

Mailing Date: August 3, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

| | | |
|----------------------------|---|----------------------|
| PENNSYLVANIA STATE POLICE, | : | |
| BUREAU OF LIQUOR CONTROL | : | Citation No. 10-0358 |
| ENFORCEMENT | : | |
| | : | |
| | : | License No. R-900 |
| v. | : | |
| | : | |
| | : | LID - 60393 |
| 461 NORTH, LLC | : | |
| t/a Buckhead Saloon | : | |
| 457-461 North 3rd Street | : | |
| Philadelphia, PA 19123 | : | |

Counsel for Licensee: Edward B. McHugh, Esq.
Goldstein & McHugh, PC
325 Chestnut Street, Ste. 713A
Philadelphia, PA 19106

Counsel for Bureau: James E. Dailey, Assistant Counsel
Pennsylvania State Police
Bureau of Liquor Control Enforcement
6901 Woodland Avenue, Third Floor
Philadelphia, PA 19142

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from the Adjudication and Order of Administrative Law

Judge Tania E. Wright (“ALJ”), mailed on April 14, 2011, wherein the ALJ sustained Count 1, but dismissed Count 2 of Citation No. 10-0358 (“the Citation”) issued to 461 North, LLC (“Licensee”).¹

The first count of the Citation charged Licensee with violating section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code § 5.32(a)], in that on September 18, 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.

The second count of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and sections 903, 2701, 2702 and 2705 of the Crimes Code [18 Pa. C.S. §§ 903, 2701, 2702 and 2705], in that on June 21, 2009, Licensee, by its servants, agents or employees, committed simple assault, aggravated assault, criminal conspiracy and recklessly endangered another person.

In its appeal, the Bureau argues that the ALJ committed an error of law, abused her discretion, and improperly dismissed Count 2 of the Citation because Licensee, through its servants, agents or employees, committed

¹ Since the Bureau’s appeal relates only to Count 2, Count 1 is not addressed herein.

simple assault, aggravated assault, criminal conspiracy and recklessly endangered another person. The Bureau contends that Count 2 of the Citation should have been sustained because: 1) Licensee should have known of the assault committed against Mr. Paris because the direct and apparent knowledge possessed by the manager and the bouncers is imputed to Licensee; 2) Licensee did not take substantial affirmative steps to prevent the assault that was committed against Mr. Paris by its employees; and 3) Licensee is liable for the assault perpetrated upon Mr. Paris by its employees under the doctrine of respondeat superior.

Pursuant to section 471 of the Pennsylvania Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/her decision was not based upon substantial evidence. The Commonwealth Court has defined “substantial evidence” to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers’ Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

The Board has reviewed the record, including the ALJ's Adjudication and Order mailed April 14, 2011, the Bureau's Appeal of the ALJ's Adjudication and Argument in Support of its Appeal, and the Notes of Testimony and Exhibits from the hearing held on September 15, 2010, and has concluded that ALJ's ruling is without error and is supported by substantial evidence.

There is no dispute between the parties as to the material facts underlying the Citation. With regard to Count 2, the record reveals that on August 12, 2009, a Bureau enforcement officer, George Tritz, conducted an inspection of the licensed premises based upon a complaint from the Sixth District Philadelphia Police alleging disorderly operations and sales to minors at the licensed premises. [N.T. 6-8]. The Bureau officer conducted its investigation from August 12, 2009 to February 3, 2010. [N.T. 9]. During the course of this investigation, he made about a half a dozen visits to the licensed premises. [N.T. 9]. One of the reasons for the investigation was to investigate an altercation between a patron and an employee of the licensed premises that occurred on June 21, 2009. [N.T. 9]. During the course of the officer's investigation, he investigated the premises for sales to minors and other Liquor Code violations. [N.T. 10]. He went to the licensed premises on a few occasions and met with the manager, and spoke to the manager on the phone

as well. [N.T. 10]. Officer Tritz also compiled documents and attempted to acquire employee records. [N.T. 10].

