

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation Nos. 05-0603
LIQUOR CONTROL ENFORCEMENT	:	& 05-0995
	:	
v.	:	(consolidated for adjudication only)
HARRY O'S PUB INC	:	Incident Nos. W01-302119
2153 S HANCOCK ST	:	W01-309654
PHILADELPHIA PA 19148-3331	:	
	:	LID - 37747
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-16618	:	BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: James E. Dailey, Esq.  
For Licensee: no appearance (see discussion)

**ADJUDICATION**

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued these citations on April 1 and May 25, 2005. The citations, as consolidated for adjudication purposes only, allege as follows:

CITATION NO. 05-0603

There are four counts in this citation.

The first count alleges that Licensee violated §§406(a)(2) and 493(16) of the Liquor Code, 47 P.S. §§4-406(a)(2) and 4-493(16), on February 19, 2005, by selling, furnishing and/or giving alcoholic beverages between 2:00 a.m. and 7:00 a.m.

The second count alleges that Licensee violated §499(a) of the Liquor Code, 47 P.S. §4499(a), on February 19, 2005, by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages.

The third count alleges that Licensee violated §499(a) of the Liquor Code, 47 P.S. §4499(a), on February 19, 2005, by permitting patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

The fourth count alleges that Licensee violated §499(a) of the Liquor Code, 47 P.S. §4499(a), on February 19, 2005, by permitting patrons to enter that portion of the premises habitually used for the service of alcoholic beverages between 2:30 a.m. and 7:00 a.m., when it did not possess an Extended Hours Food Permit.

CITATION NO. 05-0995

There are two counts in this citation.

The first count alleges that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on April 8, 2005, on the basis that the licensed premises was not a *bona fide* restaurant because there were insufficient food items.

The second count alleges that Licensee violated §5.41 of the Liquor Control Board Regulations, 40 Pa. Code §5.41, on April 8, 2005, by failing to display in the licensed premises documentary evidence that it meets all sanitary requirements for a public eating place.

By letter mailed June 6, 2005, to the licensed premises, this Office scheduled a hearing for 2:30 p.m. on Tuesday, July 19, 2005, in Plymouth Meeting, Pennsylvania. At approximately 12:30 p.m. on that date, I received a telephone call from a person who identified himself as Laurence T. McKinney, M.D. As confirmed in a facsimile letter received in my office at 2:10 p.m., Dr. McKinney represented to me that Ira Shrager was the counsel for this Licensee and that he needed a continuance because of extreme illness.

This was the first I had heard of Mr. Shrager's involvement. Since neither the docket of the Office of Administrative Law Judge nor my file reflected any appearance for the Licensee, I allowed the matter to be heard *ex parte*, for reasons explained more fully below.

FINDINGS OF FACT:

CITATION NO. 05-0603

1. The Bureau investigated Licensee during the period December 2, 2004, through March 4, 2005, and sent written notice of the results of its investigation to the licensed premises by certified mail on March 8, 2005 (N.T. 9-10, Exhibit B-1).

2. A copy of this citation was mailed to the licensed establishment by certified mail on April 1, 2005 (N.T. 10, Exhibit B-2).

3. A Notice of Hearing was mailed to the licensed establishment by the Office of Administrative Law Judge, Harrisburg, PA, by certified and first class mail on June 6, 2005.

4. Liquor Enforcement Officer B. Brallier entered the licensed premises at 1:30 a.m.  
on

February 19, 2005. At 2:15 a.m. he purchased a beer from the bartender, who deposited the \$2.50 he paid into the cash register. The officer repeated this purchase at 2:30 a.m. Sales of alcoholic beverages to other patrons continued until the officer left the premises at 2:50 a.m. When he left, there were about 20 patrons remaining, almost all of them in possession of alcoholic beverages (N.T. 5-8).

5. When Officer Brallier entered the premises at 1:30 a.m., he did so through the front door on Hancock Street. At about 2:00 a.m. the exterior lights of the establishment were turned off and the front door was locked. When the officer left the premises at 2:50 a.m., he did so through the side door on Jackson Street. This door was unlocked and patrons were entering and leaving the premises through it during the officer's entire visit (N.T. 8-9). CITATION NO. 05-0995

1. The Bureau investigated Licensee during the period April 8 through April 27, 2005, and sent written notice of the results of its investigation to the licensed premises by certified mail on April 29, 2005 (N.T. 15, Exhibit B-1).

