

Mailing Date: JUN 07 2006

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-1826
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-309168
	:	
v.	:	LID - 44610
	:	
MAIN STREET NON-PROFIT	:	
REDEVELOPMENT CORP.	:	
T/A SHIPPEN PLACE HOTEL	:	
32 E. KING ST.	:	
	:	
SHIPPENSBURG, PA 17257-1308	:	
	:	
CUMBERLAND COUNTY	:	
LICENSE NO. H-AP-SS-5741	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire
Pennsylvania State Police
3655 Vartan Way
Harrisburg, PA 17110

For Licensee
Henry F. Coyne, Esquire
3901 Market Street
Camp Hill, PA 17011-4227

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on September 15, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Main Street Non-Profit Redevelopment Corp., t/a Shippen Place Hotel (Licensee), License Number HAP-SS-5741.

This citation¹ contains three counts.

The first count charges Licensee with violations of Section 467 of the Liquor Code [47 P.S. §4-467]. The charge is that on April 5, May 25 and June 23, 2005, Licensee, by servants, agents or employes, failed to constantly and conspicuously expose its Hotel Liquor License under a transparent substance on its licensed premises.

The second count charges Licensee with violations of Section 404 of the Liquor Code [47 P.S. §4-404]. The charge is that during the period August 27, 2003 through June 23, 2005, Licensee's licensed corporation was not the only one pecuniarily interested in the operation of the licensed business.

The third count charges Licensee with violations of Section 5.16 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.16]. The charge is that during the period August 27, 2003 through June 23, 2005, Licensee's manager failed to devote full time and attention to the operation of the licensed business.

An evidentiary hearing was conducted on April 11, 2006 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, 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 April 5, 2005 and completed it on August 22, 2005. (N.T. 13)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on August 24, 2005. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-3, N.T. 123)

Count No. 1:

3. A Bureau Enforcement Officer went to the premises in an undercover capacity on April 5, 2005. She did not observe the liquor license anywhere. (N.T. 14-18)

1. Commonwealth Exhibit No. C-1, N.T. 123.

4. A second Bureau Enforcement Officer visited the premises on May 25, 2005, accompanied by the first Bureau Enforcement Officer. Both were in an undercover capacity. The second Officer did see the liquor license, including the license year (N.T. 48-51). He saw the license as he was looking over the top of a set of the swinging doors. (N.T. 48-50)
5. The Officer arrived at the premises a second time on June 23, 2005 along with an additional Enforcement Officer to conduct a routine inspection. The Officer located the liquor license behind the set of swinging doors. The license was in a frame. However, on top of the license was a cigarette license covering a portion of the liquor license. The Officer could tell the license was valid. (N.T. 55-56)

Count No. 2:

6. Records of the Pennsylvania Liquor Control Board indicate that during the relevant period the Corporate Officers were: Kenneth Shoemaker (President & Director); Duaine Collier (Vice President & Director); John Clinton (Secretary & Director); Edward Goodhart (Treasurer/Director/Manager/Steward); Judy Fogelsonger (Director); Bruce Hockersmith (Director).
7. Beginning September 1, 2003 and terminating on August 31, 2004, Licensee entered into a contract. In essence, the contract leased the restaurant portion of the business to Abn., Inc. (Commonwealth Exhibit No. C-5, N.T. 123)
8. The Agreement was extended verbally and was still in place as of the hearing date. (N.T. 67-68)

Count No. 3:

9. During the relevant period, the Board approved Manager, Mr. Goodhart, did not devote full time and attention to the operation of the business. He was on the premises anywhere from five to eight hours a week on the average. Otherwise, he was available by telephone

as problems arose. If the Manager, could solve the problem by telephone, he would do so.
(N.T. 93-96)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

Count No. 1:

2. **Sustained** as charged as to May 25, 2005, only.

Count Nos. 2 and 3:

3. **Sustained** as to the period September 15, 2004 through June 23, 2005.²

DISCUSSION:

License Display

There are occasions where I find myself counting hotdogs because I am called upon to determine whether a licensee is a bona fide restaurant. In this case, I have the equally sublime task of determining how much of a license must be observable for me to conclude no violation of law has occurred (*Elateia, Inc.*, 29 Sel.Op. ALJ. 121). I am quite ready and eager to jump into this issue with both feet on the ground, running at full tilt.