On August 22, 2009, two (2) other Bureau enforcement officers, Officers Brown and Rengal, visited the licensed premises along with the Philadelphia Police Department and Philadelphia Licenses and Inspections, and found no violations on that date. [N.T. 13]. On September 18, 2009, Officer Tritz and another Bureau Officer, Officer Rutter, visited the premises which resulted in the issuance of Count 1 of the Citation for the loudspeaker violations. [N.T. 16-20]. On October 18, 2009, Officer Tritz and another Bureau officer, Officer Collins, visited the premises but observed no violations. [N.T. 20]. On November 5, 2009, Officer Rutter visited the premises, but found no violations [N.T. 21]. On November 18 and December 9, 2009, Officer Tritz visited the premises, but the premises was closed, despite the fact that a sign said the premises would be opened on those days. [N.T. 22].

On December 17, 2009, two (2) other Bureau enforcement officers, officers, Officers Dahl and McGrath, again went to the licensed premises with the intent of conducting a routine inspection and talking to the manager, and found the premises open and operating. [N.T. 22]. The officers spoke with Trevor Day, who reported to be the interim manager. [N.T. 23]. The officers

conducted a routine inspection and found no violations. [N.T. 23]. On December 22, 2009, Officer Tritz contacted Mr. Day and spoke to him by telephone. [N.T. 23-24]. Mr. Day purported to be the manager of the licensed premises. [N.T. 23]. The officer spoke with Mr. Day about the violations he had observed and spoke with him about the alleged assault. [N.T. 24]. He informed the officer that the bouncer who was allegedly involved in the assault was no longer employed there. [N.T. 24]. Mr. Day indicated at the time of the assault, he was not employed as a manager; rather, the manager was Kyle Lucas. [N.T. 24].

In January of 2010, Officer Tritz contacted the Philadelphia Police Department to get a copy of the arrest report for the bouncer who was allegedly involved in the assault. [N.T. 24-26]. The officer was not able to obtain an arrest report on January 19, 2010, but made a call to a detective on February 1, 2010 and had the report faxed to him on February 2, 2010. [N.T. 27]. The officer then summarized the report. [N.T. 27-28]. The report confirmed that an employee of the licensed premises allegedly assaulted a patron and that the employee was Akeim Leonard. [N.T. 29]. Mr. Leonard was arrested as a result. [N.T. 29].

After Officer Tritz received the Affidavit of Probable Cause, he visited the premises again on February 3, 2010, along with his supervisor. [N.T. 29; Ex. B-4]. The officers met with Mr. Day and inquired about Akeim Leonard. [N.T. 29]. Mr. Day supplied them with employee records of the licensed premises that indicated that Mr. Leonard was working on the day that the incident occurred. [N.T. 30]. The employee records covered the period June 15, 2009 to June 21, 2009, and it revealed that Mr. Leonard started his shift on Saturday, June 20, 2010 at approximately 8:12 p.m. and that he concluded his shift at approximately 2:52 a.m. on Sunday, June 21, 2010. [N.T. 32-35, Exhibit B-3]. In February of 2010, Officer Tritz also contacted Matthew Paris, who was the victim of the alleged assault. [N.T. 31]. The officer closed the investigation on February 3, 2010. [N.T. 39]. Based on the findings of his investigation, the officer caused the notice of violation and the citation to be issued. [N.T. 39].

At the hearing, several witnesses testified to the alleged assault that occurred at the licensed premises on June 21, 2009. Katelyn Pulverenti testified that she went to the licensed premises in a limousine on June 21, 2009 as part of a birthday celebration event. [N.T. 66]. Matthew Paris was with her as well as Jessica Lopez, Nicole Ferris, Heather Elster, Lauren Madden, who was Matthew's girlfriend, and Shane Steinbag, who was the limousine driver. [N.T.

66-68, 85]. The limousine took them from New Jersey to the licensed premises. [N.T. 68]. They had drinks while on the premises. [N.T. 69]. When Ms. Pulverenti entered the premises, she remembered a ramp going up to the door and steps next to it, and she remembered seeing club personnel checking identification cards and collecting a cover charge. [N.T. 69-70]. When Ms. Pulverenti left the premises, she went to the limousine, which was parked approximately two (2) car lengths away from the licensed premises. [N.T. 70-71].

