

Mailing Date: OCT 22 2010

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-0346
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W02-401656
v.	:	
	:	LID - 54136
NORTHEAST CONCESSIONS, LP	:	
1280 STATE HWY. RTE. 315	:	
WILKES BARRE, PA 18702-7002	:	
	:	
	:	
	:	
LUZERNE COUNTY	:	
LICENSE NO. R-AP-SS-EHF-15046	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL STRONG
LICENSEE: FRANCIS X. O'BRIEN, ESQUIRE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on March 3, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against NORTHEAST CONCESSIONS, LP, License Number R-AP-SS-EHF-15046 (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 August 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 two female minors, nineteen years of age.

The second count charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] in that on January 30, 2010, 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 investigation which gave rise to the citation began on October 6, 2009 and was completed on February 9, 2010; and notice of the violation was sent to Licensee by Certified Mail on February 19, 2010. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on July 7, 2010 in the Scranton State Office Building, 100 Lackawanna Avenue, Scranton, 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. C.M. was born on July 10, 1990, and, on August 26, 2009, she was nineteen years old (N.T. 28-29).
2. On August 26, 2009 C.M. went to the Pearl Restaurant on the licensed premises at 6:45 p.m. (N.T. 29).
3. In the Pearl Restaurant C.M. ordered a mixed alcoholic beverage called a “Yang,” which contained vodka (N.T. 29).
4. C.M. paid for the drink herself. She was asked for identification and used an identification card which belonged to someone else. The drink was served to her, and she drank it (N.T. 29-30).
5. L.T. was born on June 19, 1990, and on August 26, 2009, she was nineteen years old (N.T. 31).
6. On August 26, 2009, L.T. went to the Pearl Restaurant on the licensed premises with C.M. (N.T. 32).
7. L.T. was asked for identification by the waitress at the Pearl Restaurant. She told the waitress that she did not have identification and that she was not of age. She ordered water (N.T. 32).
8. When the drinks were served to the other girls with L.T. the girl next to her was served an alcoholic drink called a “green martini.” L.T. took a sip of this drink (N.T. 32).

COUNT 2

9. On January 29, 2010 at 11:30 p.m., an officer of the Bureau arrived at the licensed premises. He walked around to several different bars in the casino, and arrived in the area where the video blackjack games were being played at approximately 12:20 a.m., January 30, 2010 (N.T. 8).

10. While the officer was walking among the blackjack machines, he heard a male voice shouting at the machines. He went to find the source of the shouting, and found a male seated at one of the blackjack machines. He watched the male for several minutes. He was very animated in his play. He yelled at the machine when it didn't give him the card that he wanted or when the machine got the card that he didn't think it should have gotten. He yelled at the machine, cursed at it, and called the "dealer" names (N.T. 8-9).

11. Shortly after the officer started watching the male, he got up and walked to the men's room. The officer noticed that he staggered as he walked and followed him to the men's room (N.T. 9).

12. While in the men's room, the male engaged the officer in conversation. He asked the officer how he was doing. The officer replied, "I'm doing fine; how about you?" The male replied that he was doing pretty good. He said he was feeling pretty good and that he was playing blackjack. However, his speech was slurred and he pronounced "blackjack" as "blajack." (N.T. 9).

13. While the male's speech was fairly normal through most of the conversation, every now and again a word would come out that was slurred pretty badly (N.T. 9).

14. Upon leaving the men's room, the officer followed the male back to a blackjack table. A short time later, the male was approached by a waitress, who took an order from him. The waitress brought him a drink about three minutes later (N.T. 9-10).

15. The male played the blackjack machine in a very animated manner. He flailed his arms. At one point, he was poking the buttons on the machine, but his dexterity was so poor that he was missing the buttons (N.T. 10).

16. When the male stood up from the machine he swayed unless he was holding on to the chair back or the machine itself. From time to time he would get up to congratulate other players and try to "fist pump" or "high five" them. On a couple of occasions he missed the "fist pumps" and "high fives." (N.T. 10).

17. At one point, the male did not get the card he wanted, and he kicked the blackjack machine. His kick caused the door underneath the console on the machine to open and rendered the machine inoperable. Within a short time a technician came over, relocked the door and fixed the machine so he could play blackjack again (N.T. 10-11).

18. At another point the male had an opportunity to “double down” on his wager, but he didn’t have enough credits in the machine to cover the bet for the double down. Another patron gave him the money to cover the bet. When the male covered the bet he won the hand. He then cashed out and tried to pay back the patron who had lent him the money. The patron refused. The male then said he would buy him a drink instead (N.T. 11).

19. The officer followed the male to the bar. At the bar, the male ordered three Jack and Cokes, which he pronounced “Jackandcokes” and a Budweiser beer, which he pronounced “Buweiser.” The rest of his speech was noticeably slurred at this point (N.T. 11-12).

