	OAH No. 3-2404-21210-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF PUBLIC SAFETY
ALCOHOL & GAMBLING ENFORCEMENT DIVISION

In the Matter of a Civil Penalty Imposed on BIS Liquors, Inc., d/b/a Nickels Sports Bar	**FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy (ALJ) on May 11, 2010, at the Office of Administrative Hearings, St. Paul, Minnesota. The OAH hearing record closed at the conclusion of the hearing that day.

David J. Koob, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101, appeared on behalf of the Department of Public Safety (DPS or Department).

Dave Imsdahl and Ken Brill appeared for BIS Liquors, Inc. (Licensee or Respondent) without counsel.

STATEMENT OF THE ISSUE

Did Nickels Sports Bar serve alcohol to an obviously intoxicated person on December 31, 2009, in violation of Minn. Stat. § 340A.502?

The ALJ concludes that the Department proved by a preponderance of the evidence that Nickels Sports Bar served alcohol to an obviously intoxicated person on December 31, 2009, in violation of Minn. Stat. § 340A.502.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. BIS Liquors, Inc., owns a licensed bar known as Nickels Sports Bar at 501 Blair Avenue in St. Paul, Minnesota. BIS Liquors, Inc., purchased the property from the previous licensee, K & L Liquors, Inc., effective June 1, 2009.

2. On December 31, 2010, the DPS Alcohol and Gambling Enforcement Division (AGED) conducted several Retail Alcohol Vendor Enforcement (RAVE) visits in the area. RAVE is a DPS program focusing on

educating liquor licensees to prevent service of alcoholic beverages to obviously intoxicated persons. Its purpose is to reduce the number of alcohol-related traffic offenses caused by impaired drivers. RAVE visits are usually conducted on Friday and Saturday nights in coordination with Safe & Sober DWI enforcement programs conducted by the State Patrol and county and local law enforcement agencies.[1]

3. Typically, DPS/AGED agents work in teams of two and visit licensed liquor establishments at random. The teams are usually made up of one DPS special agent who is a licensed peace officer and one DPS special investigator. Together they observe the clientele at bars and restaurants to see whether persons who appear to be obviously intoxicated are served alcoholic beverages. The agents also distribute educational packets to the owners or managers of the establishments that include a letter from the DPS explaining the RAVE program and identifying the governing Minnesota statutes.[2]

4. Special Agent Cliff Emmert has been a licensed peace officer since 1976 and has worked for DPS/AGED for approximately 14 years. Special Agent Emmert's duties include performing compliance checks on licensed liquor establishments and investigating alleged violations of gambling regulations. He has conducted approximately 20 RAVE visits in the past 18 months.[3]

5. Special Investigator Michael Polla is employed by DPS/AGED. His duties include conducting pre-license investigations and inspections of liquor establishments in Minnesota. He participates in RAVE visits and assists the special agents in conducting compliance checks of licensed liquor establishments. Investigator Polla estimates that he has inspected approximately 430 licensed liquor establishments during RAVE visits since September 2008 and has recommended that violations be issued in 22 cases for service of an obviously intoxicated person. Investigator Polla is not a licensed peace officer.[4]

6. In the early evening of December 31, 2009, Emmert and Polla attended a briefing with the Ramsey County DWI Task Force. Later that night they conducted RAVE visits at bars in the area.[5]

7. At about 8:15 p.m., Emmert and Polla went into Nickels Sports Bar. There were about 12 to 15 customers inside. They sat at a table from which they could observe the entire bar from end to end, and they ordered a beer. They observed a man who was standing on the left side of the bar, talking to a female customer. The man was unsteady on his feet. When he reached for his glass on the bar, he missed it and had to hold onto the edge of the bar to keep his

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[1] Testimony of Cliff Emmert and Michael Polla.
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.

balance. When he succeeded in picking up the glass, he had trouble holding onto it. He spilled the drink while setting it back down on the bar. After a few minutes, the man went outside to smoke a cigarette.[6]

8. When the man came back inside after smoking his cigarette, he went to the right side of the bar and ordered a drink from the bartender. The bartender served him a mixed drink. After several minutes, the man began to consume the drink.[7]

9. Emmert and Polla approached the bartender and advised her that she had served a drink to someone who was obviously intoxicated. The bartender was cooperative. She agreed that the man was obviously intoxicated but advised them that the man had arrived in a taxi and would not be driving home. She acknowledged that she had served the man a rum and Coke. It was the first time the bartender had worked a night shift.[8]