Ms. Pulverenti, Ms. Lopez, and Ms. Elster were sitting in the limousine when they heard Lauren Madden screaming. [N.T. 70]. They got out of the limousine to see what was going on and to check on Ms. Madden. [N.T. 70-71]. Ms. Pulverenti saw a group of people, but did not know what was going on. [N.T. 72-74]. She then saw Mr. Paris, and she and Ms. Elster attempted to talk to Mr. Paris to get him back into the limousine. [N.T. 72-74]. A few minutes later, Ms. Pulverenti saw Mr. Paris run up the ramp to the door when someone threw a punch. [N.T. 72-74]. She did not know who threw the first punch but she saw Mr. Paris being punched in the face. [N.T. 72-74]. She could not identify the man who was punching Mr. Paris, but testified that he was male and larger than Mr. Paris. [N.T. 72-74].

Ms. Pulverenti attempted to pull the individual off of Mr. Paris and yelled for him to stop, but she then saw Mr. Paris go over the railing. [N.T. 74-75]. After Mr. Paris went over the railing, he was on the ground and covering his face. [N.T. 75]. Ms. Pulverenti and her friends decided to call 911, but since they did not know the address, a passerby called for them. [N.T. 77]. Mr. Paris was taken to the hospital. [N.T. 77]. They also went to the hospital and then went to the police station to be interviewed. [N.T. 77]. The detective did not interview Ms. Pulverenti that night, but did interview Ms. Lopez. [N.T. 77]. Ms. Pulverenti consumed a beer while she was in the licensed premises and in the limousine on the way to the licensed premises. [N.T. 77].

Jessica Lopez confirmed that she attended the birthday celebration on June 20, 2009. [N.T. 81-84]. Ms. Lopez was requested to show identification and recalled that there was a bouncer at the door. [N.T. 84]. Ms. Lopez indicated that the group was inside, but she went in and out of the premises over the course of the next two or three hours. [N.T. 84-85]. She indicated that they consumed alcoholic beverages in the limousine on the way there and she ordered a beer inside of the premises, but was outside of the premises for most of the night. [N.T. 84-85]. Ms. Lopez was not aware of any incident inside of the premises. [N.T. 84-85]. She also indicated that when they left the

licensed premises, their intentions were to have the driver take them to get cheesesteaks on the way home. [N.T. 84-85]. However, Ms. Elster and Ms. Madden had to return to the premises to go to the bathroom. [N.T. 84-85].

Ms. Lopez further testified that she was already outside of the premises when the remainder of the group left the premises. [N.T. 85-86]. She testified that Mr. Paris left the bar when the two (2) females walked back inside, and he attempted to walk back inside with them. [N.T. 85-86]. She assumed that he either went to use the bathroom as well, or that he was just making sure that they came back. [N.T. 85-86]. Ms. Lopez was in the limousine trying to count up who was missing when she saw Mr. Paris walking up to the limousine. [N.T. 86]. She noticed that he was upset and said his glasses were broken. [N.T. 86].

Ms. Lopez saw Mr. Paris walk back to the front door, and noticed that there was some pushing back and forth with the bouncer. [N.T. 86-87]. She did not know who threw the first punch, but she did see Ms. Ferris getting knocked down. [N.T. 87]. Ms. Lopez picked her up and brought her back to the limousine. [N.T. 87-88]. When Ms. Ferris was on the ground, Mr. Paris was on the ramp portion of the premises. [N.T. 92-93]. After Ms. Lopez took Ms. Ferris to the limousine, Mr. Paris was still on the platform. [N.T. 93-94]. She attempted to walk back, and when she looked away for a moment and back,

she saw Mr. Paris' body going over the railing. [N.T. 93-94]. She tried to put her hand under his head so that it would not hit the concrete. [N.T. 95]. Ms. Lopez was interviewed by the police outside the club, and she identified Mr. Leonard as the culprit and identified him a second time in a police photo. [N.T. 96-98].