As to the first date charged, I do not equate the Officer's declaration that she saw no license posted as equivalent to a statement that there actually was no license posted. The Officer was engaged in an undercover investigation. Given this limitation, I am unwilling to conclude the Officer's observations are sufficient to sustain the charge for the first date.

I know Enforcement Officers are trained to observe as much as possible without drawing attention to themselves when in an undercover capacity. The Officer reminded me of this after the record was closed for purposes of taking testimony and during a time when I was explaining my thinking. Frankly, the timing of such comments raises two questions.

2. The time period is limited by operation of law as a charge must be brought within one year of the date of violation (47 P.S. §4-471).

The first is that of propriety. Once testimony is complete, further comments, especially from a witness, are out of bounds. Second, when I see any witness push a point beyond fact reporting, I worry about the witness' impartiality. This is particularly true about governmental officials, such as a Bureau Enforcement Officer, whose duties necessarily include testifying at all types of judicial proceedings.

I make no accusations of untruthfulness. Nevertheless, an Enforcement Officer must zealously guard against any incursion into her reputation for candor and truth. Displaying any conduct that might be interpreted as a personal interest in the outcome of the case runs counter to that goal.

I accept some responsibility for the colloquy between me and the Officer. It is my preferred style to engage in open and frank dialogue during the course of a hearing. Therefore, I ought not to have been surprised when the witness availed herself of the opportunity. Further, I did have the option of advising the witness that I would not accept further comment when she requested to be heard but chose not to do so.

I also dismiss the charge with respect to the last date as the Officer testified there was enough of the license visible that he could tell the license was valid. I sustain the charge with respect to May 25, 2005, as the location of the license was such that its display was not "conspicuous."

Unlawful Pecuniary Interest

Licensee interposed the defense that the Internal Revenue Service recognizes Licensee as a not-for-profit organization. Counsel advised one of the requirements of that special federal tax status is that there be no outside control of the qualifying organization. Thus, there could be no Liquor Code violation. I summarily brushed that argument aside at the hearing. It deserves to be treated with a little more depth here.

Assuming counsel accurately portrayed Federal Law, the essence of the argument is Issue Preclusion (Collateral Estoppel), i.e., Licensee's status pursuant to federal tax law, precludes a finding in favor of the Bureau. The prerequisites for Issue Preclusion are totally lacking in the instant matter. Moreover, as I remarked at the hearing, it may very well be the case that the "Service Agreement" disqualifies Licensee for special treatment under federal tax law.

The terms of the “Service Agreement” are such that Licensee, has ceded a portion of the licensed business to Abn. Inc. This interest is of such magnitude that Licensee has violated the Liquor Code. Licensee places excessive weight on the title of the document, i.e., “Service Agreement,” as if those two words magically cure any illegality. One may call a horse a dog but that change of name does not alter the attributes we associate with what we call a horse.

Manager To Devote Full Time and Attention

The first sentence of the pertinent regulation [40 Pa. Code §5.16(a)] provides that the operation of a license business requires the full time and attention of a manager. That thought is repeated in the second sentence of the referenced regulation. Notably absent from that text is any guidance as to what constitutes “full time and attention.” The regulation does not specifically require the manager to be present on the licensed premises. Further, the regulation provides little guidance as to how many hours a manager must devote to the operation of the licensed business.

Surely, the sense of attentiveness, as contemplated in the regulation, cannot be satisfied without the presence of the manager on the licensed premises. Merely being available by telephone and present only in severe emergencies is not attentive conduct.

Precisely how many hours in a given interval minimally satisfies the duty of a manager to dedicate full time is also unclear. Because every licensee is free to select its operating hours within lawful limits, the minimum number of hours needed for a manager to satisfy the regulation must necessarily be a fluid concept.

By way of example, if a licensed business operates six days a week, five hours per day, the manager’s presence during the full operating time clearly satisfies the regulation. If that manager now decides to devote the same number of hours per week, 80% of which working time occurs when the premises is closed, has the pertinent regulation been violated?

On the other extreme, we may be confronted with a licensed business which operates from 7:00 a.m. to 2:00 a.m., the following morning, Monday through Saturday, for a total of 114 hours per week. How many hours must a manager be present in that type of operation in order to satisfy the regulation?

