

Mailing Date: October 22, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1562
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

PHILLY INTERNATIONAL BAR : License No. R-14472
INC. :
52 S. 2nd Street :
Philadelphia, PA 19106-2810 :

Counsel for Licensee: Edward A. Taraskus, Esquire
1315 Walnut Street
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Philadelphia, PA 19142

Counsel for Bureau: James E. Dailey, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
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OPINION

Philly International Bar, Inc. (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright (“ALJ”), wherein the ALJ sustained the citation and imposed a one thousand five hundred dollar (\$1,500.00) fine and revoked the license.

The first count of the citation charged that, on June 17, 24, July 8, 15, August 26, September 2, 15, 22, 29, October 6, November 19, December 16, 2005, January 9, 14, 19, 30, February 1, 2 and 9, 2006, Licensee, by its servants, agents or employees violated sections 471 and 493(31) of the Liquor Code [47 P.S. §§ 4-471 and 4-493(31)] and section 780-101, et seq. of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, [35 P.S. § 780-101] by aiding, abetting or engaging in the traffic in, sale of, a controlled substance on the licensed premises and/or permitting the use of the licensed premises in the furtherance of the traffic in, or use of, a controlled substance.

The second count of the citation charged that, on June 17, 24, 30, July 8, 15, August 13, 26, September 1, 2, 15, 22, 29, October 6, 12, November 19, December 16, 2005, January 9, 14, 19, 30, February 1, 2 9 and April 8, 2006, Licensee, by its servants, agents or employees violated sections 437 of the Liquor Code [47 P.S. § 4-437] and section 5.41 of the Liquor Control Board Regulations [40 Pa. Code § 5.41] by operating the licensed establishment without a valid health permit or license, which expired on April 30, 2005.

The third count of the citation charged that, on February 9 and April 14, 2006, Licensee, by its servants, agents or employees violated section 5.41 of the Liquor Control Board Regulations [40 Pa. Code section 5.41] by failing to display on the licensed premises documentary evidence that the premises meets all sanitary requirements for a public eating place.

The fourth count of the citation charged that, during the period June 17, 2005 through April 14, 2006, Licensee, by its servants, agents or employees violated section 5.51 of the Liquor Control Board Regulations [40 Pa. Code section 5.41] by failing to clean coils, tap rods and connections at least once every seven (7) days.

The fifth count of the citation charged that, during the period 2002 through April 25, 2006, Licensee, by its servants, agents or employees violated section 5.16 of the Liquor Control Board Regulations [40 Pa. Code section 5.16] by failing to notify the Board within fifteen (15) days of a change of manager which occurred in 2002.

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 her discretion, or if her decision was not based upon

substantial evidence. The Commonwealth Court 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 contends that it did not stipulate as factual, any portion of the summary of facts. (Exhibit B). Licensee further contends that the ALJ committed an error of law in that there was no substantial evidence presented by the Commonwealth that the Licensee or its servants, agents or employees aided, abetted or engaged in, or permitted, or knew, or should have known of the traffic in or sale of a controlled substance.

Licensee also contends that the ALJ abused her discretion to hold the Licensee, its agents and employees as being responsible to detect drug related activity. The Licensee, its agents and employees are not trained to detect drug related behavior. Rosing Inc. v. PLCB, 690 A.2d 759 (Pa. Cmwlth. 1997).

An examination of the record reveals that at the hearing before the ALJ the Bureau identified and offered into evidence a series of twelve (12)

exhibits. Exhibit B-1 was identified as the Bureau's original notice of violation letter with an attached amended letter dated June 14, 2006. Exhibit B-2 was identified as the citation. (N.T. 5). Licensee's counsel stipulated to Exhibits B-1 and B-2 and to the service of the documents.¹

