Mailing Date: FEB 4 2003 **PUBLICATION**

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 01-1560
v.	:	Incident No. W1-233729
8400 TORRESDALE ENTERPRISES INC. 8400 TORRESDALE AVENUE PHILADELPHIA PA 19136-1518	:	LID - 11990
PHILADELPHIA COUNTY LICENSE NO. R-AP-SS-5781	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

EDWARD B. McHUGH, ESQ.

FOR THE LICENSEE:

PATRICK McHUGH, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 31, 2001, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against 8400 Torresdale Enterprises, Inc., License Number R-AP-SS-5781 (hereinafter "Licensee").

An Administrative hearing was held on Thursday, May 16, 2002, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

The citation contains three counts.

The first count charges Licensee with violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471 and Sections 5901 and 3127 of the Crimes Code, 18 Pa. Code Sections 5901 and 3127, in that on April 5, 2001, Licensee, by its servants, agents or employes, permitted persons to be improperly attired or engaged in open lewdness on the licensed premises.

The second count charges Licensee with violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471, in that on April 5, 2001, the licensed establishment was operated in a noisy and/or disorderly manner.

The third count charges Licensee with violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471 and Sections 2701, 2702, 2706 and 2902 of the Crimes Code, 18 Pa. Code Sections 2701, 2702, 2706 and 2902, in that on April 5, 2001, Licensee, by its servants, agents or employes aided, abetted or permitted a patron of the licensed premises to assault, terrorize, threaten and/or unlawfully restrain a patron who was an undercover Liquor Control Enforcement Officer.

COUNT NOS. 1, 2 AND 3

FINDINGS OF FACT:

1. Officer Libby Hess is employed by the Bureau of Enforcement and has been so employed for approximately eleven years. On April 4 and into the early morning hours of April 5, 2001, she visited the licensed premises (N.T. 7-8).

2. Officer Hess entered the licensed premises at approximately 11:25 p.m. and took a seat at the bar. She noted that there were approximately ten patrons and one female bartender (N.T. 9).

3. Officer Hess ordered a drink and sat by herself. While seated at the bar, she observed several males in the premises wearing warlock motorcycle club jackets. The jackets had the sleeves cut off. The back of the jackets had a warlock motorcycle gang insignia, i.e. a green face and green breasts (N.T. 9-10).

4. Initially, Officer Hess sat along the wall on the north side adjacent to Torresdale Avenue (N.T. 10 and Exhibit B-3).

5. At approximately 11:55 p.m., one of the patrons seated to her right introduced himself to Officer Hess. She first believed his name was Doug, but subsequently learned that he was going by the nickname "Duck." He introduced her to other patrons at the bar. These patrons were wearing motorcycle jackets (N.T. 12).

6. Duck was not wearing a motorcycle jacket, however, his left forearm had a warlock club tattoo with the name Chester at the bottom (N.T. 12-13).

7. Duck introduced Officer Hess to patrons named Chromie, Franny and Tommy. Another individual, whose name Officer Hess could not recall, was seated by himself (N.T. 13).

8. Duck immediately began asking the officer personal questions. Duck asked the officer "if she took it up the a--" (N.T. 13).

9. Duck called Officer Hess over to a seat next to him, which was approximately three barstools away from her original location and towards the back of the premises (N.T. 13 and Exhibit B-3).

10. Duck proceeded to question Officer Hess, asking her if she had "ever f----d a girl." She answered by saying that it was "none of his business and that whatever she did was between her and her boyfriend" (N.T. 14).

11. After asking her these very personal questions, Duck yelled out to the other persons in the bar saying things such as "hey, I just asked this fat jumbo cunt if she, you know, took it up the a--, if she ever f----d a girl" (N.T. 14).

12. Several times during the evening, Duck grabbed Officer Hess and hugged and kissed her on the cheek, saying things such as "I love you, you fat ugly cunt." He further stated to her that if she wanted to ride with the warlocks her biker name would be "Big Bald" (N.T. 14-15).

13. Duck's behavior was erratic. One minute he would be calm and the next he would be yelling comments and then calmly sitting down (N.T. 16).

