Mailing Date: MAY 29 2007 Appeal

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation Nos. 05-1191 & 05-2112 (Consolidated For All Purposes)
v.	:	Incident Nos. W01-306228 & W01-311548 LOUNGE
MANAGEMENT INC. 118-120-122 MARKET ST. PHILADELPHIA PA 19106-3015	:	LID - 50833
PHILADELPHIA COUNTY LICENSE NO. R-AP-SS-15653	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

JAMES E. DAILEY, ESQ.

FOR THE LICENSEE:

EDWARD B. McHUGH, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of citations that were issued on June 13, 2005 and October 19,

2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Lounge Management, Inc., License Number R-AP-SS-15653 (hereinafter "Licensee").

An Administrative hearing was held on Tuesday, May 16, 2006, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

The Licensee made a Motion to Consolidate the Citations for all purposes, which was Granted by the Court. The Bureau of Enforcement conducted an investigation of the licensed premises, which began on February 16, 2005. The Bureau concluded that on April 2, 2005, Licensee failed to adhere to the conditions of the agreement entered into with the Board. The agreement placed additional restrictions upon the license. That violation was established on April 2, 2005 and the investigation was closed on April 15, 2006. On separate complaint, the Bureau of Enforcement opened another investigation on May 19, 2005 and continued that investigation until August 30, 2005. During the month of May, June and July, although the Bureau did make some visits to the premises, there was no finding of any violation (to include failing to adhere to the conditions of the agreement entered into by the Board) until August 27, 2005. The Bureau appeared to have simply continued their investigation of the premises. After careful review, the Court finds it appropriate to treat this as one continuing investigation.

The citations are as follows:

Citation No. 05-1191

The citation charges Licensee with violation of Section 404 of the Liquor Code, 47 P.S. Section 4-404, in that on April 2, 2005, Licensee, by its servants, agents or employes, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license.

Citation No. 05-2112

This citation contains three counts.

The first count charges Licensee with violation of Section 404 of the Liquor Code, 47 P.S. Section 4-404, in that on August 27, 2005, Licensee, by its servants, agents or employes, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license.

The second count charges Licensee with violation of Sections 406(a)(3.1) and 493(16) of the Liquor Code, 47 P.S. Sections 4-406(a)(3.1) and 4-493(16), in that on August 21, 2005, Licensee, by its servants, agents or employes, sold, furnished and/or gave alcoholic beverages on Sunday between 2:00 a.m. and 11:00 a.m.

The third count charges Licensee with violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code Section 5.32(a), in that on August 19, 2005, Licensee, by its servants, agents or employes, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The Bureau of Enforcement moved to withdraw Count No. 3 of the Citation. That Motion was GRANTED on April 19, 2007.

CITATION NO. 05-1191

FINDINGS OF FACT:

1. Officer Brian Hendrzak visited the premises on April 2, 2005 in order to conduct a routine inspection of the premises. Officer Hendrzak was accompanied by Officers Spera and Brallier. Officers Mullen and Kohler were outside the premises. They arrived at the premises at 10:35 p.m. They noted that there were numerous patrons inside (N.T. 9-10 and 24-25).

2. Officer Hendrzak and the others identified themselves when they entered the premises and informed the employees that they were conducting an inspection of the premises (N.T. 11).

3. The Licensee applied for the transfer of Restaurant Liquor License R-15653 for its premises at 118-120-122 Market Street in Philadelphia, Pennsylvania. There were numerous petitions to intervene filed in response to the application, which raised objections to the license. The concerns raised by the petitions to intervene related to the overabundance of licenses in this area, the lack of parking and inadequate police protection. The Petitioners indicated that they were unfamiliar with the Lounge's plans for the premises and were therefore concerned. The Pennsylvania Liquor Control Board and Licensee entered into a conditional licensing agreement, signed July 28, 2003, which states that Lounge Management "will maintain approximate seating at its restaurant of at least sixty seats in the restaurant portion of this facility and thirty-five seats at the bar portion of its facility." The Licensee stipulated to the authenticity of the licensing agreement presented by Bureau's counsel (N.T. 11-12 and Exhibit B-3).

