

Mailing Date: SEP 16 2010

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-0428
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-380473
	:	
C & D TRIANGLE TAVERN INC.	:	
T/A TRIANGLE TAVERN	:	LID - 55391
1338-40 S. 10 TH ST.	:	
PHILADELPHIA PA 19147-5619	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-764	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

JAMES E. DAILEY, ESQ.

FOR THE LICENSEE:

**JAMES D'ACHINO PRO
SE**

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

C & D Triangle Tavern, Inc.
t/a Triangle Tavern Citation
No. 09-0428

This proceeding arises out of a citation that was issued on March 3, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against C & D Triangle Tavern, Inc., t/a Triangle Tavern, License Number R-AP-SS-764 (hereinafter "Licensee").

An Administrative hearing was held on Tuesday, January 19, 2010, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

The citation charges Licensee with violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471 and Section 2701 of the Crimes Code, 18 Pa. C.S. Section 2701, in that on May 23, 2008, Licensee, by its servants, agents or employes, committed simple assault.

FINDINGS OF FACT:

1. The Bureau of Enforcement conducted an investigation which began on August 31, 2008 and was completed on February 6, 2009. A notice of violation letter dated February 17, 2009 was sent to the licensed premises by certified mail, return receipt requested. That mailing was returned unclaimed. A citation was issued to the licensed premises dated March 3, 2009. The citation was signed as received on March 7, 2009 (N.T. 13-15 and Exhibits B-1 and B-2).

2. An officer from the Bureau of Enforcement testified that in August of 2008, she was employed by the Bureau and had been employed for approximately six years. In August of 2008, she conducted an investigation of the licensed premises after having received a complaint for discriminatory practices and disorderly conduct, as the result of an altercation inside the bar (N.T. 7-8).

3. The officer contacted the complainant and spoke with her and advised her that she would be out to take statements towards the end of the investigation. The officer made her first visit to the premises on September 19, 2008. When she arrived at the premises, it was closed for a five day suspension relative to another violation (N.T. 8-9).

4. The officer made other undercover visits to the premises during September and October, but found no violations (N.T. 9).

5. During the course of the investigation, the officer went to the complainant's home and took a written statement from each of the two complainants, M.C. and D.N. The officer also received information from local police officers (N.T. 8-10).

6. According to the incident report provided by the police, the complainants are an interracial couple and alleged that the Licensee was verbally abusive, using racial slurs towards them and that the Licensee ultimately physically assaulted them (N.T. 10).

7. The officer interviewed the Licensee, James D'Achino, on January 5, 2009. A citation was issued in that Mr. D'Achino was arrested for assault on the patrons (N.T. 11-12).

8. The officer stated that she did not interview others who may have been present during the alleged incident, in that Mr. D'Achino did not want other patrons involved. The officer also did not interview the bartender or other employees or staff persons (N.T. 15-16).

9. An officer from the Philadelphia Police Department indicated that he was working from midnight to 8:00 a.m. and at some point during the evening of March 23 into the early morning hours of March 24, 2008, he was called to the licensed premises (N.T. 16-17).

10. The officer interviewed the complainant, M.C., who stated that she had a dispute with an unknown male inside the licensed premises who had referred to her as a "f---ing monkey" and pushed her against the bar and grabbed her arm, causing her shirt to rip. The male was later determined to be James D'Achino (N.T. 9).

11. When the officer arrived at the premises, Mr. D'Achino, the person who was alleged to have assaulted M.C., was not present (N.T. 20).

12. After the assault, the victims indicated that the offender got into a white Cadillac. The license plate was run and it came back with Mr. D'Achino's name. They identified Mr. D'Achino as the person who committed the assault. The officer advised M.C. and D.N. to file a private criminal complaint with the District Attorney's office (N.T. 19, 25-26).

13. A detective from the Philadelphia Police Department testified that he interviewed the complainant, M.C., and the complainant/witnesses D.N. The detective called Mr. D'Achino and asked him to come in for an interview (N.T. 24-25).

14. The detective indicated that he went to the bar and spoke with the bartender but never officially interviewed him. The officer left his card and asked him to come in for an interview. Neither the bartender nor any other witnesses were ever interviewed (N.T. 35-36).

