

Mailing Date: DEC 26 2007

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-1737
LIQUOR CONTROL ENFORCEMENT	:	Citation No. 07-1901
	:	
	:	Incident No. W03-352999
v.	:	Incident No. W03-353196
	:	
	:	LID – 49443
	:	
NINE IS ENOUGH, INC.	:	
T/A THE DRAFT HOUSE	:	As Consolidated Under
670-672 BAER AVE.	:	Citation No. 07-1737
HANOVER, PA 17331-2705	:	
	:	
	:	
	:	
YORK COUNTY	:	
LICENSE NO. R-AP-19733	:	

**BEFORE:** JUDGE THAU

APPEARANCES:

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

For Licensee  
Ex-Parte

**ADJUDICATION**

BACKGROUND:

This proceeding arises out of two citations that were issued by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Nine Is Enough, Inc., t/a The Draft House (Licensee), License Number R-AP-19733.

**Citation No. 07-1737<sup>1</sup>**

This citation was issued on August 2, 2007 and contains two counts.

The first count charges Licensee with a violation of Section 15.62(a) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §15.62(a)]. The charge is that on June 5, 2007, Licensee, by servants, agents or employes, failed to post in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from the outside of the premises, a Notice of Suspension.

The second count charges Licensee with a violation of Sections 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §4-491(1), §4-492(2) and §4-493(16)]. The charge is that on June 5, 2007, Licensee, by servants, agents or employes, sold, furnished and/or gave alcoholic beverages during a time when its Restaurant Liquor License was suspended at Citation No. 06-2324X.

**Citation No. 07-1901<sup>1</sup>**

This citation was issued on August 23, 2007 and contains four counts.

The first count charges Licensee with violations of Section 492(8) of the Liquor Code [47 P.S. §4-492(8)]. The charge is that on January 3, 10, 13, 16, 17, 18, 19, 20, 23, 24, 27, 30, 31, February 3, 7, 9, 10, 27, 28, March 1, 3, 6, 8, 13, 14, 15, 17, 20, 22, 23, 27, 28, 29, 30, April 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 18, 19, 20, 24, 25, 26, 27, 28, May 3, 4, 5, 10, 11, 12 and 18, 2007, Licensee, by servants, agents or employes transported malt or brewed beverages without a license.

The second count charges Licensee with violations of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that on May 18, 24 and June 16, 2007, Licensee, by servants, agents or employes, failed to keep records on the licensed premises.

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1. Commonwealth Exhibit No. C-3, 07-1737, N.T. 25.  
2. Commonwealth Exhibit No. C-3, 07-1901, N.T. 60.

The third count charges Licensee with violations of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that on May 21, 24 and June 16, 2007, Licensee, by servants, agents or employes, refused an authorized employe of the Enforcement Bureau access to records covering the operation of the licensed business when the request was made during business hours.

The fourth count charges Licensee with violations of Section 437 of the Liquor Code [47 P.S. §4-437] and Section 5.41 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.41]. The charge is that on June 5, 16, 20, 29 and 30, 2007, and divers occasions between June 1 through July 5, 2007, Licensee, by servants, agents or employes, operated its licensed establishment without a valid health permit or license, which expired on May 31, 2007.

An evidentiary hearing was conducted on November 14, 2007 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania. Licensee did not appear personally or have any representation.

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

FINDINGS OF FACT:

1. A citation hearing notice was mailed by the Office of Administrative Law Judge on September 28, 2007 to Licensee by both certified receipt-return mail and first-class mail to the licensed premises. The notice notified Licensee of the date, time and place of the hearing. The Notice, sent by certified mail, was returned as being marked: "Moved Left No Address Unable To Forward Return To Sender." (N.T. 4)
2. On September 28, 2007, I issued a Pre-Hearing Order directing Licensee to submit its pre-hearing memorandum. That Order reiterated the date, time and place of hearing. (N.T. 4-5)
3. The Bureau began its investigation on April 27, 2007, and completed it on July 19, 2007. (N.T. 13, 31)
4. The Bureau sent notices of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on July 3 and July 30, 2007. The notices alleged violations as charged in the citations. (Commonwealth Exhibit No. C-1, 07-1737 and 07-1901, N.T. 25, 60)

**Citation No. 07-1737**

Count Nos. 1 and 2:

