

Mailing Date: MAR 30 2010

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

PENNSYLVANIA STATE :
POLICE, BUREAU OF : Citation No. 09-1606
LIQUOR CONTROL ENFORCEMENT :
 : Incident No. W09-393927
v. :
 : LID - 39852
MATTHEW K SHELLY :
T/A THE N ZONE :
454 LIBERTY ST :
ALLENTOWN PA 18102 :
 :
LEHIGH COUNTY :
LICENSE NO. R-AP-SS-16454 :

JUDGE SHENKLE
BLCE COUNSEL: Roy Harkavy, Esq.
LICENSEE COUNSEL: Theodore J. Zeller, III, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on July 13, 2009. The citation alleges that Licensee violated §5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), on June 3, 2009, 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 February 12, 2010, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On June 3, 2009, liquor enforcement officers approached the licensed premises at about 6:00 p.m. and heard music coming out of it. The front door of the premises was propped open, and the windows were open, with screen inserts in place. An officer heard the music at a distance of fifty feet in several directions (N.T. 6-7).

2. Inside the establishment, an officer saw four wall-mounted loudspeakers playing the same music heard outside. The officers did an inspection of the premises and advised the bartender that the music was too loud. The bartender did not know how to lower it, so she unplugged the jukebox, and the music stopped (N.T. 7-8).

3. The officers reviewed the provisions of a Conditional Licensing Agreement with Licensee, but found no violations (N.T. 8-14).

4. Licensee determined the appropriate volume for his sound system in the mornings

. . . when there's hardly anything going on there, as the Officer said, I would go outside, open the door, go up and down the street, see what I figured was okay, and set it at that.

Q. Can you actually hear the music that's playing with the volume that it's set at outside the premises?

A. I would say I would have to agree with the Officer that there was --- you know, you can hear bass, but I don't think it's any louder than a television set.

Q. That's right outside the door. Could you hear it 50 feet away?

A. Muffled. Maybe muffled. -- (N.T. 14-15).

CONCLUSIONS OF LAW:

Licensee violated §5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), on June 3, 2009, by permitting the use on the inside of the licensed premises of a loudspeaker, whereby the sound of music could be heard outside.

DISCUSSION:

Licensee was operating on the type of assumption most of us make when we are cruising just above the speed limit on an expressway: there is some number on the speedometer, larger than the posted speed limit, at which drivers feel confident they will not be stopped by police.

There may be such a number in the collective mind of the Bureau of Liquor Control Enforcement, too, but if so, I have not yet found it. Certainly fifty feet of distance, the number found in this case, is larger than the threshold any reasonable officer would use.

Licensees should understand that the regulation in question prohibits all loudspeaker noise outside of a licensed premises. If it can be heard, a violation has been proven. When the Licensee himself admits in testimony that the noise could be heard fifty feet away, it does not help his case to add that it is "muffled."

When a violation is proven without contradiction, an administrative law judge has no choice but to impose a penalty, giving consideration to the nature of the violation and the prior history of the offender.

PRIOR RECORD:

Licensee has been licensed since May 21, 1997, and has had prior violations as follows:

Citation No. 01-0179. \$200.00 fine and 1 day suspension.

1. Manager failed to devote full time and attention to the operation of the business.

Citation No. 01-0915. \$100.00 fine and verification conditions corrected.

1. Not a *bona fide* restaurant (insufficient food).

Citation No. 08-2048. \$200.00 fine.

1. Loudspeakers could be heard outside. May 29, 2008.

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, Matthew K. Shelly, t/a The N Zone, License No. R-AP-SS-16454, shall pay a fine of three hundred dollars (\$300.00) 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 11TH day of MARCH, 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 No. 09-1606
Matthew K. Shelly