4. On April 2 2005, the Bureau officers found that there were nine high back seats around the bar. The officer considered the restaurant to be anything outside of the bar, i.e. service area (N.T. 11 and 13-14).

5. In what the officers described as the restaurant area, they note that there were couches and small tables with candles sporadically placed on them. Licensee was not cited for having insufficient tables. The officer indicated that in counting seating, he noted that there were couches, which he described as appearing like church pews with padding on them. He noted there

was a VIP section to the left of the premises separated by a four-foot cement wall with curtains and lights (N.T. 13-15).

6. There was no reference to tables in the conditional licensing agreement (N.T. 16).

7. The Bureau officer counted nine stools in the bar area. The couches were in what the officers considered the restaurant portion of the premises (N.T. 17).

8. The inspection report indicates that there "fifty chairs + VIP section w/20" (N.T. 2829 and Exhibit B-4).

9. The officer concluded that the Licensee was not in compliance in either section of the premises (N.T. 18).

10. The officers had a camera with them and took photographs of the downstairs portion of the premises (N.T. 25-26 and 44-45).

11. No pictures were taken of the outside portion of the premises (N.T. 27).

12. Officer Spera was a part of the investigation of the licensed premises on April 2, 2005. He was aware of the conditional licensing agreement with the Pennsylvania Liquor Control Board. He walked into the premises and to the left of the establishment there was a rectangular shaped bar. It had nine barstools around it (N.T. 35).

13. The officer observed seating throughout the premises, but did not count the seating in other areas (N.T. 36).

14. The officer did not recall whether or not there was a clear concrete delineation between the bar area and the restaurant area (N.T. 38).

CONCLUSIONS OF LAW:

On April 2, 2005, Licensee, by its servants, agents or employes, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license, in violation of Section 404 of the Liquor Code, 47 P.S. Section 4-404.

CITATION NO. 05-2112 COUNT NOS. 1 AND 2

FINDINGS OF FACT:

1. Tammy Viola is a Bureau officer and she conducted an investigation of the licensed premises on Sunday, August 21, 2005 at approximately 12:30 a.m. (N.T. 84).

2. She set the time by synchronizing her watch by KYW News Radio. She was investigating the premises to determine whether they served food (N.T. 85).

3. The officer entered the bar in her undercover capacity. She ordered an alcoholic beverage of Coors Lite. She also ordered food and received it about ten minutes later after ordering (N.T. 85).

4. There were approximately 100 patrons on the premises and there was service of alcoholic beverages. She indicated that there was some celebrity in the VIP section and that there was some confrontation (N.T. 86).

5. Last call was given at approximately 1:45 a.m. and she was one of the last ones to leave. The officer attempted to purchase a beverage after 2:00 a.m. and was denied service. The officer departed the premises at about 2:20 a.m. She sat out front as they directed the people out of the premises (N.T. 86 and 92).

6. Officer Viola described the outside of the premises as being about ten feet tall, with four feet of wood on the bottom and six feet of glass on the top (N.T. 86).

7. Officer Viola described the lighting conditions as very dark at times, but she was able to see inside the premises. She remained outside the premises until about 2:45 a.m. During that time, she observed employees cleaning up the bar area, seven of them were sitting at the bar. One individual picked up a liquor bottle and poured from it into a metal shaker and poured the unknown substance into shot glasses (N.T. 88).

8. The officer observed seven shot glasses. There were ten people on one side of the bar and three were cleaning. The individuals held the glasses up, raised their arms in a toast and consumed the shot (N.T. 89).

9. The individuals were identified as employees by their shirts (N.T. 89).

10. The officer also saw a bartender get bottles of Miller Lite beer from behind the bar and hand them to two other employees (N.T. 90).

