

Mailing Date: August 2, 2006

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-1975
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

JOSEPH P. CORDARO : License No. R-20682
t/a Joey C's Roadhouse :
Route 6, Star Route :
Honesdale, PA 18431 :

Counsel for Licensee: Scott B. Bennett, Esquire
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Honesdale, PA 18431

Counsel for Bureau: Craig A. Strong, Esquire
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Bureau of Liquor Control Enforcement
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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") appealed from the Adjudication and Order of Administrative Law Judge Felix Thau ("ALJ"), wherein the ALJ dismissed the first and second counts of the three (3)-count citation, and sustained the third count of the citation, imposing a five thousand dollar (\$5,000.00) fine and a thirty (30)-day suspension of the license.

The first count of the citation charged Joseph P. Cordaro t/a Joey C's Roadhouse ("Licensee") with violations of section 471 of the Liquor Code [47 P.S. § 4-471] and sections 3127 and 5901 of the Crimes Code [18 Pa. C.S. §§ 3127, 5901] in that, on June 18 and 19, 2005, Licensee, by his servants, agents or employees, committed acts of public indecency and/or permitted such acts to be committed on the licensed premises.

The second count of the citation charged Licensee with violations of section 471 of the Liquor Code [47 P.S. § 4-471] and sections 3127 and 5901 of the Crimes Code [18 Pa. C.S. §§ 3127, 5901] in that, on June 18 and 19, 2005, Licensee, by his servants, agents or employees, permitted persons to be improperly attired or to engage in open lewdness on the licensed premises.

The third count of the citation charged Licensee with violation of section 493(10) of the Liquor Code [47 P.S. § 4-493(10)] in that, on June 18, 19 and July 16, 2005, Licensee, by his servants, agents or employees, permitted lewd entertainment.

On May 3, 2006, the ALJ mailed his Adjudication and Order. On May 17, 2006, Licensee, by and through its counsel, filed a Request for Reconsideration, seeking that an additional period of suspension be imposed

in return for a reduction in the fine. On May 19, 2006, the ALJ issued an Opinion and Order Upon Licensee's Application for Reconsideration, denying Licensee's request for reconsideration.

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).

The Bureau contends on appeal that the ALJ committed an error of law when he concluded that there could be no expectation that patrons present at the licensed premises would likely be affronted, offended or alarmed by the conduct that occurred. The Bureau argues that because Licensee is a holder of a restaurant liquor license and must be open to the general public, an

expectation that patrons present would include the general public, which would likely be affronted, offended or alarmed.

At the hearing before the ALJ, Licensee did not dispute the facts set forth in the Bureau's Pre-hearing Memorandum, and the parties agreed to the ALJ's recitation of the facts as follows. (N.T. 4-5, 21). On June 18, 2005, Bureau officers Nyer and Harvey visited the licensed premises at approximately 9:45 p.m. (N.T. 7). After paying an admission fee of forty dollars (\$40.00), they entered the main area of the premises and observed pornographic movies playing on a big screen television in a room to the right of the entrance on the second floor of Licensee's premises.¹ (N.T. 7, 18). The movie showed men and women having intercourse and women performing oral sex on men. (N.T. 7). Licensee was present and informed the officers that three (3) bedrooms were available on the third floor in an unlicensed area. (N.T. 7). Two (2) of the three (3) rooms were private, while the third room was identified as a communal room. (N.T. 9). There were three (3) mattresses and box springs lined up along side of each other in the communal room. (N.T. 9). One of the other bedrooms contained a

¹Licensee described that the first floor of the subject premises is the public area; the second floor is the social club at which the described activity took place; and, the private bedrooms are located on the third floor. (N.T. 18).

bowl of mints and a bowl of condoms. (N.T. 9). In the licensed area, on the dance floor, there were two (2) poles and a hot tub. (N.T. 10).

