

Mailing Date: JUL 24 2012

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

PENNSYLVANIA STATE : In re Citation No. 11-1617  
POLICE, BUREAU OF :  
LIQUOR CONTROL ENFORCEMENT : BLCE Incident No. W01-428463  
 :  
v. : PLCE LID No. 49600  
 :  
2655 CHESTNUT INC : PLCB License No. R-AP-SS-OPS-11569  
2655 S 18<sup>th</sup> ST :  
PHILADELPHIA PA 19145-4505 :

JUDGE SHENKLE  
BLCE COUNSEL: Erik Shmukler, Esq.  
LICENSEE COUNSEL: Edward McHugh, Esq.

**ADJUDICATION**

**BACKGROUND:**

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on September 13, 2011. There are two counts in the citation.

The first count alleges that Licensee violated §493(1) of the Liquor Code, 47 P.S. §4-493(1), on May 5, 2011, by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated patron.

The second count alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §10-602(3)(a.1)(iv) of the Clean Indoor Air Worker Protection Law, on April 8, July 2 and August 7, 2011, by permitting smoking in a public place where smoking is prohibited.

A hearing was held on June 12, 2012, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

**FINDINGS OF FACT:**

1. On April 8, 2011, liquor control enforcement officers entered the licensed premises and saw a bartender serving ten patrons. There was an odor of cigarette smoke and there were ashtrays on the bar. The bartender and two patrons who were playing pool smoked cigarettes (Exhibit B-3).

2. On July 2, 2011, a liquor control enforcement officer entered the licensed premises and saw one bartender serving fifteen patrons. There was an odor of cigarette smoke and there were ashtrays on the bar. The bartender and three patrons were smoking cigarettes despite a "No Smoking" sign posted in the premises (Exhibit B-3).

3. On August 7, 2011, a liquor control enforcement officer entered the licensed premises and saw three bartenders serving nine patrons. There was an odor of cigarette smoke and there were ashtrays on the bar. The bartenders and several patrons were smoking cigarettes despite a “No Smoking” sign posted in the premises (Exhibit B-3).

4. Licensee did not possess a waiver of the Clean Indoor Air Worker Protection Law on any of these dates (Exhibit B-4).

5. On May 5, 2011, at a little after 9:00 p.m., a Philadelphia police sergeant went to the area of 18<sup>th</sup> and Oregon in response to a radio call. He saw a man lying on the sidewalk in front of a Dunkin Donuts store. There was a nearly empty 40-ounce glass beer bottle next to him. The sergeant got the man to stand up, and observed that his speech was slurred and his breath and his body reeked of alcohol. His eyes were bloodshot and watery. The sergeant knew this man, from 15 to 20 previous police contacts, and knew that he lived about three blocks away. He took away the beer bottle and told the man to go home. He then turned his back on the man to speak to two police officers who had arrived at the scene (N.T. 8-10).

6. As the sergeant was speaking to the officers he looked back over his shoulder and saw that the man was not walking north to his home as instructed, but instead went east and entered Licensee’s premises, empty-handed. The man was staggering. The sergeant then had to go somewhere else, and instructed the officers to keep an eye on the man, to see if he would leave the licensed premises with alcohol and if so, to take the necessary action (N.T. 10-11, 14-15).

7. The police officers saw the man come out of Licensee’s premises, walk half a block east, and sit on a bench, drinking from a 40-ounce bottle of beer. They relieved the man of the beer and arrested him (N.T. 28-29).

8. In a short while the sergeant heard on the radio that the officers had stopped the man, so he returned to the area, went into the licensed premises and spoke with the only employee present. The employee admitted that he had served the man beer. The sergeant arrested him and closed the licensed premises, but the employee was later released, in favor of this proceeding (N.T. 11-12).

#### CONCLUSIONS OF LAW:

Sustained as charged.

#### DISCUSSION:

Counsel for Licensee argued, on the basis of my adjudication of No. 98-0524, issued to 2662 O.D., Inc., that this citation should be dismissed because there was no direct evidence of the patron’s state of intoxication at the moment of the sale nor was there direct evidence that the sale or furnishing had been done by Licensee’s employee, as opposed to another person.

In that case I dismissed the citation because I found the testimony of the person who was alleged to have been visibly intoxicated to be of greater weight than the Bureau’s evidence.

This case is entirely different, as I do not have testimony from the person alleged to have been visibly intoxicated. In this case the government’s evidence persuades me that the person in question was visibly intoxicated when he entered Licensee’s premises. The admission of

Licensee's employee is sufficient to sustain the finding that Licensee, through its employee, sold, furnished or gave an alcoholic beverage to the person, and the time sequence (a matter of minutes) persuades me that the person was still visibly intoxicated when that occurred. If another person inside the licensed premises actually furnished the beer it would make no difference, since the furnishing occurred inside the premises, making Licensee responsible.

