

Mailing Date: OCT 04 2011

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-1098
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W04-402094
v.	:	
	:	LID - 59174
DENNIS CURCIO	:	
T/A RUSTY STAR SALOON	:	
1 COOK ROAD	:	
BELLE VERNON PA 15012-2400	:	
	:	
	:	
FAYETTE COUNTY	:	
LICENSE NO. R-AP-SS-21056	:	

BEFORE: JUDGE SKWARYK

APPEARANCES:

BLCE COUNSEL: Emily Gustave, Esquire
LICENSEE COUNSEL: David Lint, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on May 28, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Dennis Curcio, t/a Rusty Star Saloon, License Number R-AP-SS-21056 (hereinafter Licensee).

The citation contains three counts.

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Count One of the citation charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)], in that on September 5, 12, 19, 27 and October 4, 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 (1) female minor, twenty (20) years of age.

Count Two of the citation charges Licensee with violation of Section 493(14) of the Liquor Code [47 P.S. §493(14)], in that on September 5, 12, 19, 27 and October 4, 2009, Licensee, by its servants, agents or employees, permitted one (1) female minor twenty (20) years of age, to frequent the licensed premises.

Count Three of the citation charges Licensee with Violation of Section 471 of the Liquor Code [47 P.S. §4-471], in that on May 30, June 7, 27, July 3, 4, 19, September 5, 6, 12, 20 and October 4, 2009, Licensee's establishment was operated in a noisy and/or disorderly manner.

An administrative hearing was conducted on June, 21, 2011, at Two Parkway Center, 875 Greentree Road, Pittsburgh, Pennsylvania.

The Bureau began its investigation of this matter on October 13, 2009, and completed its investigation on April 30, 2010. The notice of violations letter was sent by certified mail on May 17, 2010, and received by Licensee on May 18, 2010.

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

Counts One Two and Three

FINDINGS OF FACT:

1. Licensee is a corporation located in Fayette County, Pennsylvania and holds Restaurant Liquor License Number R-AP-SS-21056. (N.T. 4)
2. On May 30, 2009, between 2:00 a.m. and 3:30 a.m., C.M. was a Washington Township police officer on duty and called to a fight in license's parking lot, during which a patron was struck in the head with a bottle and required medical attention. (N.T. 21-22)
3. On Sunday, June 7, 2009 at 1:58 a.m., J.M. was a Washington Township police lieutenant on duty and called to the licensed premises to investigate an assault on a patron (N.T. 22-23).
4. On June 27, 2009, shortly after midnight, J.M. was on duty and was called to the licensed premises to investigate a loud music complaint. (N.T. 40, 47)

5. On July 3, 2009, J.M. was on duty and called to the licensed premises to investigate a confrontation with bar staff and patrons. (N.T. 41, 48-49, 51)
6. On July 4, 2009, J.M. was on duty and called to the licensed premises to investigate a loud music complaint from a neighbor. (N.T. 42, 51)
7. On July 19, 2009 at 2:00 a.m., J.M. was on duty to investigate a fight among patrons in Licensee's parking lot. (N.T. 43)
8. On September 5, 2009, C.M. was on patrol at Licensee's parking lot and investigated a fight among two patrons inside the premises. (N.T.22-23)
9. On September 6, 2009 at 1:45 a.m., J.M. was on foot patrol at the licensed premises and cited a patron for disorderly conduct. (N.T. 44, 52)
10. On September 12, 2009, at 1:30 a.m. and September 20, 2009 at 12:15 a.m., C.M. was on duty and called to the licensed premises to investigate loud music complaints, heard music from the street, and told Licensee's bar staff to turn the music down. (N.T. 23-24)
11. On October 4, 2009, A.L. was a twenty year old female minor with a date of birth of October 22, 1988. (N.T. 13)
12. On October 4, 2009. A.L. visited the licensed premises and purchased a Cranberry and Vodka alcoholic beverage for approximately \$3.00. (N.T. 14-15)
13. A.L. had also visited the licensed premises on three or four prior occasions in September through October 4, 2009. (N.T. 15-17)
14. During each visit to the licensed premises, A.L. was carded and used her adult sister's photo identification card as proof of age. (N.T. 17-18, 61-63)
15. On each visit, Licensee swiped the photo identification card through a scanner. (N.T. 18, 61-62)
16. A.L. looks substantially similar to her sister's photograph on the photo identification card. (N.T. 18-19, 61-62)
17. C.M. was on-duty parked in licensee's parking lot when he was called inside and found the minor A.L. fighting with another female patron.
18. As C.M. and another police officer broke up A.L.'s fight, they were notified of another fight involving friends of A.L. and the other patron taking place in licensee's parking lot which required additional police assistance being called. (N.T. 26-27)

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19. A.L. and the other patron were both arrested for simple assault and disorderly conduct. (N.T. 26-27)

20. The area surrounding the licensed premises is mixed commercial and residential in nature. (N.T. 35-36, 53-57)

21. Licensee and its owners and staff have not been cited for disorderly conduct by officer C.M. of the Washington Township Police Department for the dates listed in the citation.(N.T. 36-37)

22. Licensee's music bass beat was heard by officers C.M. and J.M. when the door to the licensed premises was opened. (N.T. 24, 34, 51-52)

23. On October 25, 2009, and three other dates, enforcement officer S.B. made undercover visits to the licensed premises and a final routine inspection of the premises. (N.T. 10-11)

24. Licensee's doormen check the identification of all patrons including L.M. and uses declaration of age cards if there is any doubt on the validity of the identification.(N.T. 60-62)

25. Licensee monitors music and noise levels outside the premises. (N.T. 63-65)

CONCLUSIONS OF LAW:

Count One – Dismissed.