5. Pursuant to Adjudication No. 06-2324X, I imposed a \$1,000.00 fine. Licensee failed to pay. On April 24, 2007, pursuant to the same Adjudication No., I issued an Order directing Licensee be suspended effective Monday, June 4, 2007 at 7:00 a.m., for one day and continuing thereafter until the fine is paid. The fine was paid on June 15, 2007. (N.T. 8-9)

6. On June 4, 2007, a Bureau Enforcement Officer conducted a suspension check at 2:00 p.m. Licensee was not in operation. The suspension placard was placed on the inside of the vestibule door. (N.T. 15-16)

7. The following day, June 5, 2007, a Bureau Enforcement Officer conducted a suspension check arriving at the premises at approximately 3:45 p.m. There was no placard posted and Licensee was open and in operation selling alcoholic beverages. (N.T. 20-21)

8. The Officer advised Licensee's employes that Licensee was still under suspension. Licensee then shut the premises down. (N.T. 23)

**Citation No. 07-1901, As Consolidated Under Citation No. 07-1737**

9. On all of the dates charged, Licensee transported beer without a permit (Commonwealth Exhibit No. C-5, 07-1901, N.T. 38, 39, 52).

Count Nos. 2 and 3:

10. On May 18, 2007, a Bureau Enforcement Officer visited the premises at approximately 3:35 p.m., after having made arrangements with the Manager by telephone to speak with him at the premises. There were no records on the licensed premises on that visit however. (N.T. 38-39)

11. The Officer met with the Manager on May 21, 2007 at the subject premises at about 4:05 p.m. The premises was closed even though he had a prearranged meeting with the Manager there. (N.T. 39-40)

12. The Officer returned to the premises on May 24, 2007 at 3:45 p.m. at a time when Licensee was open and in operation selling alcoholic beverages. He spoke to the Manager by telephone. There were no beer invoices on the premises. (N.T. 43)

13. On June 16, 2007, a Bureau Enforcement Officer visited the premises at 3:40 p.m., at a time when Licensee was open and in operation selling alcoholic beverages. Licensee had no records on the premises. (N.T. 48-49)

Count No. 4:

14. The Officer met with Licensee's Manager at the premises on June 30, 2007 at a time when Licensee was open and selling alcoholic beverages. Licensee's health license expired on May 31, 2007 (Commonwealth Exhibit No. C-6).

15. On June 5, 2007, a second Bureau Enforcement Officer visited the premises. It was open and operating selling alcoholic beverages. (N.T. 56-57)

CONCLUSIONS OF LAW:

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

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2. Count Nos. 1 and 2 are **sustained** as charged.

**Citation No. 07-1901, As Consolidated Under Citation No. 07-1737**

3. Count Nos. 1, 2 and 4 are **sustained** as charged.

**Count No. 3:**

4. The Bureau **failed** to prove Licensee, by servants, agents or employes, refused an authorized employe of the Enforcement Bureau access to records covering the operation of the licensed business when the request was made during business hours.

DISCUSSION:

These two citations arise out of one investigation. I so conclude based on *Gutshall's Café, Inc.*, As Consolidated Under Citation No. 07-1027, with one additional point.

The Bureau's testimony necessarily included a visit by the investigating officer in the first citation to testify in support a charge in the second citation.

I must dismiss Count No. 3 as there was no refusal to provide records. On one date, the premises was closed. Accordingly, the right to inspect the premises, without warrant or probable cause, is not triggered. On the other dates, the records the Officer sought were not kept on the licensed premises. Licensee was appropriately charged for that violation. One cannot produce that which is not present. Therefore, there can be no refusal to provide records. Otherwise, every case where a licensee fails to maintain records on the licensed premises would necessarily implicate a second charge for refusing access to these records.

PRIOR RECORD:

Licensee has been licensed since May 21, 2002, and has had ten prior violations:

Adjudication No. 03-0617. Fine \$600.00.

1. Used loudspeakers or devices whereby music could be heard outside.  
September 20 and October 20, 2002.
2. Noisy and/or disorderly operation.  
September 20 and October 20, 2002.
3. Engaged in disorderly conduct.  
October 20, 2002.
4. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises (sports pools).  
February 27, 2003.

Adjudication No. 04-0408. Fine \$2,300.00.

