

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF EDEN PRAIRIE

In the Matter of the Liquor License Held
by Mike Anderson for Green Mill of Eden
Prairie, 8266 Commonwealth Drive, Eden
Prairie, Minnesota.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-captioned matter came on for hearing before Administrative Law Judge Barbara L. Neilson commencing at 9:30 a.m. on February 6, 2001 at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of Hearing filed January 2, 2001.

James W. Delaplain, Attorney at Law, Lang, Pauly, Gregerson, & Rosow, Ltd., U.S. Bank Place, 1600 Park Building, 650 Third Avenue South, Minneapolis, MN 55402, appeared on behalf of the City of Eden Prairie ("City"). George E. Antrim, III, Attorney at Law, Krause & Rollins, 310 Groveland Avenue, Minneapolis, MN 55403, appeared on behalf of Mike Anderson/Green Mill ("Licensee").

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Eden Prairie City Council shall not be made until this Report has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the City Council, which, after reviewing the record, may adopt, reject, or modify the Findings of Fact, Conclusions and Recommendation contained herein. The parties should contact Don Uram, Community Development and Financial Services, Eden Prairie City Center, 8080 Mitchell Road, Eden Prairie, Minnesota 55344, telephone number 952/949-8300, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this case is whether one of the Licensee's employees served alcoholic beverages to a person who was obviously intoxicated in violation Minn. Stat. § 340A.502 (2000) and Eden Prairie City Code § 4.07, subd. 1(I); and if so, whether the Licensee's liquor license should be disciplined and a fine imposed.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On November 26, 2000, Jeffrey Johnson and his wife went to the Green Mill Restaurant in Eden Prairie ("Green Mill") for brunch. Mr. Johnson and his wife arrived at the Green Mill at approximately 1:30 p.m. After eating brunch, Mr. Johnson and his wife sat at the bar talking and playing a dice game called "pigs". From approximately 1:30 p.m. until 7:00 p.m., Mr. Johnson consumed six or seven beers. Mr. Johnson weighs about 170 pounds.^[1]

2. Mr. Johnson lives approximately one mile from the Green Mill and works within two blocks of the Green Mill. Mr. Johnson goes to the Green Mill about two or three times a week. On occasion, Mr. Johnson has left his car at the Green Mill and walked home when he believes he has had too much to drink to drive home.^[2]

3. Pedar Froseth is a bartender at the Green Mill. Mr. Froseth has been employed as a bartender at Green Mill for approximately three years. During this time, Mr. Froseth has attended two training sessions for Green Mill bartenders and servers that included, among other topics, ways to identify intoxicated persons. Mr. Froseth received similar training while employed in his former position as a cook at Ciatti's Restaurant.^[3]

4. Because Mr. Johnson comes into the Green Mill bar on a regular basis, Mr. Froseth has gotten to know Mr. Johnson and is familiar with his drinking patterns. Mr. Froseth has never seen Mr. Johnson intoxicated to the point where he felt he needed to cut off serving Mr. Johnson alcoholic beverages.^[4]

5. During the course of the afternoon of November 26, 2000, Mr. Johnson was served beers by a Green Mill bartender named Jody and by Mr. Froseth. Jody served Mr. Johnson between 1:30 p.m. and 5:00 p.m., and Mr. Froseth took over bartending duties at 5:00 p.m.^[5]

6. Between 5:00 p.m. and 7:00 p.m. Mr. Froseth served Mr. Johnson three beers. Mr. Froseth did not see Mr. Johnson walk around but he did observe him talking and laughing with his wife and others, and playing the "pigs" game. Mr. Johnson was able to converse with Mr. Froseth over the course of the afternoon and early evening. Mr. Johnson is naturally a loud person, but he did not exhibit any behavior to cause Mr. Froseth to conclude that he was intoxicated.^[6]

7. When Mr. Froseth bartends, his eyes become bloodshot due to the cigarette smoke in the bar.^[7]

8. At approximately 7:00 p.m., a man sitting a few feet away from Mr. Johnson appeared to have a heart attack or stroke. The man collapsed and slid to the floor about three feet from Mr. Johnson.^[8]

