

Mailing Date: SEP 29 2009

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1453
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-392621
v.	:	
	:	LID - 29800
SAMMARK, INC.	:	
T/A TONY'S BIG EASY	:	
129 S. PUGH ST.	:	
STATE COLLEGE, PA 16801-4745	:	
	:	
	:	
CENTRE COUNTY	:	
LICENSE NO. R-AP-SS-20004	:	

**BEFORE:** JUDGE THAU  
**BUREAU COUNSEL:** Emily L. Gustave, Esquire  
**LICENSEE:** Francis X. O'Brien, Esquire

**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 Sammark, Inc., t/a Tony's big Easy (Licensee), License Number R-AP-SS-20004.

This citation contains two counts.

The first count charges Licensee with violations of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that on April 10 and May 20, 2009, Licensee, by servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to two (2) visibly intoxicated male patrons.

The second count charges Licensee with violations of Section 471 of the Liquor Code [47 P.S. §4-471]. The charge is that on April 10, 16, 17, 18, May 9, 20 and 24, 2009, Licensee, by servants, agents or employes, failed to adhere to the terms of the court order, governing the operation of the licensed premises, issued by the Court of Common Pleas of Centre County, on March 3, 2009, at 2008-2863.

Licensee has executed a Statement of Admission, Waiver and Authorization in which Licensee: admits to the violation(s) charged in the citation and that the Bureau complied with the applicable investigatory and notice requirements of the Liquor Code, authorizes the Administrative Law Judge to enter an Adjudication without a hearing based on a summary of facts provided by the Bureau, and prior citation history, and waives the right to appeal this Adjudication.<sup>1</sup>

Based upon the admission(s) of Licensee and the summary of facts provided by the Bureau, I make the following Findings of Fact and reach the following Conclusions of Law.

FINDINGS OF FACT:

Count No. 1:

1. On April 10, 2009, a Bureau Enforcement Officer visited the licensed premises. The Officer observed a visibly intoxicated patron. The patron had difficulty maintaining his balance. There was a strong odor of alcohol emanating from the patron's breath. His eyes were glassy and bloodshot. The Officer asked the patron if he was in line to get another beer. The patron turned and attempted to focus on the Officer but had a hard time doing so. The patron mumbled a very slurred "yes" and then grabbed the Officer's arm for balance. The patron nearly fell over. The patron made his way closer to the bar, set his can on the bar along with a \$1.00 bill and was served a can of beer by a female bartender.

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1. The limitations regarding the scope of the Admission, Waiver and Authorization are expressed more fully in the discussion which follows.

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2. On May 20, 2009, a Bureau Enforcement Officer entered the licensed premises. The Officer was carded by a doorman but did not swipe the ID through a scanner nor did the doorman scan the Officer with a metal detecting wand. The doorman placed a green wristband on the Officer stating that it was eighteen and over night and that the wristband indicated the Officer was permitted alcohol. The Officer observed a visibly intoxicated patron. The patron was in possession of a twelve ounce can of beer. The patron leaned over to the Officer and with extremely slurred speech asked the Officer's name. The Officer asked the patron to repeat his question three times before the Officer understood what the patron was saying. The patron's eyes were glassy and bloodshot. The Officer detected the odor of alcohol on the patron's breath. The patron ordered six Tony Ts and paid for them. The bartender served the drinks to the table. The patron picked up one of the drinks but the bartender took it and told the patron he had a beer on the bar to finish. The patron went to the bar and chugged all of the beer. The patron then started to pick up various Tony Ts from the table and consumed them also.

#### DISCUSSION:

When this matter crossed my desk to prepare an Adjudication based on Licensee's submission of an Admission, Waiver and Authorization, I was taken aback by the description of the alleged unlawful conduct in Count No. 2.

My immediate thought was that I had no authority to entertain such a charge. As the described behavior violates a Court Order, my initial reaction was the offended party ought to seek relief from the Court which entered the Order in the first instance. Having some apprehension that the information provided did not supply an accounting sufficient to explore the contours of my authority, on September 16, 2009, I convened a telephone conference in which both counsel participated.

During the telephone conference, I was advised that this matter arose out of a refusal to renew the liquor license by the Pennsylvania Liquor Control Board. After the Pennsylvania Liquor Control Board offered to renew the license subject to Licensee's agreement to limiting conditions of operation via a Conditional Licensing Agreement, Licensee declined the offer and the license was not renewed.

Licensee appealed the Pennsylvania Liquor Control Board's action to the Centre County Court of Common Pleas pursuant to the Liquor Code. That Court refused to renew the license. Licensee then filed an appeal to the Commonwealth Court, which appeal is now pending. Licensee applied to the Centre County Court of Common Pleas for a stay pending appeal. The Court issued such a stay on March 3, 2009. In granting Licensee's request for a stay however, the Court imposed conditions upon Licensee, which conditions, the Bureau claims, Licensee violated as more specifically set forth in Count No. 2.

