

Mailing Date: August 2, 2006

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-1826
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

MAIN STREET NON-PROFIT : License No. H-5741
REDEVELOPMENT CORP. :
t/a Shippen Place Hotel :
32 East King Street :
Shippensburg, PA 17257-1308 :

Counsel for Licensee: Henry F. Coyne, Esquire (before ALJ)
3901 Market Street
Camp Hill, PA 17011-4227

Francis X. O'Brien, Esquire (on appeal)
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Counsel for Bureau: Andrew J. Lovette, Esquire
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Bureau of Liquor Control Enforcement
3655 Vartan Way
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OPINION

The Main Street Non-Profit Redevelopment Corporation t/a Shippen
Place Hotel ("Licensee") appealed from the Adjudication and Order of

Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ sustained all three (3) counts of the citation, imposed a fine of one thousand one hundred dollars (\$1,100.00), and suspended the license for seven (7) days and continuing thereafter until Licensee certified that the pecuniary interest in the operation of the licensed business was terminated, and that Licensee’s manager devotes his full time and attention to the operation of Licensee’s business.¹

The first count of the citation charged Licensee with violation of section 467 of the Liquor Code [47 P.S. § 4-467] in that Licensee, by its servants, agents or employees, failed to constantly and conspicuously expose its hotel liquor license under a transparent substance on its licensed premises on April 5, May 25 and June 23, 2005.

The second count of the citation charged Licensee with violation of section 404 of the Liquor Code [47 P.S. § 4-404] in that Licensee’s licensed corporation was not the only party pecuniarily interested in the operation of the licensed business from August 27, 2003 through June 23, 2005.

The third count of the citation charged Licensee with violation of section 5.16 of the Pennsylvania Liquor Control Board’s (“Board”)

¹ Count One was sustained as to the date of May 25, 2005 only and Count Two was sustained as to the time period of September 15, 2004 through June 23, 2005.

Regulations [40 Pa. Code § 5.16] in that Licensee's manager failed to devote his full time and attention to the operation of the licensed business from August 27, 2003 through June 23, 2005.²

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 has 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).

On appeal, Licensee argues that the ALJ improperly sustained the second count of the citation, as the Pennsylvania State Police, Bureau of

² On June 7, 2006, the ALJ mailed his Adjudication and Order. (Admin. Notice). On June 22, 2006, Licensee filed a Petition for Reconsideration seeking to have the ALJ reconsider the finding of a violation and the penalty imposed relative to the combined second and third counts or, in the alternative, seeking to reopen the record for presentation of additional testimony to determine what, if any, net profit ABN, Inc. retained after it paid its employees and related personnel costs. On June 28, 2006, the ALJ mailed an Opinion and Order Upon Licensee's Application for Reconsideration denying Licensee's request.

Liquor Control Enforcement (“Bureau”) did not prove that the management company had a pecuniary interest in the restaurant proceeds.

The Board has reviewed the record with Licensee’s objections in mind, and it finds that there is sufficient evidence to establish that a violation of section 404 of the Liquor Code occurred, and that the ALJ’s Adjudication should be affirmed.

On April 5, 2005 at 2:50 p.m., Bureau Officer, Susan Clever, visited the licensed premises in an undercover capacity. (N.T. 14). Annette Cassell, who Officer Clever observed working at the premises, told her that she and her husband lease the premises from the hotel. (N.T. 15-16). Officer Clever did not observe Ed Goodhart, Licensee’s Board-approved manager, at the premises during this one (1)-hour visit. (N.T. 16-17, 80; Admin. Notice).

On May 14, 2005, at approximately 11:30 p.m., Officer Clever again visited the licensed premises in an undercover capacity for approximately one (1) hour, during which she did not observe Mr. Goodhart. (N.T. 17-18).

On June 23, 2005, at 1:00 p.m., Bureau Officers, Jerome Botchie and Andrew Dountas, visited Licensee’s premises in order to conduct a routine inspection, and they observed Barry Cassell tending bar. (N.T. 57-

58). Mr. Cassell identified himself to Officer Botchie as the manager of the premises. (N.T. 58). Mr. Cassell told Officer Botchie that he had a Service Agreement with Licensee, which agreement was reviewed by Licensee's attorneys and, he believed, that it was approved. (N.T. 60-61, 105). He provided a copy of the Service Agreement to Officer Botchie. (N.T. 61-62; Ex. C-5).

The Service Agreement was executed on August 27, 2003 between Licensee (signed by Kenneth Shoemaker as president and Judy Fogelsonger as secretary) and Barry Cassell t/d/b/a ABN, Inc. (N.T. 26-27, 61-63, 65, 77, 80, 105; Ex. C-5). The Service Agreement terminated on August 31, 2004. (N.T. 65; Ex. C-5). The Service Agreement was renewed with the same terms when it expired; however, as of April of 2005, while negotiations were ongoing about the profit levels, the parties' agreement was on a month-to-month basis. (N.T. 66-67).

The Service Agreement provided that Licensee was to pay monthly to ABN, Inc., an independent contractor, forty-two percent (42%) of the gross revenues and income of any kind directly or indirectly from, or in connection with the restaurant. (N.T. 63-64, 66; Ex. C-5). ABN, Inc. had direct control over the operation of the restaurant under the agreement. (N.T. 64-

65, 105, 107; Ex. C-5). ABN, Inc. has twenty-two (22) employees whose salaries and benefits are paid out of the forty-two percent (42%). (N.T. 68, 106). Mr. Cassell makes up the menus and drink specials for the licensed establishment. (N.T. 65, 68).