15. The detective indicated that it is standard procedure with the Philadelphia Police Department to advise the complainant to file a private criminal complaint for a simple assault,

when there are no injuries, such as a broken bone and when the offender's name and address, date of birth and social security numbers are known (N.T. 27).

16. The detective indicated that if the activity had been witnessed by a police officer, then the Philadelphia Police officer would have made the arrest and no private criminal complaint would have been necessary (N.T. 27).

17. The complainants called the Human Relations Commission and complained that the matter was a hate crime and was racially motivated. After speaking with his captain, the detective was advised to complete an arrest warrant affidavit for Mr. D'Achino and have the District Attorney's charging unit decide whether the state would take the case. Eventually, Mr. D'Achino was charged with criminal assault (N.T. 30-31 and Exhibits B-3, B-4 and B-5).

18. The Philadelphia Human Relations notified the Licensee that the Commission made a finding of "charge not substantiated." It also indicated that the matter would remain closed unless the complainant requested there be a review hearing (N.T. 56-65).

19. M.C. testified that she resides in South Philadelphia with her now husband, D.N. She is employed with the University and has been for approximately a year and a half. On May 23, 2008, she and D.N. went to dinner at a South Philadelphia pub and shared a sandwich and appetizer and each had a beer. They decided to continue their night and pick up a night cap at a bar on the way home. They left the restaurant at approximately 11:00 p.m. and walked down the street to the licensed premises. They were at the premises on one prior occasion earlier in March of 2008 (N.T. 38-40).

20. M.C. and D.N. arrived at the bar at approximately 11:30 p.m. on May 23, 2008. M.C. indicated that the serving bar wraps around the room and is very long with a number of barstools. When the two entered, there was one woman who was sitting near the entrance. Mr. D'Achino was sitting in the corner facing the entrance (N.T. 40-41).

21. D.N. and M.C. sat a few barstools away from Mr. D'Achino. When they first sat down, there was a couple on the inside of the bar and a gentleman seated next to them. Both left shortly after the two ordered their beers, leaving D.N., M.C., Mr. D'Achino and another woman who was seated close to the entrance (N.T. 42-43).

22. D.N. and M.C. ordered two Lagers and two shots of Jack Daniels. They drank the Jack Daniels and proceeded to drink their beer (N.T. 43).

23. When D.N. and M.C. sat down, they noted that the woman sitting close to the entrance was a light skinned black woman and they also noted that Mr. D'Achino was talking quite a bit (N.T. 44).

24. Mr. D'Achino stated, "You're okay, but this --- excuse me, sh-- right here I can't stand. This sh-- right here, I hate this sh--" (N.T. 44).

25. M.C. indicated to D.N. that she thought that he was referring to the two of them. Wanting to finish her beer in peace, she decided to put some music on the jukebox, which was behind her (N.T. 44-45).

26. M.C. got up and turned around. As she walked towards the jukebox, James D'Achino said "Look at that f--ing monkey." D.N. turned, stood up and asked Mr. D'Achino was he talking to M.C. Mr. D'Achino answered "You're damn right I was talking to you. This is my f--ing place and I'll do whatever the f--k I want." Mr. D'Achino then lunged at D.N. and put his hands around D.N.'s throat. M.C. came from behind D.N. and took a swing at Mr. D'Achino. She scratched Mr. D'Achino's face and he lunged at her. When he lunged at her, he continued using racial slurs against her, calling her "nigger, moolie and monkey." The bartender came from behind the bar and pushed D.N. towards the entrance. At this time, Mr. D'Achino was still lunging at M.C., and D.N. pushed passed the bartender telling the bartender that they just wanted to get their stuff and get out (N.T. 45-46).

27. M.C. was attempting to retrieve her jacket and her open purse. Her purse was open because she had her wallet out to get money to play a song on the jukebox (N.T. 46).

28. When Mr. D'Achino lunged at M.C. the second time, they fell into the barstool. Some of M.C.'s things spilled out on the ground, including her cell phone. D.N. helped her off the floor and they picked up her stuff. M.C. indicated that when James D'Achino came towards her, he lunged and she used his weight to push him away from her. But as he pushed away from her, she fell with him and the barstool fell over along with her purse, spilling its contents (N.T. 46-47).

29. The bartender then decided to restrain Mr. D'Achino and allowed M.C. and D.N. to get their things and to leave (N.T. 48).

