

Mailing Date: OCT 11 2011

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-1168
LIQUOR CONTROL ENFORCEMENT	:	(consolidated with 10-1198
	:	and 10-1233)
	:	
	:	
	:	
	:	Incident Nos. W05-410971
v.	:	W05-410972 & W05-410974
	:	
	:	LID - 56505
THE TRACKS, INC.	:	
T/A THE TRACKS	:	
305 E. MAIN ST.	:	
PO BOX 173	:	
SOMERSET, PA 15501-2104	:	
	:	
SOMERSET COUNTY	:	
LICENSE NO. R-AP-SS-15262	:	

BEFORE JUDGE THAU
BUREAU COUNSEL GUSTAVE
LICENSEE: MICHAEL J. BURATTY, Licensee's President, Director and Majority
Stockholder

ADJUDICATION

BACKGROUND:

This proceeding arises out of three citations that were issued by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against THE TRACKS, INC., License Number R-AP-SS-15262 (Licensee) as more fully described below.

Citation No. 10-1168 (issued on June 9, 2010 containing four counts).

Citation No. 10-1198 (issued on June 14, 2010 containing two counts).

Citation No. 10-1233 (issued on June 18, 2010 containing three counts).

The first consolidated count charges Licensee with a violation of Section 15.62(a) of the Liquor Control Board Regulations [40 Pa. Code §15.62(a)]. The charge is that on May 10, 11 and 12, 2010, Licensee, by its servants, agents or employes, failed to post in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from the outside of the premises, a Notice of Suspension.

The second consolidated count charges Licensee with violation of Section 15.62(c) of the Liquor Control Board Regulations [40 Pa. Code §15.62(c)]. The charge is that on May 10 and 12, 2010, Licensee, by its servants, agents or employes, failed to remove its license from display as directed by the Office of Administrative Law Judge at Citation No. 09-1878.

The third consolidated count charges Licensee with violation of Sections 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §§4-491(1), 4-492(2) and 4-493(16)]. The charge is that on May 10, 11 and 12, 2010, Licensee, by its servants, agents or employes, sold, furnished and/or gave alcoholic beverages during a time when its Restaurant Liquor license was suspended at Citation No. 09-1878.

The fourth consolidated count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 637.2 of the Clean Indoor Air Act [35 P.S. §637.2]. The charge is that on May 10, 2010, Licensee, by its servants, agents or employes, permitted an individual under eighteen (18) years of age to be in a portion of the licensed premises where smoking was permitted.

I conducted an evidentiary hearing on June 28, 2011 in Altoona, Pennsylvania. The matter was submitted by way of Agreement of Facts.

FINDINGS OF FACT:

1. The Bureau began its investigation on April 7, 2010 and completed it on May 12, 2010.¹ N.T. 8, 44 and 60).

2. The Bureau sent three notices of alleged violations to Licensee at the licensed premises by certified mail, return receipt requested, two on May 24, 2010 and one on June 2, 2010. The notices alleged violations as charged in the citation, as consolidated. (N.T. 8, 44 and 60).

¹Licensee's representative initially agreed that the Bureau engaged in three distinct investigations (N.T. 8). Later in the hearing, Licensee's representative questioned why the Bureau issued three separate citations (N.T. 69). As Licensee was not represented by counsel and in the interest of justice, I accepted that inquiry as Licensee's withdrawal of any factual agreement related to the investigatory period.

Count No. 1

3. On May 10, 11 and 12 2010, Licensee failed to post a suspension placard as required by Order of the Administrative Law Judge (N.T. 14, 45-46).

Count No. 2

4. On May 10 and 12, 2010, Licensee failed to remove the license from display as required by Order of the Administrative Law Judge (N.T. 14-15, 55-60).

Count No. 3

5. On May 10, 11 and 12, 2010, Licensee was open and operating selling alcoholic beverages at a time when its license was suspended pursuant to the Order of the Administrative Law Judge (N.T. 14-18, 45-46 and 55-60).

Count No. 4

6. On May 10, 2010, Licensee permitted a customer under the age of 18 on a portion of the premises which Licensee was permitted to allow smoking² (N.T. 20-22).

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. Counts 1, 2, 3 and 4 of the citation are **sustained** as charged.

²The charge is only one example of how the Clean Indoor Air Act and the Liquor Code clash. The Liquor Code provides for the general prohibition against anyone under 21 to frequent any portion of the licensed premises [47 P.S. §4-493]. In some contradiction, the Clean Indoor Air Act allows for anyone over 18 to be present in an area where smoking is permitted, by exemption. When it comes to a premises licensed by the Pennsylvania Liquor Control Board, it is the Liquor Code which prevails. I see no legislative intent in the Clean Indoor Air Act to supersede the Liquor Code as it relates to minors, 18-20 years old, being allowed on a portion of a licensed premises where smoking is permitted by way of exemption.

