

Mailing Date: OCT 17 2012

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

PENNSYLVANIA STATE :
POLICE, BUREAU OF : IN RE: Citation No.: 11-1886
LIQUOR CONTROL ENFORCEMENT :
 : BLCE Incident No.: W08-433610
 :
 v. :
 : PLCB LID No.: 42429
 :
 SCOTT E. CLAWGES :
 T/A JOSE'S : PLCB License No.: R-AP-SS-14650
 21 MAIN ST. :
 LEWIS RUN, PA 16738 :
 :
 :
 :
 :
 :

BEFORE: JUDGE RODERICK FRISK

APPEARANCES:

BLCE COUNSEL: Michael C. Nickles, Esquire
LICENSEE COUNSEL: Licensee, Scott E. Clawges, Pro Se

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on November 2, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Scott E. Clawges, t/a Jose's, License Number R-AP-SS-14650 (hereinafter Licensee).

The citation contains two (2) counts.

The first count charges Licensee with violation of Section 499(a) of the Liquor Code, [47 P.S. §4-499(a)] in that on August 13, 2011, Licensee, by its servants, agents or employees, failed to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages.

Scott E. Clawges
t/a Jose's
IN RE: Citation No. 11-1886

The second count charges Licensee with violation of Section 499(a) of the Liquor Code, [47 P.S. §4-499(a)] in that on August 13, 2011, Licensee, by its servants, agents or employees, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for service of alcoholic beverages after 2:30 a.m.

An administrative hearing was conducted on Wednesday, August 15, 2012, at 2084 Interchange Road, Erie, PA. The Bureau was represented by Michael C. Nickles, Esquire. Licensee, Scott E. Clawges appeared Pro Se.

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

FINDINGS OF FACT:

1. The Bureau commenced its investigation of Licensee's premises on July 18, 2011, and completed its investigation on September 25, 2011. (N.T. 7, Exhibit C-1)
2. The Bureau notified Licensee of the nature of the alleged violation(s) disclosed by its investigation by letter dated October 11, 2011, which was sent by certified mail and received by Licensee on October 18, 2011. (N.T. 7, Exhibit C-2)
3. This citation was issued on November 2, 2011, and was sent by certified mail and received by Licensee on November 7, 2011. (N.T. 8, Exhibits C-3, C-4)

COUNTS ONE AND TWO

4. On Saturday, August 13, 2011 at 1:35 a.m., two Liquor Enforcement Officers entered Licensee's premises in undercover capacities and observed an unidentified female tending bar and rendering service to approximately 12 patrons. (N.T. 13)
5. As the Enforcement Officers entered Licensee's premises, one of the officers advised his fellow officer that he recognized a female patron as a bartender at another liquor establishment where he had been conducting an undercover investigation. The officer was unaware of her identity until she testified on behalf of Licensee at the hearing at which time she was identified as "Darla R." (N.T. 13-14)
6. Shortly after entering, one of the Enforcement Officers purchased a Miller Lite Beer for himself and a Coors Light Beer for his companion from the unidentified female bartender. During the course of this visit, the Enforcement Officers believed that they heard the unidentified female bartender to be called "Darla." At the hearing, Licensee identified the bartender on duty as "Tammy O" (N.T. 13, 37)

7. On Saturday, August 13, 2011 at 1:35 a.m., Darla R. was present on Licensee's premises as a patron and never tended bar at any time. (N.T. 55-72)
8. The officers believed that they heard the unidentified bartender being referred to as "Darla." At the hearing, "Tammy O." testified that she was the bartender on duty the evening of Friday, August 12, 2011 through the early morning hours of Saturday, August 13, 2011. (N.T. 13, 35)
9. At 1:55 a.m., the officers noted that Licensee's bartender announced "last call." Prior to 2:00 a.m., the officers purchased two additional bottles of beer for themselves consisting of a Miller Lite and a Coors Light. (N.T. 14, 22-23)
10. Licensee's bartender was observed closing out the cash register at 2:10 a.m. with no sales of alcoholic beverages occurring after 2:00 a.m. (N.T. 15)
11. Between 2:30 a.m. and 2:45 a.m., the Enforcement Officers along with two other patrons remained on Licensee's premises. In addition to the Enforcement Officers, the two unidentified individuals were also in possession of bottled beer. (N.T. 15-17)
12. The Enforcement Officers departed Licensee's premises at 2:45 a.m. with the two individuals remaining and in possession of bottled beer. (N.T. 15)

DISCUSSION:

This court notes at the onset it is well established that the Bureau must prove its case by a fair preponderance of the evidence. *Pennsylvania Liquor Control Board v. Leggens*, 542 A.2d 653 (Pa. Cmwlth. 1988); *Omicron Enterprises*, 449 A.2d 857 (Pa. Cmwlth. 1982); *Com. v. Moreno*, 14 A.3d 133 (Pa.Super. 2011).

