

Mailing Date: SEP 12 2008

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-2187
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W06-357171
	:	
v.	:	
	:	LID - 54693
	:	
THE FLYING TORTILLA, LLC : 16-22 W.	:	
5 TH ST.	:	
MOUNT CARMEL, PA 17851-2005 :	:	
	:	
	:	
NORTHUMBERLAND COUNTY	:	
LICENSE NO. R-SS-16298	:	

BEFORE: JUDGE FLAHERTY

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire

For Licensee
Michele Forry, PRO SE

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on September 14, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against THE FLYING TORTILLA, LLC, License Number R-SS-16298 (hereinafter "Licensee").

The citation contains two counts.

The first count charges Licensee with violation of Section 102 of the Liquor Code [47 P.S. §1-102] in that on July 5, 16 and 27, 2007, the licensed premises was not a bona fide restaurant in that Licensee, by its servants, agents or employes, maintained insufficient food items and/or failed to provide food upon request.

The second count charges Licensee with violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)] in that on July 27, 2007, Licensee, by its servants, agents or employes, failed to keep records on the licensed premises.

The investigation which gave rise to the citation began on July 7, 2007 and was completed on August 17, 2007; and notice of the violation was sent to Licensee by Certified Mail on August 28, 2007. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on February 5, 2008 in the PA Department of Agriculture, 2130 County Farms Road, Montoursville, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

COUNT 1

1. On July 5, 2007 at 5:35 p.m., an officer of the Bureau made an undercover visit to the licensed premises. The officer found only the six pack shop to be open. This is a small room on the right side of the licensed premises which has a counter and coolers (N.T. 10-11).
2. The officer asked the counter person in the six pack shop if he could order food. The counter person replied that he didn't sell food, only six packs of beer (N.T. 11).
3. On July 16, 2007 a female officer of the Bureau arrived at the licensed premises. She observed that there are two sections to the licensed premises. On the left hand side there is a restaurant area, and the right hand side has a little room built on which is a six pack shop. The left hand side of the premises was closed. There were no lights in that section. The door to the six pack shop was open for business. She entered the six pack shop where she found a man who was later identified as Mike working (N.T. 17).
4. The officer obtained a diet coke from a cooler and asked Mike if he had any hoagies for sale. Mike told her that he didn't have any hoagies for sale and more specifically that the kitchen

was not open because they were redoing the menu because Mexican food did not go over in town (N.T. 17).

5. On July 27, 2007 at 2:17 p.m. a third officer arrived at the licensed premises. She exited her vehicle, and from the sidewalk looked at the establishment. She found the establishment to be a large building which covers street addresses of 16 through 22 West Fifth Street, Mount Carmel. She immediately recognized that the establishment operated two different types of business, one being a Mexican restaurant on the left side of the establishment, the other being a six pack shop (N.T. 21-22).

6. The officer peered into the front windows of the licensed premises specifically that portion housing the restaurant, and there were no interior lights or exterior lights on. She observed chairs on top of tables (N.T. 22).

7. The officer further observed that right at the front entrance to the restaurant was a countertop that had an electronic cash register which was unplugged, and the cash drawer was open. There was no actual cash tray in the drawer but the drawer itself was open, and the cash register was unplugged.

8. The six pack store did appear to be open, and it did exhibit interior and exterior lights as well as having the front door open (N.T. 22).

9. The officer proceeded into the six pack shop where she found a male employe. She asked the employe when the restaurant would open saying that she was hungry. The employe replied that the restaurant was not open at that time and that the restaurant had been closed now for approximately two to three months. The officer asked if there was a chance that she could get any type of food in the six pack shop, and the employe said no he didn't have any food to sell at that time. He further stated that the owner anticipated that the restaurant would reopen in approximately one month as that Mexican food did not go over well and she was trying to revamp the restaurant into something different, possibly a buffet style restaurant. The officer exited the licensed premises at 2:20 p.m.

10. The officer returned to her vehicle, got the appropriate paperwork that she would need to do a routine inspection and reentered the licensed premises through the six pack store. Upon entry, she identified herself as an officer of the Bureau and stated that she was there to conduct a routine inspection. At this time she was able to identify the counter person as Michael Catizone (N.T. 23).

11. The officer indicated that she was there for a routine inspection and wanted to look at the liquor license and health permit to see if they were valid and Mr. Catizone said, "Well you don't want to talk to me, let me get the manager, she's here."

12. The officer identified himself to Tina DeLong, who identified herself as the manager. The officer asked her how long she had the role of manager and she stated she had been manager since April of 2006 (N.T. 24-25).

13. After verifying that the liquor license and health permit were valid, the officer proceeded into the restaurant portion of the licensed premises. At this time she observed 42 chairs on top of 12 tables. The cash register was not operational, being unplugged and with the drawer open. There was a small refrigerator that was turned off and its door was propped open. It contained various soda products (N.T. 25).

14. The officer observed that in the kitchen preparation area there was a prep table which was refrigerated. This table was unplugged and not operational. There were no perishable food items in that prep table (N.T. 25).

15. The officer inspected the kitchen area, and did not observe any food in the kitchen area. She observed a three door refrigerator that contained no food and it was unplugged and not operational. Tina DeLong stated to the officer that this was where the food was kept when the restaurant itself was open and operational (N.T. 26).

16. The officer examined other areas of the licensed premises. She observed that where the office area is located there is a long corridor type room which doubles as a dry storage area. In that storage area there was a large chest freezer. The officer opened it up and observed that it contained many food items all of which were frozen. At that time the officer did not see anything being prepared or thawed out or prepared for use later that day (N.T. 26-27).

