

Mailing Date: MAY 14 2013

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

PENNSYLVANIA STATE POLICE,	:	In Re Citation No.: 12-0922
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W05-441052
v.	:	
	:	
SEVEN SPRINGS FARM, INC.	:	PLCB LID No.: 7240
T/A MAIN LODGE	:	
777 WATERWHEEL DR.	:	
SEVEN SPRINGS, PA 15622-9801	:	PLCB License No.: H-AP-SS-4587

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Emily L. Gustave, Esquire

FOR LICENSEE: Stanley J. Wolowski, Esquire

BACKGROUND:

This proceeding arises out of a citation, containing one count, that was issued on June 20, 2012, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Seven Springs Farm, Inc. (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) visibly intoxicated patron, on January 14, 2012.

I presided at an evidentiary hearing on April 3, 2013 at 180 Charlotte Drive, Altoona, Pennsylvania.

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

FINDINGS OF FACT:

1. The Bureau began its investigation on January 2, 2012 and completed it on May 14, 2012. (N.T. 8)

2. The Bureau sent a notice of the alleged violation to Licensee at the licensed premises by certified mail, return receipt requested, on May 30, 2012. The notice alleged the violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 6)

3. Three Bureau Enforcement Officers entered the premises at approximately 10:45 p.m., January 31, 2013 in an undercover capacity. They entered into an area of the premises called "The Matterhorn," at about 11:00 p.m. There were approximately 200 to 250 patrons there. (N.T. 12-13)

4. The Matterhorn was so crowded that the Officers were fortunate to find a seat. One Officer remained at a table while the other two began to mingle. A live band provided entertainment. (N.T. 15)

5. At approximately 11:10 p.m., one Officer's attention was drawn to a patron attempting to dance with five young ladies. The patron could not keep time to the music. It appeared to the Officer as if the patron was swaying from side to side in an attempt to keep his balance. It was the Officer's conclusion that the patron's behavior was indicative of visible intoxication. (N.T. 15-28)

6. At 11:30 p.m. the band took a break. The Officer returned to the table at which another Officer was seated. He took a direct line path from his location near the dance floor to the table. There, the Officer continued to watch the patron. The patron made his way from the dance floor to a serving bar but did not take a direct line path. He weaved in and out of tables and customers. (N.T. 29-32)

7. The patron's choice of route buttressed the Officer's opinion the patron was visibly intoxicated. The Officer reasoned that a sober patron would have chosen a more direct path. (N.T. 31-33)

8. The patron stopped at a distance of approximately ten to fifteen feet away from the table where the two Officers were situated. The patron appeared to be looking at one of the Officers and said: "What's up fellows?" The Officer concluded the patron's speech was slurred. The patron fumbled through his pockets. The Officer heard the patron remark: "Where the fuck is my money." The patron continued to go through his pockets, finally finding money. (N.T. 33-39)

9. At 11:36 p.m., the patron continued to the serving bar. The Officer was now approximately twenty feet away from the patron. The patron tapped on the bar to gain the barmaid's attention. The Officer heard the patron say: "Jack Daniels." The barmaid served two drinks to the patron. The patron handed the drinks to two customers. (N.T. 39-46)

10. The Officer noticed nothing remarkable about the patron's motor skills when he handed the two drinks to the other customers or when the patron placed money on the bar. (N.T. 47-51)

11. At 11:39 p.m., the patron ordered and was served a unknown drink which he consumed in approximately three swallows. At 11:44 p.m., the patron again tapped on the bar to gain the barmaid's attention. The Officer heard the patron say: "vodka." The barmaid served the patron what appeared to be a mixed drink. (N.T. 51-56)

12. The Officer went to the bar. He ordered a vodka and cranberry juice drink. The bartender used the same beverage dispensing guns as she did for the patron's order of 11:44 p.m. (N.T. 56-59)

CONCLUSIONS OF LAW:

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

2. The Bureau has failed to prove that Licensee served a visibly intoxicated patron on January 14, 2012.

DISCUSSION:

Establishing Visible Intoxication

I cannot accord the Officer's assessment of the patron's condition any weight. This record is rife with conclusion and opinion as to what motivated the patron to behave in the manner he did. I am convinced, once having concluded the patron was visibly intoxicated based on observing the patron on the dance floor, the Officer's further observations were contaminated by a conclusion too early drawn.

I further assess little weight to the patron's uncoordinated movements on the dance floor as a manifestation of visible intoxication. The patron's movements are equally as indicative of one who suffers from EBS (Elaine Bennis Syndrome).¹

That the patron made his way from the dance floor to the serving bar, choosing a path difficult to negotiate is also an overstated element because The Matterhorn was very crowded. Furthermore, to conclude the patron displayed an unsteady gait as he negotiated his way around tables and other customers can readily be explained by the difficulty in passing through a crowd.

The patron's momentary stop to search through his pockets and say hello is not particularly unusual. I dare say, every one of us has experienced searching through our pockets accompanied by the angst of thinking an item is lost or misplaced.

For an observer to remark that a patron, stationed 20-25 feet away, with noise interference, spoke with slurred speech when the observer heard only three words, all three of which were intelligible, is a conclusion that defies common sense.

I am equally unimpressed with the patron's tapping on the bar counter as a sign of visible intoxication. At any crowded service bar, one may see all kinds of behavior designed to catch the server's attention.

In evaluating the various factors which contributed to the Officer's conclusion, I am well aware that it is not any one factor that makes or breaks a case. Standing alone, each factor is likely to have multiple causes. In this matter, the community of factors are extremely weak.²

¹ A reference to the TV series, "Seinfeld." In one episode, one of the main characters, Elaine Bennis, displays her total lack of dance rhythm.

² I am reminded of **BLCE v. 120 East Allen, Inc.**, In Re Citation No.: 08-1841. There, the Bureau presented what I consider to be a textbook case establishing a sale to a visibly intoxicated patron.

Let it be clear. I do not conclude the Officer was untruthful. Given the excessive observation distance, crowd noise and other elements, the Officer's opinion is not supported by adequate observation. However firm an Officer's opinion concerning a patron's visibly intoxicated condition may be, the Bureau may nevertheless not satisfy its burden of proof. The question is not whether the Officer believes a patron is visibly intoxicated but whether there are sufficient indicia of visible intoxication to convince the Administrative Law Judge the Officer's conclusion is worthy of substantial weight.

Alcoholic Beverage Service

As an indication of how the distance between the Officer and the patron contributed to limited observations, the Officer could not determine the type of drink actually served the patron. In order to establish the patron was served an alcoholic beverage, the Officer had to request what he thought the patron ordered as an indirect means of establishing the patron was actually served an alcohol beverage.

That subsequent evaluation assumes the Officer's ability to hear the patron's complete and accurate request was not compromised. Consequently and in addition to the lack of sufficient evidence to establish the patron's visibly intoxicated condition at the time of service, I conclude the Bureau has not met its burden of proving the beverage served the patron was alcoholic.³

ORDER:

In Re Citation No.: 12-0922; Licensee, Seven Springs Farm, Inc.; PLCB LID No.: 7240;
PLCB License No.: H-AP-SS-4587

Dismissal

I dismiss the citation.

Dated this 8TH day of May, 2013.



Felix Thau, A.L.J.

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³ In defense, Licensee presented a video recording of the patron while at the service bar. Because the recording contained lapses between each still photograph, which lapses varied anywhere from one to seven seconds, it was impossible to glean anything, whether inculpatory or exculpatory, through the video.

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.