

Mailing Date: NOV 21 2014

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

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|-----------------------------|---|----------------------------------|
| PENNSYLVANIA STATE | : | |
| POLICE, BUREAU OF | : | IN RE: CITATION NO. 13-1016 |
| LIQUOR CONTROL ENFORCEMENT | : | |
| | : | BLCE INCIDENT NO. W06-457087 |
| | : | |
| | : | |
| v. | : | |
| | : | |
| | : | PLCB LID - 65663 |
| HOTEL KAST, LLC | : | |
| T/A HOTEL KAST | : | PLCB LICENSE NO. H-AP-SS-EHF-992 |
| 723-725 ARCH ST. | : | |
| WILLIAMSPORT, PA 17701-5617 | : | |

ADJUDICATION

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL PIETRZAK
LICENSEE: KEVIN PEQUIGNOT, PARTNER**

BACKGROUND:

This proceeding arises out of a citation that was issued on May 16, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against HOTEL KAST, LLC, License Number H-AP-SS-EHF-992 (hereinafter "Licensee").

The citation charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] in that on April 16, 2013, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated patron

The investigation which gave rise to the citation began on February 11, 2013 and was completed on April 17, 2013; and notice of the violation was sent to Licensee by Certified Mail on April 30, 2013. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on July 16, 2014 at The Lysock Complex, 542 County Farm Road, Montoursville, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. On April 16, 2013, an officer of the Bureau entered the licensed premises at 7:25 p.m. and took a seat at the bar (N.T. 9-10).
2. The officer observed a female bartender heard to be called Holly (N.T. 10).
3. Shortly into her visit, the attention of the officer was drawn to a male patron who was seated approximately five feet to her left (N.T. 11).
4. The officer's attention was drawn to the patron because he started talking to himself. He said, "Yeah I saw that. It was nice." He appeared to be talking to an empty barstool and his speech was slow and slurred (N.T. 12).
5. The officer observed that the patron's eyes were "heavy" and half closed (N.T. 12).
6. The patron was drinking from a dark 12-ounce bottle (N.T. 12).
7. The patron introduced himself a total of three times throughout the investigation (N.T. 12-13).
8. The officer learned that the patron's name was Dave (N.T. 13).
9. The bottle which Dave was drinking from contained Rogue's Dead Guy beer (N.T. 14).
10. Dave got up from his seat and headed to the restroom. When he returned to his seat, he stated to the bartender, Holly, that he believed the drunk guy should go home. Holly didn't seem to acknowledge the statement but continued to talk to Dave about construction on the way to work that day (N.T. 14).
11. Dave started to attempt to balance his cell phone on its edge; and with each attempt he would state to an empty barstool, "Oh, I thought you had it that time. I really thought you had it" (N.T. 15).
12. Dave then removed an orange credit card from his wallet and attempted to balance it on his cup of water. He ended up leaning the credit card against his straw. He became excited that he was able to do this, and ended up knocking over the cup of water (N.T. 15).
13. The officer suggested to Dave that he remove his cell phone from the water before it was ruined but Dave started back toward the restroom (N.T. 15).

14. The officer watched Dave return to the bar. He walked back past a tall table with stools. His gait was staggered. He took steps to the right, forward, or to the left to balance his weight. He bounced off a barstool, which changed his course of travel. He kept on walking and then took his seat at the bar (N.T. 16).

15. When Dave took his seat at the bar his mess from the water was still there. He took his cup and turned it upside down and said, "Maybe this is what I have to do to get it cleaned up." His speech was slurred and very slow (N.T. 16-17).

16. Dave then took an ashtray and turned it over on top of the cup. He said, "I'll decorate it like a Christmas tree." He put a napkin on top of the cup and a straw paper on top of the napkin (N.T. 17).

17. At 8:36 p.m., Holly came over and said, "You can't stagger in here Dave. I'll get in trouble." She then cleaned up his mess (N.T. 17).

18. At 8:38 p.m., Holly brought Dave a 12 ounce bottle of Rogue Dead Guy beer and a glass of water (N.T. 17).

19. During her visit, the officer noted that Dave's speech got slower and more slurred; and his left eye began to close more and more to the point that it was almost completely closed while he was trying to look at things (N.T. 17-18).

20. David Pardee (Dave) owns a hoagie and pizza business in the area where the licensed premises is located; and he lives about a block from the licensed premises (N.T. 21 and 22).