14. At one point, Officer Hess was seated next to Duck who appeared calm. He grabbed her across her face with his hands and she attempted to pull his hand away from her mouth (N.T. 15-16).

15. When Officer Hess could not get him to release her, she bit down on his finger and he let go. He began screaming, "Don't ever do that again, you fat, ugly pig. The next time I'll f----g kill you" (N.T. 16).

16. Officer Hess then tried to appease him by saying that she was sorry and that she was unable to get him off any other way (N.T. 16).

17. After Duck had calmed down, she returned to a seat near him, where they proceeded to talk back and forth (N.T. 16-17).

18. Intermittently, there was *normal* conversation going on between the two (N.T. 17).

19. Duck continued to say things to the officer such as "I bet you have really big tits, don't you?" Duck began grabbing the officer's chest and she pushed him away. At this point, he began to slap her on the shoulders five or six times (N.T. 17).

20. During the course of the evening, he asked if she had ever been raped on a pool table. He told her that she would probably like it and she indicated that she didn't think she would. Duck asked the officer, "You want to suck my dick, don't you, you fat bitch?" At this point, he unzipped his pants and pulled out his penis, waved it at her and indicated that she was going to "get it right up the ass" (N.T. 18-20, 32).

21. After waving his penis four or five seconds, he eventually zipped his pants back up (N.T. 20).

22. During the time that he was talking to the officer, he was talking very loud, sufficiently loud for other patrons to hear. The other patrons were laughing (N.T. 20).

23. About 1:05 a.m., Duck's behavior became erratic again. Duck grabbed the officer in a headlock and pushed her head down to the bar. He then told her that he was going to shave the rest of her hair off and that it would be fun. He pulled a pocket knife out of his pocket, opened it up and held her head down almost to the bar. He ran the knife along her head (N.T. 18).

24. The officer was afraid of what he was going to do to her. He finally allowed her to get up; he then put the knife back into his pocket and started slapping her across the face. He was drinking a Budweiser beer and dumped the Budweiser beer, which was half full, over her head (N.T. 21).

25. The officer then stood up and said, "I'm outta here." At that point, the bartender, Fern, was standing on the outside of the serving area next to the officer, between the officer and Duck (N.T. 22).

26. After the beer was poured over the officer's head, she was visibly upset. She walked out of the premises with the female bartender following her. The officer indicated that she began to cry after the beer was poured over her head. She stood out on the front steps with the female bartender, who apologized for Duck's behavior. She said, "Come back Friday night and I'll buy you a beer and tell you more about him." The female bartender indicated that Duck does not come on Friday and that he was only there on Wednesday (N.T. 23-24).

27. The officer proceeded to her car and immediately after getting into her car, Duck came outside the bar. He indicated that he was sorry for what he did and asked her if she had called the cops. She indicated that she had not called the police and that she just wanted to get out of there. Duck asked her to open the door indicating that he wanted to talk to her. She said "no" and that she wanted to get out of there. She drove off leaving Duck cursing her (N.T. 24).

28. The officer determined that Duck's real name was Donald Doud, Jr. (N.T. 24-25).

29. The officer had two Coors Lite beers and two shots of Sambuca while on the premises (N.T. 25).

30. The officer made a total of three visits to the licensed premises, the two subsequent visits were on Wednesdays when they were trying to locate Mr. Doud (N.T. 26-27).

31. On the two subsequent occasions, the officer did not enter the licensed premises (N.T. 27).

32. Officer Hess did not advise anyone in the bar that she was an undercover enforcement agent (N.T. 30).

33. The patrons were shouting back and forth to one another across the bar, but otherwise they were not disorderly (N.T. 34).

34. Duck was loud and the premises was small (N.T. 34).

35. The maximum number of patrons in the bar during the officer's visit was ten (N.T. 40).

36. Certified records of the Court of Common Pleas of Philadelphia County dated May 10, 2002 indicate that Donald M. Doud, Jr. entered into a negotiated guilty plea to indecent assault and possessing an instrument of crime relative to the incident of Wednesday, April 4, 2001 which occurred on the licensed premises (Exhibit B-5).