It has been further established that it is for this court to decide the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robison*, 561 A.2d 82 (Pa. Cmwlth. 1989). Further, this court may accept or reject, in whole or in part, the testimony of any witness. *Kubler v. Yeager*, 150 A.2d 383 (Pa. Super 1959). It is with these principles in mind that further analysis of this case is conducted.

At the hearing, Tammy O. testified that she was the bartender on duty during the evening of Friday, August 12, 2011 into the early morning hours of Saturday, August 13, 2011. After observing the two Enforcement Officers at the hearing, Tammy O. did not recall seeing them at Licensee's premises on the date in question or any other time. During cross-examination, Tammy O. further indicated that she could not recall specifically the patrons present on Licensee's premises during the early morning hours of Saturday, August 13, 2011.

Scott E. Clawges
t/a Jose's
IN RE: Citation No. 11-1886

Darla R. testified on behalf of Licensee that she was present on Licensee's premises during the evening of Saturday, August 13, 2011 after 7:00 p.m. and was not present at Licensee's premises during the early morning hours of August 13, 2011. However, Darla R. specifically recalls seeing the Enforcement Officers at Licensee's premises on the recalled occasion. During cross-examination, Darla R. expressed some confusion regarding the date and time of her visit to Licensee's premises. More specifically, Darla R. was uncertain if she visited Licensee's premises during the early morning hours of Saturday, August 13, 2011, or during the evening of Saturday, August 13, 2011.

Upon thorough review of the testimony and evidence presented, this Court concludes that the two Liquor Enforcement Officers were present at Licensee's premises on Saturday, August 13, 2011 between the hours of 1:35 a.m. and 2:45 a.m. This Court further concludes that the discrepancy in testimony between the Bureau's Enforcement Officers and Licensee's witnesses is principally due to the confusion expressed by Darla R. regarding the time of her visit.

Finally, the Enforcement Officers believed that the bartender on duty was heard to be called to as "Darla." It is undisputed that this was an undercover visit and that the Enforcement Officers did not make a positive identification of Licensee's bartender. In the opinion of this Court, it is understandable that the Enforcement Officers may have heard the name "Darla" and harmlessly mistaken that reference to Licensee's bartender.

Accordingly, this Court believes that the Bureau has established the violations as charged in Counts one and two of this Citation by a clear preponderance of the evidence.

CONCLUSIONS OF LAW:

1. The notice provisions as prescribed by Section 471 of the Liquor Code [47 P.S. §4-471] have been satisfied.
2. On August 13, 2011, Licensee, by its servants, agents or employees, failed to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages, in violation of Section 499(a) of the Liquor Code, [47 P.S. §4-499(a)].
3. On August 13, 2011, Licensee, by its servants, agents or employees, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m., in violation of Section 499(a) of the Liquor Code, [47 P.S. §4-499(a)].

PRIOR RECORD:

Licensee has been licensed since August 14, 1998, and has had four (4) prior violations.

Scott E. Clawges
t/a Jose's
IN RE: Citation No. 11-1886

IN RE:

Citation No. 02-0847. Fine \$75.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises (tickets).

Citation No. 02-2216. Fine \$1,250.00. Licensee's request for reconsideration modified penalty to \$250.00 fine and three (3) days suspension.

1. Sales to a visibly intoxicated person.
2. Licensee was visibly intoxicated on the licensed premises.

Citation No. 08-0304. Fine \$400.00.

Failed to require patrons to vacate the premises not later than one-half hour after the required time.

July 13, 2007.

1. Permitted patrons to possess and/or remove alcoholic beverages after 2:30 a.m.
July 13, 2007.

Citation No. 08-1999. Fine \$1,000.00. 6 days suspension and R.A.M.P. training mandated.

1. Sales to a minor.
August 25, 2007.
2. Sales to a visibly intoxicated person.
October 13, 2007.
3. Sold malt or brewed beverages in excess of 192 fluid ounces for consumption off premises.
October 13, 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 \$50.00 or more than \$1,000.00 or both for violations of the types found in this case.

In consideration of the fact that counts one and two of this citation arose out of the same factual circumstances, they shall be deemed to have merged solely for the purpose of the imposition of a penalty.

The record discloses that Licensee's has had prior violations of the types herein enumerated at Citation No. 08-0304. Therefore, Licensee's shall be treated as a repeat offender.

Scott E. Clawges
t/a Jose's
IN RE: Citation No. 11-1886

For the foregoing reasons, the following penalty shall be imposed: Counts one and two (merged) \$650.00.

ORDER:

THEREFORE, it is hereby ordered that Scott E. Clawges, t/a Jose's, License Number R-AP-SS-14650, pay a fine of \$650.00 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 to ensure compliance with this Order.

Dated this 10TH day of OCTOBER, 2012.



Roderick Frisk, J.

clm

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.

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 Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal checks, which include business-use personal checks, are not acceptable.** 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

IN RE: Citation No. 11-1886
Scott E. Clawges
t/a Jose's