

Mailing Date: MAR 05 2010

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1713
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W04-393538
v.	:	
	:	LID - 53089
ZEPPIERI INC	:	
T/A ZIPPY'S	:	
542 BROOKLINE BLVD	:	
PITTSBURGH PA 15226-2002	:	
	:	
	:	
ALLEGHENY COUNTY	:	
LICENSE NO. R-SS-7138	:	

BEFORE: JUDGE FRISK

APPEARANCES:

BLCE COUNSEL: Emily Gustave, Esquire
LICENSEE COUNSEL: Wayne DeLuca, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 24, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Zeppieri, Inc., t/a Zippy's, License Number R-SS-7138 (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 June 26, 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 male patron and one visibly intoxicated female patron.

An administrative hearing was conducted on January 19, 2010, at Two Parkway Center, 875 Greentree Road, Pittsburgh, Pennsylvania. The Bureau was represented by Emily Gustave, Esquire. Licensee was represented by Wayne DeLuca, Esquire.

The Bureau began its investigation of this matter on April 30, 2009, and completed its investigation on June 27, 2009. Thereafter, Licensee was notified of the nature of the violation(s) disclosed by the investigation by letter sent by certified mail on July 2, 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 Friday, June 26, 2009 at 9:25 p.m., a Liquor Enforcement officer approached Licensee's premises in an undercover capacity and observed several patrons standing outside the front door. As he entered the premises, he followed one of those patrons inside who stated something to the officer in an unintelligible slurred voice. When the officer asked this female to repeat her statement, she simply replied, "Never mind." This female was later identified at the hearing as Sharon H. (N.T. 8-9, 26, 41, 64-65)

2. After entering the premises, the Enforcement officer took a seat at the bar to the immediate right of Sharon H. At this time, a female and a male were tending bar and a second female was operating the kitchen with approximately 40 patrons present. (N.T. 18)

3. While at the bar, the Enforcement officer observed Sharon H. interacting with other patrons and described her speech as slurred. The Enforcement officer further noted that her eyes were glassy and she had difficulty keeping her balance while standing/seated at the bar. The Enforcement officer noted that Sharon H. was repeatedly observed grabbing the genitalia and buttocks of her male companion later identified at the hearing as Dean H. (N.T. 9-10, 65-66)

4. The Enforcement officer noted that Dean H. also spoke with slurred speech and had difficulty with his balance bumping into the Enforcement officer at various times throughout this visit.

5. At 9:45 p.m., the male bartender served mixed drink alcoholic beverages to both Sharon H. and Dean H. (N.T. 10)

6. In the opinion of the Enforcement officer, Sharon H. and Dean H. displayed visible signs of intoxication immediately prior to their service of alcoholic beverages at 9:45 p.m. (N.T. 69)

7. At 10:25 p.m., Dean H. ordered another mixed drink alcoholic beverage at which time his wife Sharon stated, "No, you've had enough. He's done." The male bartender then served the mixed drink alcoholic beverage to Dean H. (N.T. 11-12)

8. In the opinion of the Enforcement officer, Dean H. continued to display signs of visible intoxication at the time of the 10:25 p.m. service of the alcoholic beverage. (N.T. 69)

9. The Enforcement officer departed Licensee's premises at 10:30 p.m. with 40 patrons remaining. (N.T. 12)

CONCLUSION OF LAW:

1. On June 26, 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 male patron and 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 Liquor Enforcement officer testified on behalf of the Bureau that during his visit to Licensee's premises on June 26, 2009, he observed the speech and actions of a married couple seated next to him at the bar identified as Dean and Sharon H. The Enforcement officer initially focused his attention on Sharon H. who spoke to the Enforcement officer with what he described as unintelligible and slurred speech. The Enforcement officer further testified that Sharon H. also had glassy eyes and was unsteady on her feet while standing at the bar. Dean H. was also described by the Enforcement officer as having slurred speech and being unsteady on his feet as he bumped into the Enforcement officer on a couple of occasions. Following these observations, the Enforcement officer concluded that both Dean and Sharon H. were displaying characteristics of visible intoxication prior to each of them having been served mixed drink alcoholic beverages by Licensee's male bartender at 9:45 p.m. The Enforcement officer again witnessed a second service of an alcoholic beverage by the male bartender to

Dean H. at 10:25 p.m. After her husband ordered another mixed drink, Sharon H. stated, “No, you’ve had enough. He’s done.” In the opinion of the Enforcement officer, Dean H. continued to display characteristics of visible intoxication immediately prior to the 10:25 p.m. service of this alcoholic beverage.

Dean H. testified on behalf of Licensee indicating that neither he nor his wife were intoxicated and were not displaying characteristics of visible intoxication. Upon reexamination of the Enforcement officer subsequent to the testimony of Dean H., the Enforcement officer continued to believe that there was a distinct difference in Dean H.’s speech and mannerisms as that displayed on the day of the hearing. Sharon H. was not present to provide testimony. Additionally, Licensee’s male and female bartenders each testified relative to their recollection of the course of events which occurred on June 26, 2009. Upon careful review of the testimony of each bartender, this court concludes that the bartenders were testifying regarding their recollection of Dean and Sharon H.’s frequenting of Licensee’s establishment on Fridays, but not necessarily the particular Friday in question.

This court further takes into consideration the fact that Licensee’s premises was somewhat crowded on Friday evening June 26, 2009, and that a disc jockey was providing entertainment throughout the Enforcement officer’s visit making it difficult at times to communicate without raising ones voice.

The Commonwealth Court has consistently held that a Liquor Enforcement officer is competent to express his or her opinion as to whether or not the person or persons served is/are visibly intoxicated and that opinion is sufficient to find a violation. *Ashman v. P.L.C.B.*, 542 A.2d 217 (Pa. Cmwlth. 1988); *Laukemann v. P.L.C.B.*, 475 A.2d 955 (Pa. Cmwlth. 1984).

Accordingly, upon thorough review of the testimony and evidence presented, this court concludes that the opinion of the Liquor Enforcement officer relating to the visible intoxication of the two patrons in question is credible and shall be afforded significant weight.

Therefore, this court concludes that the Bureau has established the violation as charged by a clear preponderance of the evidence.

PRIOR RECORD:

Licensee has been licensed since November 15, 2004, and has had one prior violation, to wit:

- Citation No. 08-1820C. Fine \$1,300.00 and
R.A.M.P. training mandated.
1. Sales to a minor.
June 25, 2008.

ZEPPIERI, INC.
Citation Number 09-1713

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.

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.

In mitigation, the record discloses that this citation represents Licensee's first violation of the type herein enumerated.

Official notice is taken that Licensee has been R.A.M.P. certified on January 5, 2009.

For the foregoing reasons, a penalty shall be imposed in the amount of \$1,200.00 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 Zeppieri, Inc., t/a Zippy's, License Number R-SS-7138, pay a fine of \$1,200.00 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)].

ZEPPIERI, INC.
Citation Number 09-1713

Jurisdiction is retained to ensure compliance with this Order.

Dated this 12TH day of February, 2010.



Roderick Frisk, J.

bg

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

Citation No. 09-1713
Zeppieri, Inc.