37. There was one bartender, but no bouncers or waitresses on the premises on that evening (N.T. 55).

CONCLUSIONS OF LAW:

Count No. 1 - On April 5, 2001, Licensee, by its servants, agents or employes, permitted persons to be improperly attired or engaged in open lewdness on the licensed premises, in violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471 and Sections 5901 and 3127 of the Crimes Code, 18 Pa. Code Sections 5901 and 3127.

Count No. 2 - On April 5, 2001, the licensed establishment was operated in a noisy and/or disorderly manner, in violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471.

Count No. 3 - On April 5, 2001, Licensee, by its servants, agents or employes aided, abetted or permitted a patron of the licensed premises to assault, terrorize, threaten and/or unlawfully restrain a patron who was an undercover Liquor Control Enforcement Officer, in violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471 and Sections 2701, 2702, 2706 and 2902 of the Crimes Code, 18 Pa. Code Sections 2701, 2702, 2706 and 2902.

PRIOR RECORD:

Licensee has been licensed since August 10, 1984, and has a record of prior violations as follows:

Citation No. 91-1908. $350.00 fine.

1. Not a bona fide restaurant in that chairs at tables were insufficient.
2. Sales to a visibly intoxicated person.

Citation No. 00-2085. $500.00 fine.

1. Sales to a visibly intoxicated person.
   November 29, 2000.

DISCUSSION:

Licensee's witness, on cross examination, testified that she gets nervous and she forgets things. That would be the politest interpretation of the bartender's testimony. The bartender's testimony was filled with repeated denial of having seen anything relative to the assault. Ultimately, Mr. Doud pled guilty to indecent assault and possession of an instrument of crime. However, the bartender only recalled that the officer had some sexual banter with Duck, which she claims was initiated by the officer. She further claimed that the officer had too much to drink and that now, unlike when she gave a statement to the police on an earlier occasion, claims she did not see Duck pour beer on the officer, but saw only the aftermath. Yet, she remembers the officer hitting Duck prior to his pouring beer on her. Her testimony is utterly unbelievable, in that in a small bar, which had a maximum number of ten patrons in it that evening, she failed to see all or even some of the activity that the officer described.

The officer suffered tremendous psychological, sexual and physical abuse at the hands of a patron who was known to the bartender. The bartender walked the crying officer out to her car, after she had been physically assaulted with a knife and after beer was poured over her head. Now, the bartender's contends that the officer was crying because she (the bartender) told her she had had enough to drink. The bartender offered to share, on another night, information with regard to Mr. Doud, which is indicative of the fact that she was aware of his volatile behavior. The bartender offered Officer Hess a drink on another occasion, as if she had simply received poor service or a bad meal during her visit. That was not a sufficient or timely response to the abuse, which the officer suffered inside the premises.

The Licensee left with the bartender with no assistance and no backup and undoubtedly she could not nor should not have physically intervened on her own, yet the thought never occurred to her to ask Mr. Doud to leave or call for some other form of intervention or assistance. Mr. Doud, in fact, followed them outside the premises asking if the officer was calling the police. Mr. Doud apparently had no notion that she was a police officer and she was certainly under no obligation to reveal that information nor would it have been prudent for her to identify herself. While this abuse was going on, other patrons in the bar simply laughed. And, the bartender chose to blame the victim.

The question was raised, *"Why did the officer remain?"* The officer was there conducting an undercover investigation. She needed to protect her anonymity and she needed to insure her own personal safety. Why she stayed in the premises is not nearly as important as that she was in the premises and suffered serious abuse. She is an officer of the law, but could have been any other private citizen in fear for their life. Taking all of the circumstances into consideration, the disturbance constituted an invasion of the public peace, welfare and morals and is indicative of the way that Licensee operates the premises. See *Appeal of Ciro's Lounge, Inc.*, 358 A.2d 141 (Pa. Cmwlth. 1976); and *In re: AJC, Inc.*, 401 A.2d 421 (Pa. Cmwlth. 1979).

