

Mailing Date: JAN 14 2013

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

PENNSYLVANIA STATE POLICE,	:	In Re Citation No.: 12-0412
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W03-432488
v.	:	
	:	
TOM SAWYER – HARRISBURG, LLC	:	PLCB LID No.: 56429
T/A TOM SAWYER DINER	:	
210 N. SECOND ST.	:	
HARRISBURG, PA 17101-1421	:	PLCB License No.: R-AP-SS-EHF-9242

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: John H. Pietrzak, Esquire

FOR LICENSEE: Frank C. Sluzis, Esquire

BACKGROUND:

This proceeding arises out of a citation, containing one count, that was issued on March 15, 2012, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Tom Sawyer – Harrisburg, LLC (Licensee).

The citation 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) minor, twenty (20) years of age, on June 17, 2011.

I presided at an evidentiary hearing on December 4, 2012 at the Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

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

FINDINGS OF FACT:

1. The Bureau began its investigation on June 23, 2011 and completed it on February 23, 2012. (N.T. 9)
2. The Bureau sent a notice of the alleged violation to Licensee at the licensed premises by certified mail, return receipt requested, on February 27, 2012. The notice alleged the violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 32)
3. During the course of the investigation, a Bureau Enforcement Officer conducted undercover visits to the premises on three occasions, finding no violations. (N.T. 15-18)
4. On June 17, 2011, Mr. H., a twenty year old (one and one-half months short of his twenty-first birthday) drank one or two beers with social acquaintances at a private residence. (N.T. 33-34)
5. With acquaintances as passengers, Mr. H. drove to the licensed premises. (N.T. 34-35)
6. Mr. H. and his companions, all of whom were of age, stood in one of two lines to gain entry to the outdoor serving area of Licensee's premises. There were two door tenders stationed at the entry point to verify the majority of every entrant. When Mr. H. was questioned, he displayed a valid Pennsylvania photo driver's license (ID) issued to an of-age individual, who gave his identification to Mr. H. for the express purpose of its illegal use. The door tender refused to allow Mr. H. entry into the premises because, after looking at the ID, he concluded the person depicted therein was not Mr. H. (N.T. 35-38)
7. Undaunted, Mr. H. proceeded to the end of the second line to attempt another entry. Mr. H. displayed the ID. The second door tender verified the ID's legitimacy by using a transaction scan device. Mr. H. was allowed to enter the premises where he was served an undetermined number of alcoholic beverages. (N.T. 38-44)
8. An of-age acquaintance, Mr. G., accompanied Mr. H. in his failure and success in gaining entry to the licensed premises. Mr. G. saw Mr. H. drinking alcoholic beverages there as well as two other licensed premises nearby. (N.T. 77-83)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. I sustain the violation as charged.

DISCUSSION:

Evidentiary Weight

Ah, but of course, the vicissitudes and vagaries of memory abound. I am reminded of the classic portrayal of memory's frailties humorously presented in the 1958 film version of *Gigi*.¹ In one scene, Honore (Maurice Chevalier), a Parisian womanizer, reminisces with Mamita (Hermione Gingold). You see, years ago, they were romantically involved. They join in a duet; a sampling of the lyrics follow:

(H): We met at nine. (M): We met at eight.

(H): I was on time. (M): No, you were late.

(H): Ah, yes, I remember it well. We dined with friends.

(M): We dined alone.

(H): A tenor sang. (M): A baritone.

(H): Ah, yes, I remember it well. That dazzling April moon!

(M): There was none that night. And the month was June.

(H): That's right. That's right.

(M): It warms my heart to know that you remember still the way you do.

(H): Ah, yes, I remember it well.²

¹ Winner of a then record nine Academy Awards, *Gigi* is now preserved in the United States National Film Registry. The stage production, which post-dated the film by some seventeen years, was considered a failure.

² Ah, but of course, the scene is set in a manner that supports Mamita's recollection. But, who is to say her memory, in total or as to any factor, is accurate? Perhaps both have mistaken memories.

We tend to assign to memory a precision equivalent to that of a well-established scientific measurement. My experience informs me that memory can be readily shaped and altered. In the instant matter, Mr. H.'s memory was severely impaired by the effects of excessive consumption of alcoholic beverages to the point where he had no memory of an automobile accident, an event which ordinarily would cause an indelible memory trail.

