

Mailing Date: OCT 19 2010

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1734
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-386988
	:	
3651 JAQUEZ ENTERPRISES INC.	:	
3651 N. 5 TH ST.	:	
PHILADELPHIA PA 19140-4525	:	LID - 53380
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-EHF-OPS-9460	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

ERIK S. SHMUKLER, ESQ.

FOR THE LICENSEE:

HENRI MARCIAL, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 28, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against 3651 Jaquez Enterprises, Inc., License Number R-AP-SS-EHF-OPS-9460 (hereinafter "Licensee").

An Administrative hearing was held on Tuesday, March 2, 2010, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation, and the jurisdictional documents.

The citation charges Licensee with violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code Section 5.32(a), in that on October 16, 19, 25, November 10, 13, 14, 16, 17, 23, 30, December 1, 2, 3, 5, 12, 13, 14, 19, 20, 25, 26, 28, 29, 30, 31, 2008, January 3, 8, 10, 11, 16, 18, 19, 25, 31, February 1, 2, 6, 8, 13, 16, 17, 20, 22, 23, 27, 28, March 1, 2, 4, 5, 8, 9, 12, 13, 15, 16, 22, 23, April 5, 6, 10, 11, 12, 13, 19 and 27, 2009, Licensee, by its servants, agents or employees, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

FINDINGS OF FACT:

1. An officer from the Bureau of Enforcement testified that he has been employed with the Bureau for approximately seven and a half years, and he had an occasion to investigate 3651 Jaquez Enterprises based upon a complaint from a neighbor, living approximately 100 feet away, who is disturbed by music and noise from the premises (N.T. 6-7 and 24-25).

2. On January 13, 2009, the officer went to the licensed premises. It was open and operating. On January 17, 2009, the officer again went to the licensed premises. It was also open and operating with patrons inside. The officer visited the premises at approximately 9:30 p.m. on that occasion. No violations were found on either of these visits (N.T. 10).

3. On March 1, 2009, the officer visited the premises at approximately 9:50 p.m. When the officer first arrived, he stopped the vehicle on Erie Avenue, right in front of the licensed premises. He was able to hear music from that location. The officer then drove up a few feet and made a u-turn and parked across the street from the premises (N.T. 10-11).

4. At 433 Erie Avenue, the officer was able to hear music from the licensed premises. He entered the premises at approximately 10:00 p.m. and found that it was the same music that he had heard outside the premises. While the officer was looking for a parking space, he went to Sixth Street and walked approximately 100 feet to the premises. He did not hear music until he was approximately thirty-five to forty feet from the premises (N.T. 12-13).

5. The officer walked fifteen paces east and west on Erie Avenue and was able to hear music from those distances (N.T. 14).

6. When the officer went into the establishment, there were approximately forty patrons. The establishment was open and operating. There were approximately four bartenders and a disc jockey playing music inside the premises. The disc jockey had a lap top with music on it or a turntable. The officer observed approximately four speakers in and about the premises (N.T. 14-16).

7. The officer departed the premises at 11:00 p.m. He could still hear music outside the premises at distances of fifteen paces in each direction (N.T. 14-16).

8. On March 13, 2009, the officer arrived at the licensed premises. He parked the car and walked approximately ten paces or the distance of approximately twenty feet. On this occasion, there were approximately twenty patrons and three Hispanic female bartenders on the premises. There was no disc jockey on the premises on that evening. Although he did hear music playing when he approached the premises, he believes that the music was coming from a jukebox or other type of sound system (N.T. 17-18).

9. On March 13, 2009, the officer arrived at approximately 1:00 a.m. and departed at approximately 1:50 a.m. When he departed, he could still hear music at distances of approximately twenty feet east and west of the premises (N.T. 21).

10. On June 10, 2009, the officer again visited the premises to conduct a routine inspection. He arrived at the premises at approximately 4:30-4:35 p.m. No violations were found (N.T. 21-22).

11. The officer noted that there were various speakers on the premises, including one underneath the jukebox and another located near the door on Erie Avenue (N.T. 22).

12. The officer spoke to the owner, via telephone, and questioned him with regard to the sound system. He indicated that the sound system had been in place for approximately four and a half years. He claims to have soundproofed the premises three to four years earlier (N.T. 24-25).

13. The officer instructed the complainant to keep a log of times when she was disturbed by music from the licensed premises (N.T. 25-26).