30. When the police came, no patrons remained in the premises. Mr. D'Achino left soon after they called 911 (N.T. 48).

31. At the time that D.N. and M.C. were at the bar, they believed Mr. D'Achino to be just another patron. When they had visited the premises in March, he was seated in the same area of the bar (N.T. 50).

32. When Mr. D'Achino first began talking, the bartender approached him a couple of times and was heard to say "Everything's cool, you know be cool, everything's fine" (N.T. 50).

33. Mr. D'Achino was consuming what M.C. and D.N. believed to be an alcoholic beverage when they entered the licensed premises (N.T. 51).

34. M.C. described Mr. D'Achino as being very red faced and with slurred speech. M.C. concluded that he was intoxicated (N.T. 51-52).

35. M.C. indicated that she contacted the Philadelphia Police Department, the Liquor Control Board, Human Relations Commission and the Philadelphia Weekly (N.T. 53-54).

36. A representative, Debbie Rhubarb, from the Human Relations Commission took a report, but M.C. never testified before the Commission. The representative informed M.C. that Mr. D'Achino had brought in several witnesses and that the charge was not substantiated (N.T. 55-57 and Exhibit B-3).

37. M.C. has not appealed the decision because she felt after her conversation with Debbie Rhubarb from the Human Relations Commission that the matter was pretty much closed. Therefore, she decided to explore other options, which included contacting Philadelphia Weekly and the Liquor Control Board (N.T. 56-59).

38. M.C. did attempt to file a private criminal complaint, however, she was told she would have to wait because the case was still active under the District Attorney's office (N.T. 59-60).

39. An article was written in the Philadelphia Weekly regarding the incident (N.T. 60).

40. M.C. and D.N. went to criminal court in July of 2009. M.C. testified in the proceedings at that time (N.T. 60-61).

41. Mr. D'Achino bought a witness to that proceeding who claimed to be in the bar at that time (N.T. 61-62).

42. M.C. was present for the Court hearing, although she was sequestered and at times not allowed to be in the Courtroom. She recalls that Licensee was found guilty of simple assault and racial intimidation and was placed on probation for eighteen months. M.C. indicates that that incident has negatively impacted on her life (N.T. 62-63).

43. D.N. testified that he is employed by a non profit agency. He has been employed with that agency for a year and a half. On May 23, 2009, he visited the licensed premises along with his now wife M.C. They were not married at the time. He also testified that they had dinner at another location and had one drink during dinner. They subsequently walked to the licensed premises (N.T. 67-68).

44. D.N. indicated that three people were leaving the premises shortly after they entered. There was a jukebox playing and there was a television on. D.N. and M.C. ordered drinks, the jukebox stopped and D.N. noticed that the Licensee, who was sitting at the bar, was mumbling. He had a beverage in front of him. D.N. could not make out all of what he was saying, but did note that he said, "but this s--t right here I can't stand." M.C. and D.N. exchanged looks trying to figure out if he was in fact talking about them. The bartender went over a couple of times and told Mr. D'Achino that it was cool (N.T. 68-69).

45. Once the music stopped, it was quiet and they could hear Mr. D'Achino talking. M.C. went to the jukebox and as she got up, Mr. D'Achino stated, "F--king monkey." At that point, D.N. stood up and asked if he was talking about his girlfriend. He was told by Mr. D'Achino that he could do "what the f--k I want." He then reached over and grabbed D.N. by the neck and pushed him against the wall. M.C. then ran over swinging at Mr. D'Achino attempting to get him off of D.N. Mr. D'Achino then turned on her and there was a scuffle. The bartender attempted to usher D.N. out of the door. D.N. saw Mr. D'Achino charging M.C. and flailing into her. They both fell into the barstool. D.N. pushed the bartender out of the way, hit Mr. D'Achino a couple of times, got him off of M.C., picked her up and told them that they just wanted to get their things. Her things were on the ground and so was his hat and jacket. The bartender eventually grabbed Mr. D'Achino and pulled him away from the two of them (N.T. 70-71).

46. D.N. also recalled that while the fight was going on, Mr. D'Achino continued to spew racial slurs (N.T. 72-73).

47. Mr. D'Achino was present on a previous visit when D.N. came to the establishment (N.T. 73).

48. M.C. and D.N. copied down Licensee's license tag number and reported it to the police (N.T. 73).

49. Mr. D'Achino identified himself as the bar owner just before choking D.N. (N.T. 74).

50. D.N. also testified in a criminal matter. He recalled Mr. D'Achino being found guilty of racial intimidation and simple assault (N.T. 75-76).

