

Mailing Date: JUNE 28 2012

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

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	In Re Citation No.: 11-2152
ENFORCEMENT (BLCE)	:	
	:	
v.	:	BLCE Incident No.: W02-422487
	:	
D & M SHUMBRIS, INC.	:	
T/A THE SWIZZLE STICK	:	PLCB LID No.: 36742
434 MAIN ST.	:	
EDWARDSVILLE, PA 18704	:	
	:	PLCB License No.: R-AP-SS-8145

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Craig A. Strong, Esquire

FOR LICENSEE: James Haggerty, Esquire

BACKGROUND:

This proceeding arises out of a citation, containing two counts, that was issued on December 23, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against D & M Shumbris, Inc. (Licensee).

The first count charges Licensee with violations of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 5513 of the Crimes Code [18 Pa. C.S. §5513]. The charge is that Licensee, by your servants, agents, or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises, on March 9 and April 12, 2011.

The second count charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that Licensee, by your servants, agents, or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated patron, on March 3, 2011.

I presided at an evidentiary hearing on April 17, 2012 at 100 Lackawanna Avenue, Scranton, Pennsylvania.

Therefore, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

1. The Bureau began its investigation on November 16, 2010 and completed it on July 29, 2011. (N.T. 26)

2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested, on August 15, 2011. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 15)

Count No. 1

3. On March 9, 2011, two Bureau Enforcement Officers entered the premises at 5:30 p.m. in an undercover capacity. Shortly thereafter, one Officer played a video gaming device. The Officer placed \$5.00 into the machine at about 6:30 p.m. The Officer accumulated 507 credits. The Officer approached the bartender to tell her about the credits. The bartender spoke to her husband. The bartender asked her husband, who was sitting near the gaming device: "How much would it be?" The bartender removed the accumulated credits from the video gaming device by using a remote device. The bartender walked to the cash register behind the bar. She entered a notation on a notebook located on the side of the cash register. She removed money from the cash register. She gave the Officer \$25.00 in currency. (N.T. 15-22)

4. On April 12, 2011, Bureau Enforcement Officers seized three video machines from the subject premises which were subsequently inspected and determined to be gambling devices *per se*. (N.T. 27-29)

Count No. 2

5. On March 3, 2011, three Bureau Enforcement Officers entered the premises in an undercover capacity at approximately 8:30 p.m. At about 9:00 p.m., an Officer took note of a patron sitting to the Officer's left. The customer introduced himself to the Officer. The targeted customer (TC) had a bottle of beer from which he was drinking. His speech was slow and slurred. The Officer had a difficult time in understanding TC. The Officer asked TC numerous times to repeat himself. TC introduced and reintroduced himself at least four times to the three Officers. TC was swinging his arms as if he was playing drums and guitar to the music that was provided. He repeatedly remarked that the song was a great one. When he placed money in the jukebox, TC had a difficult time keeping his balance. At 9:35 p.m., TC asked for another beer and a shot of liquor. The bartender sold TC a bottle of beer. The Officers departed ten minutes after TC received the bottle of beer. (N.T. 29-40)

6. The bartender who served TC took RAMP training three times. The bartender does the best she can to adhere to RAMP teachings. She is acquainted with a customer identified as Herb. He acts differently than most people. He is "intellectually challenged." (N.T. 102-107)

7. Ms. Shumbris, Licensee's Corporate President, works as a service director for an organization that assists with mentally disabled adults living in group homes or in the community. She has thirty-six years of experience working with mentally disabled adults. She is a qualified mental retardation specialist. As such, Ms. Shumbris conducts person-centered plans which involves observing and assessing intellectually disabled adults to help them live in the most appropriate setting outside institutions. At the time of the hearing, Ms. Shumbris was in charge of two group homes and twenty-eight intellectually challenged adults that reside in Luzerne and Wyoming counties. Ms. Shumbris is an expert in conducting assessments to determine whether an adult is intellectually challenged. (N.T. 129-135)

8. Ms. Shumbris conducted an assessment of Herb¹ after the events in controversy but before the hearing. The interview was conducted at the licensed premises. As he entered, Herb held onto the side of the building. While inside the premises, Herb had to hold onto items to maintain his balance. Ms. Shumbris concluded that Herb suffers from ataxia, a neurological disorder that negatively impairs muscle coordination. One cause of ataxia is brain injury. Ms. Shumbris discovered that Herb lived in a group home until he was eighteen years old and that he received government benefits. Herb has a poor concept of time. His motor skills were so diminished that he had difficulty making change for a \$20.00 bill. His speech is slurred. He talks slowly. Slow speech may be indicative of traumatic brain injury. (N.T. 136-150)

¹ Herb is the TC.