These memory differences confirm the general position that the recollection of one who is drunk ought to be weighed carefully, with the benefit of the doubt siding against assigning any testimonial value. Had it not been for the Bureau's successful effort in searching for and finding a corroborating witness, whose ability to recall is not suspect, I would likely have dismissed the case.³

Good Faith Affirmative Defense

The day has long since gone when Liquor Code Section 495 [47 P.S. §4-495] provided for only one affirmative defense.⁴ Presently, a licensee enjoys two additional, alternative affirmative defenses, delineated in sub-sections (f) (use of a photograph, photocopies, or other video or visual representation) and (g) (use of a transaction scan device) [47 P.S. §4-495(f) and (g)].

Yet, the Bureau's investigative activity in determining whether a licensee has an affirmative defense continues to be limited to that of the Declaration of Age Card.⁵ I have yet to comprehend or to be provided any reasonable explanation as to why investigative resources are allocated to determining the existence of an affirmative defense when every alternative is not explored. The best I've heard is that old habits die hard.

Each of the three affirmative defenses has two commonalities. In addition to the prescribed processing of each affirmative defense, the first is the mandate that a licensee must require the presentation of one of the permitted identification cards; the second is good faith. I find the good faith component to be lacking as applied to Licensee's use of the transaction scan device.

³ It also became clear that Mr. H.'s recall of the number of drinks served him at the licensed premises was unreliable as he was also seen drinking at two other licensed premises. Consequently, the conclusion that Mr. H. must have been served an inordinate amount of alcoholic beverages at the licensed premises, a conclusion which would have exacerbated the violation if Mr. H's testimony, standing alone, were accorded credibility, is unacceptable.

⁴ Now embodied in sub-section (e) [47 P.S. §4-495(e)], relating to the Declaration of Age Card.

⁵ In this matter, the Officer made inquiry into Licensee's use of a transaction scan device as well as the existence of a Declaration of Age Card.

Having taken the time to compare the ID to Mr. H., concluding the ID was not issued to him, the first door tender's rejection of Mr. H.'s entry militates against good faith. If one door tender found sufficient reason to disallow entry after evaluating Mr. H.'s appearance to that depicted in the ID, the same result ought to occur whoever attempts to verify the ID was issued to the presenter. Therefore, I draw the inference that the second door tender failed to inspect the ID in relationship to the presenter.⁶

PRIOR RECORD:

Licensee has been licensed since April 21, 2006, and has no prior Adjudications.

PENALTY ASSESSMENT CRITERIA:

Mandatory Requirement(s)

Liquor Code Section 471 [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 the violation found herein.

Further, Liquor Code Section 471.1 [47 P.S. §4-471.1], relating to responsible alcohol management, mandates that Licensee participate in the Pennsylvania Liquor Control Board's Responsible Alcohol Management Program (RAMP), since this is Licensee's first violation as herein found.

Discretionary Component(s)

I impose a \$1,250.00 fine.

ORDER:

In Re Citation No.: 12-0412; Licensee, Tom Sawyer – Harrisburg, LLC;
PLCB LID No.: 56429; PLCB License No.: R-AP-SS-EHF-9242

Imposition of Fine

Licensee must pay a \$1,250.00 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.

⁶ The FEAR standard, i.e. Feel, Examine, Ask, Return, suggested as a model in the Responsible Alcohol Management Program, may not be a touchstone but surely is an effective approach. See **BLCE v. Pub Charles, Ltd.**, In Re Citation No.: 00-1701.

Mandatory RAMP Compliance

I order Licensee to comply with Liquor Code Section 471.1, pertaining to responsible alcohol management, for one year from the date of Bureau of Alcohol Education (BAE) certification.

Licensee must contact the BAE, Pennsylvania Liquor Control Board: toll free telephone No.: 1-866-275-8237; web site: www.lcb@pa.gov; email address: LBEducation@pa.gov within thirty days of the mailing date of this Adjudication to effect full RAMP compliance. Licensee has ninety days from the mailing date of this Adjudication to be fully certified by the BAE.

Failure to comply may cause the Bureau to issue a citation alleging Licensee's noncompliance. Alternatively, the Bureau may request a modification of the penalty imposed in this Adjudication.

Retaining Jurisdiction

I retain Jurisdiction to ensure compliance with this Adjudication.

Dated this 2ND day of January, 2013.



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