9. Upon seeing the man collapse, Mr. Johnson told Mr. Froseth to call 911. Within three minutes of Mr. Froseth's call, Eden Prairie police officers arrived at the restaurant followed by paramedics and Sergeant Tracy Luke.^[9]

10. Sergeant Luke has been with the Eden Prairie Police Department for 15 years and she has received training in identifying intoxicated persons.^[10]

11. Sergeant Luke was dispatched to Green Mill on November 26, 2000 to assist with the medical emergency call. While there, Sergeant Luke noticed Mr. Johnson sitting at the bar drinking a beer. Sergeant Luke observed Mr. Johnson's movements to be very slow. Specifically, Sergeant Luke noticed Mr. Johnson slowly pick up and set down the bottle of beer from which he was drinking. In addition, Sergeant Luke watched Mr. Johnson walk from the bar to the restroom. Mr. Johnson's gait appeared slow and a little unsteady.^[11]

12. Sergeant Luke first noticed Mr. Johnson after he had already begun drinking the last beer he ordered that evening. Sergeant Luke did not see Mr. Johnson or observe his condition at the time Mr. Froseth served him his last beer.^[12]

13. When Mr. Johnson returned from the restroom, Sergeant Luke approached him and asked him to identify himself. Mr. Johnson gave his name and showed Sergeant Luke his driver's license. Mr. Johnson's eyes were bloodshot and there was an odor of alcohol on his breath. At this point, Mr. Johnson had been in the bar for about six hours. Mr. Johnson was cooperative and able to carry on a conversation with Sergeant Luke. Sergeant Luke asked Mr. Johnson if he thought he was intoxicated. Mr. Johnson replied that he thought he was too intoxicated to drive home and that he did not intend to drive. Mr. Johnson stated that his car was parked outside the restaurant.^[13]

14. Sergeant Luke did not conduct any field sobriety tests on Mr. Johnson.^[14]

15. Sergeant Luke arranged for Officer Harrington of the Eden Prairie Police Department to give Mr. Johnson and his wife a ride home. Before Officer Harrington drove Mr. Johnson and his wife home, Sergeant Luke asked Mr. Johnson if he would take a "preliminary breath test" (PBT). Mr. Johnson agreed to take the PBT and it was administered by Officer Harrington in the Green Mill parking lot. The PBT digital readout indicated that Mr. Johnson had a blood alcohol level of 0.18 at about 7:30 p.m. Sergeant Luke showed the PBT reading to Mr. Froseth.^[15]

16. Based on Sergeant Luke's observations and the PBT reading, the City of Eden Prairie brought this action alleging that the Green Mill violated Minn. Stat. § 340A.502 by serving alcoholic beverages to an obviously intoxicated person. The City seeks imposition of a \$500 fine.

Based upon the forgoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Eden Prairie City Council and the Administrative Law Judge have authority to consider the charges brought against the Green Mill and Mike Anderson pursuant to Minn. Stat. §§ 14.55 and 340A.415 and §§ 4.07, subd. 1(I) and 4.08, subd. 2 of the Eden Prairie Legislative Code.

2. The Licensee received timely and appropriate notice of the charges against it and the time and place of the hearing.

3. The City has complied with all relevant substantive and procedural requirements of statute and rule.

4. Under Minn. Stat. § 340A.502 and § 4.07, subd. 1(I) of the Eden Prairie Legislative Code, no person may sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person.

5. The City has the burden of proof to establish, by a preponderance of the evidence, that the Licensee violated the statute and ordinance cited by selling alcoholic beverages to an obviously intoxicated person.

6. The City has failed to establish that the Licensee's employee sold alcoholic beverages to an obviously intoxicated person on November 26, 2000.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the City of Eden Prairie take no disciplinary action against the liquor license of Mike Anderson and the Green Mill Restaurant of Eden Prairie.

Dated this 6th day of March, 2001

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape-recorded (One Tape).

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the City is requested to serve its final decision upon each party and the Administrative Law Judge by first class mail.

