

Mailing Date: FEB 19 2014

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

PENNSYLVANIA STATE	:	In re Citation No. 12-1043
POLICE, BUREAU OF	:	
LIQUOR CONTROL ENFORCEMENT	:	BLCE Incident No. W01-446126
	:	
v.	:	PLCB LID No. 65279
	:	
5892 HENRY AVE., LLC	:	PLCB License No. R-AP-SS-10394
T/A MURPHY'S TAVERN	:	
5892 HENRY AVE.	:	
PHILADELPHIA, PA 19128-1704	:	

JUDGE SHENKLE
BLCE COUNSEL: Erik S. Shmukler, Esq.
LICENSEE COUNSEL: Edward A. Taraskus, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on July 10, 2012. The citation alleges that Licensee violated Section 493(1) of the Liquor Code, 47 P.S. §4-493(1), on May 19, 2012, by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated patron.

A hearing was held on October 15, 2013 in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. In early May, 2012, a liquor enforcement officer visited the licensed premises and saw no violations (N.T. 6).
2. On May 19, 2012, liquor enforcement officers arrived at the licensed premises at 12:10 a.m. and heard loud music emanating from it, for which they caused a letter of warning to be issued. Inside the premises, the officers saw a bartender serving approximately 15 patrons. At approximately 1:00 a.m. one of the patrons walked up to the bar area and fell over. Two other patrons picked the man up, placed him at the bar counter, and then sat at the bar next to him while he was still standing, shifting his weight back and forth (N.T. 6-8).
3. The officers were sitting at a high-top table off the bar counter, about ten feet away. The bartender was in the service area, and came to the place where the two patrons and the man who fell were. One of the patrons ordered five shots of liqueur. The bartender asked who they were for. The patron indicated that three were for them, the three people at the bar. He then pointed behind him at the officers and said "get these two guys shots as well." The officers declined, with thanks.

The bartender served three shots of liqueur at 1:08 a.m. The patron who had fallen drank a shot and then chased it with the beer that was already in front of him (N.T. 8-10).

4. One of the officers heard the patron who fell speaking "vaguely. He was slurred, talking to the barmaid and the other patrons. The other patrons were also --- who were right next to him, I did hear them clearly saying, you know, something along the lines of, you know, just drink, type-deal." (N.T. 10).

5. On June 4, 2012, one of the officers spoke with Licensee's manager¹ and provided a complete account of the events of May 19, with a description of the people involved. Licensee's manager was receptive, and said he would meet with his staff about the matter (N.T. 11).

6. Licensee enforces a policy prohibiting sales of alcoholic beverages to visibly intoxicated patrons. The bartender on duty during the incident of May 19 had received RAMP training and Licensee's policy regarding sales of alcoholic beverages to visibly intoxicated patrons had been communicated to her. She is a seasoned bartender, and when Licensee's manager spoke to her about the matter she told him who the patron was. The manager knew the person (N.T. 16-19).

7. The person in question had been a customer at the licensed premises since Licensee took the business over. Licensee's manager had seen him, previous to May 19, 2012, sitting at the bar talking to someone and then suddenly "nod off" or fall asleep (N.T. 20-21).

8. Licensee's manager did not know of any medical diagnosis for this person, but drew his conclusions based on what he had seen himself and heard from others. The person has not been in the premises since May 19, 2012, and has been told that he would not be served. Licensee's manager has never seen this person appear to be intoxicated (N.T. 22).

CONCLUSIONS OF LAW:

Licensee violated Section 493(1) of the Liquor Code, 47 P.S. §4-493(1), on May 19, 2012, by furnishing alcoholic beverages to one visibly intoxicated patron.

DISCUSSION:

In Citation No. 99-1170 the Bureau alleged service of alcoholic beverages to a visibly intoxicated male patron at this same premises on June 17, 1999, but withdrew the charges "because medical evidence proved that the patron who appeared to be intoxicated was instead suffering from a degenerative neurological disorder." This was not the same patron, however.

