

Mailing Date: JAN 22 2010

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1649
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W04-389089
v.	:	
	:	LID - 18091
ESTATE OF JANET ASTORRI	:	
JAMES C ZAHORSKY	:	
ADMINISTRATOR T/A	:	
ASTORRI'S TAVERN	:	
2831 STATE ROUTE 66	:	
EXPORT PA 15632	:	
	:	
WESTMORELAND COUNTY	:	
LICENSE NO. R-AP-SS-EHF-16624	:	

BEFORE: JUDGE FRISK

APPEARANCES:

BLCE COUNSEL: Nadia Vargo, Esquire

LICENSEE COUNSEL: Marc Reisman, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 15, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Estate of Janet Astorri, James C. Zahorsky, Administrator, License Number R-AP-SS-EHF-16624 (hereinafter Licensee).

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

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An administrative hearing was conducted on December 8, 2009, at Two Parkway Center, 875 Greentree Road, Pittsburgh, Pennsylvania. The Bureau was represented by Nadia Vargo, Esquire. Licensee was represented by Marc Reisman, Esquire.

The Bureau began its investigation of this matter on February 1, 2009, and completed its investigation on June 20, 2009. Thereafter, Licensee was notified of the nature of the violation(s) disclosed by the investigation by letter sent by certified mail on June 26, 2009. Counsel for Licensee stipulates that the notice provisions of Section 471 of the Liquor Code have been satisfied.

After hearing the testimony presented, and upon review of the evidence submitted, the following Findings of Fact and Conclusions of Law are entered:

FINDINGS OF FACT:

1. On February 1, 2009 at 6:05 p.m., two Liquor Enforcement officers entered Licensee's premises in undercover capacities and observed a male bartender rendering service of alcoholic beverages to patrons. (N.T. 13, 48, 50, 69)

2. During the course of this visit, the Enforcement officers focused their attention on a female patron at the bar who was loud with slurred speech and eyes "somewhat closing." This female patron was identified at the hearing as Sherrie R. (N.T. 13, 22, 48, 50, 78)

3. At one point, Sherrie R. was heard to say that the place needed some music at which time her husband who was seated next to her handed her some money. (N.T. 13, 48, 50, 83)

4. Sherrie R. then walked with a staggered gait towards the jukebox which is located approximately four to six feet from where she was seated. While standing at the jukebox, Sherrie R. was observed swaying as she stood and occasionally leaned on the jukebox for support. After selecting her music, she swayed as she returned to her seat. Although Sherrie R. testified that she was dancing when returning from the jukebox, the Enforcement officers testified that she did so with a staggered gait. (N.T. 13, 48, 50, 89-90, 103)

5. After returning from the jukebox the bartender served Sherrie R. and her husband a shot of Jagermeister. (N.T. 13-14, 48, 50, 91)

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6. A few minutes later, Sherrie R. ordered and was served by the bartender a bottle of Miller Lite beer. (N.T. 14, 48, 50, 92)
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8. Sherrie R. testified that prior to arriving at Licensee's premises, she consumed three or four bottles of Miller Lite beer. Sherrie R. further testified that while at Licensee's premises, she consumed a total of two shots of Jagermeister and two bottles of Miller Lite beer. (N.T. 118)

9. Sherrie R. and her husband departed Licensee's premises at approximately 6:35 p.m. with various patrons remaining. (N.T. 28, 48, 50)

CONCLUSION OF LAW:

1. On February 1, 2009, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated female patron, in violation of Section 493(1) of the Liquor Code.

DISCUSSION:

This court notes at the onset it is well established that the Bureau must prove its case by a fair preponderance of the evidence. *Pennsylvania Liquor Control Board v. Leggens*, 542 A.2d 653 (Pa. Cmwlth. 1988); *Omicron Enterprises*, 449 A.2d 857 (Pa. Cmwlth. 1982).

It has been further established that it is for this court to decide the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robison*, 561 A.2d 82 (Pa. Cmwlth. 1989). Further, this court may accept or reject, in whole or in part, the testimony of any witness. *Kubler v. Yeager*, 150 A.2d 383 (Pa. Super 1959). It is with these principles in mind that further analysis of this case is conducted.