Joanne Wojnicki, a detective at the Philadelphia Police Department, testified that she conducted an investigation based on the statements received from the Philadelphia Police officers and various witnesses, which resulted in the arrest of Mr. Leonard. [N.T. 101-103]. Based on the statements of Ms. Lopez, Detective Wojnicki agreed that there was a second man involved in the attack, but she was not able to identify him. [N.T. 108].

Matthew Paris testified that he visited the licensed premises on June 20, 2009 into the early morning of June 21, 2009. [N.T. 114]. For his girlfriend's birthday, he had arranged to have a limousine take her and a group of friends from New Jersey to the licensed establishment. [N.T. 114-115]. The group met at Ms. Madden's house at approximately 4:00 or 5:00 p.m. in the afternoon. [N.T. 114-115]. The limousine was to pick them up at 7:00 p.m., but did not pick them up until 8:00 p.m. [N.T. 114-115]. While they were waiting for the limousine, they had drinks. [N.T. 114-115]. Mr. Paris testified that he had no

alcoholic beverages during the limousine ride because he was giving directions and sitting up front with the driver. [N.T. 115].

The limousine dropped off the group in front of the bar, and they walked two (2) steps and into the exit. [N.T. 116]. Down the walkway, there was a main entrance with a concrete ramp surrounded by a rail. [N.T. 116-117]. There was a bouncer stationed at the exit and Mr. Paris recalled that the bouncer was wearing a black shirt. [N.T. 118-119]. Mr. Paris recalled going back into the middle of the bar where he stood while others sat down. [N.T. 120]. He ordered a Miller Lite beer and stayed in that area for approximately forty-five (45) minutes. [N.T. 120]. The group then headed toward the entrance of the main bar where Mr. Paris ordered shots for all of his friends and another Miller Lite beer for himself. [N.T. 120]. Mr. Paris indicated that they were in licensed premises for approximately two (2) hours and there were no disturbances during that time. [N.T. 121-122].

Mr. Paris left the bar with Ms. Madden and Ms. Elster, walking down the ramp and talking with one another. [N.T. 122]. They were outside for a few minutes when Ms. Madden and Ms. Elster decided to go back to use the restroom. [N.T. 122]. Mr. Paris also decided to go back. [N.T. 122]. Ms. Madden and Ms. Elster reentered the premises using the exit and were

stopped by the doorman because they did not receive a stamp or bracelet. [N.T. 124]. The doorman was looking for that stamp or bracelet. [N.T. 124]. Mr. Paris, as well as other people, were stopped by an individual wearing a plaid shirt. [N.T. 125]. He was not wearing a black shirt that most of the bouncers appeared to be wearing. [N.T. 125]. The man wearing the plaid shirt permitted Ms. Madden and Ms. Elster to proceed into the premises, but Mr. Paris was told that he could not enter the premises. [N.T. 126, 155]. He tried to explain that he was just running in to use the bathroom and that he had been there for a birthday party and that he would be coming right back out. [N.T. 126]. Mr. Paris invited the bouncer to come with him and they began to argue. [N.T. 126]. The individual pushed Mr. Paris back and his glasses flew off of his head. [N.T. 126]. The glasses landed on the sidewalk in the street and were broken, and he could not find the entire frame. [N.T. 126].

Mr. Paris admitted that he was angry, but asked to speak to a manager. He then went to the entrance to see if he could talk to a manager but encountered two (2) bouncers. [N.T. 132-134]. The entrance was up the ramp and had an adjacent railing. Mr. Paris told the bouncers that he wanted to speak to the manager and tried to make his way into the bar. [N.T. 132-134]. Just inside the door, the bouncers grabbed his arm. [N.T. 132-134]. Mr. Paris

