

Mailing Date: November 18, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 07-3135
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 six hundred dollars (\$600.00).<sup>1</sup>

The first count of the citation charged Licensee with violating section 5.32(a) of the Liquor Control Board Regulations ("Regulations") in that, on August 25, September 7, 8, October 7, November 2 and 30, 2007 Licensee permitted the use of a loudspeaker on the licensed premises in such a way that music could be heard outside the building. [40 Pa. Code § 5.32(a)]. The second count charged that on the same dates, Licensee operated her establishment in a noisy and disorderly manner in violation of section 471 of the Liquor Code. [47 P.S. § 4-471].

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),

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<sup>1</sup> 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 cases was one thousand nine hundred dollars (\$1,900.00).

876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984).

Licensee raises three (3) 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. Next, 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. Licensee, in her third argument, states that the testimony offered by the Pennsylvania State Police, Bureau of Liquor Enforcement (“Bureau”) was not credible because if the noise could be heard at distances of one hundred-eighty (180) feet, two hundred seven (207) feet and two hundred thirty-five (235) feet, “then the patrons that are close to such music will have their ears exploding and/or bleeding.”

The Board has reviewed the record, including the ALJ’s Adjudication and Order, with Licensee’s contentions in mind, and has concluded that the ALJ’s decision on Count 1 is supported by substantial evidence. As to Count 2, the ALJ did not specifically address the count in the Adjudication and Order. While

Licensee has not specifically argued that it should be dismissed, this matter will be remanded to the ALJ to make specific findings of fact and conclusions of law as to that count.

The record reveals that Bureau Officer David Daza visited the licensed establishment on August 25, September 7, 8, October 7, November 2 and 30, 2007, and on each occasion he heard loud music outside the licensed premises. [N.T. 24 – 31]. On August 25, 2007, Officer Daza heard music from sixty (60) yards away. [N.T. 24]. He entered the establishment and heard the same music he had previously heard outside. [N.T. 24] The music was being played by a DJ and was electronically amplified by speakers. [N.T. 24]. Officer Daza continued to hear the music outside the premises when he left one (1) hour later. [N.T. 25].

Officer Daza returned to the licensed premises on September 7, 2007. [N.T. 25]. He parked his car on Thorn Street, one (1) block from the licensed establishment. [N.T. 25]. As he stepped out of his vehicle, he could hear music that appeared to be coming from the licensed establishment. [N.T. 26]. Officer Daza estimated he parked his vehicle two-hundred thirty-five (235) feet from the licensed establishment. [N.T. 26]. The volume of the music grew louder as he drew closer to the licensed premises. When he entered the premises, he

saw that the music was being played by a DJ and was being amplified through several loudspeakers that were two (2) by three (3).<sup>2</sup> [N.T. 26]. The officer could hear the same music outside when he left the licensed establishment at 12:30 a.m. on September 8, 2007. [N.T. 26].

Officer Daza made subsequent visits to the licensed establishment on October 7, November 2 and 30, 2007. On each visit he heard loud music coming from the licensed premises while he was outside. [N.T. 27-30]. He entered the building and, as he had on the two previous occasions, he observed a DJ and further observed that music was coming from similar two (2) by three (3) speakers. [N.T. 29-31]. On November 30, 2007, the music was so loud that Officer Daza could hear it while he was inside his vehicle approximately one hundred fifty (150) feet from the licensed establishment. [N.T. 30].

The Board now turns its attention to the issues raised in Licensee's appeal. Because all 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

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<sup>2</sup> The Board assumes that each speaker measured two (2) feet by three (3) feet based on clarification offered by Attorney Gonzalez during testimony for an incident that occurred on March 15, 2008. [N.T. 36].

5.32(a), a licensee is not permitted to use or allow others, such as a DJ, 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 Officer Daza established that on each of the six (6) days in question, 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.

Next, 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 a licensed premises. Nor does the section require that the volume be measured with any type of scientific device. Therefore, this argument must fail.

Finally, Licensee attacks the credibility of the testimony offered by Officer Daza. Licensee opines that if the noise could be heard at distances of one hundred-eighty (180) feet, two hundred seven (207) feet and two hundred thirty-five (235) feet, then the patrons that are close to such music would have “their ears exploding and/or bleeding.” Essentially, this challenge amounts to nothing more than dissatisfaction with how the ALJ accorded evidentiary weight. Licensee invites the Board to engage in a reevaluation of witness credibility on a cold record. Such an invitation has been previously rejected by the Commonwealth Court, and is similarly rejected by the Board in regard to this case. See Thorpe v. Pub. Sch. Employee’s Ret. Bd., 879 A.2d 341 (Pa. Cmwlth. 2005). It is well-settled that matters of witness credibility are the sole prerogative of the ALJ, and the ALJ’s findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm’n, 480 A.2d 1253 (Pa. Cmwlth. 1984). In the instant case, the ALJ found the testimony of the Bureau officer to be credible and adequate to support the first count in the citation. The Licensee makes claims regarding the effects of the loud volume of music that are not supported anywhere in the record. The Board will not overturn the ALJ’s well-reasoned opinion on nothing more than mere speculation and a suggestion

that patrons would have had ears exploding and/or bleeding if the music was so loud that it could be heard up to two hundred thirty-five (235) feet away.

Based upon the foregoing, the Board finds that the ALJ's decision on Count 1 is supported by substantial evidence and shall not be disturbed. As to Count 2, in order to establish that licensed premises is being operated in a noisy or disorderly fashion, evidence must be presented of such conduct and that such conduct is routine. See In re Revocation of Liquor License No. R-12122, 467 A.2d 85 (Pa. Cmwlth. 1983). While certainly evidence was presented that would have supported a decision by the ALJ to sustain Count 2 of the citation, it is for the ALJ, and not the Board, to make a decision as to whether to weigh the evidence in that manner. Therefore, a remand of Count 2 is necessary.<sup>3</sup>

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<sup>3</sup> The Board takes administrative notice that its decision to refuse Licensee's renewal application for the licensing term effective April 1, 2007, was affirmed by the Berks County Court of Common Pleas on October 16, 2009. Nonetheless, this matter is being remanded for purposes of completeness.

**ORDER**

The appeal of Licensee is dismissed as to Count 1 and granted in part as to Count 2.

The decision of the ALJ is affirmed as to Count 1.

This matter is remanded to the ALJ to make findings of fact and conclusions of law in regards to Count 2.

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Board Secretary