

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. 11-0689
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W06-426598
v.	:	
	:	LID - 42720
GERMANIA HOTEL, INC.	:	
1361 GERMANIA RD.	:	
GALETON, PA 16922	:	
	:	
	:	
POTTER COUNTY	:	
LICENSE NO. H-AP-SS-EHF-2300	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL PIETRZAK
LICENSEE: MARCIE DRAKE, PRO SE**

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 GERMANIA HOTEL, INC., License Number H-AP-SS-EHF-2300 (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 March 13, 2011, 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 person.

The investigation which gave rise to the citation began on February 16, 2011 and was completed on March 16, 2011; and notice of the violation was sent to Licensee by Certified Mail on March 29, 2011. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on October 13, 2011 in the PA Department of Agriculture, 2130 County Farms Road, Montoursville, 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:

1. On March 31, 2011, an officer of the Bureau arrived in the parking lot of the licensed premises and 3:25 p.m. (N.T. 10).

2. The officer entered the licensed premises and took a seat at the bar (N.T. 10-11).

3. The attention of the officer was drawn to an individual seated at the bar. His shoulders were hunched forward toward the bar, and his eyes were partially opened. His head was pointed down. From time to time he would bring his head up. Then it would slowly droop back down to his chest like he was falling asleep (N.T. 11-12).

4. The aforementioned patron, who was heard to be called "Garrett," was asked by the bartender (Carl) what he wanted. Garrett said a Buttery Nipple (N.T. 12).

5. Carl took a shot glass and filled it with one part DeKuyper's Butterscotch Schnapps and then topped the shot off with another part of Carolans Irish Crème. Another individual at the bar purchased the drink for Garrett as well as purchasing drinks for other individuals at the bar (N.T. 12-13).

6. The shot was served to Garrett who immediately drank it and placed the empty shot glass in front of him (N.T. 13).

7. Garrett asked for another shot and Carl asked him if he wanted another Buttery Nipple. Carl took the empty shot glass from in front of Garrett and poured Canadian Mist Whiskey into it and set it in front of Garrett who immediately consumed the beverage (N.T. 13).

8. The officer continued to observe Garrett who exhibited a "laid-back" manner. He appeared to be falling asleep at the bar (N.T. 13).

9. A few minutes later a female came out of the kitchen area. This individual, heard to be called Marsha, addressed Garrett saying, "Hey Garrett are you planning on drinking yourself off the barstool today?" Garrett lifted his head and said, "Yep." They continued their conversation about Garrett being in there during a previous time in which he actually fell off the barstool (N.T. 14-15).

10. After the conversation, Marsha announced that she was going out on the porch for a smoke. She exited the licensed premises. Garrett had paid his tab, and when Marsha left he got up and followed her out (N.T. 15).

11. As Garrett walked out the officer observed that his gait was "somewhat" staggered. He wasn't stumbling, falling down but his gait was staggered (N.T. 15).

12. Shortly after that, Carl the bartender walked outside to where Marsha and Garrett were (N.T. 15-16).

13. After about 15 minutes, Marsha, Garrett and Carl all walked back into the licensed premises (N.T. 16).

14. Garrett positioned himself on the bar stool he had previously occupied. He placed his wallet on the bar and asked Carl for a mixed alcoholic drink consisting of Captain Morgan's Spiced Rum and Pepsi (N.T. 16).

15. Carl made the drink and served it to Garrett (N.T. 16).

16. The officer observed Garrett trying to get into his wallet to remove currency. He removed \$1.00 and then went back in and removed two more. This took two to three attempts. The bartender took the \$3.00 and gave Garrett \$.25 change (N.T. 16).

17. The officer left the premises shortly after the service of the Captain Morgan Spiced Rum and Pepsi to Garrett.

18. The evening before the officer's visit to the licensed premises, Garrett had been at a friend's party. He became intoxicated at that party (N.T. 28-29).

19. After attending the party, he came to the licensed premises. Upon entering the premises, he attempted to sit on a barstool and fell off. At that point the proprietor of Licensee had a friend take Garrett home in her car, leaving his car at the licensed premises (N.T. 23-24).

20. On the date in question, March 13, 2011, in the afternoon, Garrett returned to the licensed premises to retrieve his car. He was feeling the effects of a hangover, which caused him to appear to be falling asleep. In addition, he is a naturally reticent person (N.T. 26).

21. When paying for his drinks on March 13, 2011 Garrett was fumbling in his wallet because he had a great deal of money in his wallet and was trying to fish out \$1.00 bills to pay for his drink (N.T. 27-28).

22. Garrett was not intoxicated on March 13, 2011. He was on the premises on that date for 45 minutes during which he had three drinks, a Buttery Nipple, a shot of Canadian Mist Whiskey and half of a mixed drink containing Captain Morgan's Spiced Rum and Pepsi. He had had nothing to drink prior to his entrance to the licensed premises on that date (N.T. 29-30).

23. Garrett had had nothing else to drink besides the aforementioned drinks on March 13, 2011 (N.T. 31).

CONCLUSION OF LAW:

The charge in the citation is **dismissed**.

DISCUSSION:

The preponderance of the evidence indicates that the slight symptoms exhibited by the patron in question (Garrett) were caused by a hangover he had the night before. On the date in question, he was only on the premises for 45 minutes and had not had enough to drink to be considered intoxicated.

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).

The phrase “preponderance of evidence” has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. *Black’s Law Dictionary, Fifth Edition*, West Publishing Company, Copyright 1979, Page 1064.

It is within my province, and is part of my responsibility to determine the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa.CmwltH 1989). I may give testimony such consideration as it may deserve, and accept it or reject it in whole or in part. *McFarland Landscape Service v. Workmen’s Comp. Bd. Of Appeal*, 557 A.2d 816, 817-18 (Pa.CmwltH 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

In my opinion, although the symptoms observed by the officer in this case, standing by themselves would be some indication of intoxication, it is my belief that with the explanations of the Licensee’s officer and of the purported “intoxicated” patron that this individual (Garrett) was not intoxicated on the date in question, but only exhibiting the symptoms of a severe hangover. He had apparently come back to the licensed premises to retrieve his vehicle which had been left there on the previous day.

Based upon the foregoing, I conclude that the charge in the citation should be dismissed.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Citation No. 11-0689 be **DISMISSED**.

Dated this 22ND day of December, 2011.

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

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.