informed them that one (1) of the bouncers had broken his glasses and he wanted to speak to the manager. [N.T. 132-134]. One of the bouncers was Mr. Leonard. [N.T. 132-134]. After Mr. Paris continued trying to walk in to find a manager, Mr. Leonard grabbed his arm and pushed him back, telling him that he was not allowed to go in. [N.T. 132-134]. Mr. Leonard grabbed Mr. Paris and pushed him back through the door and towards the railing. [N.T. 132-134]. The bouncer continued to push Mr. Paris back towards the railing. [N.T. 134-135]. When Mr. Leonard began punching him, Mr. Paris tried to protect his face. [N.T. 134-135]. He recalled that another man was holding his arms back so that he could not defend himself. Mr. Paris was not sure how many times he was struck. [N.T. 134-135]. Eventually, Mr. Paris reached the railing and was leaning back over the railing still trying to protect his face. [N.T. 136-137]. It was at that time that he was lifted by his legs and flipped over the railing. [N.T. 136]. He landed on the pavement side of the railing. [N.T. 136]. Mr. Paris recalled that his head was near the curb and close to the street. [N.T. 138]. He indicated that the railing was approximately ten (10) to fifteen (15) feet from the street. [N.T. 138].

Mr. Paris further testified that Ms. Ferris was attempting to break up the fight, but she was pushed back and down to the sidewalk. [N.T. 136]. Mr. Paris

recalled that a bouncer continued to punch him after he went over the railing, and it was the same bouncer who originally hit him. [N.T. 136-137]. Mr. Paris indicated that he was not conscious at one point, and it was a woman that was not part of his group who woke him and asked him if he was alright. [N.T. 137]. Mr. Paris recalled that the police came to the premises, as did the paramedics who took him to Jefferson Hospital emergency room for treatment for trauma. [N.T. 138-139]. The injuries he sustained included a shattered eye socket and bleeding in the eyes and ear. He also had a cut on his lip. [N.T. 139-143, Exhibit B-7]. Mr. Paris also indicated that he had surgery to his eye, but needed a second surgery. [N.T. 145]. Mr. Paris did recall that at one point Mr. Leonard said that he would get the manager, but Mr. Leonard had walked approximately five (5) feet into the premises, looked behind, and said that the manager was busy. [N.T. 165]. Mr. Paris testified that the argument started because the door person who wore the plaid shirt, requested a cover charge at the door. [N.T. 166].

Nicole Ferris testified that she also visited the licensed premises on June 21, 2009 as part of a birthday celebration for Ms. Madden. She confirmed that the party began in New Jersey, and they consumed alcoholic beverages on the way in the limousine. [N.T. 170]. Ms. Ferris remembered that they arrived by

limousine sometime before midnight. She recalled that she was asked for identification and that she entered going up the walkway ramp, but she did not recall whether or not she paid a cover charge. [N.T. 171]. She was not certain what the security guards were wearing but thought that they might have been wearing black. [N.T.172]. Ms. Ferris testified that the group was drinking throughout the night, but she was not certain how much they actually drank. [N.T. 172]. She recalled that she was not “to the point of not knowing what she was doing.” [N.T. 172]. Ms. Ferris further confirmed that the group left the premises and intended to go to get something to eat. [N.T. 173]. They left the premises somewhat separately, some being still inside and some outside. [N.T. 173]. She only recalled one (1) door and did not remember a second door to the premises. [N.T. 173].

Ms. Ferris testified that she was in the limousine when Mr. Paris attempted to go back to the restroom. [N.T. 174]. She saw him go towards the bar, but was not clear whether he entered the bar. [N.T. 174]. Ms. Ferris also observed Mr. Paris trying to find his broken glasses and he was very upset. [N.T. 174]. Ms. Ferris also observed Mr. Paris trying to get back inside and that is when the pushing and shoving started. [N.T. 175]. There were so many people surrounding the area that she really could not see what was happening.

[N.T. 175]. She recalled Mr. Paris trying to get up the railing and the bouncers threw him over the side when she tried to intervene. [N.T. 175]. Ms. Ferris attempted to get in between the bouncers and Mr. Paris to stop the bouncers from punching him. [N.T. 175-177]. She thought that because she was a female that they would stop, but instead, the bouncers threw her to the ground. [N.T. 175-177]. Ms. Ferris recalled that Ms. Lopez took her back to the limousine and that Ms. Lopez sat with her in the limousine. [N.T. 177]. Ms. Ferris cried and remained in the limousine but then left the limousine and walked back. [N.T. 178-179]. Ms. Ferris saw Mr. Paris sitting on the curb with Ms. Madden, and they both were covered in blood. [N.T. 178-179]. Ms. Ferris did go to the hospital and sat in the waiting room. [N.T. 179]. She also went to the police station and spoke with a detective. [N.T. 179].

