

Mailing Date: JUN 25 2008

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-2590
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-345745
	:	
v.	:	LID - 52699
	:	
MATTIS FAMILY, INC.	:	
T/A THE COUNTRY INN BAR &	:	
GRILL	:	
615 RAGERS HILL RD.	:	
SOUTH FORK, PA 15956-9801	:	
	:	
	:	
CAMBRIA COUNTY	:	
LICENSE NO. R-AP-SS-13766	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Nadia L. Vargo, Esquire
Pennsylvania State Police
313 Mt. Nebo Road
Pittsburgh, PA 15237-1305

For Licensee
Myron I. Markovitz, Esquire
206 Main Street
Johnstown, PA 15901

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on November 9, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Mattis Family, Inc., t/a The Country Inn Bar & Grill (Licensee), License Number R-AP-SS-13766.

This citation¹ contains two 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 February 23, March 10, 29, April 7, 19, 21, 28, May 5, 28, June 21 and 22, 2007, Licensee, by servants, agents or employes, 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 471 of the Liquor Code [47 P.S. §4-471]. The charge is that on February 23, March 10, 24, 29, April 7, 19, 20, 21, 26, 28, May 3, 5 and 28, 2007, Licensee's licensed establishment was operated in a noisy and/or disorderly manner.

An evidentiary hearing was conducted on May 22, 2008 at the Hampton Inn, 180 Charlotte Drive, Altoona, 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 January 2, 2007 and completed it on September 29, 2007. (N.T. 40)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on October 12, 2007. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 33)

1. Commonwealth Exhibit No. C-2, N.T. 33.

3. Family No. 1 lives somewhere between 500 to 600 feet, in a direct line, from the licensed premises. (N.T. 99).

4. Family No. 1 was disturbed on the following dates and in the manner described:
 - a. **February 23, 2007**
 - (1). Husband and Wife returned home at approximately 9:40 p.m. While their vehicle was parked in their driveway, Husband heard music emanating from the licensed premises. (N.T. 108-110)

 - (2). The music did not stop until somewhere between 11:00 p.m. and 11:30 p.m. (N.T. 110).

 - b. **March 10, 2007**
 - (1). Husband heard a bass sound either coming from the parking lot or the interior of the licensed premises. (N.T. 109)

 - (2). Once Husband entered his house, he could no longer hear the bass sound. (N.T. 110)

 - c. **March 29, 2007**

At about 7:30 p.m., Husband heard a bass sound coming from car stereo systems. These cars were in the parking lot of the licensed premises. (N.T. 111)

5. Family No. 2 lives approximately 220 feet from the premises. Family No. 2 has been disturbed on the following dates and in the manner described. (N.T. 134)

a. **April 7, 2007**

(1). At approximately 8:00 pm., Husband took his dog out for a walk. He heard music emanating from the premises. Husband called 911 to file a complaint at approximately 11:20 p.m., at which time there was still music emanating

from the premises. (N.T. 139)

(2). Slightly after 8:00 p.m., Wife heard music coming from the premises. (N.T. 154-160)

b. **April 19, 2007**

At approximately 9:25 p.m., Husband heard music coming from the premises. (N.T. 141-142)

c. **April 20, 2007**

(1). Husband heard music emanating from the premises. (N.T. 144)

(2). At approximately 3:10 a.m., a customer was revving a vehicle engine in the parking lot, which woke Husband from sleep. (N.T. 141-142)

d. **April 21, 2007**

At approximately 8:15 p.m., Husband was sitting on his porch and heard music coming from the premises. Customers were revving their vehicle engines in the parking lot. Between the music, engines revving and customers yelling, Husband was not able to enjoy peace and quiet of his front porch.

(N.T. 145)

e. **May 3, 2007**

In the early evening, Wife noticed a female in a van situated in Licensee's parking lot.

A male customer came out of the licensed premises with a beer bottle. He was drinking beer on his way to the van. The two were screaming at each other. The male customer returned to the premises. As he did so, he threw the beer bottle up against the back of the building. (N.T. 164-165)

f. **May 5, 2007**

Wife was disturbed by music coming from the premises and yelling from people in the parking lot. Some of the male customers were urinating in the parking lot. (N.T. 166-167)

6. On the dates below, Bureau Enforcement Officers made the following observations:

a. **April 21, 2007**

At about 9:50 p.m., a Bureau Enforcement Officer heard music emanating from the premises within a radius of approximately 50 feet, which is entirely within the premises parking lot. The source of the music was being provided by a live band. Licensee's Corporate President performed in that band. (N.T. 69-70)

b. **April 28, 2007**

A Bureau Enforcement Officer arrived in the area of

the premises. He heard faint music emanating from inside. The Officer stood in the front of the home of Family No. 2 at which point he heard music coming from the premises. The Officer also heard music coming from the licensed premises in the bedroom of Family No. 2. The source of the music was a live band. Licensee's Corporate President performed in that band.