21. Dave ordered and was served a Rogue Dead Guy beer at 6:25 p.m. (N.T. 26).

22. Before the officer entered the licensed premises, at 7:25 p.m., Dave was served a second Rogue Dead Guy beer (N.T. 27-28).

23. Dave had had nothing alcoholic to drink before coming to the licensed premises (N.T. 35).

24. Dave ate a hoagie for lunch at his shop between 2:00 p.m. and 3:00 p.m. (N.T. 36).

25. Dave's statement to the effect that it was time for the "drunk guy to leave" was made in jest. If he had actually been drunk, the bartender Holly would have thrown him out (N.T. 36 and 37).

26. The area between the bar stool that Dave was sitting on and the men's room is small. There are many obstacles in his area including a pool table, a table that seats six people and chairs that are pulled out. It would have been impossible to walk a straight line to the men's room and back (N.T. 41 and 42).

27. The bartender, Holly, has worked at the licensed premises for approximately nine (9) years and she has known Dave for approximately that amount of time (N.T. 39).

28. Dave did not have anything alcoholic to drink at the licensed premises other than the beers that Holly served him (N.T. 40-41).

29. From Holly's observation of Dave over approximately nine (9) years, his behavior on the night in question was no different from the way it has always been. From the moment he walks in to the moment he leaves he balances things, and he talks to himself (N.T. 29 and 42).

30. Because Holly knew how much Dave had had to drink when she served him the beer, observed by the officer, and because she knows his mannerisms, she was sure that Dave was not intoxicated (N.T. 42-43).

31. Holly's observation of Dave's speech on the night in question was that it followed his normal speech patterns (N.T. 43).

32. The officer arrived at the licensed premises at 7:25 p.m. and she left at 9:00 p.m. During that time she saw Holly serve Dave one beer (N.T. 64).

33. Dave has a condition called "lazy eye" which causes his left eye to droop (N.T. 30).

CONCLUSION OF LAW:

The charge in the Citation is **dismissed**.

DISCUSSION:

The preponderance of the evidence in this case establishes that the patron in question (Dave), while he was eccentric, was not, in fact, intoxicated.

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. *In re Omicron Enterprises*, 449 A.2d 857 (Pa.CmwltH 1982).

The phrase "preponderance of evidence" has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. *Black's Law Dictionary, Fifth Edition*, West Publishing Company, Copyright 1979, Page 1064.

It is within my province, and is part of my responsibility to determine the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa.CmwltH 1989). I may give testimony such consideration as it may deserve, and accept it or reject it in whole or in part. *McFarland Landscape Service v. Workmen's Comp. Bd. Of Appeal*, 557 A.2d 816, 817-18 (Pa.CmwltH 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

At the outset, I would like to point out that the testimony of the Bureau Officer, if it had been the only evidence in the record, would have established a violation. However, this testimony is outweighed by the evidence presented by the witnesses for the Licensee which establish that the patron in question had not had enough to drink at the time the officer saw him served and that his behavior, while somewhat eccentric was consistent with the behavior he had exhibited over the nine years that he had patronized the establishment.

At the time the officer observed Dave being served a 12 ounce bottle of beer at 8:38 p.m., Dave had been served two other bottles of beer; one at 6:25 p.m. and one at 7:25 p.m. He had consumed no other alcohol on that date (See Findings No. 18, 21, 22 and 23).

In addition to having been served only a moderate amount of alcohol, it is clear that Dave's behavior on the date in question was consistent with his behavior pattern at the licensed premises as established over the better part of a decade. Moreover, the erratic path he took to and from the restroom was most probably caused by the obstacles in his path such as the pool table and a number of chairs (See Finding No. 26). Holly's statement about his staggering was made in jest. Her observation of Dave's speech on the night in question was that it followed his normal patterns (See Finding No. 31). I give the testimony of the bartender Holly great weight.

Based upon the foregoing, I conclude that the preponderance of the evidence establishes that the patron Dave was not intoxicated on the night in question, and the citation is dismissed.

ORDER

IT IS HEREBY ORDERED that Citation No. 13-1016 be **DISMISSED**.

Dated this 7TH day of November, 2014.



Daniel T. Flaherty, Jr., J.

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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.

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 CHIEF COUNSEL'S OFFICE AT 717-783-9454.