Bureau counsel also offered the Bureau's pre-hearing memorandum which was identified as Exhibit B-3. Bureau counsel specifically stated that B-3 was being offered to "establish the facts of the case," with some challenges by Licensee's counsel, Edward Taraskus. (N.T. 10). Exhibit B-3 sets forth the summary of the testimony of Officer Christopher Holdeman and Officer Christopher Keisling, both enforcement officers with the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"). The Bureau's pre-hearing memorandum also sets forth the testimony of James Avery of the Office of the Attorney General, Bureau of Narcotics Investigations Division. (Exhibit B-3). Bureau counsel also identified a supplemental pre-hearing memorandum which contains a summary of the testimony of Mr. Victor Heard, the alleged drug dealer and that of a confidential informant. (N.T. 12). A more detailed summary of the testimony of Agent James Avery was also introduced as an exhibit by Bureau counsel. (N.T. 12, Exhibit B-5).

¹ Licensee stipulated to Exhibits B-1 and B-2 for jurisdictional purposes but then went on to raise objection to the proceeding before the ALJ based upon the issue of collateral estoppel.

Following the introduction of Exhibits B-3, B-4 and B-5, Bureau counsel offered a stipulation to the facts of Officer Holdeman's testimony as clarified by Mr. Taraskus. (N.T. 12). At that time Mr. Taraskus stated his objection to any reference by Officer Holdeman as to a conclusion that "what he witnessed were drug transactions, whatever he witnessed...should not be admitted into evidence". (N.T. 12). In response to Mr. Taraskus' objection, the ALJ concluded that she "would never disallow anyone from testifying as to what they...saw with their own eyes, if they saw A, B or C, or what. If it's a matter of interpretation from what they saw, that is a different issue." (N.T. 13). Mr. Taraskus then replied, "that is really what the objection is, your Honor". (N.T. 13).

Further, Licensee, through its counsel, gave an unqualified stipulation that the ALJ could accept the testimony of Victor Heard and the confidential informant as presented in Exhibit B-4. (N.T. 12, 22-23).

Licensee's counsel also gave an unqualified stipulation to the proposed testimony of Agent Avery, as embodied in Exhibits B-3 and B-5. (N.T. 20). Licensee's counsel did not have any problem with Agent Avery's testimony as set forth in Exhibit B-5, adding only a "supplemental stipulation" describing a further facet on the Avery stipulation, "that the sales never involved any of

Licensee's employees, manager, corporate officers, shareholders, [that they were] never involved with any transactions that were behind the bar itself." (N.T. 20-21).

Licensee's counsel further gave an unqualified stipulation to the Bureau's Exhibit B-6, which contained the lab analysis conducted by the Pennsylvania State Police at the Lima Regional Laboratory. (N.T. 26).

A further review of the record reveals there were also unqualified stipulations of facts concerning Exhibits B-7, B-8, B-9 and B-10, pertaining to the four (4) other citation counts.²

The nature and extent to which exhibits outlining the testimony of the Bureau's witnesses were presented and individually stipulated to clearly indicates that Licensee's counsel was in agreement that the ALJ could and would make findings of fact upon the outlined stipulations. Those facts as stipulated to are sufficient to establish that drug activity did occur at the licensed premises between June 17, 2005 and February 9, 2006. Specifically, the record reveals that on June 17, 2005, Enforcement Officer C. Holdeman, along with Officer Snyder, met with Jim Avery, a representative of the Office of Attorney General, Bureau of Narcotics

² It appears from Licensee's argument in its appeal that it has not appealed the ALJ's findings with respect to counts two, three, four and five.

Investigations. They discussed drug activity at the licensed premises in connection with a person named Victor Heard. At 10:30 p.m. on June 17, 2005, Officers Holdeman and Snyder entered the licensed premises in an undercover capacity. They observed two (2) male bartenders and three (3) female bartenders rendering service to approximately fifteen (15) patrons. Other employees were also present (Exhibit B-3).

