

Mailing Date: OCT 15 2008

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-2882 LIQUOR
CONTROL ENFORCEMENT	:	
	:	Incident No. W01-360178
v.	:	
	:	LID - 49421
2813 CHARLES INC	:	
2813 W 9 th ST	:	
CHESTER PA 19013-1710	:	
	:	
DELAWARE COUNTY	:	
LICENSE NO. R-AP-SS-7395	:	

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 December 17, 2007. There are two counts in the citation.

The first count alleges that Licensee violated §§471 and 493(31) of the Liquor Code, 47 P.S. §§4-471 and 4-493(31), and §780-101, *et seq.*, of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §780-101, on August 9, 2007, by aiding, abetting or engaging in the traffic in, or sale of, a controlled substance on its licensed premises and/or permitting the use of the licensed premises in the furtherance of the traffic in, or use of, a controlled substance.

The second count alleges that Licensee violated §5.16 of the Liquor Control Board Regulations, 40 Pa. Code §5.16, prior to October 10, 2007, on the basis that its manager failed to devote full time and attention to the operation of the licensed business.

A hearing was held on July 2, 2008, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. Liquor Enforcement Officer Julie Kohler inspected the licensed premises at about 3:30 p.m. on September 20, 2007. The employee in charge was Antoinette Jackson, who was serving three patrons. The officer asked Ms. Jackson who her boss was and if she could contact him. She said that her boss was Frank Potter, and she called him on the telephone. He arrived shortly thereafter. The officer asked Mr. Potter what his position was, and he said that he was the manager, and that he helps out his son, the Licensee (N.T. 6-8, 10).

2. During the inspection of September 20, 2007, Officer Kohler inspected all the licensed areas of the premises, the seating area, and the rest rooms. She used a flashlight, and did not observe any narcotics or narcotics-related items on the licensed premises during the inspection. Outside the back door, however, in an unlicensed portion of the property which contains the licensed premises, Officer Kohler saw empty blunt rollers and empty bags with what appeared to be marijuana residue in them. She brought this to the attention of other officers, who did not regard it as unusual or attach significance to it, so it was not in her report (N.T. 26-28).

3. On October 10, 2007, Officer Kohler spoke on the telephone with Charles Fowler, Licensee's President, Secretary/Treasurer, Director and Stockholder. She asked Mr. Fowler who his manager was, and he said it was Russell Smith. She asked him what Mr. Potter's position was, and he said that he was his father, and just came in from time to time to help him out. Mr. Fowler said that because his father had extensive experience in the bar business, he was helping Mr. Smith better acquaint himself with the operation of the business (N.T. 9-10).

4. Officer Kohler obtained Mr. Smith's cell phone number from Mr. Fowler, and then spoke with Mr. Smith about his position. Mr. Smith said that he was the sole manager and that there were three employees: himself, Frank and Antoinette. He did not remember Antoinette's last name; he said she had been working there for years, on and off (N.T. 11-12).

5. Officer Kohler asked Mr. Smith if he had any other employment, and Mr. Smith said that he works for a trucking company called Chase Leavey on an "off and on basis, basically like an on-call basis" a couple times per year. Officer Kohler told Mr. Smith that as Board-approved manager he was not allowed any other employment (N.T. 12-13).

6. A letter from the Board's Director of Licensing to the licensed premises dated March 12, 2003, lists Russell N. Smith as Licensee's Manager. The same information is reflected in the Board's records as of the current writing (Exhibit B-3, CICS database).

7. Sergeant Otis Blair, City of Chester Police Department, visited the licensed premises in the evening hours of August 9, 2007. He entered through the main entrance. Directly in front of him to his left there was a man whose last name was Jacobs, seated at the bar and looking down at what appeared to be wrappers and a blunt cigar. He was placing what appeared to be a greenish brown crushed up matter into the paper (N.T. 31-34).

8. Sergeant Blair arrested Mr. Jacobs and took possession of the material he had, which field-tested positive for marijuana. Laboratory testing later determined that the submission

consisted of two napkins and one cigar, each containing green vegetable matter. The matter in the napkins weighed 2.8 grams; the cigar weighed 1.2 grams; both contained marijuana (N.T. 38, Exhibit B-4).

9. At the time Sergeant Blair saw Mr. Jacobs seated at the bar, Antoinette Jackson was behind the bar, two to three feet to Mr. Jacobs' right (N.T. 39-40).

10. During the police action of August 9, 2007, it would have been standard procedure for a search of the premises to be done, looking for illegal weapons or narcotics. The material seized from Mr. Jackson was the only evidence listed on the police property record in this case (N.T. 53-54).

11. Mr. Jacobs, when first seen by Sergeant Blair, had his arms resting on the bar and was looking very intently downward, so for Sergeant Blair to see what he was looking at, it was necessary for him to come right up next to Mr. Jacobs, which he did. (N.T. 55-56).