20. The male was served the three Jack and Cokes and the beer (N.T. 13).

21. The activities of the male were observed by: a server when he didn’t have enough money to cover his “double down bet” (N.T. 12); two uniformed casino security personnel whom he staggered past on his way to the restroom (N.T. 13); a cleaning lady with whom he had a conversation (N.T. 13); the technician who fixed the blackjack machine after he kicked it (N.T. 13); and the bartender who took his drink order (N.T. 13).

CONCLUSIONS OF LAW:

Counts 1 and 2 of the citation are **sustained**.

DISCUSSION:

COUNT 1

Licensee is in violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] with respect to both minors involved in this case, to wit:

The minor C.M. ordered and was served an alcoholic beverage after presenting a photo identification card belonging to someone else. The only defense to serving alcohol to a minor is provided by Section 495 of the Liquor Code [47 P.S. §4-495]. In order to be covered by such defense, the Licensee must, in good faith, accept a prescribed photo identification card. In addition the Licensee must require the minor to sign a “declaration of age statement,” worded as required by Section (a) of Section 495 (supra) or must retain a photo copy of the identification card; or must establish that the photo identification card was identified as a valid card by a “transaction scan device.” Licensee did not establish any of the three alternatives. The charge in Count 1 of the citation is, therefore, sustained as to the minor C.M.

The minor L.T. admitted that she was under the age of twenty one and ordered water. When alcoholic beverages were served to other members of her party, she took a sip from one of these alcoholic drinks. The Commonwealth Court of Pennsylvania has held that a liquor licensee permits alcoholic beverages to be furnished or given to a minor in violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] if the Licensee acquiesces by failing to prevent such from happening. *Commonwealth of PA, Liquor Control Board v. Abraham*, 541 A.2d 1161 (Pa. Cmwlth Ct. 1988). In this case, Licensee is deemed to have permitted alcoholic beverages to be furnished to L.T. by failing to prevent such from occurring. Consequently, the charge in Count 1 of the citation is sustained as to the minor L.T.

COUNT 2

The record clearly establishes that a patron on the licensed premises clearly exhibited signs of intoxication after which he was served alcoholic beverages (See Findings No. 9 through 19).

At the hearing in this matter counsel for Licensee argued that the server of the alcohol in question must be aware of the visible intoxication at the time of service of alcohol in order to establish a violation (See N.T. 47-48). This is not so. It has long been established that neither ignorance of facts nor lack of intent will excuse a licensee from a direct violation of the Liquor Code [47 P.S. §§1-101 et seq]. *Commonwealth v. Koszwara*, 188 Pa. Super 153, 146 A.2d 306 (Pa. Super 1958); *Pa Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

In any event various members of the staff at the licensed premises observed the traits of visible intoxication that the patron in this case exhibited (See Finding 21).

Based upon the foregoing, I conclude that the charge in Count 2 of the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since January 25, 2005, and has had four prior violations:

Citation No. 07-0316. Fine \$250.00.

1. Permitted patrons to possess and/or remove alcoholic beverages after 2:30 a.m. November 28, 2006.

Citation No. 07-0802. Fine \$1,250.00 and RAMP training mandated.

1. Sales to a minor. February 5, 2007.

Citation No. 07-2312. Fine \$1,000.00.

1. Sales after the license expired and had not been renewed and/or validated. September 1, 2, 3 and 4, 2007.

Citation No. 08-1298. Fine \$200.00.

1. Permitted patrons to possess or remove alcoholic beverages after 2:30 a.m. March 25, 2008.

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. Further, Section 471(c) requires that the penalty imposed include license revocation or suspension where the violation in question is the third or subsequent violation of the offenses referred to in subsection 471(b) of the Liquor Code [47 P.S. §4-471(b)] and/or Crimes Code within a four year period. Therefore, license revocation or suspension must be included as part of the penalty.

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.

This office takes notice that Licensee became RAMP certified effective June 30, 2010.

Under the circumstances of this case, the penalty imposed shall be as follows:

- Count 1 - \$1,750.00 fine, 1 day suspension and remain RAMP compliant
- Count 2 - \$1,250.00 fine, 1 day suspension and remain RAMP compliant

ORDER

THEREFORE, it is hereby ordered that Licensee NORTHEAST CONCESSIONS, LP, pay a fine of \$3,000.00 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's liquor license (including all permits) License No. R-AP-SS-EHF-15046 be suspended for a period of two days **BEGINNING** at 7:00 a.m. on Monday, January 10, 2011 and **ENDING** at 7:00 a.m. on Wednesday, January 12, 2011.

Licensee is directed on January 10, 2011 at 7:00 a.m. to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised if replacement placards are needed for any reason they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized on January 12, 2011 at 7:00 a.m. to remove the placard of suspension and return his license to its original wall location.

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 must remain in compliance until **October 25, 2011**.

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 21ST day of October, 2010.

A handwritten signature in black ink, reading "Daniel T. Flaherty, Jr.", written over a horizontal line.

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. 10-0346
Northeast Concessions, LP