14. On May 7, 2009, the officer visited the complainant at her house, spoke with her and collected her noise log (N.T. 25-26).

15. The officer had spoken to the complainant numerous times prior to visiting her home (N.T. 26-27).

16. The complainant also turned over two DVD's with audio video footage of the licensed premises (N.T. 30-32 and Exhibit B-5).

17. The complainant lives across the street from the licensed premises. She has lived at her present address for twenty years and next door to her present address for ten years. She has lived on that block for a total of thirty years (N.T. 35-36).

18. The complainant claimed to be disturbed by loud music, patrons parking on the pavement outside the premises with their radios on, patrons at the bar bringing liquor and drinks outside the premises, fighting and the sound of the disc jockey up until 4:00 in the morning. She indicated that she is disturbed the most on Thursday, Friday, Saturday and Sunday (N.T. 38-39).

19. Because her bedroom faces the bar, she indicated she hears booming sounds and the voice of the disc jockey. She is forced to leave her bedroom and go to the family room in order to be able to sleep. She indicates that the officer advised her to keep a noise log, however, because she has been disturbed by music and noise from this establishment since 2004, she had previously been keeping a log. She has also observed the sound system and them bringing in speakers which are about five feet long (N.T. 40-41).

20. The complainant indicated that she took videos from directly across the street while standing on her porch (N.T. 42 and Exhibits B-4 and B-5).

21. According to the testimony of the complainant, she was disturbed by music, noise, pedestrian and vehicular traffic coming from the licensed premises on October 16, 19, 25, 2008, November 10, 13, 14, 16, 17, 23, 30, 2008, December 1, 2, 3, 5, 12, 13, 14, 19, 20, 25, 26, 28, 29, 30, 31, 2008, January 3, 8, 10, 11, 16, 18, 19, 25, 31, 2009, February 1, 2, 6, 8, 13, 16, 17, 20, 22, 23, 27, 28, 2009, March 1, 2, 4, 5, 8, 9, 12, 15, 16, 22, 23, 2009, April 5, 6, 10, 11, 12, 13, 19 and 27, 2009 (N.T. 43).

CONCLUSIONS OF LAW:

On October 16, 19, 25, November 10, 13, 14, 16, 17, 23, 30, December 1, 2, 3, 5, 12, 13, 14, 19, 20, 25, 26, 28, 29, 30, 31, 2008, January 3, 8, 10, 11, 16, 18, 19, 25, 31, February 1, 2, 6, 8, 13, 16, 17, 20, 22, 23, 27, 28, March 1, 2, 4, 5, 8, 9, 12, 13, 15, 16, 22, 23, April 5, 6, 10, 11, 12, 13, 19 and 27, 2009, Licensee, by its servants, agents or employees, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside, in violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code Section 5.32(a).

PRIOR RECORD:

Licensee has been licensed since October 13, 2004, and has a record of prior violations as follows:

Citation No. 04-2194. \$1,000.00 fine.

1. Sales to minors.
October 30, 2004.

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Citation No. 07-0051. \$1,200.00 fine.

1. Sales after the Restaurant Liquor License expired and had not been renewed and/or validated.
November 30, 2006.
2. Operated the licensed establishment without a valid health permit or license.
November 30 and December 16, 2006.

Citation No. 07-1986. \$800.00 fine.

1. Used loudspeakers or devices whereby music could be heard outside.
On 28 dates between October 8, 2006 and May 20, 2007.
2. Noisy and/or disorderly operation.
October 22, November 19, 23, 29, 2006, January 10, 14, 21 and February 3, 2007.

Citation No. 08-2161. \$1,000.00 fine, R.A.M.P. training mandated and one day suspension.

1. Sales to a minor.
July 26, 2008.

DISCUSSION:

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. *In re Omicron Enterprises*, 449 A.2d 857 (Pa.CmwltH 1982). The phrase “preponderance of evidence” has been defined as evidence which is of greater weight or is more convincing than evidence which is in opposition to it. *Black’s Law Dictionary, Fifth Edition*, West Publishing Company, Copyright 1979, Page 1064.