51. D.N. stated that this incident had a negative impact on his life and caused stress in his relationship with M.C. (N.T. 76).

52. D.N. identified Mr. D'Achino as the Licensee and the person who assaulted him on May 23, 2008 (N.T. 76-77).

53. Mr. D'Achino, the Licensee, declined to make a statement (N.T. 77).

CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

On May 23, 2008, Licensee committed simple assault, ethnic intimidation and recklessly endangering another person on the licensed premises, in violation of Section 471 of the Liquor Code, 47 P.S. Section 4-471 and Section 2701 of the Crimes Code, 18 Pa. C.S. Section 2701.

PRIOR RECORD:

Licensee has been licensed since November 4, 2005, and has a record of prior violations as follows:

Citation No. 07-0181C. \$2,000.00 and R.A.M.P. training mandated.
Reconsidered and modified penalty to five days suspension and
R.A.M.P. training mandated.

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t/a Triangle Tavern Citation
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1. Sales to a visibly intoxicated person.
December 14, 2006.
2. Sales to a minor.
December 21, 2006.

DISCUSSION:

The citation charged Licensee with a violation of Section 471 of the Liquor Code, 47 P.S. §4-471, in that on May 23, 2008, Licensee committed simple assault in violation of Section 471 of the Liquor Code, 47 P.S. §4-471 and Section 2701 of the Crimes Code, 18 Pa. C.S. §2701.

It is well established that the Bureau must prove its case by a fair 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).

As the sole trier of the facts, the ALJ is charged with determining the weight and sufficiency of all testimonial evidence. *State Correctional Institute v. Robison*, 561 A.2d 82 (Pa. Cmwlth. 1989). M.C. and D.N. were found to be very credible witnesses. The two complainants testified that they took extraordinary efforts first going to the police, who initially advised them to file a private criminal complaint. M.C. and D.N. also went to the Human Relations Commission, District Attorney's Office, the press and the Bureau of Liquor Control Enforcement, in order to redress this matter. Eventually the District Attorney's office elected to prosecute the matter.

The complainants testified that they were present and testified at a trial in July of 2009. There, Licensee presented a witness on his behalf. Licensee was found guilty of racial intimidation and simple assault relative to the March 23, 2008 incident at the licensed premises. The Office of Administrative Law Judge takes Judicial Notice of the records of the Unified Judicial System of the Commonwealth of Pennsylvania, which indicates that James D'Achino, a.k.a. James Whelan/James Whalen was tried in the Municipal Court of the Court of Philadelphia on July 7, 2009 and found guilty of Ethnic Intimidation, Simple Assault and Recklessly Endangering another person. He was given a maximum of 18 months probation.

According to the records of the Liquor Control Board, James H. D'Achino is the sole corporate officer of the licensed premises. In the hearing before the Office of Administrative Law

Judge, Mr. D’Achino chose to represent himself. Mr. D’Achino cross-examined the Bureau’s witnesses. Mr. D’Achino also submitted documentation indicating that he presented witnesses to the Human Relations Commission and that the commission dismissed the matter as being *unfounded*. Both D.N. and M.C. stated that they submitted statements in the nature of a complaint to the commission, but did not testify before the Commission. Licensee presented no witnesses or make any statement on his own behalf in the instant proceedings.

The testimony of the Bureau’s witnesses supports a finding that Mr. D’Achino is the sole corporate officer and that he assaulted M.C. and D.N., patrons of the premises, at the licensed premises. Mr. D’Achino’s commission of criminal assault and racial intimidation was connected to the operation of the establishment. *Com. v. Price Bar*, 201 A.2d 221 (Pa. Super. 1964); *Primo’s Bar v. Pennsylvania Liquor Control Board*, 409 A.2d 1369 (Pa. Cmwlth. 1979); *Pennsylvania Liquor Control Board v. Pollock*, 484 A.2d 206 (Pa. Cmwlth. 1984).