10. Emmert then approached the man and identified himself. He asked the man for his driver's license. The man declined to produce identification and swore at Agent Emmert. The man smelled strongly of alcohol; he was belligerent, his speech was slurred, and his balance was impaired. Agent Emmert backed off and rejoined Mr. Polla.[9]

11. Polla sent a letter to K & L Liquors shortly after the incident, advising that the violation had been referred to a supervisor for possible agency action. On January 11, 2010, the Director of Alcohol and Gambling Enforcement notified K & L Liquors that it was in violation of Minn. Stat. § 340A.502 for selling alcohol to an obviously intoxicated person and imposed a $200 civil penalty for the violation.[10] The Respondents received the correspondence and requested a hearing to appeal the penalty.[11]

12. On February 8, 2010, all owners and employees of BIS Liquors who serve and sell alcohol completed the Minnesota Licensed Beverage Association SALES server training program.[12]

13. On April 9, 2010, the Department issued a Notice and Order for Hearing in this matter. The hearing took place at the Office of Administrative Hearings on May 11, 2010.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

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[6] Test. of C. Emmert and M. Polla.
[7] Test. of C. Emmert.
[8] Test. of M. Polla.
[9] Test. of C. Emmert.
[10] Ex. 1.
[11] By agreement of the parties, the caption of this matter was amended during the hearing to reflect the Licensee's correct name.
[12] Ex. 2.

CONCLUSIONS

1. The Administrative Law Judge and the Department of Public Safety have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 14.57, and 340A.415.

2. The Respondent was given timely and proper notice of the hearing in this matter.

3. The Department of Public Safety has complied with all relevant substantive and procedural requirements of law and rule.

3. Minn. Stat. § 340A.502 prohibits any person from selling, giving, furnishing or in any way procuring "for another alcoholic beverages for the use of an obviously intoxicated person."

4. Minn. Stat. § 340A.415 states in pertinent part:

> **340A.415 License revocation or suspension; civil penalty.**
>
> On a finding that the license or permit holder has … (5) failed to comply with an applicable statute, rule, or ordinance relating to alcoholic beverages, the commissioner … may revoke the license or permit, suspend the license or permit for up to 60 days, impose a civil penalty of up to $2,000 for each violation, or impose any combination of these sanctions. No suspension or revocation takes effect until the license or permit holder has been given an opportunity for a hearing under sections 14.57 to 14.69 of the Administrative Procedure Act. ...

5. The Department proved by a preponderance of the evidence that the Respondent provided an alcoholic beverage to an obviously intoxicated person on October 10, 2009, in violation of Minn. Stat. § 340A.502.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of Public Safety affirm the civil penalty of $200 imposed for Respondent's violation of Minn. Stat. § 340A.502.

Dated: June 7, 2010

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Public Safety (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue his final decision. Parties should contact Michael Campion, Commissioner of Public Safety, 444 Cedar Street, Saint Paul, Minnesota 55101, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minnesota Statutes § 14.62 (2a). The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minnesota Statutes § 14.62 (1), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The standard for determining whether a person is "obviously intoxicated" is "whether exercising reasonable powers of observation, one sees or should see that the buyer is intoxicated."[13] The word "obviously" has been defined as "that which is easily discovered or seen or understood, or such as is readily perceived by the eye or the intellect, or that which is plain or evident."[14] A finding of obvious intoxication does not require proof of any specified amount of drinking or any specific degree or level of intoxication.[15]

The consistent evidence in this case is that the man observed in Nickel's Sports Bar was so intoxicated that he could barely stand. The Licensee presented no evidence to dispute the facts described by Cliff Emmert and Michael Polla. The Licensee requested a hearing in order to present the evidence of subsequent training performed after this incident, and to advocate its position that this was a minor slip on the bartender's first night shift, that it operates the premises professionally, and that the bar has the fewest police calls of any licensed premise in the area.

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[13] *Jewett v. Deutsch*, 437 N.W.2d 717 (Minn. App. 1989); *see also Strand v. Village of Watson*, 245 Minn. 414, 422, 72 N.W.2d 609, 615 (1955).
[14] *Ritter v. Village of Appleton*, 254 Minn. 30, 37, 93 N.W.2d 683, 687 (Minn. 1958).
[15] *Strand v. Village of Watson*, 245 Minn. 414, 72 N.W.2d 609 (Minn. 1963).

It is clear that this incident occurred not because of any policy or practice of over-serving customers, but because of the bartender's relative inexperience and her assumption that it was permissible to serve an obviously intoxicated person as long as he was not driving. The subsequent training of the bartender and other employees is a proactive response that should help to prevent future incidents. It does not, however, undermine the Department's case. The civil penalty should be affirmed.

K.D.S.