drive. The female patron indicated that she wouldn't be driving. The bartender reiterated that the patron had to promise that she was not going to drive. The female patron once again stated that she wouldn't be driving. Both patrons consumed the shots of alcohol (N.T. 16 and 18-19).

14. At approximately 1:20 a.m., during the early morning hours of Sunday, August 3, 2008, the officer left the bar, walked outside and dialed 911. The officer contacted the dispatcher, identifying himself and informing the dispatcher that he believed that the patrons were about to leave the premises, driving. After the officer placed the phone call, the two left the bar and walked towards the intersection of East King Street and Bridge Street to a rear parking lot where they conversed. The officer followed the pair to the parking lot and the male patron asked the officer in a loud slurred voice, "What the f--k do you want?" The officer pretended that he was trying to get a signal on his cell phone and then walked away (N.T. 19-20).

15. The officer heard car doors close, at which time he saw a yellow Cobalt leave the rear parking lot and move towards the intersection of East King Street and Bridge. The officer relayed the information to the 911 dispatcher and he was informed that there was a marked police car in the area and that would stop the vehicle. The officer was contacted by the Malvern Police Department at which point he left the area (N.T. 21-22).

16. On Saturday, August 30, 2008, the officer arrived at the premises at approximately 12:10 a.m. He entered the premises where he saw two male bartenders and one female bartender rendering service of alcoholic beverages to patrons on the premises. The premises was open and operating (N.T. 22-23).

17. For a short time, patrons played the Touch Tone Music Player jukebox. The officer noted that the music inside was rather loud. He noted that the jukebox was playing amplified music. He was able to count seven speakers that were located on the walls towards the ceiling throughout the licensed premises. At approximately 1:00 a.m., the officer left the premises and was still able to hear music over the noise of the street traffic. He paced off approximately twenty-five feet west on King Street until he could no longer hear music from the licensed premises (N.T. 23-24).

18. On Thursday, September 4, 2008 at 10:05 p.m., a Bureau officer visited the premises as a part of the Age Compliance Program. The Underage Buyer, who was sent in by the State Police, was refused service of alcoholic beverages (N.T. 24-25).

19. On Saturday, November 22, 2008 at 12:40 a.m., the officer made another visit to the premises but found no violations. On Friday, December 20, 2008 at 12:40 a.m., the officer parked his vehicle approximately sixty feet from the licensed premises. As he approached the main entrance, he could hear the volume of music increasing as he neared the premises. When he entered the premises, there was one male bartender and two female bartenders rendering services of alcoholic beverages to approximately forty patrons. The premises was open and operating (N.T. 26-27).

20. The officer noted that the source of the music, which he had heard outside at a distance of sixty feet from the premises was coming from the Touch Tone Music Player jukebox and the music was amplified through several speakers throughout the premises (N.T. 27).

21. The officer left the premises at 1:55 a.m. He was still able to hear the music coming from inside the premises over the noise of the street traffic. The officer then walked sixty feet west on East King Street until he could no longer hear the music over the street traffic (N.T. 27).

22. On Saturday, January 17, 2009 at approximately 12:10 a.m., the officer entered the licensed premises, along with a detail of officers in order to conduct a routine inspection and to check the identification of youthful appearing patrons. The officer remained undercover during this visit. The premises was open and operating. No minors were found on the premises (N.T. 27-28).

23. Other than a few apartments, the area is primarily commercial (N.T. 36).

24. The parties stipulated that if Officer Bernesky were called to testify, he would testify that during the course of the routine inspection, which he conducted on January 17, 2009, he located the liquor license on the premises and that it was only partially obscured, but not exposed under a transparent substance (N.T. 65).

25. Sergeant Lloyd Douglas is employed by the Malvern Police Department and has been so employed for approximately twenty-four years. He has been a Sergeant at the Malvern Police Department for approximately fourteen to fifteen years. He now works in a supervisory position. He was on patrol during the early morning hours of August 3, 2008, patrolling the area around east and west on King Street. He stated that the licensed establishment is known as "The Flying Pig Saloon" (N.T. 67-68).

26. The officer stopped a motor vehicle that was operated by the female who was identified by the Bureau officer at the licensed premises and who he believed to be intoxicated. When the woman was stopped, the officer could smell a strong odor of alcoholic beverages emanating from her. Her speech was slurred and her eyes were bloodshot. She was operating the moving vehicle. He asked her to get out of the vehicle and conducted some field sobriety tests. She failed each one of them. She was arrested for driving under the influence (N.T. 70).

27. The passenger in the motor vehicle smelled of alcoholic beverages. His speech was slurred and he was swaying. This was the same individual who was identified at the licensed premises by the Bureau officer as being intoxicated (N.T. 70).

28. Officer John McNamee is employed as a police officer in Chester County. He has been so employed since May of 2008. Officer McNamee was on patrol on the evening of Saturday, January 21, 2009. He was working from 7:00 p.m. to 7:00 a.m. At approximately 11:00 p.m. on that evening, he was in the vicinity of the licensed premises. While traveling east on King Street, he observed a black Ford Focus coming in his direction in the westbound lane with no headlights. The officer turned his patrol car around at East King and Bridge and saw the bartender from the licensed premises waving him down. The bartender told him that the person who was driving the black vehicle was intoxicated and was traveling west on King Street (N.T. 73-74).