A confidential informant entered the licensed premises. Shortly thereafter, Victor Heard entered the premises from the rear of the establishment. Mr. Heard sat at the bar near the front window. A female patron approached Mr. Heard and handed him an undetermined amount of U.S. currency. Mr. Heard reached into his pants pocket and handed an unknown item to the female patron. At 10:45 p.m., a female entered the licensed premises. She immediately approached Mr. Heard and had a discussion with him. She then handed Mr. Heard an undetermined amount of U.S. currency. He again reached into his pants pocket and dropped an unknown item into the female's pocketbook to complete the transaction. She immediately departed the establishment. Mr. Heard reached into his pocket and took out a large wad of U.S. currency and began sorting and counting it. The money was laid out on the bar counter. At one point, a male bartender

was observed making change with Mr. Heard for a large denomination bill (Exhibit B-3).

At 10:50 p.m., the confidential informant approached Mr. Heard while he was still sorting his money on the bar. The confidential informant requested a “fifty” and a “hundred” from Mr. Heard, meaning that he wanted a fifty dollar (\$50.00) bag of cocaine and a one hundred dollar (\$100.00) bag of cocaine. Mr. Heard reached into his rear pocket and retrieved a bag of cocaine then reached into his front pocket for another bag of cocaine. He handed the cocaine to the confidential informant. The informant handed Mr. Heard one hundred fifty dollars (\$150.00) to complete the transaction and departed the premises a short time later (Exhibit B-3).

On June 24, 2006, Officer Holdeman again met with Mr. Avery from the Office of Attorney General. Mr. Avery informed Officer Holdeman that the Board approved manager, Heather McDonnell, was no longer managing the licensed business and had moved to New York City. He stated that she had not resided in Pennsylvania since May 7, 2002. Mr. Avery also verified that the items purchased by the confidential informant on June 17, 2005, had tested positive for cocaine (Exhibit B-3).

On June 30, 2005, Officer Holdeman, along with Officer Snyder, visited the licensed premises and conducted an undercover surveillance (Exhibit B-3).

On July 15, 2005 at 10:30 p.m., Officers Holdeman and Snyder arrived in the vicinity of the licensed premises. Mr. Heard was standing outside the front door. They entered the licensed premises and observed two female bartenders and a male bartender rendering service to approximately fifteen patrons. Two (2) doormen were also present. Mr. Heard entered the premises at the same time as the officers. Mr. Heard sat at the same location as he did on June 17, 2005. The confidential informant entered the premises at 10:35 p.m. (Exhibit B-3).

At 10:40 p.m., Mr. Heard approached the confidential informant. The informant handed Mr. Heard some money. Mr. Heard reached into his pocket and handed the informant a packet of cocaine. The informant departed the premises shortly thereafter. Mr. Heard returned to his seat at the bar. At 10:45 p.m., a male patron approached Mr. Heard. He handed Mr. Heard an undetermined amount of U.S. currency and Mr. Heard handed the patron an unknown item to complete the transaction. Mr. Heard then placed a large wad of money on the bar, reorganized it and returned it to his

pocket. Both transactions took place within a few feet of the male bartender. Officers Holdeman and Snyder departed the licensed premises and met with the representative of the Attorney General's office who verified that the item the confidential informant purchased from Mr. Heard tested positive for cocaine (Exhibit B-3).

On August 13, 2005, Officer Holdeman returned to the licensed premises in an undercover capacity. He observed two (2) male bartenders and two (2) female bartenders rendering service to approximately 175-200 patrons. Three (3) doormen and a disc jockey were also observed on the premises. Mr. Heard was also present during this visit, seated at his usual location. The officer observed numerous patrons approach Mr. Heard, but was unable to observe anything due to the large number of patrons in the establishment. Several patrons came into the premises, approached Mr. Heard for a short time, and then immediately departed the premises (Exhibit B-3).

On August 26, 2005 at 11:05 p.m., Officer Holdeman entered the premises in an undercover capacity. At that time, he observed two (2) male bartenders and two (2) female bartenders rendering service to approximately seventy-five (75) patrons. Two (2) doormen and a disc jockey were also

present. The officer entered the restroom just as Mr. Heard was leaving it. At that time he could hear coughing and snorting noises coming from the center stall in the restroom. Then a patron came out of the stall. He had a white powdery substance on the side of his face and what appeared to be a white ball of powder in one of his nostrils. The patron saw his face in the mirror and washed his face. He then blew his nose, which started to bleed profusely (Exhibit B-3).