CONCLUSIONS OF LAW:

The evidence presented by the Bureau was insufficient to prove that Licensee violated §§471 and 493(31) of the Liquor Code, 47 P.S. §§4-471 and 4-493(31), and §780-101, et seq., of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §780-101, on August 9, 2007, by aiding, abetting or engaging in the traffic in, or sale of, a controlled substance on its licensed premises and/or permitting the use of the licensed premises in the furtherance of the traffic in, or use of, a controlled substance.

The evidence presented by the Bureau was insufficient to prove that Licensee violated §5.16 of the Liquor Control Board Regulations, 40 Pa. Code §5.16, prior to October 10, 2007, on the basis that its manager failed to devote full time and attention to the operation of the licensed business.

DISCUSSION:

Count 1

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

The citation in *TLK* was sustained on the basis of a single drug sale initiated in the licensed premises. However, the requisite scienter was established by a six-month investigation at the premises by an undercover narcotics agent:

Agent Way testified that he was able to purchase drugs from a patron of the establishment, and that he observed drug sales between patrons, sales of stolen goods, the use of drugs in the bathroom, and a drug sale take place in the presence of the bartender. Due to the pervasive nature of this illicit activity, it may be said that the licensee should have known of the misconduct of his employee.

-- 544 A.2d at 944

There was nothing like such evidence in the present case. On the solitary occasion when a person was found in the licensed premises to be in possession of a controlled substance, the evidence made it clear that the person was attempting to be discreet. Mr. Jacobs was not rolling his blunt openly on the bar, there was no evidence of drug trafficking whatsoever, and the drug containers found on the ground outside the back door of the premises were not judged by the police present to have any significance.

I find that the legal standard of *TLK* has not been met.

Count 2

The provisions of 40 Pa. Code §5.16, referred to in this count, were reserved on May 16, 2008, effective May 17, 2008, 38 Pa.B. 2250. As it was in force at the time this citation was filed, the section read as follows:

§ 5.16. Appointment of managers.

(a) The operation of a licensed business requires the full time and attention of a manager. A licensee holding one or more licenses shall appoint an individual as manager for each licensed establishment and the manager shall devote full time and attention to the licensed business. If the licensee is an individual, he may designate himself as manager of one licensed establishment, except in the case of distributors or importing distributors. If a license is held by more than one individual, the manager may be one of the individuals or another person the licensee may designate, except in the case of distributors and importing distributors.

(b) The manager appointed by a licensee shall be a reputable person. The licensee shall notify the Board in writing of the name and home address of the manager and the date and place of birth. If there is a change of manager, the licensee shall give the Board written notice within 15 days of the change together with full information for the new individual who is appointed as manager. Each notice of the appointment of a manager or notice of a change of manager shall be accompanied by a fee of \$60.

(c) When a background investigation shall be conducted to obtain or verify information regarding an individual appointed as manager, an additional fee of \$75,

for a total fee of \$135, will be assessed. An individual may not act in the capacity of manager after the licensee has been notified that the individual has been disapproved by the Board. The designated manager shall devote full time to the licensed business and may not be employed or engaged in another business unless prior written approval is obtained from the Board.

(d) A club manager or steward may be engaged in employment outside his duties as manager or steward except as provided in section 493(11) of the Liquor Code (47 P. S. § 4-493(11)).

The evidence presented by the Bureau in support of the second count was that Liquor Enforcement Officer Julie Kohler inspected the licensed premises on September 20, 2007. The officer asked the employee in charge who her boss was and if she could contact him. She said that her boss was Frank Potter, and she called him on the telephone. He arrived shortly thereafter. The officer asked Mr. Potter what his position was, and he said that he was the manager, and that he helps out his son, the Licensee.

On October 10, 2007, Officer Kohler spoke on the telephone with Charles Fowler, Licensee's President, Secretary/Treasurer, Director and Stockholder. She asked Mr. Fowler who his manager was, and he said it was Russell Smith. She asked him what Mr. Potter's position was, and he said that he was his father, and just came in from time to time to help him out. Mr. Fowler said that his father was helping Mr. Smith better acquaint himself with the operation of the business.

Officer Kohler then spoke with Mr. Smith about his position. Mr. Smith said that he was the sole manager and that there were three employees: himself, Frank and Antoinette. He did not remember Antoinette's last name; he said she had been working there for years, on and off.

Officer Kohler asked Mr. Smith if he had any other employment, and Mr. Smith said that he works for a trucking company called Chase Leavey on an "off and on basis, basically like an on-call basis" a couple times per year. Officer Kohler told Mr. Smith that as Board-approved manager he was not allowed any other employment.

I find that this evidence did not establish a violation of this regulation. See *Cal & Var Co., Inc.*, Citation No. 00-0947. The Bureau did not prove that Licensee's manager was engaged in another business or otherwise employed without the Board's written approval, since it presented no evidence as to the Board's records on that subject. The comment of an employee that she regarded another person – not the Board-approved manager – as her superior, did not prove that the real manager was not acting as such. The comment of the manager as to his "oncall basis" elsewhere did not prove that he was not devoting his full time and attention to the licensed business within the meaning of the regulation as it was in force at the time.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 07-2882 is DISMISSED.

Dated this 8th day of October, 2008.



David L. Shenkle, J.

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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.