29. The officer stopped the black Ford Focus, who had failed to stop at two posted Stop signs and was traveling west in the eastbound lane. The driver identified himself. The officer noted that the driver's speech was slurred and his eyes were bloodshot. The officer asked him to exit the vehicle, whereupon the officer conducted a field sobriety test. The driver failed all the field sobriety tests. He was subsequently arrested (N.T. 75-76).

30. Two to three hours later, the officer telephoned the bartender to discuss the arrest. The officer was informed by the bartender that the patron had been on the premises and had been served a shot of whiskey and one beer (N.T. 76-77).

31. Stephen Iacobucci is one of the owners of the licensed premises. He has owned the premises for approximately ten years (N.T. 81).

32. Mr. Iacobucci indicated that he and his partner are not absentee owners but live in the neighborhood and operate the bar. The bar is their livelihood and sole source of income (N.T. 82).

33. Mr. Iacobucci indicates that the premises is a bona fide restaurant with a fully operational kitchen, tables and chairs (N.T. 85, 131 and Exhibits L-1 through L-4).

34. The Licensee was R.A.M.P. certified on March 5, 2009. The Licensee had previously been TIPS certified (N.T. 104-109 and Exhibit L-14).

35. The Licensee received a notification of compliance dated September 5, 2008. They were recognized as refusing to serve a minor pursuant to the Age Compliance initiative of the State Police (N.T. 112 and Exhibit L-15).

CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

Count No. 1 - On August 3, 2008, Licensee, by its 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 and one (1) visibly intoxicated male patron, in violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1).

Count No. 2 - On August 2, 30 and December 20, 2008, Licensee, by its servants, agents or employes, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside, in violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a).

Count No. 3 - On January 17, 2009, Licensee, by its servants, agents or employes, failed to constantly and conspicuously expose Restaurant Liquor License under a transparent substance on the licensed premises, in violation of Section 467 of the Liquor Code, 47 P.S. §4-467.

PRIOR RECORD:

Licensee has been licensed since March 9, 1999, and has no record of prior violations.

DISCUSSION:

Clearly there was a problem on the evening of August 3, 2008, when two patrons were visibly intoxicated, but were served alcoholic beverages by the bartender, after the female promised the bartender that she would not drive. When someone is intoxicated, their judgment is impaired and the bartender should not have relied on any such promise. If a patron is intoxicated, then the patron should not be served.

It is fortunate that the officer was at the premises on August 3, 2008, when the two patrons left the premises intoxicated and drove away. Someone, including the intoxicated patrons, could have been seriously injured and the Licensee could have been found responsible for the resulting injuries.

On the other hand, relative to the January 21, 2009 date, the bartender flagged down the police officer to stop a patron's car who left the premises intoxicated. The bartender admitted to serving the individual, however, we have no information as to whether the bartender served that individual while that individual was intoxicated. It is not the drink that gets you drunk that is unlawful. Rather, it is the drink that is served while the patron is intoxicated. If a bartender serves the individual the drink that gets him drunk, and that person was of legal drinking age, there is no violation. However, giving alcoholic beverages to a visibly intoxicated person is clearly a violation.

The police asked the bartender for his assistance and it certainly was the appropriate thing to have done to safeguard the health and welfare of those with whom that individual may have come in contact. Fortunately, the police did see the individual driving without his headlights and was further alerted to the danger by the bartender who flagged him down. However, the bartender needs to be acutely aware of the signs of intoxication and refuse service to someone who is intoxicated whether or not they plan to drive, walk or run away from the premises.

Licensee indicates that they are now R.A.M.P. certified and are on notice that this is a very serious violation for which enhanced penalties are prescribed.

With regard to the noise violation, Licensee needs to take whatever steps are necessary to contain the music within the four walls of the premises.

Finally, Licensee is reminded that all liquor licenses should be posted in a conspicuous place and under a transparency.

After careful review of the facts, monetary penalties shall be imposed. In addition, the Licensee will be required to maintain R.A.M.P. Certification for a period of one year.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$50.00 or more than \$1,000.00, or both, for violations of the type found in Count Nos. 2 and 3 of this case.

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$1,000.00 or more than \$5,000.00, or both, for violations of the type found in Count No. 1 of this case.

The Flying Pig Saloon, Inc.  
Citation No. 09-1414

That Section further provides for mandatory compliance with Liquor Code Section 471.1, 47 P.S. Section 4-471, 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.

Therefore, penalties shall be assessed as follows:

Count No. 1 - \$2,000.00.  
Count No. 2 - \$350.00.  
Count No. 3 - \$150.00.

Accordingly, we issue the following

ORDER:

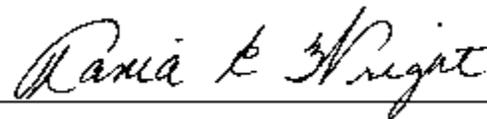
THEREFORE, it is hereby Ordered that Licensee, The Flying Pig Saloon, Inc., License Number R-AP-SS-16399, pay a fine of Two Thousand Five Hundred Dollars (\$2,500.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that Licensee shall remain in compliance with the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management for a period of one year from the mailing date of this Order.

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).

**In order to insure compliance with this Order, jurisdiction of this matter is retained.**

Dated this 6<sup>TH</sup> day of MAY, 2010.



Tania E. Wright, J.

**NOTE:** 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.

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The Flying Pig Saloon, Inc.  
Citation No. 09-1414

Detach Here and Return Stub with Payment

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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, along with any required documentation, to:

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

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