

Mailing Date: JUN 21 2013

[Appeal](#)

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

PENNSYLVANIA STATE	:	In re Citation No. 12-0823
POLICE, BUREAU OF	:	
LIQUOR CONTROL ENFORCEMENT	:	BLCE Incident No. W09-440141
	:	
v.	:	PLCB LID No. 46791
	:	
BROOKE DEREK, INC., T/A RILEY'S 4505	:	PLCB License No. H-AP-SS-1074
MAIN ST.	:	
WHITEHALL, PA 18052-1902	:	
JUDGE SHENKLE	:	
BLCE COUNSEL: Roy Harkavy, Esq.	:	
LICENSEE: Albert Charlie III, President of Licensee	:	

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on May 23, 2012. The citation alleges that Licensee violated §493(1) of the Liquor Code, 47 P.S. §4-493(1), on February 18, 2012, by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to a visibly intoxicated patron.

A hearing was held on May 2, 2013, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On February 18, 2012, liquor enforcement officers visited the licensed premises in an undercover capacity at about 1:15 a.m. They saw one bartender serving about 25 patrons. The officers sat at a table. About six feet away they saw a man stand up and begin walking to the bar counter. He tripped on a stool and almost fell, but regained his balance. Then he walked by one of the officers and tripped again. He was staggering. The man apologized to the officer and said something to the effect that he had had a little too much to drink that night (N.T. 22-23).

2. Later the man approached and began talking to one of the officers. His speech was slurred and difficult to understand, and his eyes were glassy and droopy. After this he went to the bar counter and conversed with a woman. He had his arm around her, as if to keep balance. He tried to

dance with the woman but could not do so. After this, at 1:50 a.m., the bartender served a pint of draft beer to this patron, taking money from his pile of money on the bar counter (N.T. 24).

3. Bureau Special Order 2011-7, promulgated on April 26, 2011, states Bureau policy concerning timely notification to licensees in cases involving service to visibly intoxicated patrons. The order provides that telephone notification shall be given to licensees within 72 hours after witnessing the violation, but provides exceptions in the case of long-term investigations involving other alleged violations. Licensee did not receive the telephone notification required by this order, because of an ongoing investigation of the licensed premises regarding alleged sales to minors (N.T. 25-26, Exhibit C-3).

CONCLUSIONS OF LAW:

Sustained as charged.

DISCUSSION:

In cross-examining the Bureau officer who testified, Licensee's president showed the witness a photograph said to be "a picture of Ozzy." The witness looked at the photograph and testified that it was not a photograph of the person described in his testimony. Licensee's president replied "All right. Then we have absolutely zero evidence on this case." (N.T. 28).

On the contrary, the testimony described the behavior of a person in the licensed premises but did not state that the person's name was "Ozzy." It is true that the Bureau's Prehearing Memorandum states that the visibly intoxicated patron (VIP) said that his name was "Ozzie," but the testimony on the record does not mention a name.

The first hole in Licensee's argument is that no one identified the photograph shown to the officer who testified – that is, no one vouched under oath that the photograph was a picture of a particular person, named "Ozzy" or "Ozzie" or whatever. Licensee's president might have done this, but he did not. Therefore the photograph shown to the witness is not evidence of anything, and it was neither offered nor received as evidence.

The second hole is that it is entirely possible for a licensed premises to contain within its four walls at any given time more than one person named "Ozzy" or "Ozzie."

The third hole in Licensee's defense is that Bureau Special Order 2011-7 is not a statute, nor is it a regulation. It might be argued by analogy to *Erie Sports Bar, Inc. v. PSP, BLCE*, 6 A.3d 663 (Pa.Cmwlth. 2010) that proof of notification is required before a case can be prosecuted successfully, but I decline to extend the reach of that decision beyond its facts, which had nothing to do with whether or not the Bureau gave 72 hours' notice of a VIP violation.

But even if the strict rule of *Erie Sports Bar* applied, the language of Bureau Special Order 2011-7 is not absolute. It provides exceptions, the applicability of which is supported in this record.

PRIOR RECORD:

Licensee has been licensed since October 24, 2000, and has had prior violations as follows:

In re Citation No. 01-1886. \$300.00 fine.

1. Loudspeakers could be heard outside. June 9, 2001.

In re Citation No. 01-2592. \$350.00 fine.

1. Loudspeakers could be heard outside. Sept. 4, 2001.

In re Citation No. 02-1623. \$1,500.00 fine.

1. Loudspeakers could be heard outside. May 27, 2002.
2. Permitted lewd, immoral or improper entertainment. June 13, 2002.

In re Citation No. 04-1791. \$2,050.00 fine.

1. Sold, furnished or gave liquor for consumption off premises.
2. Loudspeakers could be heard outside.
3. Sales to a visibly intoxicated person.
4. Noisy and/or disorderly conduct

In re Citation No. 06-2572. \$150.00 fine.

1. Failed to notify Board within 15 days of change of manager. January 28, 2003.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$1,000.00 to \$5,000.00 range, or both, for violations of this type.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Brooke Derek, Inc., t/a Riley's, License No. H-AP-SS-1074, shall pay a fine of one thousand two hundred fifty dollars (\$1,250.00) 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.

Dated this 12TH day of JUNE, 2013.


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

In re Citation No. 12-0823 Brooke
Derek, Inc.