Akeim Leonard testified that he was employed as a security person on June 21, 2009 at the licensed premises. [N.T. 186]. He had been employed there for about a year. [N.T. 186]. He had been previously employed at a variety of different clubs and bars. [N.T. 186-187]. He trained with a company called AFI Security. [N.T. 186-187]. He is trained to handle physical altercations and understood that his job duty was keeping the peace. [N.T. 186-187].

On June 21, 2009, at approximately 5:00 or 6:00 p.m., Mr. Leonard was one of the security persons on duty, and he was stationed at the top of the stage. [N.T. 188]. Security was all dressed the same way. [N.T. 213]. From the stage, he had a good view of everything including the front door. [N.T. 189]. Mr. Leonard indicated that Mr. Parris was intoxicated that evening, and he could tell from the look in his eyes and from his movement and his speech. [N.T. 190]. Mr. Leonard left the stage area and came to the entrance of the premises at approximately 1:45 a.m. to 1:50 a.m. because of a pushing altercation at the exit door. [N.T. 190]. Mr. Paris was trying to walk into the exit door and was blocked. [N.T.191]. Mr. Leonard refused entry to Mr. Paris and shoved him back away from the door. [N.T. 191-192]. When Mr. Leonard closed the exit door, Mr. Paris started banging on the windows. [N.T. 191]. Mr. Paris then came to the entrance where there was a ramp, and Mr. Leonard also went to that door. [N.T. 192-193]. Mr. Leonard indicated that after 1:30 a.m., they were not allowing anyone to enter through this door. [N.T. 193]. Mr. Leonard said that he saw Mr. Paris being punched by two (2) individuals. [N.T. 204]. Mr. Leonard stated that he actually picked Mr. Paris up and put him over the railing and then just put him down. [N.T. 195-196].

Mr. Leonard signed a document which stated that he was not to use violence in the course of his employment or conduct on the licensed premises. [N.T. 208]. At that time, there was no specific head of security. [N.T. 208]. Mr. Leonard testified that in an altercation where someone is direct to leave, the manager should be advised. [N.T. 210]. There was no indication that in this case the manager was advised. [N.T. 210]. Mr. Leonard did not know the manager, Mr. Cox's, location at the time of the incident. [N.T. 211-213]. Mr. Leonard did not remember Mr. Paris being escorted earlier out of the premises, and Mr. Leonard was not instructed by Mr. Cox to escort Mr. Paris out of the premises. [N.T. 214]. There were several criminal charges filed against Mr. Leonard as a result of the incident, but all the charges were dismissed for failure to prosecute. [N.T. 200-201].

Kevin Marcuse is the regional manager of seven (7) restaurants, one of which is the licensed premises. [N.T. 230]. He usually visits the premises one (1) or two (2) times a month. [N.T. 231]. Mr. Marcuse indicated that Brain Wehrman is the current manager of the premises, and Mr. Wehrman has been the general manager for approximately six (6) months. [N.T. 231]. Mr. Marcuse confirmed that Mr. Cox was the manager at the time of the incident. [N.T. 231].

Mr. Marcuse indicated that bar people must take an OJT test, which is testing for the goodwill ambassador/doorperson. [N.T. 232]. The goodwill ambassador is described as someone who runs events of the corporation by checking identifications, greeting people, stationing themselves throughout the business, picking up bottles and glassware, being a host on the floor, and communicating with patrons. They are considered part of the security team. [N.T. 232-233 and Exhibit L-2]. The licensed premises also has an employee handbook which outlines the responsibilities of the goodwill ambassador/security person. [N.T. 233-234 and Exhibit L-3]. The policy sets forth a dress code, a policy for identification requests and indicates that there is to be no violence of any kind. [N.T. 234]. The rules are focused on communicating with the patron and using hands defensively if a person must be escorted out of the premises. [N.T. 234-235]. If there is an altercation, then a manager is to be brought in. [N.T.234]. The policy also states that there is never to be any choking, punching or any kind of offensive assault. [N.T. 235]. The premises also gives each employee a “No Strike Agreement,” which indicates that employees would be terminated for striking a patron. [N.T. 237-238 and Exhibit L-4]. All employees are required to sign a copy of the “No Strike Agreement.” [N.T. 238].

