

Mailing Date: FEB 17 2011

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-1125
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-392170
v.	:	
	:	LID - 5574
OD'S PLACE, INC.	:	
1500 MARKET ST.	:	
HARRISBURG, PA 17103-2332	:	
	:	
	:	
	:	
DAUPHIN COUNTY	:	
LICENSE NO. E-SS-2579	:	

**BEFORE JUDGE FLAHERTY  
BUREAU COUNSEL BALLARON  
LICENSEE: NO APPEARANCE**

**ADJUDICATION**

BACKGROUND:

This proceeding arises out of a citation that was issued on May 25, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against OD'S PLACE, INC., License Number E-SS-2579 (hereinafter "Licensee").

The citation contains three counts.

The first 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 30, June 27, August 27, September 5, 24 and October 30, 2009, Licensee, by its servants, agents or employes, permitted smoking in a public place where smoking is prohibited.

The second count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 637.6(a)(1) of the Clean Indoor Air Act [35 P.S. §637.6(a)(1)] in that on May 30, June 27, August 27, September 5, 24 and October 30, 2009, Licensee, by its servants, agents or employes, failed to post signage as required by the Clean Indoor Air Act.

The third count charges Licensee with violation of Section 493(26) of the Liquor Code [47 P.S. §4-493(26)] in that Licensee, by its servants, agents or employes, issued checks or drafts dated May 26, 2009, in payment for purchases of malt or brewed beverages, when it had insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks.

The investigation which gave rise to the citation began on April 3, 2009 and was completed on May 13, 2010; and notice of the violation was sent to Licensee by Certified Mail on May 20, 2010. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on December 8, 2010 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania. No one appeared at the hearing on behalf of Licensee. A citation hearing notice was sent to Licensee(s) at its address of record, 1500 Market Street, Harrisburg, PA 17103-2332 by certified mail, return receipt requested and by first class mail on October 26, 2010. The notice set forth the date and time of the hearing as December 8, 2010 at 1:45 p.m., and the place of hearing as Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, PA 17110-9661.

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:

COUNTS 1 AND 2

1. During the period from May 2, 2009 through February 22, 2010, Licensee had not submitted an Application for Exception for cigar bar, drinking establishment or tobacco shop, and had not been granted an exception by the Department of Health pursuant to the Pennsylvania Clean Indoor Air Act to permit smoking on the licensed premises (N.T. 17-18 and Exhibit C-7).

2. On May 30, 2009 an officer of the Bureau entered the licensed premises in an undercover capacity. Upon entry the officer observed a male bartender rendering service to 45 patrons. The officer observed that 90% of the patronage were smoking. Ashtrays were being provided by the bartenders, and this activity was not being halted in any way. The officer also observed that there was no signage displayed indicating whether or not smoking was allowed (N.T. 10).

3. On June 27, 2009 the officer again entered the licensed premises in an undercover capacity where he observed Licensee's principal, Mr. Powell and a female bartender tending bar and rendering service to 50 patrons. The officer again noted that there was no signage authorizing or disallowing smoking. In addition, approximately 90% of the patronage were smoking. The bartenders were providing ashtrays to facilitate the smoking (N.T. 12).

4. On August 27, 2009 the officer again returned to the licensed premises. He observed a female bartender rendering service to approximately six patrons. The officer observed no signage available indicating whether smoking was permitted or not. The officer observed that smoking was being permitted and ashtrays were being provided by the bartender (N.T. 13).

5. On September 5, 2009 the officer entered the licensed premises in an undercover capacity where she observed two male bartenders rendering service to eight patrons. There was no signage observed allowing or disallowing smoking, and patrons were smoking. The bartenders were providing ashtrays to facilitate this activity (N.T. 13).

6. On September 24, 2009 the officer returned to the licensed premises in an undercover capacity. Upon entry she observed a female bartender rendering service to seven patrons. There was no signage available allowing or disallowing smoking. Approximately 90% of the patronage was smoking, and the bartender was allowing this to occur and providing ashtrays to facilitate the smoking (N.T. 15).