It is within the province and responsibility of the fact-finder to determine the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa.CmwltH 1989). The fact-finder may accept or reject the evidence in whole or in part. *McFarland Landscape Service v. Workmen’s Comp. Bd. Of Appeal*, 557 A.2d 816, 817-18 (Pa.CmwltH 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

The Bureau submitted an audio/video recording of the licensed premises, taken by the complainant, with her digital video camera recorder, from her porch, which is across the street from the licensed premises. The video portion of the tape showed much activity, including numerous people milling about entering and exiting the premises and cars standing and/or parked on and off the streets on the sidewalks and concrete areas adjacent to the licensed premises.

Licensee asserts that the audio recording device, which was set using automatic settings, according to the user's manual, is "stereo sound." Licensee, by his attorney, argues that the microphone enhances the sound. Licensee's attorney demonstrates this fact by pointing out that when the complainant spoke or a dog barked, the volume of those sounds was well above normal as compared to the music allegedly coming from the licensed premises. Further, counsel points out that only when the volume on the replay devices, i.e. television and DVD, was raised and the background noise was absent could noise/music be heard from the premises. After objection from Licensee, the Bureau submitted information stating that the recorder is not equipped with a *zoom microphone*. Still, Licensee's counsel submits that there are *too many unconfirmed or manageable variables in regard to the audio recordings character and volume to allow for its entry into evidence*.

The facts of this case were amply proven by the reliable, credible testimony of the complainant and the Bureau's Enforcement officer. Both testified to repeated instances of music and noise from the licensed premises detected with the *unaided human ear*. Here the audio/video recording is merely cumulative and/or corroborative evidence.

In *Ristorante Paparazzi, Inc.*, Citation No. 07-2934, a matter before the Office of Administrative Law Judge, a recording of the area surrounding the licensed premises was offered as evidence, on behalf of the Licensee. Judge David Shenkle gave the evidence no weight, thoroughly addressing the issue as follows:

I do not give credit to the tape recording played for my benefit during the hearing because I do not believe that a mass market portable tape recorder has the capability of discerning sound more accurately than the unaided human ear. There are too many variables, on technical grounds alone, for me to give any weight to the fact that I could not hear music on the tape that was played.

Without regard to the audio/video display, the Office of Administrative Law Judge finds that Licensee repeatedly violated Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a).

The Licensee submitted a witness who testified as to the changes that had been made to the premises with regard to the speaker system, soundproofing and other renovations. The Licensee asserts that they are making improvements which have enhanced the neighborhood. The Licensee also offered, with the Bureau's objection, a Petition from some neighbors who support the licensed premises and claim not to be disturbed by music or noise from the premises. The regulation does not require proof that anyone was disturbed from a loudspeaker inside the premises. Regardless of how many signatures are on the petition indicating people are not disturbed, a complainant has come forth who has complained of hearing music and noise by the licensed premises and those violations have also been coeberated by an officer from the Bureau of Enforcement.

Although the licensed establishment may be a visual improvement to the neighborhood, the cars, the traffic, the parking, the obsessive noise and the many people is a significant negative factor. It would behoove Licensee to take substantial steps to avoid future enforcement action. The complainant is entitled to enjoy a peaceful existence reasonably free of excessive noise and loud music, particularly if that noise is generated on a licensed premises.

After a review of the circumstances, a three day suspension and \$250.00 penalty shall be imposed. The suspension will occur on a Friday, Saturday and Sunday night. If Licensee does not make substantial improvements to change the situation, Licensee will face loss of the license at that location.

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, 3651 Jaquez Enterprises, Inc., License Number R-AP-SS-EHF-OPS-9460, pay a fine of Two Hundred Fifty Dollars (\$250.00) 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 ALSO ORDERED that the Restaurant Liquor License of 3651 Jaquez Enterprises, Inc., License Number R-AP-SS-EHF-OPS-9460, be suspended for a period of three (3) days **BEGINNING** at 7:00 a.m. on Friday, January 7, 2011 and **ENDING** at 7:00 a.m. on Monday, January 10, 2011.

Licensee is directed on Friday, January 7, 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.

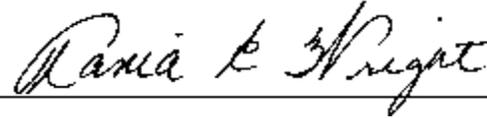
The "Bureau of Enforcement" is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

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The Licensee is authorized on Monday, January 10, 2011 at 7:00 a.m. to remove the placard of suspension and return the license to its original wall location.

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

Dated this 21ST 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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Detach Here and Return Stub with Payment

The fine must be paid by Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal Checks, which include business-use personal checks, are not acceptable.** 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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