

Mailing Date: JAN 06 2012

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 11-0529
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-414669
v.	:	
	:	LID - 19132
DELISIO OF YORK, INC.	:	
T/A RACEHORSE TAVERN	:	
738 N. BIESECKER RD.	:	
THOMASVILLE, PA 17364	:	
	:	
	:	
YORK COUNTY	:	
LICENSE NO. R-AP-SS-EHF-18102	:	

**BEFORE JUDGE FLAHERTY  
BUREAU COUNSEL PIETRZAK  
LICENSEE: L.C. HEIM, ESQUIRE**

**ADJUDICATION**

**BACKGROUND:**

This proceeding arises out of a citation that was issued on April 21, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against DELISIO OF YORK, INC., License Number R-AP-SS-EHF-18102 (hereinafter "Licensee").

The citation contains three counts.

The first count charges Licensee with violation of Sections 406(a)(3) and 493(16) of the Liquor Code [47 P.S. §§4-406(a)(3) and 4-493(16)] in that on September 19, 2010, Licensee, by its servants, agents or employes, sold, furnished and/or gave alcoholic beverages on Sunday between 2:00 a.m. and 11:00 a.m.

The second count charges Licensee with violation of Sections 401(a) and 407(a) of the Liquor Code [47 P.S. §§4-401(a) and 4-407(a)] in that on September 4 and October 3, 2010, Licensee, by its servants, agents or employes, sold malt or brewed beverages in excess of 192 fluid ounces in a single sale to one person for consumption off premises.

The third count charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] in that on October 3, 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 patron.

The investigation which gave rise to the citation began on June 16, 2010 and was completed on March 7, 2011; and notice of the violation was sent to Licensee by Certified Mail on March 16, 2011. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on August 31, 2011 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, 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. On September 19, 2010 at 12:40 a.m., an Officer of the Bureau entered the licensed premises in an undercover capacity (Stipulation N.T. 7).
2. At 1:50 a.m., the Officer purchased a vodka and cranberry juice mixed drink. At this time, a patron known to the Officer as Uncle Frank purchased the Officer a second drink of the same type (Stipulation N.T. 7).
3. At 1:50 a.m., the bartender served one of these drinks to the Officer. At 2:15 a.m., the bartender served the second vodka and cranberry juice mixed drink to the Officer (Stipulation N.T. 7).

COUNT 2

4. On September 4, 2010 an Officer of the Bureau entered the licensed premises at 12:50 a.m. At 1:20 a.m. the Officer observed a female patron and a male patron purchase two twelve-packs of 12-ounce cans of Miller Lite beer (288 fluid ounces). The bartender rang up the purchase on the cash register as a single transaction and the patrons paid for the purchase as a single transaction (Stipulation N.T. 8).
5. On October 3, 2010 the Officer entered the licensed premises in an undercover capacity at 12:55 a.m. At 1:45 a.m. the Officer observed a male patron approach the bar counter and purchase one 12-pack of 12-ounce cans of Coors Light Extra Gold beer and one 12-pack of 12-ounce cans of Budweiser beer (288 fluid ounces). The bartender rang up the sale as a single transaction and charged the patron \$26.00 which was paid in a single transaction (Stipulation N.T. 8-9).

COUNT 3

6. On October 3, 2010 an Officer of the Bureau entered the licensed premises at 12:55 a.m. and took a seat at the bar (N.T. 10).

7. The Officer observed James K. Delisio, Jr. tending bar and rendering service to approximately 45 patrons along with a female bartender heard to be called "Holly" (N.T. 11).

8. Upon being seated at the bar, the Officer noticed a female patron she knew as Kira and her boyfriend Garrett. They were about two barstools away from the Officer (N.T. 12).

9. While Kira was speaking to the Officer, Garrett went outside. Kira then went outside after him. Both Kira and Garrett subsequently came back into the premises (N.T. 12).

10. When Garrett came back inside he went to the dance floor, threw himself on his back and wiggled his arms and legs in a maneuver known as a "dead bug." When he was through he staggered to the bar where the Officer and Kira were (N.T. 13).

