

Mailing Date: NOV 10 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-0749
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W08-370039
v.	:	
	:	LID - 56661
THE DOG LLC	:	
T/A THE DOG	:	
414 W 8 TH STREET	:	
ERIE PA 16502-1335	:	
	:	
	:	
ERIE COUNTY	:	
LICENSE NO. R-AP-SS-1275	:	

BEFORE: JUDGE RODERICK FRISK

APPEARANCES:

For Bureau of Enforcement
Emily Gustave, Esquire

For Licensee
No Appearance.

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on April 14, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against The Dog, LLC, t/a the Dog, License Number R-AP-SS-1275 (hereinafter Licensee).

The citation contains four counts.

The first count charges Licensee with violation of Section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code §5.32(a)], in that on February 17, 2008, Licensee, by its servants, agents or employees, 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 violation of Sections 406(a)(3) and 493(16) of the Liquor Code [47 P.S. §§4-406(a)(3) and 4-493(16)], in that on February 17, 2008, Licensee, by its servants, agents or employees, sold, furnished and/or gave alcoholic beverages on Sunday between 2:00 a.m. and 11:00 a.m.

The third count charges Licensee with violation of Section 499(a) of the Liquor Code [47 P.S. §4-499(a)], in that on February 17, 2008, Licensee, by its servants, agents or employees, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

The fourth count charges Licensee with violation of Section 499(a) of the Liquor Code [47 P.S. §4-499(a)], in that on February 17, 2008, Licensee, by its servants, agents or employees, failed to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time.

An administrative hearing was conducted on October 2, 2008, at 2084 Interchange Road, Erie, Pennsylvania. The Bureau was represented by Emily Gustave, Esquire. Licensee did not appear personally or through legal counsel.

After hearing the testimony presented, and upon review of the evidence submitted, the following Findings of Fact and Conclusions of Law are entered:

FINDINGS OF FACT:

1. The Bureau commenced its investigation of Licensee's premises on February 17, 2008, and completed its investigation on February 27, 2008. (Exhibit C-1)
2. The Bureau notified Licensee of the nature of the alleged violation(s) disclosed by its investigation by letter dated March 19, 2008, which was sent by certified mail and returned unclaimed, and by first class mail, which was not returned. (Exhibit C-2)
3. The citation was issued on April 14, 2008, and was sent by certified mail and received by Licensee on April 28, 2008. (Exhibits C-3, C-4)
4. The notice relative to the date, time and place of the evidentiary hearing was mailed to Licensee's premises on August 14, 2008, by certified mail and first class mail.

5. The aforementioned certified mailing of the notice of hearing was signed for and received by Licensee on August 20, 2008.

COUNT 1

6. On February 17, 2008 at approximately 1:00 a.m., Liquor Enforcement Officer Douglas E. Keys commenced an outside surveillance of Licensee's premises. During the course of this surveillance, Officer Keys paced approximately 75 yards east and west of the premises where the sound of amplified music was clearly heard emanating from within the premises. (N.T. 10-12)

7. Officer Keys entered Licensee's premises at 1:11 a.m. and observed a male bartender rendering service of alcoholic beverages to approximately 35 patrons. Officer Keys further determined that the amplified music heard while outside was the same music emanating from a juke box that was amplifying prerecorded music within the premises. This sound system consisted of several speakers suspended from the ceiling of the premises. (N.T. 11)

8. Officer Keys departed Licensee's premises at 1:15 a.m. (N.T. 13)

9. Upon departing Licensee's premises, Officer Keys continued to hear the sound of amplified music emanating from within the premises at a distance of approximately 75 to 100 yards. (N.T. 11)

10. Licensee's premises is located in a community which is approximately 75 percent residential and 25 percent commercial. (N.T. 11-12)

COUNTS 2, 3 AND 4

11. On Sunday, February 17, 2008 at 2:45 a.m., Liquor Enforcement Officer Douglas E. Keys met with various members of the city of Erie Nuisance Bar Task Force including Lieutenant Kirk Werner. (N.T. 13, 22)

12. Upon approaching Licensee's premises, the officers noted that the front curtains were drawn. However, Liquor Enforcement Officer Keys and Lieutenant Werner were able to view the bar portion of the premises through a small opening in the curtains. At this time, Officer Keys and Lieutenant Werner observed several patrons at the bar in possession of bottled beer and what appeared to be mixed drinks. (N.T. 13-14, 23)

13. After finding the front door of Licensee's premises locked, Officer Keys and Lieutenant Werner accompanied by various members of the city of Erie Nuisance Bar Task Force knocked on the door and identified themselves to an unidentified individual who permitted them to enter the premises. (N.T. 14, 24)

14. Upon entering the premises, Officer Keys and Lieutenant Werner identified a female tending bar as Stacy Colin and further observed seven individuals at the bar. Officer Keys noted that several bottles of beer and two mixed drinks were on the bar in front of the patrons which were more than half filled and cold to the touch. (N.T. 14, 16-18, 24)

15. Officer Keys testified that the bottle of Coors Light beer was cold as it displayed a temperature sensitive label depicting blue mountains. Officer Keys further noted that the ice contained in the mixed drinks was fresh. Officer Keys described the two mixed drinks as a Captain Morgan and ginger and a Bacardi Lemon and diet. (N.T. 16, 20)