Count Two –Dismissed.

Count Three – Sustained only as to the date of October 4, 2009.

DISCUSSION:

At the hearing held on the matter, the enforcement officer, S.M. testified that his investigation involved receiving a newspaper article about a fight at the premises, speaking with police officers, reviewing police reports, making under cover visits and conducting a routine inspection of the licensed premises. S.M. did not cite Licensee for any violation found during his visits to the premises. This testimony is based on the police reports.

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A.L. testified that on October 4, 2009, she was a twenty year old minor who used her adult sister's photo identification card to enter the licensed premises and purchase a Cranberry and Vodka alcoholic beverage. She looks substantially similar to her sister, and had used her card on three or four prior occasions to the premises but did not recall the dates. On October 4, 2009, she was involved in a fight with another patron on the dance floor and subsequently was arrested by Washington Township police for disorderly conduct, underage drinking and false identification. (N.T. 15)

A Washington Township police officer and lieutenant testified as to their investigations of fights and noise at the premises. They did not charge Licensee for disorderly conduct as a result of their investigations.

Licensee's bar manager testified as to procedures for checking patrons' identification cards, monitoring noise and music levels, and attending R.A.M.P. training.

I find the testimony of each witness to be credible.

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. In re Omicron Enterprises, 449 A.2d 857 (Pa.CmwltH 1982).

As to Count One, Section 495(g) of the Liquor Code provides a defense for serving alcohol to a minor if the minor was required to produce an identification card as set forth in subsection (a), the identification card is identified as valid by a transaction scan device and the identification card transaction scan results were relied upon in good faith.

I find that Licensee met all the requirements of Section 495(g). Therefore, Count One is dismissed.

As to Count Two, Section 493(14) prohibits Licensee from permitting a minor to frequent a licensed premises. "Frequenting" has been defined to mean to visit often or to recur again and again on more than one or two visits. Appeal of Speranza, 206A. 2d 292 (Pa. 1965). The language of Section 495(g) does not specify a defense to allowing a minor to frequent the licensed premises. Section 493(14) does provide several defenses, none of which apply here. However, I adopt the reasoning of Judge Thau that to dismiss the charge of selling alcoholic beverages to a minor under Section 495(g) and to sustain the frequenting charge would be an absurd result. See Adjudication No. 00-0102. J.K. Restaurant Corp (www.lcb.state.pa.us/oalj/aljdocs/00-0102H.htm), for the reasoning to support dismissing both charges.

As such, Count Two is dismissed.

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As to Count Three, licensee was charged with operating in a noisy and/or disorderly manner on May 30, June 7, 27, July 3, 4, 19, September 5, 6, 12, 20 and October 4, 2009 in violation of Section 471 of the Liquor Code. Licensee is not charged with a Crimes Code violation. This count is based on police reports alone. The Bureau did not call any of licensee's neighbors to testify about being disturbed on these dates. The enforcement officer did not find any violations during his visits to the premises. The Washington Township police officer and lieutenant testified that they did not cite the licensee, but cited only patrons. The officers testified that the music they heard was mostly the bass beat and not excessive.

I find that the Bureau met its burden of proof only as to the date of October 4, 2009.

As such, Count Three is sustained only as to the date of October 4, 2009.

PRIOR RECORD:

Licensee has been licensed since June 13, 2008, and has had two (2) prior violation(s) to wit:

Citation No. 09-1034C. Fine \$2,000.00 and R.A.M.P. training mandated.

1. Used loudspeakers or devices whereby music could be heard outside.
September 20, October 4, 2008 and March 28, 2009
2. Noisy and/or disorderly operation.
September 20, October 4, 2008 and March 28, 2009.
3. Sales to a minor.
November 20, 2008.

Citation No. 09-2339. Fine \$650.00.

1. Used loudspeakers or devices whereby music could be heard outside.
May 23, 2009.
2. Discounted the price of alcoholic beverages between 12:00 midnight and 2:00 a.m.
May 23, 2009.

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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 counts one and two and \$50.00 to \$100.00 found in count three.

After due consideration of the circumstances giving rise to the citation and Licensee's citation history, the following penalty will be imposed in this case:

Count One – Dismissed.
Count Two – Dismissed.
Count Three –\$250.00 Fine.

ORDER:

THEREFORE, it is hereby ordered that Dennis Curcio, t/a Rusty Star Saloon, License Number R-AP-SS-21056, pay a fine of \$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.

Jurisdiction is retained.

Dated this 23RD day of September, 2011.



Robert F. Skwaryk, J.

mj

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.

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If you wish to appeal the decision of the Administrative Law Judge's Order, the appeal must be filed within 30 days of the mailing date of the Order. Please contact Chief Counsel's Office at 717-783-9454.

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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