DISCUSSION:

The Three Citations Arise Out Of One Investigation

The term “consolidation” does not accurately describe the determination I read herein. Based on my authority to make findings of fact, I conclude the three citations arise out of one investigation. Bureau counsel’s argument to the contrary does not sway me.

There is nothing in Bureau counsel’s submission that explains why the criteria identified in *Pa. State Police v. Six Pack Shack*, Citation No. 96-2637, as well as *Case Beer and Soda Outlet*, II Selected Opinions ALJ 124 have not been satisfied. Merely repeating the procedural history of this matter does not address the standards I conclude are applicable in determining whether, as a matter of fact, multiple citations actually arise out of one investigation.

The initial Adjudications (Adjudication No. 09-1878, 09-2277 and 09-2921) which Licensee was charged to have violated in this matter were issued by the Office of Administrative Law Judge on the same date. In fact, I deliberately selected three, concurrent dates precisely because the initial Adjudications were issued simultaneously.

The primary reason the Bureau initiated surveillance of Licensee was to ensure compliance with those three Adjudications. Three of the four combined charges are related to Licensee’s failure to comply with those three Adjudications. The three supposedly distinct investigations are temporally proximate to each other. Furthermore, the three supposedly distinct investigations were assigned to the same Enforcement Officer.

I am reminded of my reasoning in *G and Q, Inc.*, 30 Selected Opinions, ALJ 16. There, the licensee pressed me to enter findings of fact consistent with the principles expressed in *Case Beer and Soda Outlet* (supra), as a basis for me to “consolidate” two citations. In *G and Q, Inc.* (supra), the Bureau’s investigative activity was quite detailed and, as I remarked in that Adjudication, “accompanied by deliberation.” While I disagreed with the Bureau’s reasoning, it was inappropriate for me to substitute judicial discretion for administrative discretion. I remain committed to that principle.³

³ The Bureau points to Administrative Law Judge Flaherty’s determination in *Pa. State Police v. Anna Marie Davis*, Adjudication No. 10-2578 and 10-2626, as an example where, based on similarities between the Adjudications, no consolidation occurred. I cannot explain the result. However, I wonder whether Administrative Law Judge Flaherty would have taken the same approach had the issue been expressly raised.

PRIOR RECORD:

Licensee has been licensed since July 10, 2006, and has had four prior violations:

Adjudication No. 09-1878. Fine \$300.00. Fine not paid and license suspended 1 day and thereafter until fine paid.

1. Permitted smoking in a public place where smoking was prohibited. May 9, June 3, 20, July 9 and 16, 2009.
2. Failed to post signage required by the Clean Indoor Air Act. May 9, 10, June 20, July 9 and 16, 2009.

Adjudication No. 09-2277. Fine \$350.00. Fine not paid and license suspended 1 day and thereafter until fine paid.

1. Permitted smoking in a public place where smoking was prohibited. August 14, 2009.
2. Failed to post signage required by the Clean Indoor Air Act. August 14, 2009.

Adjudication No. 09-2921. Fine \$250.00. Fine not paid and license suspended 1 day and thereafter until fine paid.

1. Permitted smoking in a public place where smoking was prohibited. October 15, 29, November 13 and 28, 2009.
2. Failed to post signage required by the Clean Indoor Air Act. October 15, 29, November 13 and 28, 2009.

Adjudication No. 10-0310. Fine \$1,000.00.

1. Permitted smoking in a public place where smoking was prohibited. January 2 and 30, 2010.
2. Failed to post signage required by the Clean Indoor Air Act. January 2 and 30, 2010.

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 Counts 1, 2 and 4 of this case.

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 \$1,000.00 or more than \$5,000.00 or both for violations of the type found in Count No. 3 of this case.

I impose:

- Count No. 1 – 3 days suspension
- Count No. 2 - \$2,000.00 fine
- Count No. 3 - \$300.00 fine
- Count No. 4 - \$300.00

ORDER

THEREFORE, it is hereby ordered that Licensee THE TRACKS, INC., pay a fine of \$2,600.00 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.

IT IS FURTHER ORDERED that Licensee's liquor license (including all permits) License No. R-AP-SS-15262 be suspended for a period of three days **BEGINNING** at 7:00 a.m. on Monday, November 7, 2011 and **ENDING** at 7:00 a.m. on Thursday, November 10, 2011.

Licensee is directed on November 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 replacement placards are needed for any reason they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

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

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

Jurisdiction is retained.

Dated this 28TH day of September, 2011.



Felix Thau, A.L.J.

THE TRACKS, INC.
CITATION NO. 10-1168
(CONSOLIDATED WITH 10-1198
AND 10-1233)

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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.

IF YOU WISH TO APPEAL THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER, THE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE MAILING DATE OF THE ORDER. PLEASE CONTACT CHIEF COUNSEL'S OFFICE AT 717-783-9454.

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. 10-1168
The Tracks, Inc.