Officer Holdeman sat at the bar and observed Mr. Heard in his usual location. At 11:15 p.m., the patron who had been in the restroom approached Mr. Heard. He handed something to Mr. Heard, who reached into his pocket and handed something to this patron. At 11:45 p.m., a patron entered the licensed premises and purchased a bottle of beer. He then approached Mr. Heard and they conducted a transaction similar to those previously described. The patron departed the premises, without finishing his beer (Exhibit B-3).

On September 1, 2005, Officer Holdeman visited the licensed premises and conducted an undercover surveillance (Exhibit B-3).

On September 29, 2005 at 10:35 p.m., Officer Holdeman entered the licensed premises in an undercover capacity. He observed two (2) male bartenders and two (2) female bartenders rendering service to approximately fifteen (15) patrons. Two (2) doormen and a disc jockey were also present. At 10:40 p.m., Mr. Heard entered the licensed premises. The confidential informant entered at 10:45 p.m. Mr. Heard approached the informant. The informant placed some money on the bar. Mr. Heard picked it up and counted it slowly. Mr. Heard made change and handed the informant an item, which was later determined to be cocaine. The informant departed the premises (Exhibit B-3).

Mr. Heard then went to his usual location in the bar. A female patron was waiting at this location for Mr. Heard. They conducted a transaction similar to those previously described. A male patron entered the licensed premises, identifying himself as Keith, and sat next to Officer Holdeman. Keith stated to the officer, "My friend has something for me, if you know what I mean." He then nodded toward Mr. Heard. He asked if the officer would like to do some coke. Mr. Heard approached Keith and they completed a transaction. Mr. Heard then returned to his usual location. Keith turned to the officer and indicated that there were a lot of girls in the

premises who were looking for some coke. He then departed the premises (Exhibit B-3).

On October 4 and October 12, 2005, Officer Holdeman met with the representative from the Attorney General's office (Exhibit B-3).

On October 21, 2005, Officer Holdeman visited the licensed premises and conducted an undercover surveillance (Exhibit B-3).

On November 19, 2005 at 10:15 p.m., Officer Holdeman entered the licensed premises in an undercover capacity. He observed two (2) male bartenders and two (2) female bartenders rendering service to approximately fifty patrons. Three (3) doormen were also present. At 10:35 p.m., Mr. Heard entered the licensed premises and went to this usual location. During his visit, he observed three (3) male patrons approach Mr. Heard and complete a series of drug transactions (Exhibit B-3).

On December 16, 2005 at 11:15 p.m., Officer Holdeman entered the premises in an undercover capacity. He observed two (2) male bartenders and two (2) female bartenders rendering service to approximately fifty (50) patrons. Three (3) doormen were also present. Mr. Heard was already on the premises at his usual location. Two (2) patrons entered the premises immediately after the officer. They approached Mr. Heard and

completed a drug transaction. A short time later, another patron entered, approached Mr. Heard and completed a drug transaction (Exhibit B-3).

On January 6, 2006, Officer Holdeman contacted the representative from the Attorney General's office (Exhibit B-3).

On January 14, 2006 at 12:01 a.m., Officer Holdeman entered the licensed premises in an undercover capacity. He observed two (2) male bartenders and two (2) female bartenders rendering service to approximately sixty (60) patrons. Three (3) doormen were also present. Mr. Heard was already on the premises at his usual location. A patron entered the premises and approached Mr. Heard. The patron then went to a Money Access Center (MAC) machine on the premises and obtained some money. He approached Mr. Heard and completed a drug transaction (Exhibit B-3).

On February 1, 2006, Officer Holdeman visited the licensed premises and conducted an undercover surveillance (Exhibit B-3).

On February 7, 2006, Officer Holdeman spoke with the representative from the Attorney General's office (Exhibit B-3).

On February 9, 2006, Officer Holdeman entered the licensed premises in an undercover capacity. He observed two (2) male bartenders and one (1) female bartender rendering service to approximately fifteen (15) patrons.

