

Mailing Date: MAY 12 2006

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-1738 and
LIQUOR CONTROL ENFORCEMENT	:	Citation No. 05-2674
	:	
v.	:	Incident No. W09-315651
	:	Incident No. W09-321781
JAKZ, INC.	:	
1996 S. 5 TH ST.	:	LID - 54201
ALLENTOWN, PA 18103-4909	:	
	:	As consolidated Under
	:	Citation No. 05-1738
LEHIGH COUNTY	:	
LICENSE NO. R-AP-SS-1571	:	
	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Roy Harkavy, Esquire
Pennsylvania State Police
8320 Schantz Road, Second Floor
Breiningsville, PA 18031

For Licensee
Theodore J. Zeller, III, Esq.
The Paragon Centre
Ste. 300
1611 Pond Road
Allentown, PA 18104-2258

ADJUDICATION

BACKGROUND:

This proceeding arises out of two citations that were issued by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Jakz, Inc. (Licensee), License Number R-AP-SS-1571.

Citation No. 05-1738¹

This citation was issued on August 31, 2005 and charges Licensee with a violation of Section 5.32(a) of the Pennsylvania Liquor Control Board Regulations. The charge is that on July 31, 2005, Licensee, by servants, agents or employees, used, or permitted to be used on the inside of its licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

Citation No. 05-2674²

This citation was issued on December 21, 2005 and charges Licensee with a violation of Section 5.32(a) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.32(a)]. The charge is that on November 6, 2005, Licensee, by servants, agents or employees, used, or permitted to be used on the inside of its licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

An evidentiary hearing was conducted on March 17, 2006 at the U.S. Courthouse & Federal Building, Courtroom 4-A, 504 W. Hamilton Street, Allentown, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on July 31, 2005 and completed it on November 6, 2005. (Commonwealth Exhibit Nos. C-1 and C-3)

2. The Bureau sent two notices of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on August 5, 2005 and November 22, 2005. Both notices alleged violations as charged in the citation. (Commonwealth Exhibit Nos. C-1 and C-3)

Citation No. 05-1738

3. A Bureau Enforcement Supervisor was in the area of the premises at approximately 1:15 a.m., on July 31, 2005. Upon exiting his vehicle, he heard a loud bass beat coming from the premises. He paced off approximately 540 feet in a westerly direction at which point the Supervisor heard amplified music which was coming from the premises. (N.T. 16-18)

1. Commonwealth Exhibit No. C-2, 05-1738, N.T. 11.
2. Commonwealth Exhibit No. C-2, 05-2674, N.T. 55.

4. The Supervisor went and conducted a sound check to the south of the premises at a distance of approximately 430 feet at which location, the Supervisor heard amplified music escaping the premises. (N.T. 18-20)

5. At 1:35 a.m., the Supervisor ran into a doortender. The Supervisor asked to speak to the “owners.” The Supervisor advised Licensee’s representatives that the amplified music was escaping the premises and that there were neighbors who were complaining. (N.T. 20)

6. The Supervisor determined that the music was being provided by a disc jockey using an electronic amplification system. (N.T. 21-23)

Citation No. 05-2674

7. A Bureau Enforcement Officer visited the premises on November 6, 2005 at approximately midnight. He was there in an undercover capacity. As soon as he arrived, he heard music emanating from the premises. He conducted a sound check. He paced off approximately 75 feet in two different directions. He also paced 150 feet in a third direction. At all three locations, he heard amplified music escaping the premises. He entered about 1:20 a.m. The Officer determined the music was being provided by a disc jockey using an electronic amplification system. (N.T. 58-61)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. **Sustained** as charged in both citations.

DISCUSSION:

I am more than mildly concerned about the Bureau’s claims regarding when the subject investigations began and ended. I will not substitute judicial discretion for administrative discretion unless there is a clear abuse and it is within my authority to do so. Obviously, the Bureau is free to account for and monitor its activity as the Bureau sees fit. However, principles of law and common reason supplant those practices.

It is Bureau policy, so I was told, that a “nuisance bar” investigation is monitored in a unique fashion. The investigation is assigned an incident number. All Bureau visits are documented, whether a violation is allegedly observed or not. The investigation remains open from six months to one year. If a violation is observed, the Bureau assigns an additional incident number and, if a citation is to issue, the investigation is treated as having been opened on the date of violation.

This practice defies common sense and relevant case law. *Suzannes, Inc.*, 21 Sel. Op. ALJ 68; *Revel Railroad, Inc.*, 23 Sel.Op. ALJ 23. An investigation begins when the Bureau decides an investigation is appropriate. Likewise, an investigation ends when the Bureau decides it is time to close the investigation. That decision is primarily a mental process but observable actions must be consistent with that mental process. An investigation encompasses everything the Bureau does in the investigative effort. Visits where no violations are found cannot be summarily excluded. Therefore I find as a fact, the two citations arise out of one investigation.

PRIOR RECORD:

Licensee has been licensed since April 7, 2005, and has had two prior violations:

Adjudication No. 05-1474. Fine \$300.00.
Used loudspeakers or devices whereby
music could be heard outside.
July 2, 2005.

Adjudication No. 05-1639. Fine \$1,250.00.
Sales to a visibly intoxicated person.
July 20, 2005.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or 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.

I impose a \$400.00 fine.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$400.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

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 to:

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

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 3rd day of May, 2006.

Felix Thau, A.L.J.

pm

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.