

Mailing Date: December 2, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

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| PENNSYLVANIA STATE POLICE, | : | Citation No. 07-1769 |
| BUREAU OF LIQUOR CONTROL | : | |
| ENFORCEMENT | : | |
| | : | |
| vs. | : | |
| | : | |
| GERMAINE M. MARCANO | : | |
| t/a RENAISSANCE BISTRO | : | License No. R-15015 |
| 550-552 N. THIRD ST. | : | |
| READING, PA 19601-2815 | : | |
| | : | |

Counsel for Licensee: George A. Gonzalez, Esquire
534 Washington Street
Reading, PA 19601

Counsel for Bureau: Roy Harkavy, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Parkway
Macungie, PA 18062

OPINION

Germaine M. Marcano, t/a Renaissance Bistro (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle

("ALJ"), wherein the ALJ sustained the citation and imposed a fine in the amount of five hundred dollars (\$500.00).¹

The citation charged Licensee with violating section 5.32(a) of the Liquor Control Board Regulations in that on April 6, June 2 and 16, 2007, Licensee permitted the use of a loudspeaker or similar device on the licensed premises whereby music or other entertainment or the advertisement thereof outside. [40 Pa. Code § 5.32(a)].

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/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, 484 A.2d 413 (Pa. Cmwlth. 1984).

¹ This case is one of five (5) citations that were decided based on an evidentiary hearing held on July 31, 2009. The aggregate fine for all five (5) cases was one thousand nine hundred dollars (\$1,900.00).

Licensee raises two (2) arguments in her appeal. Licensee first argues that the decision of the ALJ was not based on substantial evidence because the testimony established that the only reason music could be heard outside the licensed premises was because the building was under construction. Second, Licensee argues that the substantial evidence as presented cannot support a finding that said music was in any way intrusive, and thus noisy, because no testimony was presented quantifying the volume of sound.

The Board has reviewed the record, including the ALJ's Adjudication and Order, with Licensee's contentions in mind. The citation refers to three (3) dates on which law enforcement heard music outside the licensed premises. Regarding the incidents that occurred on June 2 and 16, 2007, the record is completely devoid of testimony for these dates. The record reveals that there was discussion between the ALJ and counsel for both parties on whether facts supporting Citation No. 07-1769 could be submitted via a stipulation. The stipulation would have allowed the ALJ to rely on the facts set forth in the pre-hearing memorandum that was marked as Exhibit C-3. [N.T. 13]. However, the memorandum was never admitted into evidence. Nor was the Exhibit part of the record forwarded to the Board. Additionally, the record indicates that

counsel for Licensee expressed uncertainty about agreeing to the stipulation. [N.T. 14].

In the Adjudication and Order, the ALJ cites to Page 15 of the Notes of Testimony to support his Findings of Fact No. 4 for the June 2, 2007 incident and Findings of Fact No. 5 for the June 16, 2007 incident. Nowhere on Page 15 can be found any of the information set forth in these Findings. What is present is the ALJ indicating that he would consider certain information contained in the pre-hearing memorandum, but again, that information is not part of the record. As there is no evidence in the record regarding June 2 and June 16, 2007, a violation cannot be based on those dates.

The record does contain evidence to support a finding that a violation of section 5.32 occurred on April 6, 2007. The Bureau presented one (1) witness, Lieutenant Steven Powell of the City of Reading Police Department. Lt. Powell responded to a noise complaint from a property in the area of Third and Greenwich Streets on April 6, 2007. [N.T. 18]. The officer testified that while inside the apartment of the complainant he could hear the bass beat of music coming from Licensee's establishment. [N.T. 18]. Over the course of forty-five (45) minutes, Lt. Powell noted that the volume increased when the establishment's door opened and decreased when the door closed. [N.T. 19].

Lt. Powell did not enter the licensed premises to determine the source of the music, but did direct another officer to issue a citation to Licensee for violating the City of Reading's noise ordinance. [N.T. 19].

Pursuant to section 5.32(a), a licensee is not permitted to use or allow others to use a loudspeaker whereby the sound of music can be heard on the outside of the licensed premises. [Id.]. Thus, in order to find Licensee in violation of the regulation, the Bureau must prove that sound coming from a loudspeaker on the licensed premises or under the control of the licensee could be heard outside the building. Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Goodfellas, Inc., 850 A.2d 868 (Pa.Cmwlt. 2004). While the lack of evidence as to the first two (2) dates makes this a closer case than it would be otherwise, Lt. Powell's testimony established that a bass beat could be heard outside Licensee's premises, and albeit circumstantially, that the music was coming from the licensed premises.

The Board now turns its attention to the two (2) issues raised in Licensee's appeal. Because both of Licensee's arguments fail to offer a defense to the requirements of the regulation, the Board must reject them.

In her first argument, Licensee claims that it was the condition of the building that facilitated the music being heard outside. Pursuant to section

5.32(a), a licensee is not permitted to use or allow others to use a loudspeaker whereby the sound of music can be heard on the outside of the licensed premises. [40 Pa. Code. § 5.32(a)]. Ultimately, licensees are strictly liable for violations of the Board's Regulations. Pennsylvania Liquor Control Board v. T.L.K., 544 A.2d 931 (Pa. 1988). The testimony of Lt. Powell established that on April 6, 2007, music being played through a loudspeaker inside the licensed premises could be heard on the outside of the establishment. If a building is under construction and the walls or ceiling are thin, it is the licensee's duty to make sure the volume of the music is at a level that cannot be heard outside. Building conditions cannot excuse the improper actions of the licensee.

In her second argument, Licensee maintains that the evidence was insufficient to support a violation because the music heard outside was not in any way "intrusive" in that the volume of sound was not measured by a scientific device. The regulation does not state that the noise must be "intrusive." Section 5.32(a) simply prohibits amplified music from being heard outside licensed premises. Nor does the section require that the volume be measured with any type of scientific device. Therefore, this argument must fail.

Based on the foregoing, the Board concludes that the evidence submitted by the Bureau was sufficient to support a violation of section 5.32(a) and, thus the Board must affirm the decision of the ALJ to sustain the citation.

ORDER

The decision of the ALJ in regard to Citation No. 07-1769 is sustained.

The appeal of the Licensee is denied.

The fine has been paid in full.

Board Secretary