

Mailing Date: OCT 01 2014

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	In Re: Citation No. 13-0493C
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	BLCE Incident No. W01-453266
	:	
9241 PW WELSH LLC	:	
T/A PADDY WHACKS	:	PLCB LID - 58087
9241-43 ROOSEVELT BLVD. REAR	:	
PHILADELPHIA PA 19114-2205	:	
	:	PLCB License No. R-AP-SS-EHF-11481
	:	
PHILADELPHIA COUNTY	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

ANDREW R. BRITT, ESQ.

FOR THE LICENSEE:

EDWARD B. McHUGH, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on March 12, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against 9241 PW Welsh, LLC, t/a Paddy Whacks, License Number R-AP-SS-EHF-11481 (hereinafter "Licensee").

An Administrative hearing was held on Tuesday, January 14, 2014, pursuant to requisite and appropriate hearing notice.

The citation charges Licensee with violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1), in that on January 3, 2013, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, twenty (20) years of age.

FINDINGS OF FACT:

1. The Bureau of Enforcement conducted an investigation of the licensed premises which began on November 13, 2012 and ended on January 8, 2013. A notice of noncompliance letter was sent to the licensed premises dated January 8, 2013. A notice of violation letter dated February 6, 2013 was sent to the licensed premises by certified mail, return receipt requested. That mailing was signed as received. A citation dated March 12, 2013 was sent to the licensed premises by certified mail, return receipt requested. That mailing was signed as received (N.T. 10-13 and Exhibits B-1, B-2 and B-3).

2. An officer from the Bureau of Enforcement, who had been so employed for approximately five years, participated in an investigation of the licensed premises by conducting an age compliance check (N.T. 6).

3. On January 3, 2013 at approximately 9:20 p.m., the officer entered the premises. Two bartenders were tending bar and rendering service to about thirty-five patrons. The officer took a seat at the bar facing the main doors (N.T. 6).

4. At approximately 9:30 p.m., Underage Buyer #575 entered the premises. Upon entering the premises, a doorman was observed at the front door watching the television in the corner. When the Underage Buyer entered, the door person glanced at him, but did not ask him for identification (N.T. 6-7).

5. The officer watched Underage Buyer #575 approach the bar and sit down. The door person came closer to the Underage Buyer and took a look at him, but did not ask for identification (N.T. 7).

6. The Underage Buyer was observed receiving a twelve ounce Budweiser beer and handing money to the bartender. The bartender was observed placing the money in a cash register located behind the bar and giving change to the Underage Buyer (N.T. 8-9).

7. The Underage Buyer departed the premises leaving the beer on the bar (N.T. 9).

8. The officer indicated that he remained a distance of approximately ten feet from the Underage Buyer (N.T. 9).

9. At no time did the bartender or other personnel ask the Underage Buyer for identification (N.T. 9).

10. The officer entered the premises prior to the Underage Buyer to insure that it was a safe environment. The officer remained on the premises until approximately 9:40 p.m., when a supervising officer entered and identified himself to the bartender. The doorman came over to the supervising officer and informed him that he had served an Underage Buyer. Both officers departed the premises at 9:40 p.m. (N.T. 9 -10).

11. The officer indicated that he was not the original investigating officer. During the course of the investigation, he had discussions with the investigating officer. He was notified based upon a complaint and that there was an open investigation relative to minors (N.T. 14-15).

12. Underage Buyer #575 indicated that he had completed the Underage Buyer Program on line by submitting an application, taking the required training and passing a test. The Underage Buyer indicated that he had visited this particular licensed premises as a part of the age compliance program on approximately three prior occasions, but could not recall whether those occasions were done pursuant to the instant investigation between November 14, 2012 and January 8, 2013 (N.T. 27-29).

13. The Underage Buyer was twenty-one at the time of the hearing. On January 3, 2013 at the time he purchased the alcoholic beverage from Licensee, the Underage Buyer was eight months shy of age twenty-one (N.T. 29).

14. On January 3, 2013, the Underage Buyer walked into the premises at approximately 9:30 p.m., after the Enforcement officer had gone into the premises. When he was satisfied that it was safe, he entered the premises. He walked past the door person and did not show, nor was he requested to show, any type of identification. The Underage Buyer walked up to the bar and ordered a Bud Light beer. He paid \$2.00 for the beer; the money had been given to him by the Bureau (N.T. 29-30).

15. The Underage Buyer took the beer, lifted it up off the bar, put his hands around it and put it down. The Underage Buyer did not consume any portion of beer. He picked up his cell phone and walked out of the establishment. The bartender did not make any inquiry as to his age nor was he asked to sign a declaration of age card (N.T. 30-31).

16. The Underage Buyer remained on the premises for approximately a minute and half (N.T. 35).

17. The Underage Buyer had visited the premises previously, but did not recall whether he had been at the premises between November 13, 2012 and January 8, 2013 (N.T. 36-37).