On June 28, 2005, Officer Clever visited the Board's wine and spirits store in Shippensburg in order to examine Licensee's wholesale purchase permit card relative to who was authorized to purchase liquor on its behalf. (N.T. 22-23). She discovered that Nolan Cassell signed all but one (1) of Licensee's purchase orders from 2004 through 2005. (N.T. 23).

On August 8, 2005, Officer Clever had a telephone conversation with Mr. Goodhart, during which he told her that he is "in and out of the hotel," that he does not tell the operators what to do, and that he is contacted by cell phone to handle any problems that arise. (N.T. 25-26, 41-42). She advised Mr. Goodhart that the Service Agreement was not approved by the Board. (N.T. 26).

On August 11, 2005, Officer Clever spoke with Mr. Cassell at the licensed premises and advised him that the Service Agreement had not been approved by the Board. (N.T. 26).

On August 17, 2005, Officer Clever confirmed with the Board's Bureau of Licensing ("Licensing") that the Service Agreement was not approved by the Board. (N.T. 30-31, 36-37; Ex. C-4; Admin. Notice). She issued a notice of violation to Licensee on August 24, 2005. (N.T. 35; Ex. C-3).

Mr. Shoemaker understood from his counsel that the Service Agreement had been approved. (N.T. 81). He believed counsel for both parties worked together to draft it to satisfy the Internal Revenue Service and the Board. (N.T. 82). Mr. Shoemaker was not aware that the agreement had to be filed with the Board for approval. (N.T. 83). He acknowledged that the parties are still working under a signed Service Agreement. (N.T. 85, 89).

Mr. Goodhart has been Licensee's manager since August of 1999. (N.T. 80, 88). During the relevant time period, he was on the licensed premises approximately five (5) to eight (8) hours per week; when problems arose, he was contacted. (N.T. 93-94, 96). Mr. Goodhart stated that ABN, Inc. operated the licensed business day-to-day, but he managed the overall hotel operation. (N.T. 95). He does not get paid for managing the hotel, nor for being one of Licensee's corporate officers. (N.T. 88, 98).

Board records indicate that, during the relevant period, Licensee's corporate officers were Kenneth Shoemaker (President/Director), Duane Collier (Vice President/Director), John Clinton (Secretary/Director), Edward Goodhart (Treasurer/Director/Manager/Steward), Judy Fogelsonger (Director), and Bruce Hockersmith (Director). (Admin. Notice).

A lessee of the licensed premises who assumed liability for the operation of the business, owned the liquor stock, made all purchases, paid all bills and participated with the licensee in the profits is pecuniarily interested. Appeal of Andracchio, 160 Pa. Super. 74, 49 A.2d 843 (1946).

In the present case, Licensee entered into an agreement with ABN, Inc., who had "direct control over all operations of the restaurant, including creation of the menu." The agreement also provided that ABN, Inc. would receive a "monthly management fee equal to forty-two percent (42%) of gross revenues of the restaurant." Mr. Cassell admitted that the restaurant was operated according to the conditions of the agreement. Clearly ABN, Inc. has substantial control of Licensee's establishment when the terms of the agreement permit ABN, Inc. to have direct control over all operations of the establishment. In addition, ABN, Inc. was entitled to almost half of the gross profit generated by the establishment, as provided by the agreement.

In view of the fact that the Liquor Code is to be construed liberally for the protection of the public welfare, health, peace and morals of the citizens of this Commonwealth, Pennsylvania Liquor Control Bd. v. Starr, 13 Pa. Cmwlth. 415, 318 A.2d 763 (1974), aff'd. 462 Pa. 124, 337 A.2d 914 (1975), the Board does not believe that the phrase "pecuniarily interested" was intended by the Legislature to mean only an interest gained through actual conveyance of title or the execution of a binding agreement of sale or lease. Rather, where, as here, interest "*sounds* in the attributes of proprietorship," DeMichaelis License, 65 D. & C. 92, 94 (1948) (emphasis added), that is, where a party other than the licensee has not only participated in the profits, but has exercised substantially all right to control the business, such an arrangement gives to that party at least a pecuniary interest in the business in some manner. Appeal of E-J Westside Inn Corp., 68 Pa. Cmwlth. 323, 326, 449 A.2d 93 (1982).

The Board finds there is sufficient evidence to establish that Licensee was not the only party pecuniarily interested in the operation of the licensed

business from August 27, 2003 through June 23, 2005.³ Therefore, the ALJ's decision is affirmed.

³ Due to the fact that the Bureau's Notice of Violation was issued on August 24, 2005, and section 471(a) of the Liquor Code provides that the Bureau must cite a licensee within one (1) year from the date of violation [47 P.S. § 4-471(a)], Licensee is liable for activity that occurred from August 24, 2004 through August 24, 2005.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine of one thousand one hundred dollars (\$1,100.00).

It is hereby ordered that Licensee's Hotel Liquor License No. H-5741 is suspended for seven (7) days beginning at 7:00 a.m. on Monday, September 18, 2006 and ending at 7:00 a.m. on Monday, September 25, 2006, and continuing thereafter until Licensee has forwarded a certification to the Office of Administrative Law Judge 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.

License is directed on Monday, September 18, 2006 at 7:00 a.m. to place the enclosed Notice of Suspension placard (Form No. PLCB-1925) 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 may not resume operation of the licensed premises until further order by the Office of Administrative Law Judge.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated May 31, 2006.

Board Secretary