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MEMORANDUM

The City of Eden Prairie has charged the Licensee with serving alcoholic beverages to an "obviously intoxicated" person in violation of Minn. Stat. § 340A.502 and Eden Prairie City Code section 4.07, subd. 1(I). Minn. Stat. § 340A.502 provides that: "[n]o person may sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person." Similarly, the Eden Prairie City Code makes it unlawful for any Licensee to "sell beer, wine or liquor to any person who is obviously intoxicated."^[16]

The City maintains that on November 26, 2000, the Licensee's bartender served beer to an obviously intoxicated patron named Jeffrey Johnson. The City bases its claim on the observations of Eden Prairie Police Sergeant Tracy Luke and on the results of a preliminary breath test ("PBT") administered to Mr. Johnson at approximately 7:30 p.m. that evening. The evidence presented established that Mr. Johnson consumed six to seven beers at the Green Mill between 1:30 p.m. and 7:30 p.m. on November 26, 2000. Sergeant Luke arrived at the Green Mill at about 7:00 p.m. and noticed Mr. Johnson drinking a beer at the bar. Sergeant Luke observed that Mr. Johnson's movements were slow, his eyes were bloodshot, and his gait was a little unsteady. The PBT indicated that at 7:30 p.m. Mr. Johnson had a blood alcohol level of 0.18. Based on Sergeant Luke's observations and the PBT results, the City contends that Mr. Johnson was obviously intoxicated when he was served a beer by the Licensee's bartender.

The Licensee argues that Mr. Johnson did not exhibit any behavior that should have caused the bartender, using reasonable powers of observation, to conclude that Mr. Johnson was intoxicated. Instead, the evidence established that Mr. Johnson spent the afternoon playing a dice game, laughing, and socializing with his wife and others. The Licensee maintains that Mr. Johnson was coherent and conversant with the bartender, and cooperative when questioned by Sergeant Luke. And there was no evidence presented that Mr. Johnson engaged in unruly, boisterous or unusually loud behavior. According to the Licensee, Mr. Johnson did not behave or conduct himself in a manner that indicated he was obviously intoxicated.

In considering a prior version of the statute prohibiting the sale of liquor to obviously intoxicated persons, the Minnesota Supreme Court in *Strand v. City of Watson*^[17] held that a vendor complies with the statute when it acts as a reasonable person. According to the court:

Before there can be an illegal sale under § 340.14, the person to whom the sale is made must be intoxicated to such an extent that the seller, using his usual and reasonable powers of observation, sees or should see that the buyer is intoxicated. In other words, there must be such outward manifestation of intoxication, that a person using his reasonable powers of observation can see or should see that such person has become intoxicated.^[18]

The court also held that, unlike traffic offenses, a person's blood alcohol level alone cannot establish as a matter of law whether the person was "obviously" intoxicated. The court explained that:

the seller must determine from what he observes whether the buyer has reached a point of saturation where it would be illegal to sell him more liquor. It can hardly be supposed that the seller of intoxicating liquor must subject a buyer to a blood test or urinalysis between each drink or sell at his peril if there are no signs of intoxication which should reasonably lead him to conclude that the time has come to refuse to sell more liquor. To give the statute any other meaning would render the word "obviously" in § 340.14 meaningless.^[19]

Thus, while a blood test may be admitted to assist the trier of fact in determining whether the buyer was obviously intoxicated, the test is insufficient in and of itself to establish a prima facie case of obvious intoxication.^[20] There must be additional evidence from which it reasonably could be inferred that an individual was obviously intoxicated. And unless it appears to the seller that the buyer is obviously intoxicated, or by the reasonable exercise of his powers of observation it should appear that he is intoxicated, the seller may lawfully continue to sell liquor to a customer.^[21] 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.”^[22]

