

Mailing Date: JUL 28 2010

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-3042
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W09-377155
	:	
v.	:	LID - 52271
	:	
RISTORANTE PAPARAZZI INC	:	
47-49 N LEHIGH AVE	:	
FRACKVILLE PA 17931-1423	:	
	:	
SCHUYLKILL COUNTY	:	
LICENSE NO. R-AP-SS-17815	:	

JUDGE SHENKLE
BLCE COUNSEL: Roy Harkavy, Esq.
LICENSEE COUNSEL: Stephen P. Ellwood, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on January 7, 2009. The citation alleges that Licensee violated §5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), on October 3 and 4, 2008, by permitting the use on the inside of the licensed premises of a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

A hearing was held on Friday, May 14, 2010 in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On Friday, October 3, 2008, a liquor enforcement officer arrived at the licensed premises at about 11:10 p.m. There was a five dollar cover charge. A four-piece band was set up to play, using loudspeakers on either side of a stage. The band was on a break when the officer arrived at the premises, but they began to play after about 15 to 20 minutes (N.T. 5-6).

2. At about 11:40 p.m. the officer went outside and continued to hear the same music he had heard inside. He re-entered the premises and stayed until about 12:10 a.m. on Saturday, October 4,

2008. At that time he left again and again heard the band's music outside, at a distance of fifty to sixty feet (N.T. 7).

3. The officer returned to the premises that evening, at about 10:30 p.m., and paid a six dollar cover charge to hear a different band. On this occasion he heard the music outside before entering the premises, where he observed that this band was using the same loudspeakers he had seen earlier. He left the premises and again heard the band's music outside (N.T. 9-10).

4. Licensee's corporate officer was unaware of any complaints about the licensed premises from anybody in the neighborhood. She attempts to keep the amplified sound at such a level that it does not escape the licensed premises, and periodically checks on this. If she finds that the sound can be heard outside, she turns down the volume herself, if need be (N.T. 34).

5. Licensee's sound man also makes regular outside sound checks, and reduces the sound level if it can be heard outside. This has resulted in complaints from a neighboring barber that he can no longer hear the music outside for free, but no other complaints (N.T. 36-37).

6. In a hearing on September 29, 2009, before a Hearing Examiner for the PLCB, a full-time Frackville Borough Police Officer testified that there had been noise complaints against the premises but that after remedial measures were taken, the number of complaints decreased (9/29/09 N.T. 17-31).

7. In the same hearing, a private investigator employed by Licensee testified that he canvassed six neighbors of the licensed premises in the summer of 2007 and heard no complaints (9/29/09 N.T. 32-40).

8. In the same hearing, one of Licensee's co-owners testified that when they bought the building in July, 2003, it was in poor condition. Since then, substantial improvements have been made, including insulation and construction intended to contain noise. The owner identified the establishment's menu and wine list, showing that upscale cuisine is available. Numerous photographs were introduced to show the context of the premises (9/29/09 N.T. 41-95).

9. The record of the hearing referred to in findings 6 through 8 above was received in evidence by the Honorable D. Michael Stine, Judge of the Court of Common Pleas of Schuylkill County, in a hearing held on May 10, 2010. In that hearing, Licensee presented the testimony of seven additional witnesses who had been close neighbors of the establishment for a sufficient time to judge the effect of Licensee's operations on the peaceable enjoyment of their properties. All of them stated that they were not disturbed by sound emanating from the premises (Exhibit L-1).

CONCLUSIONS OF LAW:

Licensee violated §5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), on October 3 and 4, 2008, by permitting the use on the inside of the licensed premises of a loudspeaker, whereby the sound of music could be heard outside.

DISCUSSION:

The hearing before Judge Stine was on appeal from the Board's refusal to renew Licensee's amusement permit, which it did notwithstanding the examiner's recommendation to the contrary. At this writing, Judge Stine has not decided the matter.

The evidence presented to the examiner by Licensee, as well as the additional evidence presented to Judge Stine, is of a sort intended to influence a decision-maker who has discretion to overrule the Board. I am not such a decision-maker. If I find that credible evidence supports the violation alleged in a citation, I must sustain it. I can consider evidence that an establishment has made substantial progress in eradicating a past problem in mitigation of penalty only.

PRIOR RECORD:

Licensee has been licensed since February 6, 2004, and has had prior violations as follows:

Citation No. 04-2311. \$150.00 fine.

1. Noisy and/or disorderly operation. March 14, April 24 and August 15, 2004.

Citation No. 05-0372. \$200.00

1. Loudspeakers could be heard outside.
December 19, 31, 2004, January 15 and February 11, 2005.

Citation No. 05-1421. \$150.00 fine.

1. Loudspeakers could be heard outside. April 23, May 20 and June 4, 2005.

Citation No. 05-1917. \$50.00 fine.

1. Loudspeakers could be heard outside. August 19, 2005.

Citation No. 05-2490. \$1,000.00 fine.

1. Sales to a minor. October 6, 2005.

Citation No. 06-1312 (including 06-0225, 06-3001, and 06-1911, which were consolidated for all purposes as No. 06-1312). \$600.00 fine.

1. Loudspeakers could be heard outside. April 15, July 7, 8 and December 1, 2006.

Citation No. 07-2934. \$400.00 fine.

1. Loudspeakers could be heard outside. November 9 and 10, 2007.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$50.00 to \$1,000.00 range, or both, for violations of this type.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Ristorante Paparazzi, Inc., License No. R-AP-SS-17815, shall pay a fine of five hundred dollars (\$500.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

Dated this 6TH day of JULY, 2010.



David L. Shenkle, J.

jb

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.

Detach Here and Return Stub with Payment

The fine must be paid by cashier's check, certified check or money order. Personal and business checks are not acceptable unless bank certified. 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

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