(N.T. 42-46)

c. **June 22, 2007**

A Bureau Enforcement Officer walked to the residence of Family No. 2. He heard no music at this point. He walked to the licensed premises and began to hear music at a distance of 110 feet from the licensed premises. The Officer entered the premises and determined music was being provided by using an amplification system. The Officer determined the source of the music was Karaoke at the licensed premises. (N.T. 47-49)

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 to April 21, April 28 and June 22, 2007.
3. The remaining dates in Count No. 1 are **dismissed**.²

2. There was no proof the disturbances were caused by amplified sound escaping the premises.

Count No. 2:

4. **Sustained** as to February 23, March 20, 29, April 7, 19, 20, 21, May 3 and 5, 2007.
5. The remaining dates in Count No. 2 are **dismissed**.

DISCUSSION:

Attorney Professional Conduct

I have discovered my duties sometimes impose the obligation upon me of wearing many hats. This matter mandates that I imagine I am the Disciplinary Board of The Pennsylvania Supreme Court.

The hearing opened with a challenge by Bureau Counsel to the continued representation of Licensee by its counsel, resulting in a request for a continuance. The challenge was based on an alleged violation of the Professional Rules of Conduct, were Licensee's counsel to continue his representation.

During the colloquy, I asked Bureau counsel why this issue was not presented much earlier in the pre-hearing phase. Bureau counsel remarked she first discovered the supposed ethical dilemma the morning of the hearing.

As the discussion continued, it became clear information provided by members of Families No. 1 and No. 2 prompted Bureau counsel to raise the issue. Apparently, both families attended a meeting in which the Adams Township Solicitor commented to the effect that it would not be prudent for the attendees, the majority of whom had complaints concerning Licensee and the disturbances in the surrounding area, to gather a petition demanding governmental response. The licensed premises is located in Adams Township. The Solicitor is a member of the law firm in which Licensee's counsel practices. The Township Police Chief was to be called as a witness.³

3. Given the issues and nature of the Bureau's case, I remain confused what benefit would the Bureau have gotten from a continuance. Delaying the outcome serves no one's purpose.

In asserting this claim, Bureau counsel treads rather gingerly on an ethical issue herself and one similar to that she propounds. However directly the complainants may benefit from a resolution in favor of the Bureau, Bureau counsel may have blurred the line between client and witness. The complainants are not parties to the within action; they are no more than witnesses, albeit essential ones. Counsel's obligation is to her client, the Bureau, not the witnesses.

Licensee's counsel expressed his deep and sincere reservations about proceeding lest there be even a hint of an ethical violation. Seeing none, I ordered counsel to represent Licensee. As an officer of the court and consistent with an attorney's obligation to honor such a directive, counsel complied.

The pertinent Rule of Professional Conduct is Rule 1:7, relating to conflict of interest with current clients. Because counsel's law firm represents Adams Township and counsel is representing Licensee, the Bureau argues Rule 1.7 has been violated.⁴

The Professional Rules of Conduct do not address the question of standing, i.e., who and under what circumstances one may claim a violation. It makes sense the Rules are not responsive to this inquiry. As more specifically stated in the extensive Preamble, the Rules are designed to assist an attorney in understanding the line that separates the ethical from the unethical. The Rules are not designed to confer rights upon litigants.⁵

4. Counsel also points me to 1 Pa. Code §31.28(3) regarding suspension and disbarment before an agency for unethical or improper conduct. That provision confers no right upon the Bureau. It merely authorizes an agency to take action. Moreover by using "may" instead of "shall," the regulation is permissive rather than mandatory. Lastly, the Bureau begs the question as the regulation requires a showing of unethical conduct in the first place.

5. As the asserted representation conflict is between the interests of Adams Township and Licensee, the Bureau is simply not in a position to raise any direct and immediate harm.

In this matter, the closest we come to a conflict relates to counsel's representation of Licensee and cross-examining the Adams Township Police Chief. Interestingly, the Bureau never called the Chief so that even the smallest measurable suspicion is absent.

I have three final thoughts. The first is that Rule 1.7 is not absolute. It allows for what the Rule defines as "informed consent." In that regard, in my presence and on the record, both Licensee and the Police Chief, on behalf of the Municipality, consented to counsel's continued representation.

Perhaps one of the more fundamental Rules, Rule 1.7 is overshadowed in its length by the Explanatory Comments. The nuances and shades in those Comments are varied and subtle. No small wonder that swift and clearly defined responses are not always forthcoming. Lastly, just as the ultimate decision on a motion for recusal lies in the sound discretion of the judicial officer whose recusal has been requested, the decision on resolving ethical considerations rests primarily with the attorney who is confronted with the issue.

Due Process

Through Rebuttal, the Bureau attempted to introduce additional dates during which Licensee's operation caused a disturbance to the community (N.T. 63-66). I directed Counsel to cease any questioning of this nature because of serious Due Process implications.

If the Bureau had evidence of additional violation dates not now included in the charges, addressing them on Rebuttal places Licensee in a Constitutionally unfair predicament. It is now beyond question, the essential requirements of Due Process are notice and opportunity to be heard. Licensee received no notice regarding the added occasions the Bureau sought to introduce. Having no notice, Licensee had no opportunity to defend the new allegations.⁶

6. As a general principle, Rebuttal ought not to be used as a vehicle to mint additional allegations.

PRIOR RECORD:

Licensee has been licensed since April 19, 2004, and has had four prior violations: (Commonwealth Exhibit No. C-5, N.T. 215):

Adjudication No. 05-1409. Fine \$100.00.

