

Mailing Date: AUG 17 2006

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-2139
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-318222
v.	:	
	:	LID - 49943
4705 INC	:	
4705 FRANKFORD AVE	:	
PHILADELPHIA PA 19124-5812	:	
	:	
	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. E-SS-1631	:	BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: James E. Dailey, Esq.  
For Licensee: John J. McCreesh, III, Esq.

**ADJUDICATION**

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on October 19, 2005. The citation alleges that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on September 12, 2005, on the basis that the licensed premises was not a *bona fide* eating place because there was insufficient seating.

A hearing was held on Wednesday, June 21, 2006, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and the citation.

FINDINGS OF FACT:

1. Liquor Enforcement Officer John Bernesky inspected the licensed premises on September 12, 2005. When he entered at about 2:00 p.m. the establishment was open and operating, but there were no customers present. There was a woman attending the cash register and counter who opened the door that led to the area behind the counter (N.T. 4-6).

2. Officer Bernesky saw two tables in the back left-hand corner of the premises which had some boxes on them, advertising paraphernalia, and four folding chairs stacked on top of them. There was Plexiglas on the officer's right, behind which there were beer coolers, the kitchen, and the cash register. Patrons could not access the area behind the Plexiglas unless store personnel opened the door to allow them in there (N.T. 7-8).

3. Officer Bernesky asked the cashier if there was any additional seating. In response, she telephoned Peter Lee, Licensee's president. When Mr. Lee arrived at the premises a short time later, the officer repeated his question about the seating. Mr. Lee answered "no" (N.T. 8-9).

4. The officer prepared a Routine Inspection Report in which he checked "no" for the item "30 Chairs at Tables." In the "remarks" area of the report he wrote "Seating Booths Covered w/empty Cases & other debri." (sic). The figures for average monthly gross and the breakdown for beer and liquor and food were provided by Mr. Lee (N.T. 9-11, Exhibit B-3).

5. When the officer used the word "booths" in the report, he was making a mistake, and should have used the word "table." During his time in the premises, one patron entered. The officer does not know if that patron requested seating. The visit of September 12, 2005, was Officer Bernesky's only visit to the licensed premises during this investigation, which was opened and concluded on the same day. Officer Bernesky never visited this premises in an undercover capacity (N.T. 14-17, Exhibit B-1).

6. The empty boxes and advertising material are not always on the table where the officer saw them. Licensee owns nine tables and 32 chairs, but they were stacked or folded behind the booths on the date of the inspection. Licensee has never refused seating to anyone; if anyone comes to the store and asks to sit down, there is plenty of room (N.T. 19-20).

#### CONCLUSIONS OF LAW:

Sustained as charged.

#### NOTICE OF ASSESSMENT OF POINTS PURSUANT TO ACT 239 OF 2004

Section 479 of the Liquor Code, 47 P.S. §4-479, establishes a numerical system for use in cities of the first class. Every restaurant and eating place licensee in cities of the first class who has been cited for a violation of §471 of the Liquor Code, 47 P.S. §4-471, on or after February 6, 2005, must have points assessed as of the date of the final adjudication. Points are in addition to other provisions of the Liquor Code regarding license transfer and renewal. Points are required to be assigned in addition to a monetary penalty and/or suspension and/or revocation of the license by the administrative law judge.

An enhanced penalty violation requires that the administrative law judge assign five to ten points, depending upon the circumstances surrounding the violation, to a license record, for each and every enhanced penalty violation. The Board has by regulation established a point system ranging from one to five points for other violations of the Liquor Code and Regulations not specifically set forth in §479.

Section 481(a), 47 P.S. §4-481(a) provides that when any license accumulates ten points or more, the administrative law judge must require the license holder to become compliant with and remain compliant with the provisions of §471.1, 47 P.S. §4-471.1, relating to the Responsible Alcohol Management Program (R.A.M.P.). Failure to comply with such an order within ninety days will result in two additional points being assessed against the license record.

Section 481(b), 47 P.S. §4-481(b) provides that when any license accumulates fifteen points or more, the administrative law judge must place the license in safekeeping. The license

can only be removed from safekeeping upon approval by the board of a transfer to a disinterested third party. Upon completion of the transfer, the points assigned to it will be reduced to ten. If, within ninety days of the transfer the new owner voluntarily becomes compliant with and remains compliant with the responsible alcohol management provisions of §471.1, two additional points will be removed from the license record.

Notwithstanding other provisions of the Act, §481(c), 47 P.S. §4-481(c), provides that when any license accumulates twenty or more points in more than one citation, the administrative law judge must revoke the license.

DISCUSSION:

The Liquor Code provides in §102, 47 P.S. §1-102, as follows:

§ 1-102. Definitions

The following words or phrases, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

....

“Eating place” shall mean a premise where food is regularly and customarily prepared and sold, having a total area of not less than three hundred square feet available to the public in one or more rooms, other than living quarters, and equipped with tables and chairs, including bar seats, accommodating thirty persons at one time. The board shall, by regulation, set forth what constitutes tables and chairs sufficient to accommodate thirty persons at one time.

Although the Liquor Code does not specifically state that it is a violation for a licensee to fail to continuously meet the definition of the requirements for the class of license held, the authority set forth in §471 for an administrative law judge to impose a penalty for “sufficient cause” is quite broad. In addition, Commonwealth Court in *PLCB v. Dobrinoff*, 471 A.2d 941 (1984) has held that the failure to meet the definition of “restaurant” in 47 P.S. §1-102 is a basis for imposition of a penalty.

It must be noted that the definition quoted above requires the PLCB to promulgate a regulation setting forth “what constitutes tables and chairs sufficient to accommodate thirty persons at one time.” The Board has not done so, but I do not consider that the absence of such a regulation prevents the Bureau from issuing a citation on the basis of the ordinary meaning of the words of the statute, “equipped with tables and chairs, including bar seats, accommodating thirty persons at one time.”

The definition was a part of the Liquor Code when it was enacted on April 12, 1951. The phrase “including bar seats” was added by Act 10 of 2002, and the requirement to promulgate a regulation was added by Act 212 in the same session. I believe the intent was to require the Board to address the question of booth seating, so as to provide some method to calculate the seating capacity of a booth of a given size.

I understand the definition’s use of “equipped” to mean something more than “present” in the licensed premises, because the phrase “accommodating thirty persons at one time” seems

clearly to require that the seating accommodations be in such a state that they can actually serve their intended purpose should any given group of thirty appear in the premises at one time.

I recognize that in the course of the actual business being conducted by this licensee, it is quite unlikely that thirty people will ever sit down at once to a meal. However, I believe the legislature was entitled to require that the ability to accommodate such a group be maintained as a condition of the licensed privilege. Licensee must immediately set up the tables and chairs it owns so as to comply with this requirement.

PRIOR RECORD:

Licensee has been licensed since November 7, 2002, 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 in the \$50.00 to \$1,000.00 range, or both, for violations of the type found in this case.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, 4705, Inc., License No. E-SS-1631, shall pay a fine of one hundred dollars (\$100.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

IT IS FURTHER ORDERED that two (2) points are hereby assessed against the record of Licensee, 4705, Inc., License No. E-SS-1631, as required by 47 P.S. §4-479(d)(9).

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 PA 17110-9661

Dated this 10<sup>th</sup> day of August, 2006.

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David L. Shenkle, J.

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**NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.**