

Mailing Date: July 7, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 09-1649
ENFORCEMENT	:	
	:	
v.	:	
	:	
ESTATE OF JANET ASTORRI,	:	License No. R-16624
JAMES C. ZAHORSKY,	:	
ADMINISTRATOR	:	LID No. 18091
T/A ASTORRI'S TAVERN	:	
2831 STATE ROUTE 66	:	
EXPORT, PA 15632	:	

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OPINION

The Estate of Janet Astorri, James C. Zahorsky, Administrator, t/a Astorri's Tavern ("Licensee") appeals from the Adjudication and Order of

Administrative Law Judge Roderick Frisk (“ALJ”), wherein the ALJ sustained Citation No. 09-1649, imposed an aggregate fine in the amount of one thousand two hundred fifty dollars (\$1,250.00), and ordered that Licensee remain in compliance with the Responsible Alcoholic Management Program (“RAMP”) requirements in section 471.1 of the Liquor Code [47 P.S. § 4-471.1].

The citation in the present matter alleged that on February 1, 2009, Licensee furnished alcoholic beverages to one (1) visibly intoxicated female patron, in violation of section 493(1) of the Liquor Code. [47 P.S. § 4-493(1)].

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Pennsylvania Liquor Control Board (“Board”) shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/her decision was not based upon substantial evidence. The Commonwealth Court has defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984).

On appeal, Licensee submits the following issue for the Board’s review:

[The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”)] did not meet its burden of proving its case by a clear preponderance of the evidence, In re Omicron Enterprises, 449 A.2d 857 (Pa. Cmwlth. 1982), and that the ALJ’s decision was not based upon substantial evidence, as required by 47 [Pa. C.S.] § 4-471. Accordingly, Licensee respectfully requests that the Board reverse the decision of the ALJ.

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the notes of testimony from the hearing of December 8, 2009, and the ALJ’s Adjudication and Order, with the Licensee’s contention in mind, and has concluded that the ALJ did not commit an error of law or abuse his discretion, and based his decision upon substantial evidence when he affirmed the citation. Accordingly, we affirm.

At the hearing, two (2) witnesses testified on behalf of the Bureau, Officers Patrick O’Neill and James Brown. Two (2) witnesses also testified on behalf of Licensee, James C. Zahorsky, Administrator of Licensee, and Sherry Ridenour, the alleged visibly intoxicated patron.

Officer O’Neill is a six (6)-year veteran of the Bureau and was the lead officer on the investigation that resulted in the subject citation. [N.T. 8]. Officer Brown is a twelve (12)-year veteran of the Bureau. [N.T. 46]. On February 1, 2009, “Superbowl Sunday”, Officers O’Neill and Brown were

present at the licensed premises and witnessed a female patron, Sherry Ridenour, seated at the bar. [N.T. 12-13, 22]. She was animated in her movements, speaking loud, slurring her speech, and her eyes were droopy and somewhat closed. [N.T. 13, 48]. The officers then observed her take money from the male individual she was with and walk to the jukebox. [N.T. 13]. As she was walking, she staggered and swayed, and she had to lean on the jukebox to support herself. [N.T. 13]. She inserted the money into the jukebox with some difficulty before staggering and swaying back to her seat, dancing before the music started. [N.T. 13].

When she sat back down, the officers observed Ms. Ridenour order and be served a shot of Jägermeister. [N.T. 13]. Approximately five (5) minutes later, the officers observed her order and be served a bottle of Miller Lite beer. [N.T. 13]. Prior to being served these drinks, the officers observed that Ms. Ridenour was visibly intoxicated. [N.T. 46]. Shortly thereafter, as she prepared to leave, Ms. Ridenour was having difficulty standing and keeping her balance. [N.T. 13-14, 42]. She then leaned into the male individual to support her, putting her arms around him and stating "I'm fried." [N.T. 13-14, 48-49]. As she left the premises, the officers heard an exchange between Ms. Ridenour and the male individual during which she expressed confusion as to it being

Superbowl Sunday, and the male expressed that it was the very reason they were at the premises. [N.T. 14, 48-49].

Once Ms. Ridenour and the male had left the premises, Officers O'Neill and Brown observed patrons commenting on Ms. Ridenour's state of intoxication, stating: "Wow, she's really fucked up;" "She'll never make the game;" and "Even if she did make the game, she'll never remember it." [N.T. 15-16, 48-49]. The officers then heard the bartender comment that Ms. Ridenour was very intoxicated or extremely drunk. [N.T. 16, 48-49].