Mr. D’Achino clearly has serious issues which are beyond this Court’s ability to remedy. Based upon the testimony of the complainant, Mr. D’Achino was drinking at the licensed premises and appeared to be intoxicated at the time of the offense. On this occasion, Mr. D’Achino was unable to control his rage supposedly brought on by the mere presence of the interracial couple on the premises. Mr. D’Achino was verbally abusive, calling D.N. a “f---ing monkey” and physically abusive, choking D.N. and fighting with M.C. We do not know when, or which, of life’s situation will again trigger this volatile violent behavior. Mr. D’Achino was unable to curtail his behavior, despite the fact that the bartender was consoling and cajoling him and finally physically restraining him. Mr. D’Achino articulated an entitlement to spew racial slurs and to assault patrons as an absolute right of ownership of the premises. Mr. D’Achino’s penalty is fashioned by his own tongue.

Mr. D’Achino will be required to divest himself of ownership and active participation in the operation of the licensed business, e.g. he can not serve as a corporate officer or manager. If Mr. D’Achino fails to do so, he will face suspension and eventually revocation of the license. The Liquor Code does not specifically give the OALJ power to order divestitures, but clearly provides for Orders of revocation. The authority of the Administrative Law Judge to direct divestiture is a lesser penalty included within the penalty of revocation. *See M.A. O’Donnell Associates, Inc., Appeal to Pennsylvania Liquor Control Board*, Citation No. 00-0313, wherein Licensee was ordered to divest his interest after pleading *nolo contendere* to indecent assault of a patron in a room above the licensed premises.¹

¹ In Citation No. 96-0939, this Court examined the issue of divestiture and dismissed a Citation, wherein the Bureau asked this Court to Order a divestiture of a Licensee’s interest in a corporation. In that matter, the Pennsylvania Liquor Control Board had already ordered divestiture. At that time, I wrote that I believed that there was some support for the

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Divestitures have been used in the past to keep from harming innocent parties, where a corporate officer has behaved criminally unrelated to the liquor license. *See Pennsylvania Liquor Control Board v. Sherman*, 566 A.2d 362, Note 2 (1989) *citing Pennsylvania Liquor Control Board v. Pollack*, 484 A.2d 206 (1984). Mr. D'Achino is the sole corporate owner – there are no innocent owners. Divestiture, in this case, is a kindness of the Court, i.e. allowing Licensee to avoid revocation, not a right or privilege of the Licensees.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of 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.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, C & D Triangle Tavern, Inc., t/a Triangle Tavern, License Number R-AP-SS-764, pay a fine of One Thousand Dollars (\$1,000.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that the Restaurant Liquor License of C & D Triangle Tavern, Inc., t/a Triangle Tavern, License Number R-AP-SS-764, be suspended for a period of one (1) day **BEGINNING** at 7:00 a.m. on Monday, February 28, 2011 and **continuing thereafter** until Licensee has submitted a Certification indicating he submitted application to the Pennsylvania Liquor Control Board that he has sold, transferred, or otherwise divested himself of ownership and any active participation in the operation of the licensed premises.

The suspension can be avoided if Licensee divests himself of interest in the license prior to the date of suspension by naming new corporate owners and managers (Mr. D'Achino may

OALJ ordering divestiture, but was reluctant to do so unless it was based on a Citation brought for Licensees failing to divest after being directed to do so by the Board. See 40 Pa. Code §17.41. Here the ALJ reaches a different result based upon a very different set of facts and circumstances.

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not be an officer in the corporation or have active participation in the operation of the premises), transferring the license, selling the license or placing the license in safekeeping pending sale of the license.

Licensee is directed on Monday, February 28, 2011 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.

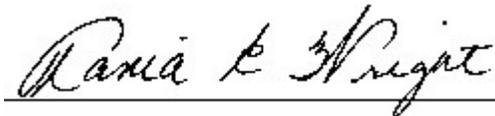
Licensee is advised if a replacement placard is needed for any reason they are available at all State Liquor Stores/Wine and Spirit Shoppes.

The "Bureau of Enforcement" is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

THE LICENSEE MAY NOT REOPEN THE LICENSED PREMISES UNTIL FURTHER ORDER FROM THE OFFICE OF ADMINISTRATIVE LAW JUDGE.

In order to insure compliance with this Order, jurisdiction of this matter is retained.

Dated this 13TH day of September, 2010.



Tania E. Wright, J.

NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO 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.

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mm

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, along with any required documentation, to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

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