Taking another step, suppose a licensee operates Monday through Saturday, eight hours per day, for a total of forty eight hours per week. One week, the manager is present eight hours per day for five of the six days, for a total of forty hours. The next week, the manager works at the premises for the same forty hour block of time but is present three of the six operating days. Is this a violation?

As we quickly discover, the permutations are infinite. Professor Einstein would readily recognize that “full time and attention” is a relative concept the application of which is dependant upon the unique operating schedule of a given license. In the case of these licensees that remain open for a significant portion of a week in excess of forty hours, it seems reasonable to interpret “full-time” as a term that has come to mean forty hours per week, more or less.

In this matter, where the manager estimates his presence on the premises to average about eight hours per week, I am quite comfortable in concluding, the manager is not devoting “full time and attention” to the business.

PRIOR RECORD:

Licensee has been licensed since August 10, 1999, and has had no prior violations.

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 Count Nos. 1, 2 and 3 in this case.

I was advised the unlawful contractual relationship was still ongoing even on the hearing date. I responded by saying that a contract that is unlawful is void as against public policy and that all business dealings pursuant to the unlawful agreement must cease immediately.

Licensee’s representative inquired as to whether there was a grace period to effect a termination. I remarked that Licensee already enjoyed an extended grace period. Furthermore, I am not in the business of doling out grace; I leave that for theological leaders.

I impose:

Count No. 1 - \$100.00 fine.

Count Nos. 2 and 3 - merged - \$1,000.00 fine and seven days suspension and continuing thereafter until Licensee submits a

Certification stating the pecuniary interest

in the operation of the licensed business is terminated and that Licensee’s manager devotes full time and attention to the operation of the licensed business.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$1,100.00 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 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

Imposition of Suspension

IT IS FURTHER ORDERED that the Hotel liquor license of Main Street Non-Profit Redevelopment Corp., t/a Shippen Place Hotel, License No. H-AP-SS-5741, be suspended for a period of seven days, **BEGINNING** at 7:00 a.m., on Monday, August 7, 2006 and **ENDING** at 7:00 A.M., on Monday, August 14, 2006 and continuing thereafter until Licensee has forwarded a Certification stating that the pecuniary interest in the operation of the licensed business is terminated and that Licensee's manager devotes full time and attention to the operation of the licensed business. Said Certification is to be returned to the Office of Administrative Law Judge, Pennsylvania Liquor Control Board, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania 17110-9661. A copy of the Certification is to be sent to Andrew J. Lovette, Assistant Counsel, Bureau of Liquor Control Enforcement, Pennsylvania State Police, 3655 Vartan Way, Harrisburg, PA 17110.

Licensee is directed, on Monday, August 7, 2006, at 7:00 a.m., to place a 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 replacement placards are needed for any reason, they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

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

LICENSEE MAY NOT RESUME OPERATION OF THE LICENSED PREMISES UNTIL FURTHER ORDER BY THE ADMINISTRATIVE LAW JUDGE.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 31st 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.

CERTIFICATION

Citation No. 05-1826

We, Main Street Non-Profit Redevelopment Corp., t/a Shippen Place Hotel, License No. H-AP-SS-5741, certify that the pecuniary interest in the operation of our licensed premises is terminated as of _____. Our manager now devotes full time attention to the operation of the licensed business.

We Main Street Non-Profit Redevelopment Corp, further acknowledge that the Bureau of Liquor Control Enforcement has been sent a copy of the Certification as ordered.

We, the above licensee [or authorized officer's thereof], under penalty of law [18 Pa. C.S. §4904, relating to unsworn falsification to authorities] acknowledge that We are signing and executing this document as the authorized act and deed of the licensee. We certify that the foregoing is true and correct.

Print Signature

Signature

Date

Print Signature

Signature

Date

Original copy of Certification to be sent to: Office of Administrative Law Judge, Pennsylvania Liquor Control Board, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania 17110-9661.

A copy of the Certification to be sent to: Andrew J. Lovette, Assistant Counsel, Bureau of Liquor Control Enforcement, Pennsylvania State Police, 3655 Vartan Way, Harrisburg, Pennsylvania 17110.