

Mailing Date: DEC 19 2016

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	IN RE Citation No.: 16-0398
LIQUOR CONTROL ENFORCEMENT	:	
	:	BLCE Incident No.: W05-506783
v.	:	
	:	
MATTHEW W. WALKER	:	PLCB LID No.: 50754
CRYSTAL D. WALKER	:	
T/A NEW NATIONAL HOTEL	:	PLCB License No: H-AP-SS-2101
302 MAIN ST.	:	
BERLIN, PA 15530-1260	:	
	:	
SOMERSET COUNTY	:	
	:	

BEFORE: JUDGE RICHARD O'NEILL EARLEY

APPEARANCES:

BLCE COUNSEL: NADIA VARGO, ESQUIRE
LICENSEE: CRYSTAL D. WALKER, OWNER

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on March 25, 2016, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Matthew W. Walker, Crystal D. Walker, t/a New National Hotel, License Number H-AP-SS-2101, (Licensee).

The citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-493(1), alleging that on February 13, 2016, 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.

An administrative hearing was conducted on Wednesday, October 5, 2016, at 11:30 a.m., in Altoona, PA. The Bureau was represented by Nadia Vargo, Esquire. Licensee was represented by Crystal Walker, Owner/Licensee.

I make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

STIPULATIONS

1. Licensee stipulates to notice and service provisions under the Liquor Code. (N.T. pp. 5-7)
2. Licensee further stipulates that on February 13, 2016, a patron was present named Tony Miller. At all times during Mr. Miller's visit to the licensed premises, he was visibly intoxicated. (N.T. p. 7)
3. Mr. Miller arrived at approximately 6:55 p.m. accompanied by four other individuals. (N.T. pp. 10, 36) One of those individuals was Gladen Maust, Sr., (Mr. Maust, Sr.) with whom Licensee, Crystal Walker, used to work. They were friends and had not seen each other in many years, so they spent some time talking and catching up with each other. (N.T. p. 32) During that reunion, Mr. Maust, Sr., introduced Ms. Walker to another member of the party, his son, Gladen Maust, Jr., whom everyone called "Glades" (Mr. Maust, Jr.). (Id.) The other two members of the group were not identified at the hearing.
4. When Mr. Miller's party arrived, he came in with an open can of beer from another bar. (N.T. p. 33)
5. Ms. Walker knows Mr. Miller (N.T. p. 32) and told the group he was not going to be served because he was drunk. (Id.) She attempted to take his open beverage from him, but Mr. Miller was uncooperative and refused to give it up. (N.T. p. 33) Ms. Walker was running the bar and kitchen by herself that night, (N.T. p. 19, 30, 33, 46-47) and did not believe she had the ability to remove Mr. Miller's drink. Therefore, she let him keep it. (N.T. p. 33)
6. During the group's visit to the premises, Mr. Maust, Sr., spent his time in the pool table area with one of their group, (N.T. pp. 33, 36) while Mr. Maust, Jr., sat at the bar with another one of their group sitting to his right. (N.T. pp. 33-34, 36, 48) Mr. Miller wandered back and forth between the pool table and the bar. (N.T. p. 33)
7. At 7:10 p.m., Liquor Enforcement Officer, Brandon Stevanus, entered the premises undercover and sat to the left of Mr. Maust, Jr., at the bar. (N.T. pp. 10-12) Officer Stevanus described the premises as busy and noted that Ms. Walker was the only employee present. (N.T. p. 10)
8. Officer Stevanus talked with Mr. Maust, Jr., for about 10 minutes. (N.T. p. 14) At that time, Mr. Miller started shouting profanities from the pool room before heading

to the bar. (Id.) Mr. Miller noticed Officer Stevanus as an unfamiliar patron and approached him loudly, demanding to know who he was. (Id.)

9. Mr. Miller generally displayed his inebriation by talking loudly and profanely, hanging on patrons and furniture, and spilling the drink in his hand on Officer Stevanus. Mr. Miller's behavior gave rise to comments from both the woman sitting to the Officer's left (N.T. p. 12) and Mr. Maust, Jr., on his right. Specifically, Officer Stevanus described Mr. Maust, Jr., as demonstrating embarrassment at Mr. Miller's drunken behavior. At one point, Mr. Maust, Jr., warned the Officer, "Oh, here he comes," (N.T. p. 14) and then later apologized to Officer Stevanus for Mr. Miller's conduct. (N.T. pp. 15, 19)
10. Throughout the evening Mr. Miller made multiple, loud requests to be served alcohol, specifically a drink called a black and blue, which Ms. Walker refused. (N.T. pp. 21, 33-35, 48)
11. At approximately 7:30 p.m., Mr. Maust, Jr., ordered a shot of whiskey for himself and his friend seated to his right, not Mr. Miller. (N.T. p. 48) Mr. Miller was standing behind but between the two and said he didn't like whiskey, to which Ms. Walker responded it did not matter because she was not serving him any. (N.T. p. 34) When Mr. Miller requested a black and blue, Ms. Walker refused again. (Id.) Ms. Walker placed the drinks on the bar for Mr. Maust, Jr., and the person to his right. However, after Mr. Maust, Jr., nudged a drink toward his friend, Mr. Miller grabbed the shot and drank it without hesitation or comment. (N.T. p. 24) Ms. Walker, although present, did not see Mr. Miller drink the shot. (N.T. p. 48)
12. Officer Stevanus testified that he never saw Ms. Walker serve Mr. Miller the black and blue drink he continually requested. (N.T. pp. 18-21, 25-26, 28-29, 53-54) The Officer left the premises at 8:25 p.m. (N.T. p. 27) Mr. Miller eventually left the premises at approximately 9:30 p.m., after the rest of his group left. (N.T. p. 40, 45)

CONCLUSIONS OF LAW:

1. The notice provisions as prescribed by the Liquor Code at 47 P.S. §4-471 have been satisfied.
2. Count one: The Bureau has failed to establish by a preponderance of the evidence that Licensee violated the Liquor Code at 47 P.S. §4-493(1), by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated patron.