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

Count No. 1

2. The violations are sustained as charged.

Count No. 2

3. The violation is dismissed.

DISCUSSION:

Count No. 1

Although Licensee may not have been aware of the bartenders payouts for credits accumulated on the video gaming device, I conclude Licensee should have known. Furthermore, that the video gaming machines were gambling devices *per se* is also something Licensee should have been aware of.

Count No. 2

Recently, I have heard far too many cases where the Bureau's investigation, in my opinion, fell short of the mark. In most of those cases, the investment in additional investigative measures was marginal in relationship to the possible return. In this matter, the Bureau's investigation took more than eight months. The Bureau knew the identity of the alleged visibly intoxicated patron to be Herb, yet took no steps to interview him.

It was clear the Bureau concluded Licensee served the visibly intoxicated patron on or before April 12, 2011, more than three months before the investigation ended, because that was the date the Bureau notified Licensee that an Officer observed a violation.

As I once remarked, when you look for poison ivy in a rose garden with sufficient vigor, it is likely you will find a leaf or two. Put another way, if one has already concluded that a violation has occurred, everything one sees and does afterward is modified by that conclusion to the point that rotten teeth and bad breath may be interpreted as the remnants of a vomiting episode.

The purpose of an investigation is to gather information. The decision on whether a violation has occurred ought to be made after the investigation ends. If, as here, such a decision is prematurely made, the likelihood of taking further investigative steps, especially during an extended investigation, to determine the validity of the conclusion is not likely to occur².

I am firmly convinced the Officer's observations were accurate but manifestations of mental and physical incapacity rather than visible intoxication.

PRIOR RECORD:

Licensee has been licensed since September 22, 1995, and has the following Adjudication history:

In Re Citation No.: 03-0912. 3 days suspension.
Sales to a minor on May 9, 2003.

In Re Citation No.: 06-2332. Fine \$200.00.
Fortified, adulterated and/or contaminated liquor on
September 3, 2006.

In Re Citation No.: 07-1490. Fine \$500.00.
Fortified, adulterated and/or contaminated liquor on May
23, 2007.

In Re Citation No.: 10-2588. 4 days suspension and RAMP training
mandated.
Sales to a visibly intoxicated person on October 14, 2010.

² There are days when I find myself tilting at windmills as I reiterate, time after time, the same theme, without disagreement or noticing any change. Nevertheless, I commend **BLCE v. 128 East Allen, Inc.**, Docket No. 08-1841, www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2008&adjudication_sequence=1841&appeal=n, for an Adjudication which the Bureau's presentation of sales to a visibly intoxicated patron represents a paradigm.

PENALTY ASSESSMENT CRITERIA:

Mandatory Requirement(s)

Count No. 1

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 the violations found herein.

Discretionary Component(s)

Count No. 1

I impose a \$600.00 fine.

ORDER:

In Re Citation No.: 11-2152; Licensee, D & M Shumbris, Inc.; PLCB LID No.: 36742;
PLCB License No.: R-AP-SS-8145

Imposition of Fine

Licensee must pay a \$600.00 fine within twenty days of the mailing date of this Adjudication. The mailing date is located on this Adjudication's first page, upper left corner. If Licensee fails to comply, the Liquor Code requires that I suspend or revoke the license.

Dismissal

I dismiss Count No. 2.

Retaining Jurisdiction

I retain Jurisdiction to ensure compliance with this Adjudication.

Dated this 25TH day of June, 2012.



Felix Thau, A.L.J.

bc

General Information

This Adjudication is a legal document. It affects your rights, privileges, and obligations. The information which follows is a general guide. Therefore, you may want to consult with an attorney.

Applying for Reconsideration

If you want the Administrative Law Judge to reconsider this Adjudication, you must submit a written application and a nonrefundable \$25.00 filing fee. Both must be received by the Office of Administrative Law Judge, (PLCB - Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, PA 17110-9661) within fifteen days of this Adjudication's mailing date. Your application must describe the reasons for reconsideration. The full requirements for reconsideration can be found in Title 1 Pa. Code §35.241.

Appeal Rights

If you wish to appeal this Adjudication, you must file an appeal within thirty days of the mailing date of this Adjudication by contacting the Office of Chief Counsel of the Pennsylvania Liquor Control Board (717-783-9454). For further information, visit www.lcb.state.pa.us. The full requirements for an appeal can be found in 47 P.S. §4-471.

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.** 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