At 11:00 p.m., sixteen (16) patrons were present, two (2) in the bar area and fourteen (14) at the table. (N.T. 10). The doors to the premises were locked. (N.T. 10). At 11:26 p.m., a male patron removed all of his clothing and got into the hot tub. (N.T. 10). A minute later, a female companion disrobed and joined him in the tub. (N.T. 10). The other twelve (12) patrons began removing their clothing and, by 11:45 p.m., everyone was naked. (N.T. 10). Some individuals engaged in more sexually suggestive activities. (N.T. 10). Behavior of this nature, and the playing of the pornographic movie, continued throughout the officers' stay into the early morning hours of the next day, June 19, 2005. (N.T. 11-12).

On July 16, 2005, the same Bureau officers entered the premises at 10:00 p.m. in an undercover capacity. (N.T. 12-13). There was an admission fee of forty dollars (\$40.00). (N.T. 12). The large screen television was again showing pornographic movies. (N.T. 12). Three (3) bedrooms on the third floor were available for patron use. (N.T. 12, 18).

Licensee has posted at the entrance to the second floor rules and regulations of membership for patrons' review upon arrival. (N.T. 18-20;

Ex. L-1). The rules require members to “cover up appropriately in the public areas.” (N.T. 20; Ex. L-1).

Section 5901 of the Pennsylvania Crimes Code [18 Pa. C.S. § 5901] provides that open lewdness, a misdemeanor of the third degree, occurs when a person does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed. Section 3127 of the Pennsylvania Crimes Code [18 Pa. C.S. § 3127] provides that indecent exposure, in this instance a misdemeanor of the second degree, occurs when a person permits the exposure of his or another person’s genitals in any public place, or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm.

The Board agrees with the ALJ’s conclusion that the Bureau has failed to prove a key element in first two (2) counts of the citation. Specifically, for each of those counts, the Bureau failed to establish that Licensee had a sense that those persons present on the upper floor of the licensed premises on June 18-19, 2005 were likely to be affronted, offended or alarmed by the activities taking place there. Rather, a further review of the facts reveals that patrons wishing to participate in the adult social club portion of the

licensed premises paid a separate membership fee, used a separate entrance and were required to review the specific rules and regulations of the club. One such rule required social club patrons to “cover up” only before entering public areas.

It is clear from the record that patrons freely chose to participate in the types of activities occurring in the adult social club portion of the licensed premises and, therefore, there was no expectation that any of those patrons would be affronted, offended or alarmed by the actions of those participants. Licensee’s contention that the ALJ committed an error of law in concluding that there could be no expectation that patrons present at the licensed premises would likely be affronted, offended or alarmed by the conduct occurring because Licensee is a holder of a restaurant liquor license and must be open to the general public, is without merit. Therefore, the ALJ’s decisions relative to the first and second counts of the citation were based upon substantial evidence.

Relative to the third count of the citation, section 493(10) of the Liquor Code provides that it is unlawful for any licensee, under any circumstances, to permit in any licensed premises or in any place operated in

connection therewith any lewd, immoral or improper entertainment.² [47 P.S. § 4-493(10)].

The Supreme Court of Pennsylvania established the criteria for what constitutes lewd, immoral and improper entertainment in In re Tahiti Bar, 150 A.2d 112 (Pa. 1959). In that case, the court held that lewd, immoral and improper entertainment was entertainment which made a “predominant appeal to prurient interests.” [Id. at 119]. The term “prurient” is defined as: “Obsessively interested in improper matters especially those of a sexual nature.” [Webster’s Illustrated Encyclopedia Dictionary, 1990 Ed., Tormont Publications, Inc., page 1360].

It was undisputed that Licensee, at the very least, was playing movies in which men and women were having intercourse, and women were performing oral sex on men on June 18 and 19, 2005 and on July 16, 2005. Based upon the record, the Board concludes that the ALJ’s findings and conclusions relative to the third count of the citation were based upon substantial evidence.

Based upon the foregoing, the ALJ’s decision is affirmed.

² Liquor Code section 493(10) was limited in its scope to rendering only lewd entertainment unlawful by virtue of Conchatta, Inc. v. Evanko, 2005 WL 426452 (E.D.Pa. 2005).

ORDER

The decision of the ALJ is affirmed.

The appeal of the Bureau is dismissed.

Licensee has paid the fine in the amount of five thousand (\$5,000.00) dollars.

Licensee must also adhere to all other conditions set forth in the ALJ's Order dated April 26, 2006.

Board Secretary