

Mailing Date: FEB 01 2011

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-2792
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-385132
	:	
v.	:	
	:	LID - 58972
	:	
NOSTALGIA, INC.	:	
T/A THE CORVETTE GRILLE 202	:	
W. MAIN ST.	:	
ANNVILLE, PA 17003-1325	:	
	:	
	:	
LEBANON COUNTY	:	
LICENSE NO. R-AP-SS-18148	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL BALLARON
LICENSEE: MICHAEL BEARE, PRO SE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on November 25, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against NOSTALGIA, INC., License Number R-AP-SS-18148 (hereinafter "Licensee").

The citation contains two counts.

The first count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 5101 of the Crimes Code [18 Pa. C.S. §5101] in that on November 28, 2008, Licensee, by its servants, agents or employes, interfered with police officers in the performance of their duties.

The second count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 637.6(a)(2) of the Clean Indoor Air Act [35 P.S. §637.6(a)(2)] in that on May 23 and June 26, 2009, Licensee, by its servants, agents or employes, permitted smoking in a public place where smoking is prohibited.

The investigation which gave rise to the citation began on November 26, 2008 and was completed on September 10, 2009; and notice of the violation was sent to Licensee by Certified Mail on September 23, 2009. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on September 16, 2010 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

COUNT 1

1. On November 28, 2008, Patrolman Heisey of the Annville Township Police Department, received a call indicating that an assault was in progress directly outside the licensed premises (N.T. 28).
2. Officer Heisey proceeded to the licensed premises in his marked police cruiser with the flashing red and blue police overhead lights on, but no siren (N.T. 29).
3. Officer Heisey arrived at the licensed premises in a minute or less (N.T. 30).
4. As Officer Heisey arrived at the licensed premises, he observed a chaotic scene. People were running everywhere and yelling, "It's the cops." (N.T. 30).
5. Heisey got out of his vehicle to assess the scene to determine if there were any weapons present and if anyone was still fighting (N.T. 31).
6. Officer Heisey observed that the encounter seemed to be breaking apart. He saw people breathing heavily and people bleeding on the scene (N.T. 31).
7. The officer observed one male individual in front of the licensed premises who was bleeding from the head and another individual directly across the street, who was also bleeding (N.T. 31-32).

8. In an effort to control the scene, and because he was the only officer on the scene at the time, Officer Heisey directed all individuals who were injured to have a seat. At this point, he saw one individual who had apparent injuries enter the licensed premises (N.T. 32).
9. The individual who entered the licensed premises was important to Officer Heisey because he felt he needed to ascertain whether or not this individual was carrying a weapon. Further it was important to know the extent of this person's injuries and whether or not he needed medical attention (N.T. 32).
10. The only information that Officer Heisey had concerning the medical condition of the individual who entered the licensed premises was that he was bleeding from the face (N.T. 32).
11. Officer Heisey then called for backup, indicating that he would need at least two additional units and enough ambulances to take care of three individuals with injuries (N.T. 33).
12. Officer Heisey then attempted to enter the licensed premises to make contact with the individual with blood on his face who had entered shortly after his arrival. He had observed this individual to be a white male in his early to mid twenties wearing a black hooded sweatshirt and a black knit cap (N.T. 34).
13. Officer Heisey made his way through a crowd that had congregated in front of the entrance to the licensed premises. As he reached the entrance he found a female standing in the doorway (N.T. 35).
14. Officer Heisey told the female standing in the doorway to move out of the way. The female replied that the individual who had entered had nothing to do with the fight. Officer Heisey said that he needed to get through (N.T. 35).
15. The female standing in the entrance told Officer Heisey that she was the bartender at the licensed premises. Officer Heisey replied that he didn't care and he needed to get through (N.T. 35).
16. The bartender in a loud angry voice said to Officer Heisey, "Fuck you." (N.T. 35).
17. Because Officer Heisey felt that the behavior of the female bartender was inciting a riot situation, he took her by the wrist and shoulder and escorted her to his police cruiser and placed her in the back. The entire time she yelled that she was the bartender, and that Officer Heisey did not have the right to do this sort of thing (N.T. 35-38).

18. After placing the female bartender in the police cruiser, Officer Heisey was able to enter the licensed premises; however, he was unable to find the individual in the black hooded sweatshirt and knit cap that he had sought (N.T. 39).
19. Officer Heisey had been seeking the aforementioned individual to make sure that he wasn't part of the assault; that he wasn't injured; and that he wasn't armed and dangerous (N.T. 39).
20. At this point backup units arrived. The first to arrive was a two-man State Police unit. The troopers from this unit took information from the female bartender and determined her name to be April Devoy (N.T. 40).
21. Ms. Devoy was charged by Officer Heisey with a summary non-traffic offense. The matter went to hearing and she was found guilty (N.T. 43-44).
22. During the time from the arrival of Officer Heisey until he attempted to enter the licensed premises, Michael Beare, president, manager and stockholder of Licensee corporation did not come down from the office above the barroom of the licensed premises and address the situation (N.T. 41).
23. Mr. Beare left the bar area of the licensed premises at 12:30 a.m. on April 28, 2009. He was in his office on the third floor of the building which houses the licensed premises (N.T. 50-51).
24. April Devoy, the female bartender was left in the bar area alone when Mr. Beare went upstairs to the office at approximately 12:30 a.m. (N.T. 53).