11. After the employees received the beer, they continued cleaning up the premises (N.T.
94).

12. The shots were served at approximately 2:35 and again at 2:40 a.m. The Miller Lite beers were served at 2:35 a.m. The officer departed the area at 2:45 a.m. (N.T. 90-91).

13. The officer did not see any money exchanged for the shots of liquor or beer (N.T. 94).

14. Officer Daniel Harris is employed by the Bureau of Enforcement. On August 27, 2005, he arrived at the licensed premises at 8:40 p.m. in order to conduct a routine inspection. The premises was open and operating. The officer went to the premises alone (N.T. 51).

15. When the officer went in, the door was propped open and there was someone standing at the door. There was no music playing and the officer saw two bartenders, but no patrons (N.T. 51-53).

16. No one stopped the officer from entering. He identified himself to a Mr. McQueen. Mr. McQueen indicated that he was the general manager (N.T. 54).

17. Officer Harris saw a first floor, a serving area with a very small bar in there. He saw bartenders and a doorman (N.T. 54-55).

18. There were approximately twelve high deck barstools around the bar (N.T. 55).

19. In the center of the premises, there were couch type seating with small round tables and chairs. Throughout the premises, there was bench style couch seating with coffee type tables in front of them (N.T. 56).

20. The officer asked for a health permit and he was given a license, which had expired in April of 2005 (N.T. 56).

21. Licensee was operating under a conditional licensing agreement signed on July 28, 2003. According to the agreement, Licensee was to have 35 seats at the bar portion of the premises and 60 in the restaurant portion of the premises (N.T. 57 and Exhibit B-3).

22. The officer considered the bar portion to be the rectangular bar area (N.T. 57).

23. The officer interpreted the conditional licensing agreement to mean that the seats had to literally be at the bar as opposed to additional seating in the area (N.T. 59).

24. He also considered the bar portion to be the approximately four foot long serving structure (N.T. 60).

25. There was another serving bar in another area. Seats were around the room and were couch like (N.T. 64-65).

26. The officer considered restaurant seating to be seating other than that was at the main bar (N.T. 66-67).

27. The officer found that there were about sixty seats throughout other portions of the premises (N.T. 67).

28. The officer visited the premises on Saturday, August 27, 2005 and at that time, he indicated that the door was propped open. He identified himself to Mr. McQueen who was standing at the door. He identified himself as the general manager (N.T. 69).

29. The officer asked to speak to Jason McGinley. Mr. McQueen indicated that he wasn't available, but Mr. McQueen offered to assist the officer in conducting the routine inspection of the premises. There were no patrons on the premises at that time and no alcohol was being served (N.T. 70 -71).

30. The attorney for the Licensee presented the officer with photographs of the licensed premises. He was able to identify the front of the premises as well as some interior photographs, which purported to be the licensed premises (N.T. 72-73 and Exhibit L-2).

31. The officer identified a VIP room to the left of the building (N.T. 74).

32. There is nothing to delineate the bar area other than the rectangular four foot bar (N.T. 76).

33. The agreement does not indicate that the premises must maintain thirty-five barstools (N.T. 77).

34. After the seats were all counted, the officer agreed that they would add up to approximately ninety-five, including twelve seats at the bar (N.T. 77-82).

35. The officer decided that they had enough seating for the restaurant area in that the couches were considered to be seating. On that night, he did not count the number of seats in the restaurant portion of the premises. The officer determined that it was adequate but did not do a physical count (N.T. 82).

CONCLUSIONS OF LAW:

Count No. 1 - There is insufficient evidence to conclude that on August 27, 2005, Licensee, by its servants, agents or employes, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license, in violation of Section 404 of the Liquor Code, 47 P.S. Section 4-404.

Count No. 2 - On August 21, 2005, Licensee, by its servants, agents or employes, sold, furnished and/or gave alcoholic beverages on Sunday between 2:00 a.m. and 11:00 a.m., in violation of

Sections 406(a)(3.1) and 493(16) of the Liquor Code, 47 P.S. Sections 4-406(a)(3.1) and 4-493(16).

