

Mailing Date: FEB 7 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 06-2981
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-341822
v.	:	
	:	LID - 56454
B H B INC	:	
T/A BOAT HOUSE BAR	:	
4768 TACONY ST	:	
PHILADELPHIA PA 19137-1124	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-4085	:	BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: Erik S. Shmukler, Esq.
For Licensee: Edward B. McHugh, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on February 27, 2007. There are two counts in the citation.

The first count alleges that Licensee violated §§491(1), 492(2) and 493(16) of the Liquor Code, 47 P.S. §§4-491(1), 4-492(2) and 4-493(16), on November 28, 2006, by selling alcoholic beverages after its Restaurant Liquor License expired on October 31, 2006, and had not been renewed and/or validated.

The second count alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and Section 5902 of the Crimes Code, 18 Pa. C.S. §5902, on October 18, 2006, by promoting prostitution on the licensed premises or in rooms contiguous with the licensed premises or used in connection therewith.

A hearing was held on September 27, 2007, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and the citation. Due to the unavailability of a necessary witness on that date, the case was bifurcated and a second hearing was held on December 4, 2007.

FINDINGS OF FACT:

1. Liquor Enforcement Officer E. Gall visited the licensed premises at about 1:45 p.m. on October 18, 2006. There was one bartender and three patrons. There was an L-shaped bar, behind which there was a pole attached to the ceiling, with mirrors on the wall behind it. In the

rear of the premises there were restrooms and two booths, like small rooms, equipped with shades or drapes which covered the doorways to the booths. During this visit, Officer Gall did not see anyone enter these booths (9/27/07 N.T. 5-7, 18).

2. At about 2:00 p.m. a woman came rushing into the premises and went directly to the rear, out of the officer's sight. A few minutes later she reappeared, wearing a bikini top, boy shorts and a small covering around her waist. She started a song on the juke box and began dancing on the pole behind the bar. At no time did she remove any of her clothing. Although he later gave her a tip, Officer Gall did not speak to this woman (9/27/07 N.T. 7-8, 18).

3. Officer Gall told the bartender that he was planning a bachelor party with some friends. He asked her how much a lap dance would be for the bachelor. The bartender said "twenty dollars." The officer asked if the lap dances took place in the booths in the back. The bartender said "yes." There was nothing about the bartender's appearance or behavior which would have given the impression that she was in charge of anyone (9/27/07 N.T. 8, 18-19).

4. Officer Gall asked the bartender if, for some extra money, the girls would "take care of" the bachelor. The bartender paused, then said "I'm sure the girls will take care of the guy." Officer Gall asked if, for a little extra money, would any of the girls "jerk off the bachelor or give him a blow job" and the bartender said "yeah." These suggestive inquiries were initiated entirely by Officer Gall. The bartender was not herself a dancer, and Officer Gall did not receive a "lap dance" during this visit (9/27/07 N.T. 8, 19-20).

5. The bartender continued, saying that she was not exactly sure what the girls did in the back, but that "they would take care of the guy." She also said, before ending the conversation, that they were on a "don't ask, don't tell" policy with the girls. The officers left the premises (9/27/07 N.T. 8).

6. Officer Gall entered the premises at about 6:30 p.m. on November 28, 2006. The bar was in operation, with money on the bar and patrons in possession of alcoholic beverages. Officer Gall did not observe any sale or furnishing of alcoholic beverages by Licensee on this date. This license had expired on October 31, 2006, and Licensee did not have authority to sell alcoholic beverages on November 28, 2006 (9/27/07 N.T. 10-15, 23, Exhibit B-3).

7. Philadelphia Police Officer Tom Paxton purchased a 12-ounce bottle of beer in the licensed premises on November 28, 2006, for which he paid four dollars (12/7/07 N.T. 5).

CONCLUSIONS OF LAW:

Licensee violated §§491(1), 492(2) and 493(16) of the Liquor Code, 47 P.S. §§4-491(1), 4-492(2) and 4-493(16), on November 28, 2006, by selling alcoholic beverages after its Restaurant Liquor License expired on October 31, 2006, and had not been renewed and/or validated.

The evidence did not prove that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and Section 5902 of the Crimes Code, 18 Pa. C.S. §5902, on October 18, 2006, by promoting prostitution on the licensed premises or in rooms contiguous with the licensed premises or used in connection therewith.

DISCUSSION:

As to the second count, the government contended that the actions of Licensee's employees promoted prostitution, and cited 18 Pa. C.S. §5902, which provides in relevant part:

(b) PROMOTING PROSTITUTION. --A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in subsection (c) of this section. The following acts shall, without limitation of the foregoing, constitute promoting prostitution:

(1) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business;

(2) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate;

(3) encouraging, inducing, or otherwise intentionally causing another to become or remain a prostitute;

(4) soliciting a person to patronize a prostitute;

(5) procuring a prostitute for a patron;

(6) transporting a person into or within this Commonwealth with intent to promote the engaging in prostitution by that person, or procuring or paying for transportation with that intent;

(7) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or

(8) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this subsection.

The only subsections of the foregoing definition which might, by a stretch of the imagination, apply to this case, are (4) and (5). Neither was proven by the evidence, as the initiative which might theoretically have led to a crime was entirely Officer Gall's, and he did not engage in any conduct which might have led to the commission of a crime in his presence. That is, Officer Gall did not even obtain a lap dance during this visit, let alone negotiate a price for a sexual favor with one who was in a position to provide it.

The bartender's hesitant and vague responses to the officer's vulgar speech might be understood as a hint that some form of sex could be had for money, but in the entire context of the interaction between the bartender and the officer, these responses were meaningless puffery, and fell far short of proving the violation charged.

In addition, when a licensee is charged under §471 of the Liquor Code for the unlawful acts of its employees or patrons, the Pennsylvania Supreme Court has held that “some element of scienter on the part of the licensee is required to endanger the license,” if the underlying conduct violates the Crimes Code rather than a standard of conduct set forth in the liquor laws. *PLCB v. TLK, Inc.*, 518 Pa. 500, 544 A.2d 931 (1988). Although the court did not list every form that such guilty knowledge could take, two principles in particular were expressly approved:

The first is that if a licensee knew or should have known of illegal activities by an employee or patron, the licensee is liable. The second principle is that a licensee may defend his license by demonstrating that he took substantial affirmative steps to guard against a known pattern of illegal activities. – 544 A.2d at 933

There was no evidence in this case that Licensee knew or should have known of the alleged illegal conduct of its employees or agents.

PRIOR RECORD:

Licensee has been licensed since October 4, 2006, 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 \$1,000.00 to \$5,000.00 range, or both, for violations of the type found in this case. Penalties are allocated as follows:

- Count 1 – a fine of \$1,000.00.
- Count 2 – dismissed.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, B H B, Inc., t/a Boat House Bar, License No. R-AP-SS-4085, shall pay a fine of one thousand dollars (\$1,000.00) 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.

Dated this 24th day of January, 2008.

David L. Shenkle, J.

jb

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.

Return this Page with Payment

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

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