1. Used loudspeakers or devices whereby music could be heard outside.  
April 27, May 11, June 14, 21, July 19, August 10 and 30, 2003.
2. Sales to a visibly intoxicated person.  
June 21, 2003.
3. Noisy and/or disorderly operation.  
On 22 dates from April 27 through October 17, 2003.
4. Failed to require patrons to vacate the premises not later than one-half hour after the required time.  
November 26, 2003.
5. Permitted patrons to possess and/or remove alcoholic beverages after 2:30 A.M.  
November 26, 2003.

Adjudication No. 06-0896. Fine \$1,000.00. Fine not paid and 1 day suspension and thereafter until fine is paid imposed.

Failed to appoint a Board-approved full-time manager for the licensed premises.  
April 9, 2005 through March 8, 2006.

Adjudication No. 06-1245. Fine \$150.00. Fine not paid and 1 day suspension and thereafter until fine is paid imposed.

Issued worthless checks in payment for malt or brewed beverages.  
March 22, 2006.

Adjudication No. 06-1666. Fine \$200.00. Fine not paid and 1 day suspension and thereafter until fine is paid imposed.

Issued worthless checks in payment for malt or brewed beverages.  
April 28 and May 12, 2006.

Adjudication No. 06-2324. Fine \$1,000.00. Fine not paid and license suspended 1 day and thereafter until fine paid.

Issued worthless checks in payment for malt or brewed beverages.  
July 28, August 7 and 16, 2006.

Adjudication No. 07-0114. Fine \$1,550.00 and 2 days suspension.

1. Sales during a time when your Restaurant Liquor License was suspended.  
December 12 and 13, 2006.
2. Failed to post in a conspicuous place on the outside of the licensed premises, a Notice of Suspension.  
December 11, 12 and 13, 2006.

Adjudication No. 07-0300. Fine \$500.00.

Failed to post in a conspicuous place on the outside of the licensed premises a Notice of Suspension.  
January 29, 2007.

Adjudication No. 07-0477. Fine \$500.00.

Failed to post in a conspicuous place on the  
outside of the licensed premises, a Notice of  
Suspension.  
February 5, 2007.

Adjudication No. 07-1133. Revocation of the license.

1. Operated the licensed establishment without  
a valid health permit or license.  
June 1 through December 26, 2006.
2. Used loudspeakers or devices whereby music  
could be heard outside.  
On 13 dates between December 29, 2006 and  
February 2, 2007.
3. Noisy and/or disorderly operation.  
On 13 dates between December 29, 2006 and  
February 2, 2007.

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 No. 1 and a penalty of license suspension or revocation or a fine of not less than \$1,000.00 or more than \$5,000.00 or both for violations of the type found in Count No. 2 in Citation No. 07-1737.

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 4 in Citation No. 07-1901, As Consolidated Under Citation No. 07-1737.

As Licensee has failed to appear at the hearing and obey process, I impose:

**Citation No. 07-1737**

Count No. 1 – Revocation of the license.  
Count No. 2 – Revocation of the license.

**Citation No. 07-1901, As Consolidated Under Citation No. 07-1737**

Count No. 1 – Revocation of the license.  
Count No. 2 – Revocation of the license.  
Count No. 3 – Dismissed.  
Count No. 4 – Revocation of the license.

ORDER:

**Imposition of Revocation**

THEREFORE, it is hereby ordered that Restaurant liquor license No. R-AP-19733, issued to Nine Is Enough, Inc., be **REVOKED**, effective at 7:00 a.m., on Friday, February 22, 2008. Any Wholesale Liquor Purchase Permit Card or discount card issued in connection with the aforementioned license is hereby **CANCELLED**.

Licensee is directed to remove its license from the wall on Monday, February 22, 2008 and return the license and Wholesale Liquor Purchase Permit Card and/or discount card to the Pennsylvania Liquor Control Board, Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania 17110-9661, personally or by certified mail so as to be received no later than Friday, February 29, 2008.

**Dismissal of Count No. 3 in Citation No. 07-1901, As Consolidated Under Citation No. 07-1737**

IT IS FURTHER ORDERED THAT Count No. 3 in Citation No. 07-1901, As Consolidated Under Citation No. 07-1737, is **DISMISSED**.

**Retaining Jurisdiction**

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 17th day of December, 2007.

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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.**