

Mailing Date: JAN 28 2011

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-1722
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-411165
v.	:	
	:	LID - 56341
3001 CASTOR LLC	:	
3001 CASTOR AVE	:	
PHILADELPHIA PA 19134-6203	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-EHF-9527	:	

JUDGE SHENKLE
 BLCE COUNSEL: James E. Dailey, Esq.
 LICENSEE COUNSEL: Edward B. McHugh, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on August 17, 2010. There are three counts in the citation.

The first count alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §637.6(a)(2) of the Clean Indoor Air Act, 35 P.S. §637.6(a)(2), on April 29, May 29, June 25 and July 18, 2010, by permitting smoking in a public place where smoking is prohibited.

The second count alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §637.6(a)(1) of the Clean Indoor Air Act, 35 P.S. §637.6(a)(1), on April 29, May 29, June 25 and July 18, 2010, by failing to post signage as required.

The third count alleges that Licensee violated §13.102 of the Liquor Control Board Regulations, 40 Pa. Code §13.102, on May 29, 2010, by furnishing an unlimited or indefinite amount of free alcoholic beverages for a period of two hours.

A hearing was held on December 8, 2010, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On July 18, 2010, two liquor enforcement officers entered the licensed premises at 1:00

a.m. They were asked for identification and required to pay a cover charge. There were about 100 patrons attended by several bartenders. One of the officers smelled tobacco smoke, looked around, and saw several ashtrays containing discarded cigarettes and cigars. Some of the patrons seated at the bar area were smoking cigarettes. There were no “no smoking” signs in the premises (N.T. 5-7).

2. On April 29, 2010, a liquor enforcement officer entered the licensed premises at about 4:00 p.m. There were about ten patrons and one bartender, but there were also waitresses. There were ashtrays on the bar, but the officer saw no one smoking until a woman walked past him smoking a cigarette. She later returned, stood behind the bar, and smoked. There were no “no smoking” signs in the premises. The complaint which resulted in the Bureau’s investigation came from the Philadelphia Health Department (N.T. 11-14).

3. On May 29, 2010, two liquor enforcement officers entered the licensed premises at 7:40 p.m. They were asked for identification and required to pay a cover charge. There were about 35 patrons, attended by bartenders. There were ashtrays on the small tables which surrounded the stage. Two or three people were smoking cigarettes. There were no “no smoking” signs in the premises (N.T. 14-16).

4. One of the officers bought a bucket of five bottles of Miller Lite beer, which the two officers shared, for \$20. At about 7:50 p.m. the disc jockey announced that there would be an open bar, for two hours, on Corona and Corona Light bottled beer. The bartender explained that the officer could have as much Corona or Corona Light as he wanted, for zero dollars (N.T. 16-17, 20).

5. After finishing the Miller Lite, one of the officers ordered a bottle of Corona beer, for which no charge was made. A little later he had another one, also free (N.T. 18-20).

6. On June 25, 2010, a liquor enforcement officer entered the licensed premises at 3:40 p.m. There were several ashtrays containing cigarette butts and ashes. Some of the patrons were smoking cigarettes. There were no “no smoking” signs in the premises (N.T. 20-22).

7. Licensee did not possess a waiver from the Clean Indoor Air Worker Protection Law on the dates the officers observed smoking and an absence of “no smoking” signs in the premises (N.T. 22-23, Exhibit B-3).

8. On November 30, 2009, the Pennsylvania Department of Health received Licensee’s “Application for Exception for Cigar Bar, Drinking Establishment, or Tobacco Shop” under the Clean Indoor Air Act, Act 27 of 2008. On December 16, 2009, the Department returned the application to Licensee on the basis that the Clean Indoor Air Act does not apply to the City of Philadelphia. The letter states that the city enacted its own Clean Indoor Air Ordinance, effective September 14, 2006,

and that this ordinance is the law governing smoking in public places within the Philadelphia city limits (Exhibit L-1).

CONCLUSIONS OF LAW:

Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, on April 29, May 29, June 25 and July 18, 2010, by permitting smoking in a public place where smoking is prohibited.

Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, on April 29, May 29, June 25 and July 18, 2010, by failing to post signage as required.

Licensee violated §13.102 of the Liquor Control Board Regulations, 40 Pa. Code §13.102, on May 29, 2010, by furnishing unlimited free alcoholic beverages for a period of two hours.

DISCUSSION:

The conclusions of law omit part of the statutory authority cited in the first and second counts of the citation because the Clean Indoor Air Act does not apply to Philadelphia. *See* 35 P.S. §637.11. The basis for the charge in these counts is the authority of an administrative law judge to impose a penalty for “other sufficient cause.” *See* 47 P.S. §4-471(a).

Both the state’s Clean Indoor Air Act and the city’s Clean Indoor Air Worker Protection Law prohibit smoking in public places, absent an exemption. Both require the posting of “no smoking” signs. Licensee was not exempt from the Clean Indoor Air Worker Protection Law on the dates mentioned in the findings of fact, and could not be exempt from the Clean Indoor Air Act because that act did not apply.

Counsel for Licensee argued that the statutory scheme discriminates unconstitutionally against his client. Given that laws of both the city and the state prohibit the same conduct and allow exemptions on the same bases, I do not think that Licensee has been treated unequally.

As to the third count, Licensee’s counsel argued that the free Corona and Corona Light beer furnished on May 29, 2010, did not violate 40 Pa. Code §13.102 because it would be lawful, according to LCB Advisory Opinion No. 03-353, for a non-licensed, unrelated business to sponsor a “free drink” promotion at a licensed premises. Otherwise, a licensee is limited to furnishing one free drink per patron per day, according to Advisory Notice No. 16 (Amended April 14, 2004).

In the first place, there was no evidence that a non-licensed, unrelated business sponsored this “free drink” promotion at the licensed premises. In the second place, more than one free drink per person was offered. The practice therefore violates the regulation and advisory notice cited.

PRIOR RECORD:

Licensee has been licensed since November 30, 2006, and has had two prior violations:

Citation No. 09-2997. \$200.00 fine.

1. Permitted smoking in a public place where prohibited. November 19, 2009.
2. Failed to post signs required by the Clean Indoor Air Act. November 19, 2009.

Citation No. 10-0784. \$200.00 fine.

1. Permitted smoking in a public place where prohibited. March 11, 2010.
2. Failed to post signs required by the Clean Indoor Air Act. March 11, 2010.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$50.00 to \$1,000.00 range, or both, for violations of this type. Penalties are assessed as follows:

- Count Nos. 1 and 2 (as merged) – a fine of \$300.00.
- Count No. 3 – a fine of \$100.00.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, 3001 Castor, LLC, License No. R-APSS-EHF-9527, shall pay a fine of four hundred dollars (\$400.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

Dated this 18TH day of January, 2011.



David L. Shenkle, J.

jb

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.

Detach Here and Return 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. Please make your 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

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3001 Castor, LLC