11. The Officer observed that Garrett was weaving back and forth after he walked from the dance floor. His eyes were glassy. He had trouble speaking to the point where the Officer could not understand what he was saying (N.T. 13-14).

12. The Officer observed the bartender Holly prepare a shot containing Goldschlager Cinnamon liquor. Mr. Delisio was concerned about who the shot was for. Holly explained that the shot was not for Garrett, but for Kira. The shot was, in fact served to Kira (N.T. 14).

13. As the Officer sat at the bar and continued to socialize with Kira and Garrett, she noticed that Garrett became more animated, flailing his arms and talking loudly with slurred speech (N.T. 15).

14. The attention of the Officer was diverted when she observed the transaction described in Count No. 2, Finding No. 5. When she turned back she observed that Garrett was in possession of a bottle of Miller Lite beer and a glass that was partially filled with beer (N.T. 15-16).

15. The Officer had met Kira and Garrett at the premises on three or four previous occasions. On these previous occasions Garrett was not staggering or stumbling or slurring his words (N.T. 18-19).

CONCLUSIONS OF LAW:

1. Counts 1 and 2 of the Citation are **sustained**.
2. Count 3 of the Citation is **dismissed**.

DISCUSSION:

COUNT 1

The stipulated facts establish that, at 2:15 a.m., on September 19, 2010, the bartender on the licensed premises served a mixed alcoholic drink consisting of vodka and cranberry juice to an undercover officer (See Finding No. 3). The charge in this count is, therefore, sustained.

COUNT 2

The stipulated facts as to this count establish that on September 4, 2010 and on October 3, 2010 employees of Licensee, on each of these dates, sold 288 ounces of beer to customers in single transactions thus exceeding the 192 ounce maximum (See Findings No. 4 and 5). On this basis the charge in Count 2 of the citation is sustained.

COUNT 3

Because there is nothing in the record which establishes how the visibly intoxicated patron (Garrett) had obtained a bottle of beer and a glass, or that the personnel of Licensee corporation were aware that he had done so; and further because the personnel of Licensee were watching Garrett in an attempt to keep him from obtaining more alcoholic beverages, I conclude that the charge in Count 3 of the citation must be dismissed.

In *Pennsylvania State Police v. J.E.K.*, 680 A.2d 53 (Pa. Cmwlth. 1996), the Commonwealth Court of Pennsylvania held that it is a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] when a licensee: “permits” the consumption of alcohol [by a visibly intoxicated patron] by taking or failing to take actions to prevent it from occurring...” However, the court went on to say that where the licensee has acted in a responsible manner to prevent the patron from being served and the personnel of the licensee are not aware that the patron has been furnished alcohol, the licensee is not deemed to have permitted the furnishing to take place.

In this case, since the bartender, Mr. Delisio was actively attempting to stop service of alcohol to Garrett (See Finding No. 12) and nothing in the record indicates how Garrett came into possession of the bottle of beer, I conclude that, consistent with *J.E.K.* (supra), Licensee cannot be deemed to have permitted service to Garrett. Thus, the charge in this count must be dismissed.

PRIOR RECORD:

Licensee has been licensed since December 18, 1987, and has had two prior violations:

Citation No. 97-0799. Fine \$50.00.

1. Issued worthless checks in payment for purchases of malt or brewed beverages.

Citation No. 08-0378. Fine \$500.00.

1. Possessed or operated gambling devices or permitted gambling on the licensed premises (machines, sports bets, raffles and tickets). On 11 dates between July 19 and December 7, 2007.

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 Count 1 of this case.

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 \$50.00 or more than \$1,000.00 or both for violations of the type found in Count 2 of this case.

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

Count 1 - \$1,250.00 fine  
Count 2 - \$ 250.00 fine  
Count 3 - Dismissed

ORDER

THEREFORE, it is hereby ordered that Licensee DELISIO OF YORK, INC., pay a fine of \$1,500.00 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 22<sup>ND</sup> day of December, 2011.



Daniel T. Flaherty, Jr., J.

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**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.**

**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 submit stub with payment**

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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. 11-0529  
Delisio of York, Inc.