The question before the Administrative Law Judge is whether the Green Mill bartender, by exercising reasonable powers of observation, should have concluded that Mr. Johnson was intoxicated.^[23] The evidence presented established that Mr. Johnson spent the afternoon at the Green Mill bar, talking and laughing with others and playing the dice game “pigs.” The bartender was familiar with Mr. Johnson, who was a regular patron of Green Mill, and had served him on many prior occasions. He had observed over time that Mr. Johnson spoke loudly and seemed to have a good time regardless of his level of alcohol consumption. The bartender testified that Mr. Johnson did not appear to be intoxicated when he served him beer between 5:00 p.m. and 7:00 p.m. The evidence further established that Mr. Johnson was able to converse coherently with Mr. Froseth during that time. According to Mr. Froseth, Mr. Johnson’s speech was not slurred and Mr. Johnson exhibited no movements or behavior to cause Mr. Froseth to conclude he was intoxicated. Sergeant Luke also testified that Mr. Johnson was cooperative and able to carry on a conversation. Although Sergeant Luke maintained that Mr. Johnson did slur some words by the time she spoke to him around 7:30 p.m., she could not recall which words. Sergeant Luke also observed Mr. Johnson’s movements in picking up and setting down his bottle of beer to be slow, and his gait to be “a little unsteady.” In addition, the PBT results indicated that Mr. Johnson’s blood alcohol level was 0.18 at 7:30 p.m.

Based on all of the evidence presented, the Administrative Law Judge concludes that the City has failed to demonstrate by a preponderance of the evidence that the Licensee sold beer to an “obviously intoxicated” person. Although the PBT reading indicates that Mr. Johnson had a blood alcohol level of 0.18 at about 7:30 p.m., the evidence established that Mr. Johnson was not exhibiting behavior by the time he was served his last beer that should cause someone exercising reasonable powers of observation to conclude he was intoxicated. Instead, the record reflects that Mr. Johnson was conversant with Mr. Froseth, cooperative and coherent with Sergeant Luke, and sufficiently clear-thinking to react promptly and appropriately to a medical emergency. Mr. Johnson was not unusually loud, unruly, or boisterous. And although both Sergeant Luke and Mr. Froseth testified that Mr. Johnson’s eyes may have been bloodshot by 7:30 p.m., this condition could easily have been caused by Mr. Johnson’s exposure to cigarette smoke in the bar over the course of the six hours. The ALJ is not convinced that Mr. Johnson’s level of intoxication should have been readily perceived or obvious to the bartender. The bartender had extensive prior experience in serving Mr. Johnson and testified in a straightforward and credible manner about his observations on November 26, 2000. As a result, the Administrative Law Judge recommends that

the City of Eden Prairie take no disciplinary action against the liquor license held by Mike Anderson for Green Mill of Eden Prairie.

B.L.N.

^[1] Testimony of Johnson, Froseth.

^[2] Testimony of Johnson, Froseth.

^[3] Testimony of Froseth.

^[4] Testimony of Froseth.

^[5] Testimony of Johnson, Froseth.

^[6] Testimony of Froseth.

^[7] Testimony of Froseth.

^[8] Testimony of Johnson, Froseth.

^[9] Testimony of Johnson, Froseth, Luke.

^[10] Testimony of Luke.

^[11] Testimony of Luke.

^[12] Testimony of Luke.

^[13] Testimony of Luke, Johnson.

^[14] Testimony of Luke.

^[15] Testimony of Luke, Johnson, Froeseth.

^[16] Eden Prairie City Code § 4.07, subd. 1(l).

^[17] 245 Minn. 414, 72 N.W.2d 609 (1955).

^[18] Id. at 615.

^[19] Id. at 616; *See also*, Seeley v. Sobczak, 281 N.W.2d 368, 370-371 (Minn. 1979).

^[20] Gutwein v. Edwards, 419 N.W.2d 809, 811-812 (Minn. App. 1988), *citing*, Harden v. Seventh Rib, Inc., 311 Minn. 27, 33, 247 N.W.2d 42, 46 (Minn. 1976); Strand v. Village of Watson, 245 Minn. 414, 422, 72 N.W.2d 609, 615 (Minn. 1955).

^[21] Ritter v. Village of Appleton, 254 Minn. 30, 37, 93 N.W.2d 683, 687 (Minn. 1958).

^[22] Id.

^[23] *Strand* at 615; Paulson v. Lapa, Inc., 450 N.W.2d 374, 379 (Minn. App. 1990); Jewett v. Deutsch, 437 N.W.2d 717, 720 (Minn. App. 1989).