In the present case there was no medical evidence, only testimony which might support a conclusion that the patron in question might have had a neurological condition which might have made him appear to be intoxicated.

There was also testimony from a patron who accompanied the patron in question to the licensed premises, which would support a conclusion that the patron in question was not actually intoxicated, but that he was sometimes prone to falling asleep suddenly.

¹ Who is also a member of this company, owning 50% of the stock.

I have reservations about that patron's testimony, and I also have reservations about the testimony of the liquor enforcement officer who saw the patron in question.² I do not doubt that the patron fell, however, suddenly and unexpectedly.

This event – falling down on one's rear end with no apparent cause – is sufficiently unusual that it should be grounds for any bartender to refuse service of alcohol to the patron involved. Even if that patron was not actually intoxicated, there were objective signs which made him appear to be.

In *Laukemann t/d/b/a Countryside Inn v. Commonwealth, PLCB*, 82 Pa. Cmwlth. Ct., 475 A.2d 955 (1984) the licensee offered to prove by expert medical evidence that the observations provided by the enforcement officer were insufficient to prove intoxication. The testimony would have shown that other physical and medical conditions or afflictions could have produced the same symptoms. The court wrote as follows:

Finally, in defining the violation as the dispensation of alcoholic beverages to a person "visibly intoxicated," the statute displays considerable logic in placing stress upon what can be seen. The law does not hold a licensee or its agent responsible on any basis, such as the blood alcohol level of a patron, which would not be externally apparent; instead, the law decrees that the alcoholic beverage dispenser shall not provide more alcohol when the signs of intoxication are visible. The practical effect of the law is to insist that the licensee be governed by appearances, rather than by medical diagnoses. The wisdom of the legislative approach is plain.

-- 475 A.2d at 956-957

Licensee's evidentiary defense was handicapped by its inability to present evidence from the bartender or the alleged visibly intoxicated patron, which might have substantiated a medical defense. This might be cured by a hearing *de novo* in the Common Pleas Court, which has the power to issue enforceable subpoenas, which might have changed this result.

PRIOR RECORD:

Licensee has been licensed since October 11, 2012, and has had no prior violations.

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 the type found in this case. Mandatory R.A.M.P. – certification is required by 47 P.S. §4-471(d) in these circumstances.

² The officer was asked about the condition of the patron's eyes, and I have disregarded his overeager and nonresponsive answer regarding seeing the person stumble as he walked by, "kind of going to the bathroom" because it did not fit in with the chronology I understood from the evidence as a whole. The friend of the allegedly intoxicated patron, on the other hand, related a very dodgy narrative I found difficult to believe entirely.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, 5892 Henry Ave., LLC, t/a Murphy's Tavern, License No. R-AP-SS-10394, shall pay a fine of one thousand dollars (\$1,000.00) 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.

IT IS FURTHER ORDERED that Licensee shall comply with the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management in the following manner. The Licensee is directed to contact the Bureau of Alcohol Education, Pennsylvania Liquor Control Board (toll free telephone: 1-866-275-8237; www.lcb.state.pa.us) within thirty (30) days of the mailing date of this adjudication in order to receive assistance in the compliance process. Licensee must receive certification within ninety (90) days of the mailing date of this adjudication. Licensee must remain in compliance for a period of one year from the date such certification is issued. The Bureau of Liquor Control Enforcement is further directed to monitor compliance with this adjudication.

Failure to comply with this order will be grounds for modification of penalty in this case. Failure to comply may also constitute grounds for issuance of a new citation as authorized by Section 471(d) of the Liquor Code, 47 P.S. Section 4-471(d).

Dated this 4TH day of FEBRUARY, 2014.



David L. Shenle, 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; Note Citation Number on Check

The fine must be paid by cashier's check, money order, or a check drawn on the business or trust account of an attorney licensed in Pennsylvania. **Personal and business checks are not acceptable unless bank certified.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail it, along with any required documentation, to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661

In re Citation No. 12-1043
5892 Henry Ave., LLC