Mailing Date: JUN 09 2015

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : :	In re Citation No. 14-1156 BLCE Incident No. W09-470399
v.	: : :	PLCB LID No. 40339
MDW ENTERPRISES, L.L.C., T/A KUTZTOWN TAVERN-AVALANCHE BREWING CO. 270-278 W. MAIN ST. KUTZTOWN, PA 19530-1604	: : : :	PLCB License No. R-AP-SS-10458 Berks County

JUDGE SHENKLE
BLCE COUNSEL: Roy Harkavy, Esq.
LICENSEE COUNSEL: James E. Gavin, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on June 16, 2014. The citation alleges that Licensee violated the Liquor Code, 47 P.S. §4-493(1), on March 8, 2014, 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 Thursday, April 23, 2015, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On March 8, 2014, two undercover liquor enforcement officers visited the licensed premises at about 10:30 p.m. There were 45 to 50 patrons. On the lower level of the premises one of the officers noticed a white, non-Hispanic male approximately 23 to 25 years of age, short black hair, wearing green novelty glasses such as might be worn for Saint Patrick's Day (N.T. 7-8).

2. The man was dancing awkwardly, apparently unaware that he was spilling beer from the cup in his hand. The patron was approximately 15 feet from the bar. The officer was standing opposite the bar. The patron was between the bar and the officer. The patron walked to the bar area. He pulled a dollar bill out of his wallet. He asked the bartender how much Coors Light draft was. She said it was two dollars. He tried to hand her the dollar bill. She repeated that it was two dollars. He then pulled out a credit card and tried to hand it to her. She said that you have to make at least a $20 purchase to use a credit card. A woman then came next to the patron and asked the bartender what the issue was. The bartender explained that the man was trying to use a credit card for a two dollar purchase. The woman then gave the bartender money. The bartender filled the man's cup and handed it back to him. He went back to the dance floor (N.T. 9-11).

3. The man was again having coordination problems, spilling his drink. A security guard was watching the man when he stumbled and nearly struck his head on a metal pole in the middle of the dance floor. Security personnel then escorted the man out of the building (N.T. 11-12).

4. The officer does not know the name or address of the patron in question. His testimony about the man's age was only an estimate. The officer knew nothing of the man's physical abilities or disabilities; the officer never spoke to him, and does not know how much he had to drink. The man was already in the premises when the officers arrived; they did not see him become progressively drunk during the evening. The officer had no evidence that the bartender who served the man saw any of his behavior on the dance floor (N.T. 12-15).

5. The officer only heard the man ask how much Coors Light draft cost, so he didn't get to hear much of his speech and has no evidence it was slurred, one of the indicia of being under the influence of alcohol. The officer's report makes no mention of having seen a glassy appearance in the man's eyes, which would have been an important fact; therefore the officer had no evidence that the man's eyes were glassy (N.T. 16-19).

6. It is also true that the officer did not observe that the man's eyes were bloodshot, or that his face was flushed, or that there was an odor of alcohol about him. The officer believed he could not have perceived an odor of alcohol because the smell of alcohol was so pervasive in the establishment that one could not tell if it was coming from one person or another (N.T 21-22).

7. The officer performed no field sobriety, blood or urine tests. He did not believe the man was liable to be arrested for public drunkenness because he did not present a danger to himself or others. Officers followed the patron after he was escorted out of the building, and saw that two of his friends also saw this and followed the man out. This made the officer believe that the man would be taken care of by his friends, so there was no need for police intervention. The incident where the man almost fell into a metal pole was not done in front of the bartender. There is no indication in the officer's report that the man was leaning against the bar (N.T. 22-27).

8. Licensee's first knowledge about the matters alleged in the citation came from receipt of the Bureau's notice of violation letter, which was received on May 29, 2014 (82 days after the incident). Therefore Licensee had no opportunity to investigate the matter. Timely notice would have enabled Licensee to preserve the full-color, high definition security recordings it makes of activity in the premises, but without knowing the importance, the storage space used for the recordings was reused. None of the bar service personnel match the description of the server mentioned in the officer's testimony (N.T. 28-31).

CONCLUSIONS OF LAW:

The weight of the evidence was insufficient to prove that Licensee violated the Liquor Code, 47 P.S. §4-493(1), on March 8, 2014, by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated patron.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 14-1156 is DISMISSED.

Dated this 29TH day of MAY, 2015.

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.