

The investigation which gave rise to the citation began on April 10, 2007 and was completed on December 21, 2007; and notice of the violation was sent to Licensee by Certified Mail on January 10, 2008. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on July 27, 2008 in the PA Dept. 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:

1. On October 10, 2007, shortly after 5:00 p.m., an officer of the Bureau arrived in the area of the licensed premises. He found the premises was closed and not in operation. Before leaving the area the officer walked down an alley beside the premises and looked up to the second floor and observed a window unit air conditioner that was running in one of the windows on the second floor. The officer attempted to gain entry to the second floor by knocking on the door. However, there was no response (N.T. 24-25).

2. On October 28, 2007 the aforementioned officer along with another officer entered the licensed premises. They found it open and operating. They observed one female bartender rendering service to approximately 25 patrons (N.T. 26).

3. The officer identified himself to the bartender and advised her that they were conducting a routine inspection and needed to see the person that was in charge. At that time the bartender said she would contact Francis Ortona. She indicated she would contact him by phone and that he lived approximately 15 minutes away. The officer elected to wait (N.T. 26).

4. While waiting for Mr. Ortona to arrive the officer asked the bartender if Mike still lives upstairs. She replied, "I don't think Mike's still living upstairs."

5. Also, while waiting for Mr. Ortona to arrive, the officers walked back toward the kitchen area. There they noticed a doorway entrance leading to the second floor. There was a hasp on the door. However, there was no lock preventing the door from opening (N.T. 26-27).

6. At 7:21 p.m., Mr. Ortona arrived at the licensed premises. The officer advised him that he was there to gather information regarding whether someone was living on the upstairs portion of the licensed premises. Mr. Ortona gave the officers permission to accompany him through the unlocked door upstairs. Mr. Ortona and the officers went through the door approximately twelve steps onto a landing and turned right into a bedroom area. The bedroom area had a queen size bed, a dresser, a night stand and on top of the dresser there was a television set. The bed had bed sheets and bed clothes on it. There were male clothes about the bedroom area together with a gray hard hat and safety glasses on another counter inside the room (N.T. 28-30).

7. On the bed the officers noticed a pair of dark colored trousers. The size of these trousers were 30" waist by 32" long (N.T. 30).

8. The officers asked Mr. Ortona if he was aware of anyone with the first name of Mike, and Mr. Ortona said the only one he knew would be the cook downstairs (N.T. 30).

9. The officer asked Mr. Ortona if he could speak with Mike because he was working at that time. Before going downstairs, Mr. Ortona stated that Mike, the cook did live upstairs (N.T. 30).

10. The officers and Mr. Ortona went downstairs and the officer made contact with Michael R. Bodewes. At that point, the officer asked Mr. Bodewes who was working as a cook in the kitchen if he was staying upstairs. He said that he was not. The officer asked him what size jeans he wore and he told them that he wore 30" waist, 32" long jeans.

11. As the officers were preparing to leave the licensed premises, Mr. Ortona said that Bodewes did live upstairs. However, he did not know exactly how long he had been living there. He also said that Mr. Bodewes works construction on the side, which accounts for the gray hard hat and glasses found the room upstairs (N.T. 31).

12. On November 7, 2007 at 3:00 p.m., the officer made contact with Mrs. Jody Henry, the Board approved manager for the licensed premises. Mrs. Henry told the officer that Mr. Bodewes and his wife had been living next door to the licensed premises in a rental property owned by the Henrys. Mrs. Henry further indicated at the beginning of October, 2007 a water pipe burst inside the aforementioned rental property. Further, the wife of Mr. Bodewes moved out. Further, until the water pipe was fixed Mrs. Henry invited Mr. Bodewes to stay up in the apartment above the licensed premises. She further indicated that Mr. Bodewes had been living upstairs on the licensed premises from the beginning of October 2007 until October 27, 2007. After the open inspection, she had him move out (N.T. 33-34).

CONCLUSION OF LAW:

The charge in the citation is **sustained**.

DISCUSSION:

The preponderance of the credible evidence in this case indicates that, at least for most of the month of October, Michael Bodewes, a cook on the licensed premises, was staying in a room in the upstairs portion of the licensed premises. Since there was a stairway inside the licensed premises that lead to the area in which Mr. Bodewes was staying, a violation of Section 3.51 of the Liquor Control Board Regulations [40 Pa. Code §3.51] has been established. The charge in the citation is therefore sustained.

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. *In re Omicron Enterprises*, 449 A.2d 857 (Pa.CmwltH 1982).

The phrase "preponderance of evidence" has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. *Black's Law Dictionary, Fifth Edition*, West Publishing Company, Copyright 1979, Page 1064.

It is within my province, and is part of my responsibility to determine the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa.CmwltH 1989). I may give testimony such consideration as it may deserve, and accept it or reject it in whole or in part. *McFarland Landscape Service v. Workmen's Comp. Bd. Of Appeal*, 557 A.2d 816, 817-18 (Pa.CmwltH 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

Although there is some conflict in the evidence in this case as to whether or not Mr. Bodewes was staying on the second floor of the licensed premises, the statements of Mrs. Henry and Mr. Ortona clearly indicate that Mr. Bodewes was staying on the second floor of the licensed premises. The record also establishes that there was a stairway from the interior of the licensed premises first floor to the second floor where the bedroom area in question was located. The greater weight of testimony indicates that Mr. Bodewes was staying on the licensed premises in a bedroom at least during the month of October, 2007. Based on the foregoing, I conclude that the Bureau has met its burden and the charge in the citation is **sustained**.

PRIOR RECORD:

Licensee has been licensed since August 25, 2006, and has had no prior violation. 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.

Under the circumstances of this case, the penalty imposed shall be a fine of \$250.00.

ORDER

THEREFORE, it is hereby ordered that Licensee END ZONE BAR & GRILL, INC., pay a fine of \$250.00 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 15th day of October, 2008.

Daniel T. Flaherty, Jr., J.

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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. 08-0113
End Zone Bar & Grill, Inc.