PRIOR RECORD:

Licensee has been licensed since October 1, 2002, and has had eight prior violations:

In re Citation No. 04-1760. \$500.00 fine.

1. Gambling (numbers bets). June 15, 2004.

In re Citation No. 05-1041. \$2,250.00 fine. One day suspension for late payment of fine.

1. Operated without a valid health permit or license. February 3, 2005.
2. Gambling (horse bets and sports pool). February 3, 2005.
3. Sales between 2:00 a.m. and 7:00 a.m. March 12, 2005.
4. Failed to require patrons to vacate the premises by the required time. March 12, 2005.
5. Permitted patrons to possess alcoholic beverages after 2:30 a.m. March 12, 2005.

In re Citation No. 05-2075. \$500.00 fine.

1. Operated without a valid health permit. August 26 and September 14, 2005.

In re Citation No. 06-1919. \$1,250.00 fine, 1 day suspension, R.A.M.P. – certification mandated.

1. Sales to a minor. June 28, 2006.

In re Citation No. 09-1347. \$2,000.00 fine.

1. Sales to a minor. May 3, 2009.
2. Minor frequenting. May 3, 2009.

In re Citation No. 09-3065C. \$1,500.00 fine and 3 days suspension.

1. Sales to a minor. November 21, 2009.

In re Citation No. 10-1994. \$2,000.00 fine and 1 day suspension.

1. Refilled liquor bottles. September 16, 2009.
2. Fortified, adulterated and/or contaminated liquor. September 16, 2009.
3. Gambling (football pools). September 16, 2009.

In re Citation No. 11-0704. \$700.00 fine and 3 days suspension.

1. Smoked and/or permitted smoking in a public place where smoking was prohibited. January 4 and 5, 2011.
2. Failed to post signage, as required. January 4 and 5, 2011.
3. Gambling (football pools and machines). January 5, 2011.
4. Refilled liquor bottles. January 5, 2011.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine, or both, for violations of the type found in this case. For violations of the

type found in the first count any fine must be in the \$1,000.00 to \$5,000.00 range. For violations of the type found in the second count any fine must be in the \$50.00 to \$1,000.00 range.

Since the first count is Licensee's first violation of 47 P.S. §4-493(1) as it relates to a visibly intoxicated person, 47 P.S. §4-471(d) requires an order for mandatory R.A.M.P. – certification.

Since this is Licensee's fifth violation in a four-year period of a provision of the Crimes Code or a provision mentioned in 47 P.S. §4-471(b), the law requires that the penalty for the first count include license suspension or revocation. Penalties are assessed as follows:

- Count No. 1 – suspension of license for 3 days plus mandatory R.A.M.P. – certification.
- Count No. 2 – a fine of \$300.00.

### ORDER

THEREFORE, it is hereby ORDERED that Licensee, 2655 Chestnut, Inc., License No. R-AP-SS-OPS-11569, shall pay a fine of three hundred dollars (\$300.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

IT IS FURTHER ORDERED that the Restaurant Liquor License of Licensee, 2655 Chestnut, Inc., License No. R-AP-SS-OPS-11569, shall be suspended for a period of three (3) days BEGINNING at 7:00 a.m. on Monday, September 17, 2012, and ENDING at 7:00 a.m. on Thursday, September 20, 2012. Jurisdiction is retained.

Licensee is directed on Monday, September 17, 2012, 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 premises for compliance with this order.

Licensee is authorized on Thursday, September 20, 2012, at 7:00 a.m. to remove the placard of suspension and return the 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. The Licensee is directed to contact the Bureau of Alcohol Education, Pennsylvania Liquor Control Board (toll free telephone: 1-866-275-8237; [www.lcb.state.pa.us](http://www.lcb.state.pa.us)) within thirty (30) days of the mailing date of this adjudication in order to receive assistance in the compliance process. Licensee must receive certification within ninety (90) days of the mailing date of this adjudication. Licensee must remain in compliance for a period of one year from the date such certification is issued. The Bureau of Liquor Control Enforcement is further directed to monitor compliance with this adjudication.

Failure to comply with this order will be grounds for modification of penalty in this case. Failure to comply may also constitute grounds for issuance of a new citation as authorized by Section 471(d) of the Liquor Code, 47 P.S. Section 4-471(d).

Dated this 17<sup>TH</sup> day of JULY, 2012.



David L. Shenkle, J.

jb

**NOTICE: 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.**

**WHETHER OR NOT RECONSIDERATION HAS BEEN REQUESTED, AGGRIEVED PERSONS MAY APPEAL TO THE PLCB, NORTHWEST OFFICE BUILDING, HARRISBURG, PA 17124 WITHIN 30 DAYS AFTER THE MAILING DATE OF THIS ORDER.**

**THE PLCB CHIEF COUNSEL'S TELEPHONE NUMBER IS 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