Although ordinarily a single event is not sufficient to determine that a premises is run in a disorderly manner, in this instance, the extent, duration (over an hour), i.e. Doud's continuing and escalating bad behavior over the course of the evening was sufficient to draw a conclusion regarding the operation of the premises. Doud was a regular customer, Doud exposed himself, was loud, used profanity, was verbally abusive, sexually abusive, physically abusive and all of the behavior went unchecked by Licensee or its agent. It has long been held that violations of the Crimes Code constitute "other sufficient cause" as that term is used in Section 471 of the Liquor Code, 47 P.S. Section 4-471 and thus licensees who commit crimes are subject to penalty provisions of Section 471. *See VJR Bar Corporation v. Pennsylvania Liquor Control Board*, 390 A.2d 173 (1978).

The Supreme Court has held that if a licensee is charged with a violation of the penal laws of Pennsylvania, the Bureau must prove that Licensee knew or should have know of the unlawful conduct. *Pennsylvania Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. Cmwlth. 1988). In this instance, Mr. Doud's erratic behavior was known to the bartender, and he grew increasingly more abusive until it culminated in his use of a knife and unlawful restraint of an individual, who happened to be an Enforcement officer. In this instance, the Licensee is found to have permitted the criminal behavior by failing to take any action to end the disturbance and allowing it to get completely out of hand. The situation could have been stopped much earlier in order to keep it from reaching the point of aggravated assault with a weapon.

Licensee's culpability is for failing to take any measures to stop Doud's repeated harassment and assault of Officer Hess, albeit her status as an officer was unknown. Mr. Doud's knowledge that his victim was a police officer is not an element of the crime of aggravated assault. The intent to assault was sufficient without knowledge of her status. *See Comm. v. Flemings*, 652 A.2d 1282 (Pa. 1995).

Licensee has had two prior citations, one in 1991 and the other in the year 2000. Most significant is that both violations involve sales to visibly intoxicated persons. Although Mr. Doud was not charged with being visibly intoxicated and perhaps he was not, he appeared to be under the influence of alcohol or other drugs or suffering from a mental illness. Nevertheless, the Court is very concerned about the nature of the operation and the lack of order and supervision on the licensed premises.

In imposing the penalties relative to the licensed premises, it does not reflect the intensity of the affront to the officer. However, it is to be noted that the primary culprit in this was Mr. Doud and that Mr. Doud's offenses must be readdressed by the criminal and civil courts. The Licensee does face a substantial suspension for its role in this. Had the Court found the Licensee to have been a direct cause rather then a facilitator, there would be no question that the license would have been revoked. Any citizen should be able to go into a licensed facility, i.e. a **reputable** place, as defined by the Code, without having to face that kind of terror.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than $50.00 or more than $1,000.00, or both, for violations of the type found in this case.

Therefore, penalties shall be assessed as follows:

Count No. 1 - $500.00 and three days suspension.
Count No. 2 - Five days suspension.
Count No. 3 - Seven days suspension.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, 8400 Torresdale Enterprises, Inc., License Number R-AP-SS-5781, pay a fine of Five Hundred Dollars ($500.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that the Restaurant Liquor License of 8400 Torresdale Enterprises, Inc., License Number R-AP-SS-5781, be suspended for a period of fifteen (15) days **BEGINNING** at 7:00 a.m. on Monday, April 28, 2003 and **ENDING** at 7:00 a.m. on Tuesday, May 13, 2003.

Licensee is directed on Monday, April 28, 2003 at 7:00 a.m. to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised if a replacement placard is needed for any reason they are available at all State Liquor Stores/Wine and Spirit Shoppes.

The "Bureau of Enforcement" is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

The Licensee is authorized on Tuesday, May 13, 2003 at 7:00 a.m. to remove the placard of suspension and return the license to its original wall location.

In order to insure compliance with this Order, jurisdiction of this matter is retained.

The fine must be paid by Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal Checks, which include business-use personal checks, are not acceptable.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail, along with any required documentation, to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

Dated this ____28th___ day of _____January_____, 2003.

_____
Tania E. Wright, J.

NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO 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.

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