Mr. Marcuse was advised that Mr. Cox was inside the premises at the time of the incident and did not come outside of the premises until the police and the ambulance arrived. [N.T. 236-237]. Mr. Cox did not witness the event, but advised the regional office of the incident shortly after it occurred. [N.T. 235-236]. While Mr. Cox was the manager, the responsibilities of the doormen were constantly reinforced. [N.T. 242]. As a manager, Mr. Cox's responsibility would have been to open the premises, be in charge of scheduling, hire and terminate employees, coordinate marketing data, make purchases of liquor, beer, and wine, coordinate local events, work with charities and reach out to the community. [N.T. 239-240].

After carefully reviewing the record, the Board has concluded that there is substantial evidence to support the ALJ's decision to dismiss Count 2 of the Citation, and the ALJ did not commit any error of law or abuse his discretion. The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. The Pennsylvania Supreme Court defined an abuse of discretion as "not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by

the evidence or the record, discretion is abused.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 602 A.2d 1300, 1305 (1992).

In the case at hand, there is no evidence in the record to suggest that the ALJ’s conclusion was the result of misapplication of the law, prejudice or bias, or that it was manifestly unreasonable. Section 471 of the Liquor Code permits the Bureau to issue citations for “sufficient cause,” including violations of the Crimes Code which occur on a licensed premises. [47 P.S. § 4-471]. In Pa. Liquor Control Bd. v. TLK, Inc., 518 Pa. 500 (1988), the Pennsylvania Supreme Court declined to apply strict liability assigned to Liquor Code violations when the violation involves statutes other than the Liquor Code. The Court held that some element of scienter on the part of a licensee is required before liability could be attached to the licensee. Id. at 505-507. In the case at hand, the ALJ found that the Bureau failed to establish that Licensee knew or should have known of the illegal activities by an employee or patron and that Licensee failed to take substantial steps to prevent the illegal activity. The analysis of the ALJ in the Adjudication and Order is sound and, accordingly, the Board finds that the ALJ did not abuse her discretion in dismissing Count 2 of the Citation.

The ALJ determined that Mr. Leonard and another bouncer clearly assaulted Mr. Paris. Mr. Paris had been drinking, apparently to excess, but it was not an excuse for the bouncers to use excessive force and violence against him. The ALJ further found Mr. Paris should have been allowed to take his complaint to the manager as he requested, and the fact that Mr. Paris was intoxicated did not justify the use of physical violation against him. Mr. Leonard offered an unbelievable recitation of the facts, including a tale of an African-American and an Asian-American male coming from across the street and beating up Mr. Paris. The ALJ also found that Mr. Leonard offered an absurd statement that he placed Mr. Paris on the other side of the railing to get him out of the way of harm, when in fact Mr. Leonard tossed him over the balcony in furtherance of his assault against Mr. Paris. Nonetheless, the ALJ ruled that there was not substantial evidence to find that Licensee knew or should have known of the illegal activity that occurred outside of the premises at the hands of Licensee's employees. We agree.

The record reveals that there is no evidence that the incident were consistent with prior or subsequent events of this nature related to the operation of this Licensee. For almost a six (6) month period from August 2009 to February 2010, the Bureau conducted an investigation of the licensed

premises that included several visits to the premises. Some of the visits were undercover; however, the visits included an open inspection and meetings with the manager. The initial visit to the premises on August 22, 2009, included a detail of officers which included the Philadelphia Police Department and the Department of Licensing and Inspections. No violations resulted from that visit to the premises. In September 2009, the Bureau made an undercover visit to the premises, which resulted in Count 1 of the Citation for the loudspeaker violation; no other violation resulted from that visit. In October 2009, the Bureau made another undercover visit to the premises, and no violations were found. On November 18 and December 9, 2009, the Bureau went to the premises to conduct an investigation, but the premises was closed.

