

Mailing Date: MAY 18 2007

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

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|----------------------------|---|-------------------------|
| PENNSYLVANIA STATE | : | |
| POLICE, BUREAU OF | : | Citation No. 06-2346 |
| LIQUOR CONTROL ENFORCEMENT | : | |
| | : | Incident No. W03-329769 |
| v. | : | |
| | : | LID - 34233 |
| KALDES, INC. | : | |
| T/A AL'S CAFE | : | |
| 268 VERBEKE ST. | : | |
| HARRISBURG, PA 17102-2738 | : | |
| | : | |
| | : | |
| DAUPHIN COUNTY | : | |
| LICENSE NO. R-167 | : | |

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire
Pennsylvania State Police
3655 Vartan Way
Harrisburg, PA 17110

For Licensee
Frank C. Sluzis, Esquire
2148 Deodate Road
Elizabethtown, PA 17022

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on October 12, 2006, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Kaldes, Inc., t/a Al's Cafe (Licensee), License Number R-167.

This citation¹ contains three counts.

The first count charges Licensee with violations of Section 5.32(a) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.32(a)]. The charge is that on May 13 and July 20, 2006, Licensee, by servants, agents or employees, used, or permitted to be used on the inside of its licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The second count charges Licensee with violations of Section 493(10) of the Liquor Code [47 P.S. §4-493(10)]. The charge is that on May 8, 27 and June 16, 2006, Licensee, by servants, agents or employees, permitted dancing to jukebox music without an Amusement Permit.

The third count charges Licensee with a violation of Section 102 of the Liquor Code [47 P.S. §1-102]. The charge is that on August 17, 2006, Licensee's licensed premises was not a bona fide restaurant in that Licensee, by servants, agents or employees, maintained insufficient food items and eating utensils.

An evidentiary hearing was conducted on April 18, 2007 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on March 22, 2006 and completed it on September 7, 2006. (N.T. 6)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on September 22, 2006. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 6)

Count No. 1:

3. On May 13, 2006, a Bureau Enforcement Officer was outside the premises. The Officer heard base tones and vocals. The side door of the premises was open. Music was coming from that entrance. The source of the music was a jukebox. (N.T. 11-16)

1. Commonwealth Exhibit No. C-2, N.T. 7.

4. On July 20, 2006, at 9:40 p.m., the Officer returned to the premises. He heard music emanating from inside as far away as 30 feet. The music was being provided by a jukebox. (N.T. 23-25)

Count No. 2:

5. I take Official Notice that in all relevant dates, Licensee did not have an Amusement Permit.

6. On May 8, 2006, a Bureau Enforcement Officer conducted an undercover visit to the premises. There were three female patrons dancing to a song that was playing on the jukebox. (N.T. 8-10)

7. On May 27, 2006, a Bureau Enforcement Officer arrived at the premises at 8:30 p.m., in an undercover capacity. Patrons were dancing to music provided by the jukebox. (N.T. 21-22)

8. The Officer returned on June 16, 2006 at 10:15 p.m., and again observed customers dancing. (N.T. 23)

Count No. 3:

9. On August 17, 2006, a Bureau Enforcement Officer conducted an administrative inspection of the premises. The Officer arrived at about 1:50 p.m., at a time when Licensee was open for business. The Officer found no food on the premises except for chips and pretzels. Licensee's Sole Corporate Officer advised the Officer that Licensee did not sell much food. (N.T. 35-36)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

Count No. 1:

2. **Sustained** as charged.

Count No. 2:

3. **Sustained** as charged.

Count No. 3:

4. The Bureau has **failed** to prove that Licensee's licensed premises was not a bona fide restaurant in that Licensee, by servants, agents or employes, maintained insufficient food items and eating utensils, on August 17, 2006.

DISCUSSION:

I dismiss Count No. 3, as the Officer's brief, momentary observation is insufficient to sustain the charge. A failure to find any food on a licensed premises does not necessarily prove a licensee is not a legitimate restaurant. I further recognize the manner in which a licensee operates may serve to discourage food sales. *Pub Charles, Ltd.*, 00-1224, <http://www.lcb.state.pa.us/webapp/Legal/PublicAdjudicationSrch.asp>., D & M Shumbris, Inc., 01-0899, <http://www.lcb.state.pa.us/webapp/Legal/PublicAdjudicationSrch.asp>., Rita and Kenny May's Happy Days, Inc., 03-1777, <http://www.lcb.state.pa.us/webapp/Legal/PublicAdjudicationSrch.asp>.

In consort with this short visual inspection is a statement by Licensee's Sole Corporate Officer that Licensee does not sell much food. I do not find that declaration to be largely relevant. Perhaps Licensee simply does not attract much food business.

The Liquor Code places no obligation upon a restaurant liquor licensee to sell a specified amount of food. On the contrary, the Liquor Code defines a restaurant as a place where food is habitually and principally provided. The more meaningful test of a restaurant's legitimacy is not what was sold but what was purchased.

So long as a licensee purchases sufficient food in quantity and variety, to satisfy minimum standards, without deliberately engaging in a practice intended to discourage food sales, I see nothing but a legal operation. The opportunity to verify Licensee's food purchase history was readily available through inspection of Licensee's records. That action would have gone a long way to determine whether the premises was legitimate.

PRIOR RECORD

Licensee has been licensed since May 11, 1994, and has had two prior violations (Commonwealth Exhibit No. C-3, N.T. 43):

Adjudication No. 96-0251. Fine \$525.00.

1. Used loudspeakers or devices whereby music could be heard outside.
October 23, 1995.
2. Not a bona fide restaurant in that you failed to provide food upon request.
October 24 and November 15, 1995.
3. Not a bona fide restaurant in that food items, eating utensils and dishes were insufficient.
November 20, 1995.
4. Fortified, adulterated and/or contaminated liquor.
November 20, 1995.

Adjudication No. 98-1445. Fine \$300.00.

1. Not a bona fide restaurant in that you failed to provide food upon request.
June 2, 1998.
2. Not a bona fide restaurant in that food items were insufficient.
July 1, 1998.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$50.00 or more than \$1,000.00 or both for violations of the type found in Count Nos. 1, 2 and 3 in this case.

I impose:

- Count No. 1 – \$200.00 fine.
- Count No. 2 – \$100.00 fine.
- Count No. 3 – Dismissed.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$300.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

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, Pennsylvania 17110-9661

Dismissal of Count No. 3

IT IS FURTHER ORDERED that Count No. 3 of Citation No. 06-2346, issued against Kaldes, Inc., t/a Al's Café, is DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 14th day of May, 2007.

Felix Thau, A.L.J.

pm

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.