

Mailing Date: OCT 18 2010

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-2986
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W09-401863
v.	:	
	:	LID - 6064
JEFF-RON INC T/A RINGER'S ROOST	:	
1801-03 LIBERTY ST	:	
ALLENTOWN PA 18104	:	
	:	
LEHIGH COUNTY	:	
LICENSE NO. H-SS-468	:	

JUDGE SHENKLE  
BLCE COUNSEL: Roy Harkavy, Esq.  
LICENSEE COUNSEL: Charles R. Osinski, Esq.

**ADJUDICATION**

**BACKGROUND:**

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on December 30, 2009. The first count alleges that Licensee violated §493(21) of the Liquor Code, 47 P.S. §4-493(21), on December 2, 2009, by refusing enforcement officers the right to inspect completely the entire licensed premises at a time when it was open for business or when patrons, guests or members were in the portion where alcoholic beverages are sold.

A hearing was held on July 16, 2010, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On December 2, 2009, two liquor enforcement officers entered the licensed premises and informed a woman tending bar that they intended to conduct a routine inspection, because they had received complaints of gambling devices in the basement. A few minutes later the owner came out of the kitchen, and the officers told him the same thing (N.T. 6-7, 18-19).

2. The owner went to a door behind the bar and operated a keypad, which unlocked it. The officers asked to go into the basement. The owner said they could not, and that he was going to call his lawyer. He opened the door. An officer asked him, "can we please inspect the downstairs?" Again the owner said no, that they needed a search warrant. He entered the open door, which led to the basement, and closed it behind him (N.T. 29-32, 7-8, 22).

3. The officers discussed between themselves whether they should just leave, since the owner was not going to let them inspect the area they wanted to inspect. They went back to the area where they had first spoken with a bartender, because they had not gotten her name. Shortly thereafter, the owner came back upstairs and told the officers they could go downstairs. So, the officers "decided to go ahead and do the routine instead of leaving." (N.T. 8).

4. In the basement the officers saw a nice lounge area with couches, plants and four machines, which appeared to be poker machines. The machines were turned off, though. The officers did not touch the machines to see if they were warm (N.T. 8, 17).

CONCLUSIONS OF LAW:

The evidence did not show a violation of 47 P.S. §4-493(21) on December 2, 2009, because the minimal delay the enforcement officers experienced before exercising their right to inspect the entire premises was caused by Licensee's officer's good-faith exercise of a legitimate right to the advice of counsel.

Notwithstanding the delay experienced by the enforcement officers, they were not thereby deprived of any evidence which they might otherwise have obtained.

DISCUSSION:

My research has disclosed no reported decision considering the specific issue whether assertion of a right to the advice of counsel, which causes a delay in the commencement of an inspection, constitutes a violation of 47 P.S. §4-493(21).

The most relevant appellate decision appears to be *PSP, BLCE v. Capek*, 657 A.2d 1352 (Pa. Cmwlth. Ct. 1995). That case began with a citation consisting of four counts: failing to require patrons to vacate the premises by the required time, permitting patrons to possess

alcoholic beverages after that time, refusing enforcement officers the right to inspect the premises, and interfering with an enforcement officer in the performance of his duties.

Administrative Law Judge Howard B. Elbling found that an enforcement officer saw activity inside the licensed premises at 2:35 a.m., and entered the establishment at 2:43 a.m. to find eighteen persons, many of them in possession of alcoholic beverages. The officer approached an individual whom he assumed to be the bartender and displayed his badge for three to four seconds. He demanded to go behind the bar. The individual, who was the licensee, asked to see the officer's identification a second time; the area was poorly lit.

Judge Elbling found the enforcement officer's testimony vague on some aspects of what followed, so he was unable to conclude precisely the cause of the scuffle which ensued between the licensee and the enforcement officer. The judge could say with confidence, however, that the enforcement officer was in the premises only for about sixty seconds before he was "rescued" by the police officer who followed him inside, that a complete inspection of the premises was completed by the enforcement officer, and that the establishment had previously been robbed by a person whose behavior matched that of the officer. The judge dismissed the third and fourth counts. 15 Sel. Op. ALJ 111, Citation No. 92-2597.

The Bureau appealed the dismissal to the PLCB. The Board reversed and remanded for an appropriate penalty, holding, in essence, that 47 P.S. §4-493(21) is a strict liability statute. 657 A.2d at 1354.

Licensee appealed to the court of common pleas. In reversing the Board's decision, that court concluded:

As regrettable as this encounter may be, it could have been avoided by a greater exercise of patience and restraint on the part of the officer. An experienced investigator such as Officer Radvansky, would be cognizant that the practice of entering a dimly lit establishment after hours while in civilian apparel and demanding access to an area of the establishment which includes the cash register, *may* raise the suspicions of the licensee and any other interested parties who may be present irrespective of any prior incidents experienced by the licensee.

We reiterate the language of the ALJ in that the exigency of the circumstances did not demand that Officer Radvansky obtain immediate access to the area behind the bar. The officer was already on the premises and, therefore, the possibility that the licensee would mask potential violations or destroy evidence of contraband was minimal. A mere minute or less of further explanation by the officer could have sufficed to calm the fears of the licensee.

-- 657 A.2d at 1354-1355.

Commonwealth Court affirmed the trial court's decision. The opinion notes that:

The Bureau asserts that section 493(21) should be strictly construed; that is, when an agent identifies himself and demands the right to inspect the premises, the licensee must immediately allow the agent to inspect the entire premises. However, the Bureau itself states that "the only exception to this immediacy requirement is if the delay is the result of a licensee attempting to verify the identity of a Board or Bureau officer by requesting, in good faith, to see the officer's badge or photographic identification." (Bureau's brief at 12.) Interestingly, we believe that the facts here are consistent with the Bureau's exception to a strict interpretation of section 493(21).

-- 657 A.2d at 1355.

I find that the desire of Licensee's corporate officer to seek the advice of counsel was analogous to the desire of Dale E. Capek to be certain that the person demanding to go behind his bar was entitled to do so. I construe Commonwealth Court's decision in that case as a repudiation of the concept that section 493(21) is an absolute liability statute which must be obeyed instantly in all cases.

In this case I find that Licensee's corporate officer had a good-faith, although mistaken, belief that the BLCE officers needed a search warrant. The corporate officer stated his intention to seek counsel on this point, and this was a reasonable position for him to take. Within minutes, Licensee's counsel provided the correct answer. Licensee's corporate officer accepted the advice given, and the enforcement officers were able to complete the inspection without hindrance.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 09-2986 is DISMISSED.

Dated this     SEPTEMBER     day of     29    , 2010.

  
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David L. Shenkle, J.

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**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.**