PRIOR RECORD:

Licensee has been licensed since August 6, 2003, and has a record of prior violations as follows:

Citation No. 04-1379. $1,200.00 fine.

1. Used loudspeakers or devices whereby music could be heard outside.
   July 17 and 18, 2004.
2. Sunday sales after 2:00 a.m.
   July 18, 2004.

Citation No. 05-0112. $300.00 fine.

1. Noisy and/or disorderly operation.
   September 26, October 22, 23 and November 5, 2004.
2. Used loudspeakers or devices whereby music could be heard outside.
   September 26, October 22, 23 and November 5, 2004.

DISCUSSION:

Failed to Adhere to the Conditions of the Agreement
Entered into with the Board

The terms of the conditional licensing agreement, which was signed between the Pennsylvania Liquor Control Board and the Licensee entered into on July 23, 2003, are summarized below:

The Licensee applied for the transfer of Restaurant Liquor License R-15653 for its premises at 118-120-122 Market Street in Philadelphia, Pennsylvania. There were numerous petitions to intervene filed in response to the application, which raised objections to the license. The concerns raised by the petitions to intervene related to the overabundance of licenses in this area, the lack of

parking and inadequate police protection. The Petitioners also expressed concern they are unfamiliar with the Lounge's plans for the premises.

The Board indicated that it is obliged to refuse the transfer application, if it finds that an approval of this application would have an adverse affect on the welfare, health, peace and morals of the neighborhood within five hundred feet of the licensed premises.

The Lounge was willing to enter into an agreement with the Board imposing additional conditions on this license. The condition that was placed on the license was "Lounge will maintain approximate seating at its restaurant of at least sixty seats in the restaurant portion of the facility and thirty-five seats at the bar portion of this facility."

Administrative Law Judge Thau well expressed my sentiment in the case of *So Young, Inc. II*, Citation No. 03-1573:

> When the Generally Assembly amended the Liquor Code by authorizing the Pennsylvania Liquor Control Board to place restrictions on a licensee by agreement and further defined a breach by that licensee as the subject matter of this administrative process, I sensed a legal storm was brewing.

> The Legislature has indeed created a curious procedural creature. We now have a system where government agency, not a party to the agreement (Bureau of Liquor Control Enforcement), alleges that agreement has been violated by a licensee. The matter is brought before an Administrative Law Judge who renders a determination, which may be appealed, by either party, to the Pennsylvania Liquor Control Board. The Pennsylvania Liquor Control Board, in its judicial capacity as the first reviewing authority, is in the very enviable position of interpreting an agreement to which it was a party.

Here, the primary problem arises in that the term "bar" is **not** a term of art and is generally used very loosely by the Enforcement officers and general public. The Liquor Code does **not** allow for bars *per se* in the licensing process and rather establishes restaurants, eating places, etc. Nevertheless in our everyday language, we refer to some of these establishments as bars. And, when the Enforcement officers provide testimony, many times, as in this instance, it is necessary

to clarify whether they are talking about physical structure or piece of furniture used for the serving of drinks, or whether they are talking about a room or an entire building.

Looking at the licensing application, there are numerous areas that are divided up as serving areas, but nothing which would draw a distinction between a restaurant and a bar. Also, the Bureau must make some reasonable estimation as to how many people can be seated in this establishment, because much of the seating is sofas and not chairs. At various times, there were nine to twelve high back chairs around a "bar." However, there was a second alcoholic beverage service counter on the premises. It is with these concerns that the Court now must interpret the meaning of having thirty-five seats at the bar and sixty-five in the restaurant. And if appealed, the Pennsylvania Liquor Control Board will be in an "enviable" but perhaps legally precarious position of interpreting its own agreement.