At the administrative hearing, the two Liquor Enforcement officers testified that they each observed the actions of Sherrie R. during the early evening of February 1, 2009, at Licensee's establishment. The Enforcement officers described her as having slurred speech, heavy eyes, staggering as she walked to the jukebox and swaying while she stood. Following these observations, Sherrie R. ordered and was served a shot of Jagermeister and a few minutes later, a bottle of Miller Lite beer served by Licensee's bartender on each occasion. Upon observing Sherrie R. on the day of the hearing, each of the Enforcement officers confirmed their belief that her speech, gait and actions were normal and were distinguishable from those actions which she displayed during her visit to Licensee's establishment on February 1, 2009.

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Sherrie R. testified that prior to her arrival at the premises, she consumed three or four bottles of Miller Lite beer and that while at Licensee's establishment, she consumed a total of two shots of Jagermeister and two bottles of Miller Lite beer.

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Upon thorough review of the testimony and evidence presented, this court concludes that the corroborated testimony of the two Liquor Enforcement officers relative to their observation of Sherrie R. regarding her slurred speech, heavy eyes, staggered gait and swaying while standing is characteristic of visible intoxication. Moreover, the testimony of Sherrie R. regarding her consumption of three or four bottles of Miller Lite beer prior to arriving at the premises as well as her consumption of a total of two shots of Jagermeister and two bottles of Miller Lite beer while at Licensee's establishment certainly adds credibility to the Bureau's charge. Although this court will acknowledge that Sherrie R. appeared to be a person who is somewhat spirited and energetic, this court, nevertheless, concludes that the observations testified to by the Enforcement officers are sufficient to establish the charge of visible intoxication. *Laukemann v. Pa. Liquor Control Board*, 475 A.2d 955 (Pa. Cmwlth. 1984); *Ashman v. Pa. Liquor Control Board*, 542 A.2d 218 (Pa. Cmwlth. 1988).

Accordingly, this court concludes that the Bureau has established the violation as charged by a clear preponderance of the evidence. *Pennsylvania Liquor Control Board v. Leggens*, 542 A.2d 653 (Pa. Cmwlth. 1988); *Omicron Enterprises*, 449 A.2d 857 (Pa. Cmwlth. 1982).

PRIOR RECORD:

Licensee has been licensed since May 1, 1978, and has had two prior violation(s) since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, to wit:

Citation No. 91-1549. License held by Janet Astorri.

Three days suspension.

1. Not a bona fide restaurant in that seating was insufficient.
2. Failed to maintain coil cleaning records.

Citation No. 09-1261C. Fine \$1,250.00 and R.A.M.P. training.

1. Sales to a minor.
May 1, 2009.

PENALTY:

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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.

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Moreover, Section 471(d) of the Liquor Code [47 P.S. §4-471(d)] 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 case, 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.

Official notice is taken that Licensee was R.A.M.P. certified on August 14, 2009.

For the foregoing reasons, a penalty shall be imposed in the amount of \$1,250.00. and Licensee must remain in compliance with the requirements of Section 471.1 of the Liquor Code pertaining to responsible alcohol management for a period of one year from the mailing date of this Order.

ORDER:

THEREFORE, it is hereby ordered that Estate of Janet Astorri, James C. Zahorsky, Administrator, t/a Astorri's Tavern, License Number R-AP-SS-EHF-16624, 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 Section 471.1 of the Liquor Code [47 P.S. §4-471.1], pertaining to Responsible Alcohol Management and must remain in compliance 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) or (e) of the Liquor Code [47 P.S. §4-471(d) or §4-471(e)].

Jurisdiction is retained to ensure compliance with this Order.

Dated this 8TH day of January, 2010.

ESTATE OF JANET ASTORRI

Roderick Frisk

Roderick Frisk, J. bg

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NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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.

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

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Estate of Janet Astorri

James C. Zahorsky, Administrator