17. In the storage area the officer observed a large quantity of items such as cornmeal, bags of tortilla chips, condiments, cans of refried beans and cheese sauces.

18. The officer spoke with Ms. DeLong about the operation of the restaurant itself. DeLong indicated that the restaurant had been shut down for a couple of months and said that the establishment had failed because it was a Mexican restaurant, and that just did not go over well in Mount Carmel. The officer asked DeLong if she could tell her what the specific date was that it had shut down, and Ms. DeLong said that she could and went to the computer and pulled up her daily sales and pinpointed the date as April 21, 2007 (N.T. 27-28).

19. The officer then asked DeLong for sale invoices, that she needed as part of the routine inspection to compute monthly gross sales of food and alcohol in the operation. She asked to see sales records from January 1, 2007 through the date of July 27, 2007. DeLong was able to produce records that consisted of February, March, April, May and then July. Therefore out of the seven

month period the officer was missing the records for January and June, 2007. The officer asked DeLong why January and June records were missing. After DeLong explained it the officer still wasn't sure why the records for January couldn't be produced. DeLong did say that June was not available because the computer had a glitch and erased all of those records so that is why June was not available (N.T. 28-29).

20. The records that DeLong produced indicated that in February of 2007, 108 meals were sold producing \$552.00 in revenue (N.T. 30 and Exhibit C-4).

21. The records further indicated that for the month of March 2007, 30 meals were sold producing revenue of \$163.55. For the month of April, four meals were sold for total revenue of \$32.50. For May and July there were no meals sold (N.T. 31 and Exhibit C-4).

22. After reviewing the sales invoices, the officer asked Ms. DeLong for food invoices for food that was purchased during the period January of 2007 through July of 2007. DeLong went to her desk and produced a folder which she handed to the officer stating that all 2007 food invoices were in that folder. The officer went through the folder and could not find any 2007 food invoices. She asked DeLong who was the food provider for the licensed premises, and DeLong replied that Sysco provided the licensed premises with the majority of the food, however, they would buy local items from Massers in that area. The last Sysco food sales invoice that the officer was able to find was for September, 2006.

23. When she could find no food invoices for 2007 she brought this to the attention of Ms. DeLong and asked if Ms. DeLong would be able to contact the principal for Licensee corporation, Michele Furray. DeLong was successful in contacting Furray on the phone. She talked to her for a few minutes and then turned the phone over to the officer. The officer indicated that she was there to do a routine inspection and indicated that she was reviewing records and could not find food invoices for 2007. At that time Furray indicated that she was in possession of those food records which were currently located in the trunk of her vehicle which was in Texas. Furray explained that she didn't know she had to have the food records on the premises and that she was taking the invoices to her accountant. Furray indicated that the restaurant had failed and that she had shut it down and thought that the only thing she had to do in order to keep her liquor license valid without placing it into safekeeping was to keep the six pack shop open. The officer indicated that that would be permissible, however, she still had to provide food from the location when customers came in and asked for it. Furray explained that she was revamping into a buffet style restaurant and hoped to have it open in two weeks (N.T. 33 and 34).

24. After her conversation with Ms. Furray, the officer turned the phone back to DeLong. DeLong was instructed by Furray to contact Sysco to get the food invoices for the officer (N.T. 35).

25. At 4:18 p.m. the food invoices were faxed to the licensed premises by Sysco. The officer reviewed these invoices and observed that the last delivery invoice reflected a date of July 20, 2007. Between March 9, 2007 and July 20, 2007, the only delivery items consisted of paper bags. The last food delivery was reflected on an invoice with a date of March 9, 2007 (N.T. 35 and Exhibit C-4).

CONCLUSIONS OF LAW:

Counts 1 and 2 of the citation are **sustained**.

DISCUSSION:

The preponderance of the evidence in this case indicates that on three occasions an employee working on the licensed premises denied officers food service indicating that the kitchen was closed. Although Licensee did produce some evidence that food would be sold later on in the day, the fact that chairs were on tables and no preparations had been made to provide food indicate that this testimony is less than credible. Consequently, I conclude that the Bureau has met its burden and the charge in Count No. 1 of the citation is sustained.

As to Count No. 2, it is clear that Licensee did not have the records pertaining to the licensed premises available on the premises when the officer requested them. There were no records available for several of the months involved, and Licensee's principal indicated that she had the invoices for food purchases in the trunk of her car in Texas when the officer spoke to her on the telephone. Consequently, I conclude that Count No. 2 of the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since July 12, 2005, and has had no prior violations. Licensee is, therefore, entitled to be treated as a first time offender.

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 this case.

Licensee's principal has represented that the licensed premises currently is serving food on a regular basis. Consequently, no suspension with thereafter conditions is necessary.

Under the circumstances of this case, the penalty imposed shall be as follows:

Count 1 - \$300.00 fine

Count 2 - \$150.00 fine

ORDER

THEREFORE, it is hereby ordered that Licensee THE FLYING TORTILLA, LLC pay a fine of \$450.00 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.

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 28th day of August, 2008.

Daniel T. Flaherty, Jr., J. an

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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.

Detach here and submit stub with payment

The fine must be paid by Treasurer's Check, Cashier's Check or Certified Check. **Personal checks, which includes business-use personal checks, are not acceptable.** Make 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

Citation No. 07-2187

The Flying Tortilla LLC