At least some of the Enforcement officers interpreted the agreement to mean that there must be the thirty-five barstools surrounding the physical structure used for service of alcoholic beverages, commonly known as a bar. The officers concluded that although it was a small, it was conceivable that Licensee could have put thirty-five seats in the area. No two officers gave the same testimony as to how many seats there actually were on the premises. One officer said that in doing his count, he was impeded by the number of people in the establishment.

On April 2, 2006, the Enforcement officer counted all seating and found the number of seats inadequate. The Inspection report indicates that there were fifty seats in the restaurant area plus an additional twenty in the VIP area. The inspection report makes no mention of the nine bar stools that the officer pointed out in his testimony. The officer concluded that seating was inadequate in the restaurant and in the bar. Obviously, he did not consider the VIP area to be a part of the bar or restaurant. On August 27, 2006, an officer concluded, without actually counting, that the seating in the restaurant was more than adequate to comply with the requirements of the conditional licensing agreement. The officer did count only twelve bar stools.

Initially, the Court attempted to determine if there were thirty-five seats in the *area of the bar*, as opposed to *at the bar*. In addition, there was a second small structure which was also described as a bar in another area of the premises. The boundaries are unspecified in the agreement and the Court will not interpret the lack of specificity against the Licensee. A determination was essentially made as to whether the total amount of seating was adequate. In one instance, the Court accepted the officer's testimony that the seating was deficient in both areas. In the second instance, the Court determined that there appeared to be the required amount of seating on the premises, if not in specific locations.

<u>After Hours Sales</u>

On August 21, 2005, the bartender provided service of alcoholic beverages to employees of the premises, after the lawful closing time. Even though no patrons were present, no liquor should have been served from the establishment after 2:00 a.m.

Under the circumstances, a $1,200.00 fine shall be imposed.

NOTICE OF ASSESSMENT OF POINTS PURSUANT TO ACT 239, 2004

Section 479 of the Liquor Code, 47 P.S. Section 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 have been cited for a violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471, on or after February 6, 2005, shall have points assessed as of the date of the final Adjudication. Points are in addition to other provisions of this Act for license transfer and renewal. Points shall be assigned in addition to the imposition of a monetary penalty and/or suspension and/or revocation of the license by the Administrative Law Judge.

An enhanced penalty violation requires that the Administrative Law Judge assign five to ten points, depending upon the circumstances surrounding the violation, to a license record for each and every enhanced penalty violation. 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 Section 479.

Section 481(a), 47 P.S. Section 4-481(a) provides that when any license accumulates ten points or more, the Administrative Law Judge shall require the license holder to become compliant with and remain compliant with the provisions of Section 471.1, 47 P.S. Section 4471.1 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. Section 4-481(b) provides that when any license accumulates fifteen points or more, the Administrative Law Judge shall 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 section 471.1, two additional points shall be removed from the license record.

Notwithstanding other provisions of this Act, Section 481(c), 47 P.S. Section 4-481(c), provides that when any license accumulates twenty or more points in more than one citation, the Administrative Law Judge shall revoke the license.

POINTS ASSESSED:

Accordingly, you are hereby notified that five points have been assigned to your record.

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 Count No. 1 of Citation No. 05-1191 of this case.

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 $1,000.00 or more than $5,000.00, or both, for violations of the type found in Count No. 2 of Citation No. 05-2112 of this case.

Therefore, penalties shall be assessed as follows:

Citation No. 05-1191
Count No. 1 - $200.00.

Citation No. 05-2112 Count No. 1 - DISMISSED.
Count No. 2 - $1,000.00.
Count No. 3 - Withdrawn.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, Lounge Management, Inc., License Number R-AP-SS-15653, pay a fine of One Thousand Two Hundred Dollars ($1,200.00) 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 five (5) points are hereby assessed against the record of Licensee, Lounge Management, Inc., License Number R-AP-SS-15653, as required by 47 P.S. Section 4-479(b)(4).

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 21st day of May, 2007.

_____
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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