A doorman and disc jockey were also present. At 10:30 p.m., Mr. Heard entered the licensed premises. Mr. Heard approached a patron and they completed a drug transaction (Exhibit B-3).

At 10:50 p.m., a detail consisting of Enforcement Officers Powers, Harris, Keisling, Ringgold and Collins, as well as representatives from other local and state agencies, entered the establishment. Mr. Heard was arrested at that time. Fifteen (15) packets of cocaine were seized from him (Exhibit B-3).

Dominic Cosenza identified himself as the manager of the licensed premises. Mr. Cosenza was observed on the premises during many of the officer's visits, but the officer was not aware that he was the manager. Mr. Cosenza stated that the Board approved manager, Heather McDonnell, had not been working at the licensed premises since he became manager. Another person identified himself as Robert Miller. Mr. Miller stated that he acts as manager on Sunday's, Monday's, and Tuesday's. He stated that he often works at the same time as Mr. Cosenza. He stated that it was understood that they were managing the licensed premises, and either one or the other was always present (Exhibit B-3).

Officer Holdeman interviewed Mr. Heard on February 10, 2006. Mr. Heard admitted that he had been selling cocaine at the licensed premises for the past two (2) years. He stated that he was working for Louis Watson. Mr. Watson was observed on the premises on numerous occasions.

Mr. Heard admitted to having met the sole corporate officer, Andrew Cosenza and his brother Dominic.

The evidence of record clearly shows that Mr. Heard repeatedly and consistently used the licensed premises for drug trafficking and sales.

Given the existence of illegal drug activity on the licensed premises, often occurring at the bar while bar employees were present, it must then be considered whether Licensee knew or should have known about the drug activity.

On appeal, Licensee argues that although the ALJ found that because “the sales were numerous and conducted in such a manner anyone present would have at least known that there was an exchange of money for product whatever that product might have been; this is insufficient to charge that the Licensee should have known that there was drug activity occurring on the premises.”

The Board disagrees. The illegal activity occurring on the premises was not necessarily an open display of sales transactions or drug use on the premises. However, there was sufficient evidence for the ALJ to find that the circumstances surrounding the illegal activity was sufficient to, at the very least, raise suspicion as to whether or not illegal activity was afoot. A review of the Bureau's pre-hearing memorandum supports at least fourteen (14) instances where patrons engaged in some sort of exchange of cash for a hand held item. (Ex. B-3). In all but one of those instances the patrons in question remained on the premises for only a short period of time and did not purchase either food or beverage from Licensee while on the premises. (B-3). In one particular instance, a patron purchased a beer, engaged in a transaction with Mr. Heard, the alleged drug dealer and then departed the premises, without finishing his beer. (Ex. B-3). On two (2) separate occasions Mr. Heard was observed taking out a large wad of money which he then counted and sorted in plain view of anyone sitting or working near the bar area where he routinely sat. (Ex. B-3). On two (2) occasions a male patron was observed handing Mr. Heard some cash and Heard handing the patron an unknown item. These transactions occurred within a few feet of a male bartender. The activities involving Mr. Heard were conducted in such a

manner, that anyone present would at least have cause to suspect that illegal activity was afoot. Under such circumstances, the ALJ had sufficient evidence to find that Licensee should have known through observation and investigation that illegal drug activity was occurring inside its premises. The record is devoid of any evidence of any substantial affirmative steps taken by Licensee to deter the drug activity taking place.

For the reasons set forth above the ALJ acted properly in making its finding of fact and determining that Licensee knew or should have known of the illegal drug activity occurring in its premises on the violation dates. Further the ALJ acted properly and was well within her discretion in revoking the liquor license pursuant to section 471 of the Liquor Code, for such violations.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee is hereby ordered to pay the fine in the amount of fifteen hundred (\$1,500.00) dollars within twenty (20) days of the mailing date of this Order.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-14472 remains revoked as of August 18, 2008.

Licensee must adhere to all conditions set forth in the ALJ's Orders in this matter.

Board Secretary