2. A copy of this citation was mailed to the licensed establishment by certified mail on May 25, 2005 (N.T. 15-16, Exhibit B-2).

3. A Notice of Hearing was mailed to the licensed establishment by the Office of Administrative Law Judge, Harrisburg, PA, by certified and first class mail on June 6, 2005.

4. Liquor Enforcement Officer C. Holdeman entered the licensed premises at 11:10 p.m. on April 8, 2005. There were about 15 patrons being attended by one bartender. Officer Holdeman inspected the premises and found that there was no health permit on display, and the only food present was nine 7¼ ounce cans of Campbell's soup (N.T. 11-13).

5. A health permit for the premises was in effect on that date, although it was not on display (N.T. 13-14).

#### CONCLUSIONS OF LAW:

Both citations are sustained as charged.

#### DISCUSSION:

Chapter 15 of the Regulations of the Pennsylvania Liquor Control Board governs the practice and procedure before this Office. Section 15.22, 40 Pa. Code §15.22, provides that "Representation shall be in accordance with 1 Pa. Code Chapter 31 Subchapter C (relating to representation before agency)."

Title 1 of the Pennsylvania Code provides in § 31.24 as follows:

- (b) If an attorney appears before an agency head or a presiding officer in a representative capacity in a particular proceeding which involves a hearing or an opportunity for hearing, he shall file with the office of the agency a written notice of the appearance, which shall state his name, address and telephone

number and the name and address of the person or persons on whose behalf he appears. Additional notice or other written communication required to be served on or furnished to a person may be sent to the attorney of record for the person at the stated address of the attorney.

As noted above in the "background" section of this adjudication, the Office of Administrative Law Judge had no notice prior to the date of the hearing in these matters that this Licensee was represented by counsel.

Furthermore, the facsimile letter transmitted by McKinney Medical Centers, Inc., to my office approximately twenty minutes before the hearing was scheduled to commence did not state the name, address and telephone number of Mr. Shrager. Therefore, it did not constitute an entry of appearance on behalf of this Licensee.

Finally, the notice of hearing mailed to the licensed premises specifically warned the Licensee that "DELAY IN OBTAINING LEGAL COUNSEL IS NOT REASON FOR CONTINUANCE."

Under these circumstances, with the Bureau of Liquor Control Enforcement present by counsel in the hearing room and ready to proceed with its witnesses and documentary evidence, the allowance of a continuance would have been an abuse of discretion, in my opinion.

PRIOR RECORD:

Licensee has been licensed since October 9, 1996, and has had four prior violations:

Citation No. 98-0883. \$1,000.00 fine.

1. Sales between 2:00 a.m. and 7:00 a.m.
2. Failed to require patrons to vacate the premises by the required time.
3. Permitted patrons to possess or remove alcoholic beverages after 2:30 a.m.

Citation No. 98-2122. \$300.00 fine and one day suspension with thereafter conditions.  
Suspension vacated.

1. Failed to keep records on the licensed premises.
2. Not a *bona fide* restaurant in that chairs at tables were insufficient.

Citation No. 00-1409. Two days suspension with thereafter conditions.

1. Not a *bona fide* restaurant in that seating was insufficient. July 25, 2000.

Citation No. 03-0809. \$1,500.00 fine.

1. Sales between 2:00 a.m. and 7:00 a.m. March 15, 2003.
2. Failed to require patron to vacate the premises by the required time. March 15, 2003.
3. Permitted patrons to possess or remove alcoholic beverages after 2:30 a.m. March 15, 2003.