DISCUSSION:

The Bureau contends that Ms. Walker served a shot of whiskey to Mr. Miller or permitted him to receive alcohol via Mr. Maust, Jr. The Liquor Enforcement Officer described how Ms. Walker appeared to place one of the shot glasses in front of Mr. Miller (N.T. pp. 22-23), and how she must have seen Mr. Miller drink it. (N.T. p. 25) The Officer further denied hearing any discussion between Ms. Walker and Mr. Miller at this time concerning his dislike of whiskey and her refusal to serve him. (N.T. p. 54)

However, I do not find the Officer's testimony credible. There is no evidence the Officer was aware that Mr. Maust, Jr., had a friend seated to his right at the bar. While the Officer testified he concluded the person to Mr. Maust, Jr.'s, right was Mr. Miller, (N.T. pp. 55-56) that conclusion was based on incomplete information. Therefore it is understandable how the Officer concluded that Mr. Maust, Jr., intended to buy a shot for Mr. Miller and that Ms. Walker should have known Mr. Miller was the intended recipient. Furthermore, I find it more plausible that Mr. Maust, Jr., was buying a shot for his friend instead of Mr. Miller since he had just finished apologizing for Mr. Miller's drunken behavior. (Finding No. 10)

Therefore, the question before the court is whether a licensee violates the Liquor Code when a visibly intoxicated patron (VIP) takes another person's drink without the licensee's knowledge. In BLCE v. J.E.K. Enterprises, Inc., 680 A.2d 53 (Pa.Cmwlth. 1996), a VIP named Dennis was refused service at the bar. However, he took an abandoned bottle and drank the remaining contents. Later another patron ordered a beer and gave it to Dennis. The Commonwealth Court concluded that the Liquor Code permitted the VIP to be on the premises and the licensee did not, therefore, violate the Liquor Code merely by allowing him to stay. Id. at 55. Further, the court held,

[I]t is only unlawful for that person to be served or allowed to be served alcohol by the licensee or one of its employees. A violation of §493(1) of the Liquor Code only occurs when a licensee "permits" the consumption of alcohol by taking or failing to take actions to prevent it from occurring. Nothing in the record indicates that Licensee acquiesced to Dennis' consuming the beer, that its employees were aware that the unidentified patron had passed Dennis a beer, or even that he consumed it. Rather than "permitting" Dennis to be served, the Licensee acted in a responsible manner by refusing to serve him and doing all that it reasonably could to prevent him from being served.

Id. Therefore, because there was no evidence the licensee was complicit in the service of alcohol to a VIP, the Commonwealth Court held that it acted reasonably and did not violate the Liquor code.

The Board has previously held that under some circumstances merely refusing service to a VIP is inadequate to avoid violating the Liquor Code. The Board distinguished J.E.K. in

MATTHEW W. WALKER
CRYSTAL D. WALKER
IN RE CITATION NO. 16-0398

BLCE v. Bier De Trinken, Inc., Citation No. 04-0907 (PLCB 10/19/05). There, the Board upheld Judge Flaherty's adjudication sustaining a violation despite a licensee refusing service to a VIP because there was evidence in the record that licensee knew the VIP had friends who would give him alcohol, that the VIP would steal drinks, and that the licensee took no action when an employee saw the VIP with a new drink. (Id. p. 6) Under those circumstances the Board reasoned that the licensee permitted service by acquiescence when it allowed the VIP to obtain alcohol, either from another bartender or server, or other patrons at the licensed premises.

However, in this case there is no evidence in the record that Licensee knew Mr. Miller's friends would give him alcohol or that he would steal drinks. Rather, the evidence establishes that Mr. Miller kept the beer he came in with during the Officer's visit, suggesting at least that Mr. Miller was not getting new drinks. And there is no evidence in this case that Licensee saw Mr. Miller with the shot of whiskey. Therefore, this case is factually closer to J.E.K. than to Bier De Trinken.

The Bureau urges me to consider the factual differences between this case and J.E.K. However, I do not find the facts preferred by the Bureau to be credible. Thus, there is no factual distinction that justifies departing from J.E.K., and no facts compelling the application of the Board's reasoning in Bier De Trinken.

Accordingly, Licensee acted reasonably in refusing all requests to serve a VIP, Mr. Miller. Thus, under J.E.K., Licensee did not violate the Liquor Code when Mr. Miller took another patron's alcohol without Licensee's knowledge.

ORDER:

THEREFORE, Citation is dismissed.

Dated this 5TH day of December, 2016.



Richard O'Neill Earley, J.

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NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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 CHIEF COUNSEL'S OFFICE AT 717-783-9454.