

Mailing Date: OCT 18 2006

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-1866
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-312249
	:	
FLUELLEN INC.	:	
1385 NARRAGANSETT ST.	:	LID - 34012
PHILADELPHIA PA 19138-1911	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-7746	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

JAMES E. DAILEY, ESQ.

FOR THE LICENSEE:

EX PARTE

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on September 19, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Fluellen, Inc., License Number R-AP-SS-7746 (hereinafter "Licensee").

An Administrative hearing was held on Tuesday, January 24, 2006, pursuant to requisite and appropriate hearing notice. Despite notice of the hearing having been sent to the Licensee, the Licensee failed to appear. Therefore, the hearing proceeded *ex parte*.

The citation 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 June 4 and 17, 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.

FINDINGS OF FACT:

1. The Bureau of Enforcement conducted an investigation of the licensed premises, which began June 2, 2005 and ended August 16, 2005. The Bureau sent a notice of violation letter on August 24, 2005 to the licensed premises by certified mail, return receipt requested. A citation dated September 19, 2005 was sent to the Bureau by certified mail, return receipt requested. The mailing was signed as received. The Office of Administrative Law Judge in Harrisburg sent a citation hearing notice to the licensed premises by certified mail, return receipt requested and by first class mail on December 8, 2005. The certified mailing was returned unclaimed (N.T. 12-13 and Exhibits B-1 and B-2).

2. Officer Kareem Davis visited the licensed premises on June 4, 2005. He arrived at the premises at approximately 8:20 p.m. He went to the premises regarding a complaint called in from the District Attorney's office for loud music (N.T. 5-6).

3. The officer drove his state vehicle to the premises and parked across the street. As he approached, he heard loud music in the nature of rap and/or rhythm and blues and instrumentals coming from the premises. He could hear both types of music as well (N.T. 6).

4. The officer paced off approximately twenty feet north and south of the premises. He could still hear music coming from the licensed premises (N.T. 6-7).

5. The officer entered the premises and noted that on the right hand side, there were booths. On the left hand side there was a jukebox, which was mounted on the wall with about five speakers located throughout the premises. The speakers were approximately two feet by two feet (N.T. 7).

6. The music outside the premises was the same music heard inside the premises (N.T. 7).

7. The officer remained in the premises for approximately an hour. He noticed that there were patrons and a female bartender (N.T. 8).

8. The officer purchased a Heineken beer while on the premises (N.T. 8).

9. The officer departed and could hear music outside. He paced off approximately twenty feet north and south of the premises where he could still hear the sound of music coming from the premises (N.T. 8).

10. The neighborhood is 80% residential and 20% commercial. The officer did not observe any other licensed establishments in operation (N.T. 9).

11. The officer again visited the premises on January 17, 2005, arriving at approximately 12:35 a.m. The officer parked across the street from the establishment and could hear music coming from the premises. He noted that the front door and the side door were open (N.T. 9).

12. The officer heard rap and rhythm and blues music coming from the premises (N.T. 10).

13. The officer paced off approximately thirty-five feet north and south of the premises. He was able to clearly hear music coming from the establishment at those distances (N.T. 10).

14. The officer observed that there were patrons inside and a bartender on duty (N.T. 10).

15. The officer remained on the premises for approximately one hour and purchased a beer (N.T.10-11).

16. The entertainment was again provided by a jukebox which had speakers located throughout the premises (N.T. 11).

17. The officer noted the same music that he heard inside the premises was the same music that he heard as he was departing the premises. He again paced off sixteen paces or approximately thirty-five feet north and south of the premises and could clearly hear music at both distances (N.T. 11).

CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

On June 4 and 17, 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, in violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code Section 5.32(a).

PRIOR RECORD:

Licensee has been licensed since May 4, 1994, and has a record of prior violations as follows:

Citation No. 95-2998. \$600.00 fine and Verification conditions corrected. Verification not received and license suspended for a period of one day and thereafter until Verification received.

1. Not a bona fide restaurant in that they failed to provide food upon request.
2. Sales after the Restaurant Liquor License had expired and had not been renewed. (Dismissed by A.L.J.)
3. Operated without a valid health permit.

Citation No. 96-1833. \$300.00 fine.

1. Not a bona fide restaurant in that food items were insufficient.

Citation No. 96-2557. \$100.00 fine and one day suspension and thereafter until conditions corrected.

1. Not a bona fide restaurant in that they failed to provide food upon request.
2. Failed to keep records on the licensed premises.

Citation No. 99-1167. \$350.00 fine and one day suspension. Fine not paid and license suspended for a day and thereafter until fine paid.

1. Sold liquor for consumption off premises.
October 18, December 2, 9, 1998, January 9, February 20, April 21, May 13 and June 12, 1999.

Citation No. 99-1541. \$250.00 fine, four days suspension and thereafter until restitution in the amount of \$209.18 paid.

1. Refilled liquor bottles.
June 16, 1999.
2. Unlawfully possessed liquor obtained from a source other than a Pennsylvania State Store.
June 16, 1999.

Citation No. 02-0287. Four days suspension.

1. Fortified, adulterated and/or contaminated liquor.
November 19, 2001.

DISCUSSION:

Music inside a licensed premises should be contained within the premises. In this case, it appears that the situation could be remedied by simply closing the doors and windows. Although, if that it not the position, the Licensee must take whatever steps are necessary to see that the music does not spill over into the streets.

Fluellen, Inc.
Citation No. 05-1866

After a review of the Licensee's prior record, it is noted that they have a somewhat lengthy record but there appears not to be any prior violations of this nature. Under the circumstances, a \$300.00 monetary penalty shall be imposed.

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 this case.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, Fluellen, Inc., License Number R-AP-SS-7746, pay a fine of Three Hundred Dollars (\$300.00) 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.

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 11th day of October, 2006.

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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