COUNT 2

25. During the period from November 26, 2008 to August 4, 2009, Licensee had not been granted an exception by the Department of Health, pursuant to the Pennsylvania Clean Indoor Air Act to permit smoking in the establishment (N.T. Exhibit C-3).
26. On May 23, 2009 at 12:50 a.m., an officer of the Bureau entered the licensed premises in an undercover capacity. Upon entry the officer observed a sign stating that smoking was prohibited. However, the officer observed that patrons were smoking and that the bartender would provide ashtrays when requested (N.T. 16).
27. On June 26, 2009 at 11:00 p.m. an officer of the Bureau entered the licensed premises in an undercover capacity. The officer took a seat at the bar. He observed ashtrays on the bar, and a patron to his right was engaged in smoking (N.T. 25).

CONCLUSIONS OF LAW:

Counts 1 and 2 of the citation are **sustained**.

DISCUSSION:

COUNT 1

The record establishes that the bartender on the licensed premises on the date in question interfered with an Annville Township Police Officer in the performance of his duties which constitute other sufficient cause as that term is used in Section 471 of the Liquor Code [47 P.S. §4-471].

The Supreme Court of Pennsylvania has held that violation of the criminal laws of the Commonwealth, where appropriate scienter is present constitutes “other sufficient cause” as that term is used in Section 471 of the Liquor Code (supra). *Pa. Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

Section 5101 of the Crimes Code [18 Pa. C.S. §5101], as pertinent, reads as follows:

§5101. Obstructing administration of law or other governmental function.

A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental by force, violence, physical interference or obstacle, breach of duty, or other unlawful act...

In this case the bartender on the licensed premises, April Devoy blocked the entrance to the licensed premises and otherwise caused a disturbance which detained and delayed Officer Heisey thus preventing him from entering the public bar area of the licensed premises to observe and interview a possible participant in a fight outside the licensed premises to determine if he was, in fact a participant; whether he was injured; and whether he was in possession of a weapon. As a result of the delay, Officer Heisey was unable to find this individual.

The actions of Mr. Devoy clearly constituted “physical interference or obstacle” in violation of Section 5101 (supra).

The Supreme Court of Pennsylvania has mandated that when a licensee has been found to have committed a violation which is classified as “other sufficient cause,” some element of scienter must be present before the penalties set forth in Section 471 of the Liquor Code (supra) may be applied. The test set forth by the court is as follows:

1. Whether the licensee knew or should have known of the illegal activities by an employe or patron. If so, the licensee is liable.

2. A licensee may defend his license by demonstrating he took substantial, affirmative steps to guard against a known pattern of illegal activities.

Pa. Liquor Control Board v. TLK, Inc. (supra).

In this case, it is clear that the bartender, who had been left in charge of the licensed premises was the individual involved in the events with which this case is concerned. It can, therefore be safely said that Licensee corporation knew of the illegal conduct taking place. Moreover, Mr. Beare, president of Licensee corporation was in his office above the bar when these events transpired. With all of the commotion that took place, it is difficult to see how he could not have known what was going on. At the very least, he certainly should have known.

In light of the foregoing, I conclude that Count 1 of the citation is sustained.

COUNT 2

Criminal penalties are provided for violations of the Clean Indoor Air Act [35 P.S. §637.8(e)]. Therefore, violations of this Act constitute other sufficient cause as that term is used in Section 471 of the Liquor Code [47 P.S. §4-471] making a licensee who violates this Act liable for penalties provided by that Section as “other sufficient cause.” (*Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

The Clean Indoor Air Act [35 P.S. §637.1 et seq] makes it unlawful for the proprietor of a business to allow anyone to smoke in a public area unless that individual has obtained an exception as provided in the Act from the Pennsylvania Department of Health.

The record in this case discloses that Licensee allowed smoking on the licensed premises on the dates set forth in Count 2 of the Citation. Further, the record also discloses that Licensee did not have the appropriate exception from the Department of Health to allow such smoking.

I incorporate herein by reference the discussion of scienter set forth in the discussion of the previous count. As with the previous count, the bartender or bartenders on duty on each of the dates involved were aware of the smoking taking place and did nothing to prevent it.

Based upon the foregoing, I conclude that Count 2 of the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since March 1, 2008, and has had one prior violation:

Citation No. 08-2862C. Fine \$1,250.00 and RAMP training mandated.
1. Sales to a minor. October 30, 2008.

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 \$50.00 or more than \$1,000.00 or both for violations of the type found in this case.

Under the circumstances of this case, the penalty imposed shall be as follows:

Count 1 - \$1,000.00 fine
Count 2 - \$ 250.00 fine

ORDER

THEREFORE, it is hereby ordered that Licensee NOSTALGIA, INC., pay a fine of \$1,250.00 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.

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 21ST day of January, 2011.



Daniel T. Flaherty, Jr., J. an

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 submit 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.** Make 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. 09-2792 Nostalgia,
Inc.