

Mailing Date: JUNE 28 2011

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-2720
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W04-419744
	:	
NADINE'S INC	:	
T/A NADINE'S	:	LID-48043
19 S 27 <sup>TH</sup> ST	:	
PITTSBURGH PA 15203-2322	:	
	:	
	:	
ALLEGHENY COUNTY	:	
LICENSE NO. R-AP-SS-EHF-501	:	

**ADJUDICATION**

**JUDGE:** ROBERT F. SKWARYK

APPEARANCES:

**BUREAU COUNSEL:** Emily L. Gustave, Esq.

**LICENSEE COUNSEL:** Louis F. Caputo, Esq.

BACKGROUND:

This proceeding arises out of a citation that was issued on January 3, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Nadine's, Inc., T/A Nadine's, License Number R-AP-SS-EHF-501 (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 October 10, 2010, 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) visibly intoxicated female patron.

The investigation which gave rise to the citation began on September 24, 2010 and was completed on November 25, 2010. The notice of violation letter was mailed to Licensee on December 13, 2010.

An evidentiary hearing was held on this matter on May 10, 2011, in Pittsburgh, Pennsylvania.

Upon review of the transcript of the hearing and the Pre-Hearing Memorandum, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. Licensee is a corporation located in Allegheny County, Pennsylvania and holds Restaurant License Number R-AP-SS-EHF-501. (N.T. 4).

2. On Saturday, October 9, 2010 at approximately 11:50 p.m., an enforcement officer entered the licensed premises in an undercover capacity and found a bartender rendering service of alcoholic beverages to approximately 25 patrons. (N.T. 7, 33).

3. The officer took a seat at the bar directly to the right of a female patron seated on a barstool holding an aluminum cane with her right hand and drinking a rum and coke mixed drink. (N.T. 8, 10).

4. Licensee's bar stools have backs but no arm supports and swivel. (N.T. 27-28).

5. During the course of his visit, which extended past midnight into the early morning of October 10, 2010, the female patron bumped the officer eight to ten times with her cane, after which she apologized and laughed. (N.T. 8).

6. The officer observed the female patron to have glassy eyes and her speech was slurred. (N.T. 8, 12-13).

7. The female patron unsuccessfully tried to light a cigarette in her mouth using a lit Zippo lighter four or five times. (N.T. 9).

8. The officer asked her if she wanted him to light her cigarette, to which she stated, yes; and he lit her cigarette with her Zippo lighter. (N.T. 9-10).

9. The patron ordered and was served another rum and coke mixed drink, which she spilled on the bar. (N.T. 10).

10. The bartender cleaned the spilled drink, after which the patron requested another drink. (N.T. 10).

11. The bartender stated that he would give the patron one more drink, but then she was done. (N.T. 10).

12. The bartender served the patron another rum and coke mixed drink. (N.T. 10).

13. The patron remained seated at the bar; however, she had difficulty maintaining her balance on the bar stool and slumped to her left. (N.T. 11).

14. The officer helped the patron regain her seat. (N.T. 11).

15. The officer observed the patron for 15 to 20 minutes prior to her being served the rum and coke; however he did not smell alcohol on her breath. (N.T. 11-12, 14).

16. The officer visited the licensed premises on prior occasions and did not see any violations. (N.T. 14).

17. The patron left the licensed premises before the officer departed. (N.T. 14).

18. The patron is a regular at the licensed premises, lives nearby, and walks to and from her residence for take-out food. (N.T. 16, 20, 24-25).

19. The patron usually visits the licensed premises for two to three hours and has three or four rum and coke mixed drinks. (N.T. 17, 25).

20. The patron takes eye drops regularly, and is on several pain medications including Vicodin and morphine for ailments to her back, knee and foot. (N.T. 18, 21).

21. The patron is aware of medical warnings not to drink alcohol with the medications. (N.T. 22-23).

22. The patron's ailments cause her difficulty in sitting for a long time which results in her moving from side to side, and balance problems which require her to use a cane. (N.T. 18, 23).

23. On October 10, 2010, the bartender on duty is the son of the owner, who knew the patron as a regular, and on medication, and is R.A.M.P. certified. (N.T. 30-31, 34-36).

24. The Licensee's policy is that if a patron spills a drink, they receive one more drink, but then must leave. (N.T. 30-31, 33-34, 38).

25. The bartender did not consider the patron to be intoxicated. (N.T. 31, 34-36).

26. Licensee's owner/manager was not at the premises during the officer's visit. (N.T. 39).

#### CONCLUSION OF LAW:

Sustained as charged.

#### DISCUSSION:

The burden of proof is on the Bureau to show by a clear preponderance of the evidence that Licensee's bartender furnished an alcoholic beverage to a visibly intoxicated patron. In re Omicron Enterprises, 449 A.2d 857 (Pa.Cmwlth 1982).

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A Liquor Control Board Agent (BLCE Enforcement Officer) is competent to testify that a patron exhibited the signs of visible intoxication when he was served alcoholic beverages by licensee's employee. Laukemann v. Pa. Liquor Control Board, 475 A.2d 955 (Pa.Cmwlth 1984); Roylene Ashman v. Pa. Liquor Control Board, 542 A.2d 217 (Pa.Cmwlth 1988).

The issue is whether the patron's behavior and characteristics were such as to put the bartender on notice that the patron was visibly intoxicated when furnished an alcoholic beverage.

At the hearing held on the matter, the enforcement officer testified in detail as to his undercover visit to the licensed premises during the late evening of October 9, 2010, and extending into the early morning hours of October 10, 2010. The officer testified that he sat next to the female patron who bumped him with her cane on seven to eight occasions, and then apologized and laughed. She also had difficulty keeping her balance on her bar stool and lighting a cigarette. He did not testify if these behaviors were in view of the bartender. He testified that the patron had glassy eyes and slurred speech, but he did not smell alcohol on her breath. The bartender served her a rum and coke mixed drink which she spilled. The bartender served her another mixed drink and told her it was her last.

The patron testified as to her various ailments which require her to use a cane for balance and the medications she takes for pain and dry eyes. She testified that she is a regular patron and drank three of four rum and coke mixed drinks over the course of two or three hours.

The bartender testified that he is the son of the licensee and is R.A.M.P. certified. He worked that night because someone had called off work. He knew the patron as a regular and of her physical ailments. He served her the final rum and coke after the spill and told her it was her last one, because that is their policy. He denied that she was visibly intoxicated.

Licensee's owner, Nadine Voelker, testified that she was not there during the visit because she begins work at 5:00 a.m. to prepare food for the day. Her policy is that if someone spills a drink, they are allowed one more and then they have to leave.

After a careful review of the record, I find that the Bureau has not met its burden of proof in this case.

As such, the citation is dismissed.

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ORDER:

THEREFORE, it is hereby ordered that Case No. 10-2720 is DISMISSED.

**JURISDICTION IS RETAINED.**

Dated this 27<sup>TH</sup> day of JUNE, 2011.



Robert F. Skwaryk, J.

**MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO 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.**

**IF FILING AN APPEAL, IT MUST BE RECEIVED WITHIN 30 DAYS OF THE MAILING DATE OF THE ADMINISTRATIVE LAW JUDGE'S ORDER; MAIL TO OR CONTACT THE PA. LIQUOR CONTROL BOARD, OFFICE OF CHIEF COUNSEL, ROOM 401, NORTHWEST OFFICE BLDG., HARRISBURG, PA 17124-0001, PHONE NO. 717-783-9454.**