Mailing Date: JAN 11 2010

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 09-1313
	:	Incident No. W07-384873
v.	:	
	:	LID - 19593
JOHN W. SHAFFER T/A BRANDON HOTEL CENTRAL STREET BOX 46 ROSSITER, PA 15772-0046	:	
INDIANA COUNTY LICENSE NO. R-AP-SS-18664	:	

BEFORE: JUDGE THAU
BUREAU COUNSEL: Emily L. Gustave, Esquire
LICENSEE: Pro Se

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on June 19, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against John W. Shaffer, t/a Brandon Hotel (Licensee), License Number R-AP-SS-18664.

The citation charges Licensee with a violation of Section 5.42 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.42]. The charge is that on January 24, 2009, Licensee's licensed premises had insufficient illumination.

1. Commonwealth Exhibit No. C-2, N.T. 10

An evidentiary hearing was conducted on November 19, 2009 at the Hampton Inn, 180 Charlotte Drive, Altoona, Pennsylvania. Licensee appeared at the hearing personally. I advised Licensee of his right to counsel, to cross-examine witnesses and to present testimony. Licensee acknowledged that he understood those rights and that he was prepared to go forward without an attorney.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on November 21, 2008 and completed it on April 25, 2009. (N.T. 6)

2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on April 29, 2009. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 8)

3. A Pennsylvania State Police Trooper went to the licensed premises on January 24, 2009. He was assisted by a second State Police Trooper. They were executing an arrest warrant for a subject who was known to frequent the licensed premises. The individual was to be arrested for driving under the influence. They arrived somewhere between 11:00 a.m. and 11:30 a.m. The Officers were in full uniform. When they entered, one Officer noticed a woman standing just inside the entrance. The woman was identified as the "significant other" of the individual for whom the arrest warrant was issued. The Trooper asked the woman where her boyfriend was. She nodded to a location within the premises. The Trooper noticed there were two seats at the bar where two individuals had been seated. He assumed one was for the woman he spoke to and the second was for the individual he was seeking to arrest. (N.T. 17-21)

4. The Trooper noticed there were two additional women seated at the corner of the bar. The Trooper gestured to both as if to say: "Is he in here?" The Trooper then went to an area of the bar that was "pretty dark." It was an open dance floor type area. There was some illumination from the bar area. The Trooper could see to the point that he was not going to bump into objects even though the outside walls were pitch black. Because he entered the facility from daylight into dim light and then into further darkness, the Trooper's eyes needed time to adjust. He did notice a door and found the suspect standing up in that doorway as the Trooper's eyes adjusted to the light level in that area. The suspect was then taken into custody without struggle. The lights were turned on after the suspect was arrested. (N.T. 22-28)

5. The area in which the arrest took place has some tables and a pool table. Licensee's wife was one of the two individuals seated at the bar. She had no idea why the Troopers entered the premises. The Trooper did ask her about the suspect but she had no idea who the suspect was. The visit by the Troopers caught Licensee's wife by surprise. (N.T. 35-43)

6. The back area of the premises where the pool table is situated was not being used to service customers at the time. That is why the lights were not on. When Licensee's wife was asked to turn on the lights, she did so. (N.T. 44)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

2. The Bureau has **failed** to prove that on January 24, 2009, Licensee's licensed premises had insufficient illumination.

DISCUSSION:

In pertinent part, the subject regulation provides:

> §5.42….licensees…, shall at all times during the hours when the sale of liquor or malt or brewed beverages is permitted maintain throughout the licensed premises illumination sufficient to insure clear visibility of the premises and to permit patrons to read a menu or newsprint with ease. Tables and booths available for the accommodation of the public shall be so situated as to permit clear visibility of occurrences at the tables or in the booths.

As regulations go, this one is ripe for a Constitutional attack as being facially invalid because it is vague. The second sentence is particularly problematic as it demands the positioning of tables and booths to permit observation from an unspecified location. For all intents and purposes, the regulation's lack of specificity renders it difficult to enforce.

In my own experience, I have patronized licensed premises in which I was able to read a menu but had to place the menu closer to a light source than in other establishments. On other occasions I have witnessed a portion of a licensed premises go completely dark for an instant, to be followed by a display of strobe lights.

In larger licensed premises, I have passed entire rooms darkened because that portion of the licensed premises was not in use. Some establishments keep the restroom lights off when not in use, requiring a customer to search for the light switch. It is possible for a fugitive to hide in an unlit closet in a licensed premises. It is also possible for the same fugitive to secrete himself under a table or any other area where the light source is blocked, causing shadows.

These few examples, both real and hypothetical, underscore a reading of an already subjective regulation that is unreasonable. The Bureau's reading, in my estimation, is as follows: Every square inch of a licensed premises must be sufficiently and equally illuminated for clarity of vision in the event an arrest warrant is served in a licensed premises, so that a fugitive will have no unilluminated place to hide and so that any shadows caused by any light source is washed away by another.[2]

The Bureau raises the issue of Officer safety as being compromised if I do not sustain the charge. I am one who is deeply concerned with the safety of those who stand in the front line of protecting our society. I have backed up these words with action when I have perceived a threat.

This is not such a case. The Troopers who entered the premises did not display a high level of concern for safety. Obviously, in their mind, there was no such serious threat. Indeed, they had the option, as Enforcement officers do, to direct the owner to turn up all the lights before the search for the fugitive began.

When a fugitive selects the most light free place to hide in an area of a licensed premises that is darkened because it is not in use, and when the licensee is surprised by the unexpected entry of uniformed peace officers whose intention it is to arrest a fugitive, at a time when the peace officer's eyes have yet to adjust fully from outdoors to indoors, I cannot conclude the licensee violated the regulation at issue.

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2. I concede the above wording is a huge stretch and certainly not likely to represent the Bureau's genuine interpretation. However, when applied to the instant facts, the re-phrasing may not be too far out of line.

ORDER:

NOW THEREFORE, it is ordered and decreed that Citation No. 09-1313, issued against John W. Shaffer, t/a Brandon Hotel, is hereby DISMISSED.

Dated this 23RD day of December, 2009.

Felix Thau, A.L.J.

pm

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.