4. Permitted patrons to enter that portion of the premises habitually used for the service of alcoholic beverages between 2:30 a.m. and 7:00 a.m. when Licensee did not possess an extended hours – food permit. March 15, 2003.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine, or both, for violations of the type found in these cases. For violations of the type found in Count No. 1 of Citation No. 05-0603, any fine must be in the \$1,000.00 to \$5,000.00 range. For violations of the type found in all other counts of these citations, any fine must be in the \$50.00 to \$1,000.00 range. Penalties are allocated as follows:

Citation No. 05-0603:

- Count No. 1 – a fine of \$1,500.00.
- Count No. 2 – a fine of \$500.00.
- Count No. 3 – a fine of \$500.00.
- Count No. 4 – a fine of \$500.00.

Citation No. 05-0995:

- Count No. 1 – a fine of \$400.00 plus verification that conditions have been corrected.
- Count No. 2 – a fine of \$100.00.

NOTICE OF ASSESSMENT OF POINTS PURSUANT TO ACT 239 OF 2004

Section 479 of the Liquor Code, 47 P.S. §4-479, establishes a numerical system for use in cities of the first class. Every restaurant and eating place licensee in cities of the first class who has been cited for a violation of §493(16) of the Liquor Code, 47 P.S. §4-493(16), on or after February 6, 2005, must have points assessed as of the date of the final adjudication. Points are in addition to other provisions of the Liquor Code regarding license transfer and renewal. Points are required to be assigned in addition to a monetary penalty and/or suspension and/or revocation of the license by the administrative law judge.

An enhanced penalty violation, such as the one involved in this case, requires that the administrative law judge assign five to ten points, depending upon the circumstances surrounding the violation, to a license record. The Board has by regulation established a point system ranging from one to five points for other violations of the Liquor Code and Regulations not specifically set forth in §479.

In my judgment, the minimum of five points is warranted with respect to Citation No. 050603. In addition, two points must be assessed for a violation of any requirement of the board or the city to obtain or maintain the license issued by the board, such as failure to operate as a *bona fide* restaurant in violation of §102 of the Liquor Code, 47 P.S. §1-102, as charged in Citation No. 05-0995.

Section 481(a), 47 P.S. §4-481(a) provides that when any license accumulates ten points or more, the administrative law judge must require the license holder to become compliant with and remain compliant with the provisions of §471.1, 47 P.S. §4-471.1, relating to the Responsible Alcohol Management Program (R.A.M.P.). Failure to comply with such an order within ninety days shall result in two additional points being assessed against the license record.

Section 481(b), 47 P.S. §4-481(b) provides that when any license accumulates fifteen points or more, the administrative law judge must place the license in safekeeping. The license can only be removed from safekeeping upon approval by the board of a transfer to a disinterested third party. Upon completion of the transfer, the points assigned to it will be reduced to ten. If, within ninety days of the transfer the new owner voluntarily becomes compliant with and remains compliant with the responsible alcohol management provisions of §471.1, two additional points will be removed from the license record.

Notwithstanding other provisions of the Act, §481(c), 47 P.S. §4-481(c), provides that when any license accumulates twenty or more points in more than one citation, the administrative law judge must revoke the license.

### ORDER

THEREFORE, it is hereby ORDERED that Licensee, Harry O's Pub, Inc., License No. R-AP-SS-16618, shall pay fines totaling three thousand five hundred dollars (\$3,500.00) within 20 days of the mailing date of this order. In the event the fines are not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

IT IS FURTHER ORDERED that seven (7) points are hereby assessed against the record of Harry O's Pub, Inc., License No. R-AP-SS-16618, as required by 47 P.S. §479(b)(4) and 479(d)(9).

IT IS FURTHER ORDERED that Licensee shall submit verification in the form attached hereto that the premises now has sufficient food, as required by §102 of the Liquor Code. In the event the verification is not submitted within twenty (20) days from the mailing date of this order, Licensee's license will be suspended or revoked.

The fines 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 to:

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

Dated this 29<sup>th</sup> day of August, 2005.

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.**

**VERIFICATION**

Subject to the penalties contained in 18 Pa. C. S. §4904, relating to unsworn falsification to authorities, the undersigned officer verifies that the licensed premises now has sufficient food, utensils and dishes to accommodate people.

Licensee acknowledges that sufficient food, cooking equipment, utensils, and dishes are to be maintained at all times this license is in operation.

\_\_\_\_\_ Corporate Officer's Signature

\_\_\_\_\_  
Date

Submit Verification to:

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