18. The Underage Buyer was told that he would not be permitted to be in the program at age twenty and three-fourths (N.T. 37-38).

19. On the day of the visit to the licensed premises, the Underage Buyer had a beard, i.e. a substantial amount of facial hair (N.T. 40-41).

20. An officer from Bureau of Enforcement, M.R., stated that he was employed by the Bureau of Enforcement as a supervisor in the Philadelphia office and he had been employed by the State Police for approximately ten years in a supervisory position (N.T. 46-47).

21. M.R. was involved in the investigation as a supervisor in charge of the age compliance detail on January 3, 2013. He did not do the training of the Underage Buyer but did verify that it had been done before utilizing the minor in the age compliance program (N.T. 48).

22. The Bureau permits college students between the age of eighteen and twenty and a half to participate in the program (N.T. 50).

23. The officer observed the Underage Buyer on January 3, 2013. The Underage Buyer explained that he was inside the premises and gave the officer a description of the bartender. M.R. went inside to identify the person who sold him the alcoholic beverage (N.T. 51).

24. The officer entered the premises at approximately 9:45 p.m., identified himself to the bartender and notified him that he had sold to an underage patron (N.T. 51-52).

25. The officer advised him that he would be getting a letter in the mail with regard to notification of noncompliance and most likely it would be followed by an administrative citation (N.T. 52).

26. M.R. indicated when minor complaints are given to him, he keeps them in a file and when an age compliance is conducted, several times a month, and M.R. is assigned to run it, he will determine a generalized area where he will conduct the compliance checks. He is aware that one of the officers had an ongoing minor's case at this licensed premises (N.T. 54).

27. According to the investigative report of the Bureau of Enforcement, there were six undercover visits to the licensed premises between November 13, 2012 and January 8, 2013, when the premises was open and operating (N.T. 59-60).

28. The supervisor of the age compliance detail determined who is assigned to do the compliance checks and he would have contacted Underage Buyer #575 and asked about his availability for January 3, 2013 (N.T. 60-61).

CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

9241 PW Welsh, LLC
t/a Paddy Whacks
In Re: Citation No. 13-0493C

On January 3, 2013, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, twenty (20) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1).

PRIOR RECORD:

Licensee has been licensed since October 3, 2008, and has a record of prior violations as follows:

In Re:

Citation No. 09-2967. \$1,250.00 fine.

1. Sales on Sunday between 2:00 a.m. and 11:00 a.m.
November 22, 2009.
2. Failed to require patrons to vacate the premises not later than one-half hour after the required time.
November 22, 2009.
3. Permitted patrons to possess or remove alcoholic beverages after 2:30 a.m.
November 22, 2009.

Citation No. 11-0299C. \$500.00 fine.

1. Sales to a minor.
January 20, 2011.

Citation No. 12-0395. \$300.00 fine.

1. Sold and/or served an unlimited or indefinite amount of alcoholic beverages.
December 31, 2011.

Citation No. 12-1634C. One day suspension.

1. Sales to a minor.
October 24, 2012.

DISCUSSION:

Licensee is charged with violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1), in that on January 3, 2013, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, twenty (20) years of age. The minor, who was served, was a member of the Bureau of Liquor Control Enforcement Age Compliance Program.

An investigation of the premises began on November 13, 2012, after a complaint was received by the Bureau, alleging sales to minors. Although the Bureau was not asked to reveal the name of the complainant, a supervisor testified that it was *not* an anonymous complaint. The investigating officer(s) from the Bureau made six visits to the licensed premises during the course of a three month investigation and uncovered no violations. The Bureau presented no witnesses regarding those investigative activities.

A supervisor, in the age compliance program, testified that he was responsible for selecting the detail of officers and minor for the age compliance check on January 3, 2013. The supervising officer indicated that the minor was selected based upon availability. Although a doorperson did give the minor a *second glance*, no doorperson or server requested identification nor asked the minor to sign a declaration of age card. The minor was served, feigned a phone call, and left the premises without consuming an alcoholic beverage. Licensee was advised shortly thereafter that they had served a minor. The investigation was closed on January 8, 2013.

The manner in which compliance checks are to be performed and the requirements of officers, employees and interns of the Bureau to undergo approved training prior to participation in a compliance check is prescribed by 37 Pa.C.S. §23. The minor who was served appears to have met the age (18-20) and training requirements to participate in the program. The Bureau seemingly complied with the letter of the law, if not the spirit of the law, which further requires justice and fair play.

The Court is concerned that the Bureau's investigative scheme came perilously close to entrapment: (1) even though the minor selected for this assignment was underage, at the time of his visit to the premises he had a full beard and looked decidedly over the age of twenty-one. At the time of hearing, the minor was then twenty-one years of age, clean shaven, but still appeared to be considerably older than his stated age; and (2) the undeniably older looking minor was utilized in this investigation after six visits by Bureau agents over a period of three months revealed no violations at the licensed premises. Licensee's attorney stated that if not entrapment, the Bureau's investigation was *disingenuous*.

