

Mailing Date: September 14, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-2040
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
CUSAT'S CAFÉ, INC.	:	License No. R-13002
742-744 Alter Street	:	
R. 746-752 Alter Street	:	
Hazleton, PA 18201-2966	:	LID 54167

Counsel for Licensee: John P. Rodgers, Esquire  
Caverly, Shea, Phillips & Rodgers, LLC  
15 Public Square, Suite 210  
Wilkes-Barre, PA 18701

Counsel for Bureau: Craig A. Strong, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
7448 Industrial Park Way  
Macungie, PA 18062

**OPINION**

Cusat's Café, Inc. ("Licensee") timely appealed from the Adjudication and Order of Administrative Law Judge Felix Thau ("ALJ") mailed on March 28,

2011, wherein the ALJ imposed a fine of three hundred dollars (\$300.00) on Citation No. 10-2040.

Pursuant to section 471 of the Liquor Code, an appeal must be based solely on the record before the ALJ. [47 P.S. § 4-471]. 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 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 Citation charged that on September 5, 2010, Licensee, by its servants, agents or employees, used or permitted to be used on the inside/outside 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, in violation of section 5.32(a) of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 5.32(a)].

In response to the Citation, Licensee attended a hearing held before the ALJ on February 9, 2011. After the hearing, the ALJ sustained the Citation. [Adjudication & Order, mailed March 9, 2011].

In its Appeal, Licensee first claims that the ALJ abused his discretion when he ignored the purported fact that Licensee withdrew its request for a temporary extension of the licensed premises, and, therefore, the bandstand was not located on the licensed premises. Licensee next argues that the ALJ erred as a matter of law when he misinterpreted section 5.32(a) of the Board's Regulations by holding that a bandstand on unlicensed premises would be included in the definition of "outside the licensed premises." Lastly, Licensee argues that the ALJ committed an error of law when he held that a bandstand and speakers located on an unlicensed area, with power not being provided by Licensee but rather from a neighboring residence, would be considered "outside the licensed premises" under section 5.32(a) of the Liquor Code (sic).<sup>1</sup>

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge ("OALJ"), including the ALJ's Adjudication and Order mailed March 9, 2011, Licensee's Appeal, and the Notes of Testimony and Exhibits from the hearing held on February 9, 2011, and

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<sup>1</sup> The correct citation is to the Board's Regulations, 40 Pa. Code § 5.32(a).

has concluded that the ALJ's ruling is without error and is supported by substantial evidence.

Section 5.32(a) of the Board's Regulations provides that "a licensee may not use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard on the outside of the licensed premises." [40 Pa. Code § 5.32(a)]. The ALJ found that on September 5, 2010, a Bureau Enforcement Officer ("Officer") arrived in the area of the licensed premises at approximately 6:45 p.m. [FF No. 3; N.T. 23]. Upon exiting his vehicle, the Officer heard music and determined that the music was coming from the licensed premises. [FF No. 3; N.T. 23-24]. The Officer entered the premises and went through the inside portion of the licensed premises to the outside area. [FF No. 3; N.T. 24]. There was a band shell set up in the outside area, which area was fenced off. [FF No. 3; N.T. 24]. A four-piece band was on the band shell stage, playing the music that the Officer heard when he arrived in the area of the premises. [FF No. 3; N.T. 25-26]. The Officer departed the area to do a sound check and could still hear the bass at a distance of approximately six hundred (600) feet. [FF No. 3; N.T. 26].

The ALJ also found that Licensee allows its premises to be used for charitable events four (4) to five (5) times a year. [FF No. 5; N.T. 50]. At such an event, Licensee donates all profit to the charity. [FF No. 5; N.T. 51]. On September 5, 2010, Licensee sponsored such a charitable event. [FF No. 6; N.T. 51]. The charity took donations or a cover charge when patrons entered the licensed premises. [FF No. 5; N.T. 27, 51].<sup>2</sup> The charity chose the band. [FF No. 7; N.T. 56]. The electrical power for the stage was donated by a neighbor and also by a generator. [FF No. 7; N.T. 56].

The case of Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Goodfellas, Inc., t/a Goodfellas, 850 A.2d 868 (Pa. Cmwlth. 2004) is dispositive of this appeal. In Goodfellas, as in the instant matter, a band playing amplified music was physically located outside off the licensed premises of the restaurant, but adjacent to the licensed premises. The licensee collected a cover charge from anyone entering the licensed premises. Although the licensee had applied for a temporary extension of its premises to cover another outside area near the one in question, the latter was delineated as an “Unlicensed Area - Band or Disc Jockey.” The ALJ sustained the citation for violation of the Board’s noise ordinance, and the Board affirmed that

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<sup>2</sup> There was a conflict in the testimony as to whether the payment of money at the entrance to the premises was a cover charge, as the Officer testified to [N.T. 27] or a donation, as Licensee testified to. [N.T. 51]. The ALJ did not resolve this conflict in testimony by making a credibility determination, but this issue is not material to the Board’s decision.

decision. On appeal, the Commonwealth Court affirmed the Board's decision, holding that "Licensee's behavior falls cleanly under the provisions of Section 5.32(a) and is clearly governed by the Liquor Code and the Board's regulations promulgated thereunder." [Id. at 872]. The Court noted that the noise regulation provides that a licensee may not use or *permit to be used* loudspeakers or similar devices emitting sound outside of the licensed premises. [Id. at 871-872]. Moreover, the restrictions in section 5.32(a) apply not only to the licensee, but to any others connected with it. [Id. at 872]. Thus, even if a licensee has not directly engaged the band, but merely contributed to the band's engagement to entertain its patrons on its licensed premises, a violation of section 5.32(a) has occurred. [Id. at 872].

In the instant case, Licensee's situation is nearly on all fours with that in Goodfellas and the Board does not find any of Licensee's arguments on appeal to require a different outcome. The record does not reflect that the ALJ ignored Licensee's withdrawal of its request for a temporary extension to cover the outdoor stage area; rather the ALJ discusses that very fact in his adjudication. Further, as the ALJ correctly points out, such request was filed days after the events in question, and more importantly, whether the outside area was licensed or not is irrelevant to the outcome in this case. Nor did the

ALJ misinterpret the law when he found that a stage set up on unlicensed premises but adjacent to the licensed premises, for the benefit of Licensee's patrons, is a violation of section 5.32 of the Board's Regulations when amplified music is provided and can be heard outside. Finally, the fact that the electrical power for the band was donated by a neighbor is immaterial.

In conclusion, for the reasons set forth above, the Board affirms the decision of the ALJ.

**ORDER**

The decision of the ALJ in regard to Citation 10-2040 is affirmed.

The appeal of Licensee is denied.

The fine of three hundred dollars (\$300.00) remains unpaid.

Licensee must adhere to all conditions set forth in the ALJ's Order dated  
March 28, 2011.

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Board Secretary