

Mailing Date: September 5, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-1191  
BUREAU OF LIQUOR CONTROL : & 05-2112  
ENFORCEMENT : (As Consolidated)

vs.

LOUNGE MANAGEMENT, INC. : License No. R-15653  
118-120-122 Market Street :  
Philadelphia, PA 19106-3015 :

Counsel for Licensee: Edward B. McHugh, Esquire  
Two Greenwood Square  
3331 Street Road, Suite 450  
Bensalem, PA 19020

Counsel for Bureau: James E. Dailey, Esquire  
PENNSYLVANIA STATE POLICE,  
Bureau of Liquor Control Enforcement  
6901 Woodland Avenue, Third Floor  
Philadelphia, PA 19142

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from the Adjudication and Order issued by Administrative Law Judge Tania E. Wright (“ALJ”), wherein the ALJ dismissed the first count of the citation, sustained the second count of

the citation, and imposed a total fine of one thousand two hundred dollars (\$1,200.00).<sup>1</sup>

The first count of the citation charged that, on August 27, 2005, Licensee, by its servants, agents or employees, violated section 404 of the Liquor Code [47 P.S. § 4-404] by failing to adhere to the conditions of the agreement entered into with the Pennsylvania Liquor Control Board (“Board”) placing additional restrictions upon the subject license.

The second count of the citation charged that, on August 21, 2005, Licensee, by its servants, agents or employees, violated sections 406(a)(3.1) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(3.1), 4-493(16)] by selling, furnishing and/or giving alcoholic beverages on Sunday between 2:00 a.m. and 11:00 a.m.

The third count of the citation charged that, on August 19, 2005, Licensee, by its servants, agents or employees, violated section 5.32(a) of the Board’s Regulations [40 Pa. Code § 5.32(a)] by using, or permitting to be used on the inside of the licensed premises, a loudspeaker or similar device

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<sup>1</sup> A fine of two hundred dollars (\$200.00) was imposed for Citation No. 05-1191 and a fine of one thousand dollars (\$1,000.00) was imposed for Citation No. 05-2112.

whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.<sup>2</sup>

On appeal, the Bureau contends that the ALJ committed an error of law in dismissing the first count of Citation No. 05-2112.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

The record reveals that, on July 28, 2003, Licensee entered into a Conditional Licensing Agreement ("CLA") with the Board in which Licensee agreed to "maintain approximate seating at its restaurant of at least sixty (60)

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<sup>2</sup> The Bureau moved to withdraw the third count of the citation. The Bureau's motion was granted on April 19, 2007.

seats in the restaurant portion of its facility, and thirty-five (35) seats at the bar portion of its facility.” (N.T. 11-12, 57, 77; Ex. B-3).

The record further reveals that, on August 27, 2005, Bureau Officer Daniel Harris visited the licensed premises at 8:40 p.m. to conduct a routine inspection. (N.T. 50-51, 69, 71). The premises appeared to be opening for operation. (N.T. 53). Officer Harris observed a serving area with a very small bar on the first floor. (N.T. 54-55). He observed approximately twelve (12) high barstools around the bar. (N.T. 55, 79, 81-82). Officer Harris also observed bench-style, couch-type seating throughout the premises, with a few very small tables with chairs. (N.T. 56). Officer Harris could not make a definitive determination as to how many people could actually sit on the couches and the chairs at the small tables in what he considered the restaurant portion of the premises; however, he thought it was sufficient to meet the terms of the CLA. (N.T. 58, 79, 81-82). Officer Harris testified that there was another serving bar in another area which had couch-like seating around the bar. (N.T. 64-66). Officer Harris interpreted the CLA with regard to seating “at the bar portion” of the facility to mean seating at the four (4)-foot high rectangular bar itself. (N.T. 59-60, 64-66, 76).

Officer Harris estimated that Licensee had seating on its entire premises for approximately seventy-two (72) to eighty (80) patrons. (N.T. 80).

The Board has reviewed the record with the Bureau's objections in mind. The ALJ dismissed the first count of Citation No. 05-2112 related to the condition contained within the CLA that Licensee "will maintain approximate seating at its restaurant of at least sixty (60) seats in the restaurant portion of its facility and thirty-five (35) seats at the bar portion of its facility." The ALJ found that because the boundaries are unspecified in the CLA, she would not interpret the lack of specificity against Licensee. The Board recognizes that the unique circumstances of this case do not support a different outcome.

While the Bureau's evidence established that Licensee had approximately twelve (12) seats at the rectangular bar, the officer's testimony was confusing and lacked the specific detail needed to determine whether other seating accommodations were included in the "bar portion" such as would satisfy the conditions of the CLA. The Board agrees with the ALJ that a lack of specificity set forth in the CLA should not be interpreted against the Licensee, where there is clearly doubt as to the exact amount of seating and its location within the licensed premises.

It is the determination of the Board that the Bureau presented insufficient evidence to support a violation of section 404 of the Liquor Code. The ALJ's dismissal of the first count of Citation No. 05-2112 is, therefore, affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of the Bureau is dismissed.

Licensee has paid the fine in the amount of one thousand dollars (\$1,000.00) relative to Citation No. 05-2112.

It is further ordered that five (5) points are hereby assessed against the record of Licensee pursuant to 40 Pa. Code § 3.122(d).

The Licensee-` must adhere to all other conditions set forth in the ALJ's Order dated May 21, 2007.

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Board Secretary