When Officers O'Neill and Brown observed Ms. Ridenour on the day of the hearing, they compared and contrasted her behavior, speech and mannerisms to those on February 1, 2009, and found that, presently, her speech was not slurred or loud and she was not swaying or staggering when she walked. [N.T. 23, 47-48]. They stated that her behavior and physical state at the hearing were very different than on February 1, 2009 when she was showing signs of visible intoxication. [N.T. 23, 47-48].

Mr. Zahorsky testified as Administrator of the Estate of Licensee. [N.T. 60]. Although he was familiar with the licensed premises, he was not present at the licensed premises during the incident, and did not observe Ms. Ridenour during the incident. [N.T. 61].

Ms. Ridenour testified as the alleged visibly intoxicated patron. Ms. Ridenour attempted to explain her behavior as a reflection of her boisterous personality, love of music, awkward dancing, showing affection and joking with her husband. [N.T. 79-82, 92, 96-98]. Ms. Ridenour admitted to having three (3) to four (4) twelve (12)-ounce Miller Lite beers over the course of a “couple hours” prior to arriving at the licensed premises. [N.T. 114-115]. Additionally, Ms. Ridenour admitted to having two (2) Miller Lite beers and two (2) shots of Jägermeister at the licensed premises. [N.T. 115]. Ms. Ridenour stated that at least one (1) shot of Jägermeister and one (1) Miller Lite beer were ordered after she walked back from the jukebox. [N.T. 88-89].

The Bureau has the burden of proof in a citation proceeding and it must prove its case by a clear preponderance of the evidence. Omicron Enterprises, 449 A.2d 857 (Pa. Cmwlth. 1982). The preponderance of the evidence standard requires the bearer of the burden to show that it is “more likely than not” that the alleged event occurred. Agostino v. Township of Collier, 968 A.2d 258 (Pa. Cmwlth. 2009).

Section 493(1) of the Liquor Code provides in pertinent part that “[i]t shall be unlawful...[f]or any licensee...or any employe, servant or agent of such licensee...to sell, furnish or give any liquor or malt or brewed beverages,

or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated....” [47 P.S. § 4-493(1)]. Therefore, in order to meet its burden, the Bureau must prove that it is more likely than not that, 1) Licensee or its employee, servant or agent furnished an alcoholic beverage to a patron, and 2) at the time of the service, the patron was visibly intoxicated.

In the instant case, there is no dispute that Licensee served the patron two (2) bottles of a malt or brewed beverage and two (2) shots of liquor. The officers testified, the subject patron confirmed, and Licensee did not disagree, that the bartender served the patron one (1) twelve (12)-ounce bottles of Miller Lite and one (1) shot of Jägermeister while the officers were present on February 1, 2009.

The only remaining issue is whether the patron was visibly intoxicated at the time Licensee served her one (1) bottle of Miller Lite and one (1) shot of Jägermeister. In Laukemann v. Commonwealth, Pennsylvania Liquor Control Bd., 475 A.2d 955 (Pa. Cmwlth. 1984), the Commonwealth Court enunciated the longstanding rule that evidence of intoxication is a matter of common observation and that the testimony of a liquor enforcement officer is sufficient to sustain the Commonwealth’s burden of proof.

Ms. Ridenour's behavior, speech and mannerisms on February 1, 2009, as witnessed by two (2) officers, were those of a visibly intoxicated individual prior to her being served her final two (2) drinks. This assertion is further bolstered by Ms. Ridenour's admitted intake of five (5) to six (6) beers and two (2) shots of liquor. Although Ms. Ridenour attempted to make excuses for her behavior, such as enjoying music so much that she wants to dance even before it starts playing or liking to joke around, these excuses do not address the issue that her behaviors, including swaying, staggering and slurred and boisterous speech, as well as physical signs such as droopy eyes and inability to stand unassisted, are all well known and accepted signs of extreme intoxication.

These signs of visible intoxication were witnessed by two (2) officers, who also heard the impressions of patrons and the bartender, all expressing similar reactions and impressions of Ms. Ridenour's level of intoxication.

In sustaining the citation, the ALJ found that the behaviors observed by the officers are signs of intoxication. Laukemann clearly states that an enforcement officer's observations of the behavior of a visibly intoxicated patron are sufficient to establish that the patron is, in fact, visibly intoxicated. Furthermore, in this case, the patron admitted having consumed a high volume of alcohol over a short period of time, and her demeanor or behavior was

notably different on the day of the hearing, which the officers were able to compare and contrast to her behavior on February 1, 2009 to further confirm her visible intoxication on February 1, 2009.

Accordingly, the ALJ did not commit an error of law or abuse his discretion, and his decision was based upon substantial evidence. The decision of the ALJ is, therefore, affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is denied.

The fine of one thousand two hundred fifty dollars (\$1,250.00) has been paid.

Board Secretary