Title 18 Pa. C.S. §313 provides a criminal defense of entrapment if the person charged shows by a preponderance of the evidence that a law enforcement official or a person cooperating with the official induces a person to engage in the offense by either making false statements to induce belief that the conduct is not prohibited or using methods of persuasion to create a substantial risk that an offense will be committed by persons other than those ready to commit it. It is applicable only to criminal prosecutions. On the other hand, Common Law Entrapment, a defense which existed prior to codification of the Rules of Criminal Procedure, is still a viable concept in administrative actions. *Smith v. State Horse Racing Comm.*, 535 A.2d 596 (Pa. 1988); *4-6 Club v. Pennsylvania Liquor Control Board*, 275 A.2d 40 (Pa. 1971). However, it has long been established that the fact that officers provide opportunities for the commission of an offense does not defeat prosecution.

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Here, Licensee is strictly liable for offenses of §4-493(1) and could not present any of the defenses available in §4-495 of the Liquor Code. On the issue of strict liability *Commonwealth v. Koczwar*, 155 A.2d 825, 828 (Pa. 1959), *cites Tahiti Bar, Inc. Liquor License Case*, 150 A.2d 112 (Pa. 1959), "There is perhaps no other area of permissible state action within which the exercise of the police power of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages." **Koczwar** further states:

It is abundantly clear that the conduct of the liquor business is lawful only to the extent and manner permitted by statute. Individuals who embark on such an enterprise do so with knowledge of considerable peril, since their actions are rigidly circumscribed by the Liquor Code.

Because of the peculiar nature of this business, one who applies for and receives permission from the Commonwealth to carry on the liquor trade assumes the highest degree of responsibility to his fellow citizens. As the licensee of the Board, he is under a duty not only to regulate his own personal conduct in a manner consistent with the permit he has received, but also to control the acts and conduct of any employee to whom he entrusts the sale of liquor. Such fealty is the *quid pro quo* which the Commonwealth demands in return for the privilege of entering the highly restricted and, what is more important, the highly *dangerous* business of selling intoxicating liquor.

While the Court questioned the Bureau's conduct in this investigation, Licensee also fell short of its duty and responsibility. The Bureau conducted this investigation as a result of a complaint. Even though the Court in no way used Licensee's prior record to determine whether there was a violation in the instant matter, surely the Bureau would have been privy to Licensee's prior history, which included sales to minors when they were conducting this investigation. Licensees will encounter individuals who appear younger or older than their stated ages, but prudence requires that licensee's check for valid identification before rendering service of alcoholic beverages. Licensee was RAMP Certified on July 11, 2014.

After careful consideration of the facts and circumstances of this case, as well as the prior history, which includes violations for sales to minors in 2011 and 2012, a period of suspension shall be imposed.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$1,000.00 or more than \$5,000.00, or both, for violations of the type found in this case.

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Section 471(c) of the Liquor Code, 47 P.S. Section 4-471(c), also requires that where, as here, the violation in question is the third or subsequent violation of any of the offenses referred to in subsection 471(b) of the Liquor Code, 47 P.S. Section 4-471(b), and/or the Crimes Code, within a four year period, the penalty include license revocation or suspension.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that the Restaurant Liquor License of 9241 PW Welsh, LLC, t/a Paddy Whacks, License Number R-AP-SS-EHF-11481 (including all permits and Licensee Discount Card), be suspended for a period of two (2) days **BEGINNING** at 7:00 a.m. on Monday, January 5, 2015 and **ENDING** at 7:00 a.m. on Wednesday, January 7, 2015.

IT IS FURTHER ORDERED that Licensee shall remain in compliance with the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management for a period of one year from the mailing date of this Order.

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).

Licensee is directed on Monday, January 5, 2015 at 7:00 a.m. to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised if a replacement placard is needed for any reason they are available at all State Liquor Stores/Wine and Spirit Shoppes.

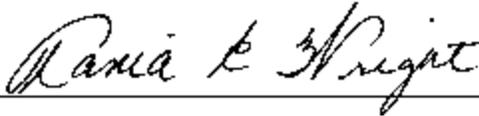
The "Bureau of Enforcement" is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

The Licensee is authorized on Wednesday, January 7, 2015 at 7:00 a.m. to remove the placard of suspension and return the license to its original wall location.

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t/a Paddy Whacks
In Re: Citation No. 13-0493C

Jurisdiction of this matter is retained.

Dated this 22ND day of September, 2014.



Tania E. Wright, J.

NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.

If you wish to appeal the decision of the Administrative Law Judge's Order, the appeal must be filed within 30 days of the mailing date of the Order. Please contact the Office of the Chief Counsel of the Pennsylvania Liquor Control Board at 717-783-9454.

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