On December 17, 2009, the Bureau went to the licensed premises and conducted a routine inspection, but found no violations. On February 3, 2010, an officer from the Bureau met with Mr. Day regarding the violations the alleged assault and obtained employee records concerning Mr. Leonard, but found no additional violations that day. The ALJ also concluded that the altercation on the licensed premises involving Mr. Leonard and another apparent unknown bouncer(s), was not connected to a consistent theme of operations, and Licensee presented evidence of training and distribution of

materials to its employees which expressed disapproval of the use of physical force or violence. Based on the evidence presented at hearing, the ALJ found that there was no pattern of disturbances in and around the licensed premises such that Licensee knew or reasonably should have known of the activity and failed to take any steps to prevent it. We find this determination to be reasonable.

In its appeal, the Bureau argues that Licensee should have known of the assault committed against Mr. Paris because the direct and apparent knowledge possessed by the manager and the bouncers is imputed to Licensee. The Bureau further argues that due to the unique operational and managerial structure set up by Licensee itself for this establishment, any direct and apparent knowledge of the assault committed against Mr. Paris possessed by the manager and the bouncers should be imputed to Licensee. In support of its position, the Bureau cites Alaska Waffle House, Citation No. 03-1592, which was affirmed in an unpublished opinion on appeal to the Court of Common Pleas. The case involved bouncers who assaulted a patron where the manager was found to have actual knowledge or of the criminal acts of the employees and failed to take affirmative steps to stop an assault on a patron which began inside the premises and continued outside. We agree with the

ALJ in the case at hand that there is no evidence that tends to show actual or apparent knowledge on the part of Licensee or the manager where Licensee knew or should have known of the illegal activity that occurred immediately outside the premises. We do not find that there is an unique operational and managerial structure where any direct and apparent knowledge of the assault committed against Mr. Paris possessed by the manager and the bouncers should be directly imputed to Licensee.

The Bureau also asserts that Licensee did not take substantial affirmative steps to prevent the assault that was committed against Mr. Paris by its employees. The Bureau submits that the testimony of Mr. Marcuse fell short of proving that substantial affirmative steps were taken to prevent the assault on Mr. Paris. We disagree. The record shows that there was no pattern of disturbances in and around the licensed premises. On the night of incident, Mr. Paris testified that there was no altercation inside the licensed premises and that he was not ejected from the premises that night. The altercation apparently began when Mr. Paris, who had been drinking apparently to excess, attempted to re-enter the premises and demanded to see a manager. Although this is no excuse for the use of excessive force or violence against him, there is no evidence that liability should be extended to Licensee when

Mr. Leonard and another unknown bouncer(s) used excessive force and violence against Mr. Paris. There was no evidence in the record that revealed Mr. Leonard or the other unknown bouncer(s) would use excessive force and violence that night. Licensee presented evidence of training its employees from using physical force or violence, and Licensee apparently terminated Mr. Leonard's employment shortly after the incident.

Lastly, the Bureau submits that Count No. 2 should have been sustained based on the doctrine of respondeat superior. Under this doctrine, an employer should be vicariously held liable for tortious acts committed by its servant and employee if the tortious act committed within the scope of an employment relationship. The Bureau argues that Licensee should be held liable for the assault perpetrated upon Mr. Paris by its employees, because the duty owed to a business invitee should be the highest standard of care. The Board is not aware of any cases where Licensee should be held vicariously liable for an assault perpetrated upon a patron by its employees outside the premises when there was no pattern of disturbances in and around the licensed premises such that Licensee knew or reasonably should have known of the activity and failed to take any steps to prevent it. As a result, we decline to extend the doctrine of respondeat superior to this case.

Applying the foregoing law to the facts of this case, the Board concludes that the ALJ did not commit an error of law or abused his discretion in dismissing the charge. Accordingly, the Board will sustain the decision of the ALJ to dismiss Count 2 of the Citation.

ORDER

The decision of the ALJ to dismiss Count 2 of the Citation is affirmed.

The appeal of the Bureau is dismissed.

The fine of six hundred dollars (\$600.00) imposed for Count 1 of the Citation has been paid in full.

Board Secretary