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The information I gleaned in that telephone conference call did nothing but provide clear and unequivocal support for my initial position. I am without any subject matter jurisdiction to adjudicate the alleged illegality as referenced in Count No. 2.

It is well settled law that subject matter jurisdiction may always be raised because it goes to the very essence of a tribunal's authority to manage the controversy presented it. As the telephone conference proceeded, I expressed the above concerns to the parties. I offered Licensee's counsel the opportunity to withdraw the Admission, Waiver and Authorization. Counsel advised the Admission, Waiver and Authorization was to be limited in its application to Count No. 1 and Licensee was not, in any manner whatsoever, admitting to the underlying conduct supporting Count No. 2.

As the telephone conference progressed, Bureau counsel asserted that subject matter jurisdiction was conferred upon me based on the "other sufficient cause" provision of Liquor Code Section 471 [47 P.S. §4-471]. It is now beyond any respectable dispute, the "other sufficient cause" provision in Liquor Code Section 471 incorporates an expansive array of violations which may be the subject matter of this administrative process. However, "expansive" is not equivalent to "boundary less." Even the Ponderosa had its border fences.

The "other sufficient cause" provision of Liquor Code Section 471 cannot be read to include virtually every illegality imaginable. The weakness of the Bureau's position may be underscored by the technique in formal logical discourse called: **reductio ad absurdum**. Will I next be asked to adjudicate a citation in which a licensee is charged with being impolite to a patron as the licensee violated some tome on etiquette?

When the Centre County Court of Common Pleas issued the Stay and placed conditions therein, the Court was essentially entering an interlocutory injunction. The Stay is interlocutory because

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it was issued during the pendency of litigation for the purpose of preventing irreparable injury by maintaining the status quo.

The Order is an injunction because it commands Licensee to engage in and refrain from activities specified therein.<sup>2</sup> As a consequence, the Centre County Court of Common Pleas has continuing and exclusive authority to manage the Order in question. The appropriate process to assert a violation of that Court's Order is via a Contempt proceeding.<sup>3</sup>

2. See "injunction," Black's Law Dictionary, Special Deluxe Fifth Edition.
3. I imagine some of our citizens may be displeased by the use of precious governmental resources to challenge unlawful conduct in this indirect manner even if we assume, for purposes of argument, that such a challenge is cognizable. In theory, a Petition for Contempt could have been filed as early as April 11, 2009 based on the alleged violation of the Order on April 10, 2009. Were we to include in that Petition for Contempt all of the dates of alleged violation that appear in Count No. 2, that Petition could have been filed shortly after the last date of violation, May 25, 2009.

CONCLUSIONS OF LAW:

Count No. 1:

1. **Sustained** as charged.

Count No. 2:

2. Because I have no subject matter jurisdiction to entertain the charge, it must be dismissed.

PRIOR RECORD:

Licensee has been licensed since July 28, 1992, and has had four prior violations:

Adjudication No. 05-0630. Fine \$200.00.

Discounted the price of alcoholic beverages for a period or periods other than a consecutive period of time not to exceed two hours in a business day.

January 26, 2005.

Adjudication No. 05-1565. Fine \$200.00.

Used loudspeakers or devices whereby music could be heard outside.  
May 21, 2005.

Adjudication No. 05-1766. Fine \$500.00.

Used loudspeakers or devices whereby music could be heard outside.  
July 16, 2005.

Adjudication No. 06-1144. Fine \$600.00 and 1 day suspension. 1.  
Discounted the price of alcoholic beverages for a period or periods in excess of 2 hours in a business day.

February 23 and March 16, 2006.

2. Sold and/or served an unlimited or indefinite amount of alcoholic beverages.

February 23 and 25, 2006.

3. Minors frequenting.  
March 1, 2006.

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 \$1,000.00 or more than \$5,000.00 or both for violations of the type found in Count No. 1 in this case.

That Section further provides for mandatory compliance with Liquor Code Section 471.1 [47 P.S. §4-471.1], pertaining to Responsible Alcohol Management when, as in this matter, Licensee has been found to have violated Section 493(1) as a first offense as it relates to sales to minors or sales to a visibly intoxicated patron.

I adopt the jointly recommended penalty as follows:

- Count No. 1 – \$1,800.00 fine.  
Count No. 2 – Dismissed.

ORDER:

**Imposition of Fine**

THEREFORE, it is hereby ordered that Licensee pay a fine of \$1,800.00 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.

**R.A.M.P. Requirements**

IT IS FURTHER ORDERED that Licensee shall comply with the requirements set forth in Liquor Code Section 471.1 pertaining to Responsible Alcohol Management in the following manner. Licensee must remain in compliance for a period of one year from the mailing date of this Adjudication.

**Retaining Jurisdiction**

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 17<sup>TH</sup> day of September, 2009.

  
Felix Shaw

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.**

Detach Here and Return Stub with Payment

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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 No. 09-1453  
SAMMARK, INC.