Used loudspeakers or devices whereby
music could be heard outside.
April 2 and May 14, 2005.

Adjudication No. 05-2751. Fine \$700.00.

1. Used loudspeakers or devices whereby music could be heard outside. On 17 dates between September 22 and November 27, 2005.
2. Noisy and/or disorderly operation. On 19 dates between September 22 and November 27, 2005.

Adjudication No. 06-0210. Fine \$300.00.

Used loudspeakers or devices whereby
music could be heard outside.
December 3, 4 and 31, 2005.

Adjudication No. 07-0033. Fine \$1,000.00.

Noisy and/or disorderly operation.
August 4, 17, 26, September 9, 23, 29,
October 7, 14 and 27, 2006.

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 and 2 in this case.

PENALTY DISCUSSION:

It is evident, however I respond, the community is likely to suffer continued invasions of peace and quiet as a significant portion of the complaints relates to the conduct of patrons after they depart Licensee's parking lot. It is also apparent Adams Township does not have the resources to

devote to the streets and highways surrounding the licensed premises in a manner commensurate with need.

Ultimately, in our society, we expect citizens to behave civilly, i.e., to respect property and to avoid behavior which disturbs others. Civility is supposedly ingrained in us during childhood. Regrettably, some of us either lack the will or the appropriate training to behave as we should. Add to this the effects of alcohol, loosening inhibitions and tongues of those who would otherwise conform to community standards, the recipe for boorish behavior is now complete. Accordingly, I hold Licensee accountable only for those disturbances within the licensed premises and its private parking lot.

My penalty assessment deliberations cannot ignore the existence of a Conditional License Agreement, entered into by Licensee and the Pennsylvania Liquor Control Board (the licensing/immediate reviewing authority) pursuant to the Liquor Code. That Agreement allows Licensee to continue entertainment but with restrictions greater than those in the Liquor Code.

At first glance, through the licensing procedure, it seems my authority has been undermined. What convinces me otherwise is Paragraph 6, f of the Agreement. There, the instant matter has been specifically excluded as constituting a future Adjudication within the terms of the Agreement.

As a matter of law, the licensing/immediate reviewing authority could not have considered this then pending citation when the Conditional License Agreement was formulated and subsequently endorsed. It is impossible to say what the terms of the Conditional License Agreement might have been had this Adjudication been part of the mix. Therefore, I am not constrained by the terms of the Agreement. I am free to impose whatever penalty I deem appropriate, not only as a matter of law but also as a condition of circumstance.

I well recognize several witnesses candidly remarked Licensee's operation has shown a marked improvement since the prior Adjudication. I also am cognizant of the many days within the investigation period where no disturbances can be attributed to Licensee through this administrative process. What I still find disconcerting is the Corporate President's continuing lack of sufficient empathy, particularly for the closest neighbor, so as to curb all disturbances within Licensee's responsibility.⁷

7. Perhaps one recommendation is for the Corporate President to eliminate the time he spends playing in the band and dedicate that time to policing the premises and parking lot.

Licensee has not been doing enough. I have been searching for the most limited penalty that will serve to correct Licensee's business practices. The prior penalty was obviously insufficient. Therefore I impose:

Count No. 1 - \$1,000.00 fine, 1 day suspension and an additional 7 days suspension of Licensee's Amusement Permit.

Count No. 2 - \$1,000.00 fine and 1 day suspension.

If the above penalty, does not correct Licensee's operation, I may have to consider license revocation.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$2,000.00 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.

Imposition of Suspension

IT IS FURTHER ORDERED that the Restaurant liquor license (including all permits) of Mattis Family, Inc., t/a The Country Inn Bar & Grill, License No. R-AP-SS-13766, be suspended for a period of two days, **BEGINNING** at 7:00 a.m., on Monday, September 8, 2008, and **ENDING** at 7:00 a.m., on Wednesday, September 10, 2008.

Licensee is directed, on Monday, September 8, 2008, at 7:00 a.m., to place a placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised, if replacement placards are needed for any reason, they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized, on Wednesday, September 10, 2008, at 7:00 a.m., to remove the placard of suspension and return its license to its original wall location.

Amusement Permit Suspension

THEREFORE, it is ordered that Amusement Permit No. AP-13766, issued to Mattis Family, Inc., t/a The Country Inn Bar & Grill, be suspended for a period of nine days, beginning at 7:00 a.m., Monday, September 8, 2008 and ending at 7:00 a.m., Thursday, September 17, 2008. Licensee is directed to place the enclosed label over the Amusement Permit portion of the license on or before the effective date of said suspension.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 23rd day of June, 2008.

Felix Thau, A.L.J.

pm

Detach Here and Return Stub 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, Pennsylvania 17110-9661

Citation No. 07-2590