16. One of the individuals seated at the bar was described as an elderly gentleman who indicated that he was an employee of Licensee's Corporate Officer Kenneth Toglia in another business. This gentleman indicated that Kenneth Toglia resided in an apartment on the second floor of the premises at which time an officer and the elderly gentleman notified Kenneth Toglia that an open inspection was being conducted. (N.T. 15, 24)

17. Officer Keys then advised Mr. Toglia that the premises was not permitted to serve alcoholic beverages after 2:00 a.m. and that all patrons must depart the premises no later than 2:30 a.m. Mr. Toglia replied by indicating that he was well aware of the laws. (N.T. 18-19)

18. The officers departed Licensee's premises at 3:15 a.m. (N.T. 19)

CONCLUSIONS OF LAW:

1. The notice provisions as prescribed by Section 471 of the Liquor Code [47 P.S. §4-471] have been satisfied.

2. On February 17, 2008, Licensee, by its servants, agents or employees, 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, in violation of Section 5.32(a) of the Liquor Control Board Regulations.

3. On February 17, 2008, Licensee, by its servants, agents or employees, sold, furnished and/or gave alcoholic beverages on Sunday between 2:00 a.m. and 11:00 a.m., in violation of Sections 406(a)(3) and 493(16) of the Liquor Code.

4. On February 17, 2008, Licensee, by its servants, agents or employees, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m., in violation of Section 499(a) of the Liquor Code.

5. On February 17, 2008, Licensee, by its servants, agents or employees, failed to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages, in violation of Section 499(a) of the Liquor Code.

DISCUSSION:

Upon thorough review of the testimony and evidence presented, this court is of the opinion that the Bureau has established the violations as charged in Counts one through four of this citation by a clear preponderance of the evidence. *Pennsylvania Liquor Control Board v. Leggens*, 542 A.2d 653 (Pa. Cmwlth. 1988); *Omicron Enterprises*, 449 A.2d 857 (Pa. Cmwlth. 1982).

PRIOR RECORD:

Licensee has been licensed since September 22, 2006, and has had three prior violations, to wit:

Citation No. 07-0275X. Fine \$150.00.

1. Issued worthless checks in payment for purchases of malt or brewed beverages. November 22, 30 and December 5, 2006.

Citation No. 07-2337. Fine \$2,400.00 and R.A.M.P. training mandated.

1. Sales after the license expired and had not been renewed and/or validated. September 2, 2007.
2. Sales to a visibly intoxicated person. September 2, 2007.

Citation No. 08-0328. Eight days and until Licensee is in compliance as a bona fide restaurant.

1. Not a bona fide restaurant in that food items were insufficient and Licensee failed to provide food upon request.
2. Failed to require patrons to vacate the premises not later than one-half hour after the required time. January 1, 2008.

3. Permitted patrons to possess or remove alcoholic beverages after 2:30 a.m.
January 1, 2008.
4. Sales between 2:00 a.m. and 7:00 a.m.
January 1, 2008.

PENALTY:

With respect to Counts one, three and four, 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 types found in this case. As to Count two, Section 471 of the Liquor Code prescribes a penalty of license suspension or revocation or a fine of not less than \$1,000.00 or more than \$5,000.00 or both for a violation of this type.

In consideration of the fact that Counts three and four arose out of the same factual circumstances, they shall be deemed to have merged solely for the purpose of the imposition of a penalty.

This court notes that its failure to submit a pre-hearing memorandum as well as its failure to appear at the administrative hearing demonstrates a clear lack of interest in this liquor license.

The record discloses that Licensee has had two prior violations involving the sale, furnishing and/or giving of alcoholic beverages during prohibited hours. Therefore, Licensee shall be treated as a repeat offender.

Moreover, Licensee is advised that the operation of its licensed premises as an "open saloon" shall not be tolerated.

For the foregoing reasons, the following penalties shall be imposed:

Count one - \$400.00.

Count two - \$2,500.00 and a suspension of Licensee's restaurant liquor license for a period of three days.

Counts three and four (merged) - \$500.00.

ORDER:

THEREFORE, it is hereby ordered that The Dog, LLC, t/a The Dog, License Number R-AP-SS-1275, pay a fine of \$3,400.00 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.

THE DOG, LLC
Citation Number 08-0749

IT IS FURTHER ORDERED that License No. R-AP-SS-1275 be suspended for a period of three (3) days **BEGINNING** at 7:00 a.m. on Wednesday, January 7, 2009 and **ENDING** at 7:00 a.m. on Saturday, January 10, 2009.

Licensee is directed on Wednesday, January 7, 2009 at 7:00 a.m. to place the enclosed 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 Saturday, January 10, 2009 at 7:00 a.m. to remove the placard of suspension and return the license to its original wall location.

Jurisdiction is retained to ensure compliance with this Order.

Dated this 31st day of October, 2008.



Roderick Frisk, J.

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NOTE: 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.

THE DOG, LLC
Citation Number 08-0749

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 PA 17110-9661

Citation No. 08-0749
The Dog, LLC