7. On October 30, 2009 the officer returned to the licensed premises in an undercover capacity. Upon entry she observed two male bartenders rendering service to 25 patrons. No signage was displayed allowing or disallowing smoking. Approximately 90% of the patrons inside the premises were smoking. The bartender did not prevent this from occurring and provided ashtrays to facilitate it (N.T. 16).

### COUNT 3

8. On May 26, 2009 Licensee purchased malt or brewed beverages from Wilsbach Distributors, Inc. In payment therefore, Licensee issued its check in the amount of \$620.15. The check was dishonored by Licensee's bank for insufficient funds (N.T. 12, 20 and Exhibit C-5 and C-5A).

9. On February 11, 2009 Licensee was sent a warning letter by the Bureau with respect to a purchase of alcoholic beverages from Wilsbach Distributors by Licensee on January 5, 2009. In payment therefore Licensee issued its check in the amount of \$620.53 which was dishonored by Licensee's bank for insufficient funds. The check was made good in a timely fashion (N.T. Exhibit C-6).

### CONCLUSIONS OF LAW:

Counts 1, 2 and 3 of the citation are **sustained**.

DISCUSSION:

COUNTS 1 AND 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. Further, this Act requires Licensee to post prominently smoking or non-smoking signs as appropriate in areas where smoking is either regulated or permitted under this Act.

The record in this case discloses that Licensee allowed smoking on the licensed premises on the dates set forth in Count 1 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.

The record also discloses that Licensee had no signs indicating whether smoking was allowed or disallowed on the licensed premises.

Based on the foregoing I conclude that Counts 1 and 2 of the citation are sustained.

COUNT 3

Section 493(26) of the Liquor Code [47 P.S. §4-493(26)] prohibits a Licensee from issuing checks or drafts in payment for malt or brewed beverages when it has insufficient funds in or credit with the institution upon which the check is drawn for payment of such check. Further, Licensee is entitled to be issued a warning for each distributor from which it purchased malt or brewed beverages with an insufficient check during a calendar year before charges are brought under the aforementioned Section. In this case, Licensee had previously received a warning during the calendar year and on the date in question issued an NSF check for payment of malt or brewed beverages. Based on the foregoing, I conclude that the charge in Count 3 of the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since August 15, 1973, and has had eight prior violation(s) since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

Citation No. 96-1603. Fine \$100.00.

1. Issued worthless checks in payment for malt or brewed beverages.

Citation No. 96-1671. Fine \$400.00 and 1 day suspension with thereafter conditions.

1. Operated the licensed establishment without a valid health permit or license.
2. Not a bona fide eating place in that food items and chairs at tables were insufficient.

Citation No. 96-2471. Fine \$125.00 and 1 day suspension.

1. Issued worthless checks in payment for malt or brewed beverages.

Citation No. 97-0434. Fine \$500.00 and 2 days suspension. Fine not paid and license suspended an additional 5 days and thereafter until fine paid.

1. Failed to post in a conspicuous place on the outside of the licensed premises, a notice of suspension.

Citation No. 97-1342. Fine \$150.00.

1. Failed to return the eating place license to the Board after the licensed establishment had not been in operation for a period of 15 consecutive days.

Citation No. 02-2296. Fine \$1,000.00.

1. Sales to a visibly intoxicated person.

Citation No. 06-0631X. Fine \$150.00.

1. Issued worthless checks in payment for malt or brewed beverages. December 6, 2005.

Citation No. 09-0085X. Fine \$200.00.

1. Issued worthless checks in payment for malt or brewed beverages. December 5, 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.

Counts 1 and 2 of the citation arise from the same facts and address the same enforcement interests. They will, therefore, be merged for purposes of imposing a penalty.

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

Counts 1 and 2 merged - \$200.00 fine  
Count 3 - \$250.00 fine

ORDER

THEREFORE, it is hereby ordered that Licensee OD'S PLACE, INC., pay a fine of \$450.00 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 31<sup>ST</sup> day of January, 2011.

A handwritten signature in cursive script, reading "Daniel T. Flaherty, Jr.", is written over a horizontal line.

Daniel T. Flaherty, Jr., J.

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**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**

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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. 10-1125  
OD'S Place, Inc.