Mailing Date: MAR 28 2011

Appeal
Amended Order

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : : :

An evidentiary hearing was conducted on February 9, 2011 at the Scranton State Office Building, PUC Hearing Room 318, 100 Lackawanna Avenue, Scranton, Pennsylvania.

1. Commonwealth Exhibit No. B-2, N.T. 6.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on July 27, 2010 and completed it on September 8, 2010. (N.T. 23)

2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on September 14, 2010. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. B-1, N.T. 6)

3. On September 5, 2010, a Bureau Enforcement Officer arrived in the area of the premises at approximately 6:45 p.m. Upon exiting his vehicle, the Officer heard music. As he approached the premises, he determined the music was coming from the licensed premises. He heard the music in excess of 300 feet from the premises. The Officer entered the premises. There was a band shell set up in an outside area. Patrons accessed that area through the licensed premises. The Officer went through the inside portion of the licensed premises to the outside area. The area was fenced off. There was a four piece band on the stage. The music the Officer heard while standing at his vehicle when he arrived in the area of the premises was that of the four piece band which was using an electronically amplified sound system. (N.T. 23-25)

4. The Officer departed the area to do a sound check. At a distance of approximately 600 feet, the Officer could still hear the bass. (N.T. 26-27)

5. Licensee allows its premises to be used for charitable events four to five times a year. At such an event, Licensee donates all profit to the charity.

6. On September 5, 2010, Licensee sponsored such a charitable event. Board members of the charity took the "donations/cover charge" when patrons entered. (N.T. 50-55)

7. The charity chose the band. The electric power for the stage was donated by a neighbor, i.e., the power that ran from the mixing board was connected directly to the neighbor's home. The remaining electrical power was supplied by a generator. (N.T. 56-58)

8. At an earlier event for another charity, Licensee was visited by a Bureau Enforcement Officer who advised Licensee's President/Manager, Mr. C., that there may be citations issued for future events. Mr. C. decided not to have any more events. However, the charity for whom the September 5, 2010 event was being sponsored convinced Mr. C. to continue his practice. Mr. C. believed the arrangement for this event was legal. Licensee further believed the outside area had been temporally removed from the license. (N.T. 58-61)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

2. The citation is **sustained** as charged.

DISCUSSION:

Licensee's counsel presented a letter (N.T. 38) prepared by a staff member of the Pennsylvania Liquor Control Board's Licensing Bureau (Judge's Exhibit No. J-1). Licensee argues, that letter demonstrates the outside area was not licensed.

The letter does nothing more than acknowledge receipt of counsel's request to remove the outside area as part of the licensed premises for September 5 and 6, 2010. The letter goes on to indicate that Licensing records have been marked accordingly. What the letter does not say is the request to remove the outside area from the license for the two days in question was granted retroactively.[2]

In order to support Licensee's argument that the area was not licensed at the time of the event and for the Bureau to counter such a claim, I kept the record open until the close of business March 2, 2011, so that either party could submit a certification from the Pennsylvania Liquor Control Board that would have clarified whether the outside area was or was not licensed on September 5 and 6, 2010. Having received no such certification, the record is now closed.

2. The letter is dated September 10, 2010, after the events in controversy. At best, the letter is ambiguous. I read the letter to say that counsel's request to remove the outside area from the licensed premises temporarily as having been received and recorded.
Ordinarily, I would take official notice regarding the dimensions of the licensed premises. In this matter because the question of the status of the outside area requires interpretation, my ability to take official notice has been compromised. When records are clear on their face, it is appropriate for me to take official notice. When explanation is required, taking official notice is out of the question.

In any event and as I explained to counsel at the hearing, the distinction between whether the outside area was or was not licensed is irrelevant. The pertinent regulation renders it unlawful for a licensee to "use or permit to be used inside or outside the licensed premises"[3] any device that amplifies sound so that it is heard outside of the licensed premises.

Obviously, when the regulation speaks of locations outside the licensed premises, the charged licensee must have some connection and/or responsibility for the use of an amplification system. Instantly, that connection is clearly established.

PRIOR RECORD:

Licensee has been licensed since February 23, 2005, and has had one prior violation (Commonwealth Exhibit No. B-3):

> Adjudication No. 07-2014. Fine $250.00.
> Used loudspeakers or devices whereby music could be heard outside.
> July 7, 2007.

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.

I adopt the recommended penalty of a $300.00 fine.

3. "Permit," when used in relationship to other provisions of the Liquor Code, has been judicially interpreted to mean: "to acquiesce by failing to prevent." ***Liquor Control Bd. V. S & B*** Restaurants, 535 A.2d 709 (Pa.Cmwlth. 1988). Also see ***George Atiyeh***, Citation No. 88-1955, 2 Selected ALJ Opinions 1 and cases cited therein.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of $300.00 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.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this __9TH____ day of March, 2011.

Felix Thau, A.L.J.

pm

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

Citation No. 10-2040
CUSAT'S CAFÉ, INC.