Mailing Date: APR 02 2012

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 10-2129
	:	Incident No. W02-411321
v.	:	
	:	LID - 63011
KR SCRANTON ASSOCIATES, LLC 519 LINDEN ST. SCRANTON, PA 18503-1605	:	
LACKAWANNA COUNTY LICENSE NO. R-AP-SS-10837	:	

BEFORE JUDGE FLAHERTY
BUREAU COUNSEL STRONG
LICENSEE: EDWARD A. TARASKUS, ESQUIRE

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on October 13, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against KR SCRANTON ASSOCIATES, LLC, License Number R-AP-SS-10837 (hereinafter "Licensee").

The citation contains two counts.

The first count charges Licensee with violation of Section 491(10) of the Liquor Code [47 P.S. §4-491(10)] in that on August 27, 2010, Licensee, by its servants, agents or employes, fortified, adulterated and/or contaminated liquor.

The second count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] in that on March 13, April 25, May 9, 13, 22, June 6 and 20, 2010, the licensed establishment was operated in a noisy and/or disorderly manner.

The investigation which gave rise to the citation began on April 14, 2010 and was completed on September 20, 2010; and notice of the violation was sent to Licensee by Certified Mail on September 24, 2010. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on December 13, 2011 in the Scranton State Office Building, 100 Lackawanna Avenue, Scranton, Pennsylvania.

At the hearing, the Bureau moved to withdraw the date of June 20, 2010 in Count No. 2. The motion was granted (See N.T. 61).

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:

COUNT 1

1. On August 27, 2010 an officer of the Bureau visited the licensed premises and conducted an open inspection (N.T. 8).

2. During the inspection, the officer discovered twelve open bottles of liquor which were contaminated with insects which appeared to be fruit flies (N.T. 8).

COUNT 2

March 13, 2010

3. On March 13, 2010, Corporal Harris of the Scranton Police was in the area of the licensed premises attending to an incident (N.T. 14-15).

4. While attending to the aforementioned incident Corporal Harris was approached by a member of the security staff for the licensed premises who asked him for assistance with respect to a male patron who had been removed from the licensed premises because of his degree of intoxication and who kept trying to re-enter the premises (N.T. 15).

5. Corporal Harris observed an individual who was near the front door of the licensed premises who exhibited an aggressive demeanor. He had slurred speech and he was stumbling. Since he was with no sober party, Corporal Harris placed this individual under arrest for public drunkenness (N.T. 15-16).

April 25, 2010

6. On April 25, 2010 Kristen Tansits was a patron on the licensed premises (N.T. 21).

7. While on the licensed premises, Tansits and her friend went into the women's bathroom and went to the handicapped stall at the back (N.T. 21).

8. Security personnel working for Licensee received a radio call that indicated that someone was smoking marijuana in the women's bathroom. A female security guard was sent into the women's bathroom to check (N.T. 75).

9. The female security guard asked Tansits to leave. Tansits became aggressive and began screaming obscenities. The female security guard called for back-up. Two more security guards entered the bathroom and stood between Tansits and the female security guard. Tansits tried to swing and hit the female security guard. One of the male security guards ducked as she swung. He then "wrapped her up," and took her out of the property and placed her on the ground. Tansits took one step and fell down (N.T. 75-76 and 79-80).

May 9, 2010

10. On May 9, 2010 Patrolman Daniel Schaufler of the Scranton Police Department was dispatched to the licensed premises in response to a call that a male individual who had been ejected from the premises had kicked the glass door and smashed it (N.T. 29).

11. When Officer Schaufler arrived at the licensed premises, employes pointed out an individual who was then in front of the premises (N.T. 29).

12. Officer Schaufler observed that this individual had slurred speech and an unsteady gait. He was trying to start arguments with anyone within ear shot (N.T. 30).

13. The aforementioned individual was arrested by Officer Schaufler for criminal mischief, public drunkenness and disorderly conduct (N.T. 29).

14. While the aforementioned arrest was taking place, an individual who claimed to be a friend of the person being arrested attempted to intervene. When he physically attempted to remove his friend from police custody, he was also arrested (N.T. 30).

May 13, 2010

15. On May 13, 2010, Patrolman Robert Olecki of the Scranton Police Department, while on patrol, stopped in the area of the licensed premises. As he stopped, one of the security guards at the licensed premises informed him that an intoxicated male patron had been asked to leave and was attempting to get back in. He had pushed one of the security guards (N.T. 36).

16. Patrolman Olecki was given a description of the intoxicated patron, and as he was leaving the licensed premises he saw this individual try to enter the licensed premises (N.T. 36).

17. Patrolman Olicki observed that this individual had a strong odor of alcoholic beverage on his person and he had a "drunken sway," and could not stand in one position (N.T. 37).

18. Patrolman Olecki placed this individual under arrest for public drunkenness (N.T. 38).

19. The aforementioned incident (on May 13, 2010) occurred on the sidewalk in front of the licensed premises (N.T. 38).

May 22, 2010

20. On May 22, 2010, Patrolman Francis McLane was on duty patrolling downtown Scranton. He was "flagged down" by security staff at the licensed premises (N.T. 47).

21. The security staff indicated that there was a disorderly person trying to regain entrance to the premises and that they were trying to keep him out (N.T. 47).

22. Officer McLane observed three males. One was disorderly and intoxicated. He emanated an odor of alcohol. He had a lack of balance and motor abilities; and his speech was slurred at times. He was yelling obscenities. The other two males were attempting to pull the intoxicated person away from the licensed premises (N.T. 47-48).

23. Officer McLane attempted to convince the intoxicated male to leave with his friends, but he became more disorderly and combative (N.T. 47).

24. Officer Olecki arrived on the scene to assist officer McLane (N.T. 47-48).

25. Officer McLane made the decision to take the intoxicated male into custody. He placed one handcuff on him, and the male pushed him back and screamed obscenities at him. Officer Olecki then subdued this individual with his taser (N.T. 40-41).

26. This entire incident occurred outside the licensed premises (N.T. 50).

June 5, 2010

27. On June 5, 2010 Robert Jones entered the licensed premises as a patron at 10:00 p.m. (N.T. 52).

28. Two bouncers subsequently asked Jones to leave the licensed premises because of bad blood between him and another bouncer named Anthony Gance (N.T. 53 and 76-77).

29. Jones left the licensed premises and went to the establishment next door known as the Backyard Ale House where he remained until 2:00 a.m. (N.T. 54).

30. At 2:00 a.m., Jones left the Backyard Ale House and called a cab (N.T. 54).

31. At approximately 2:15 a.m., Mr. Gance clocked out and left the licensed premises. He then attacked Mr. Jones from behind on the sidewalk outside and knocked him to the ground (N.T. 55 and 78).

32. Police officers who were already in the area broke up the altercation and arrested Mr. Gance (N.T. 55 and 57).

33. The next day, Mr. Gance was discharged from his position with Licensee for inappropriate behavior (N.T. 78).

June 20, 2010

34. This date was Withdrawn.

CONCLUSIONS OF LAW:

1. Count No. 1 of the citation is **sustained**.

2. Count No. 2 of the citation is **dismissed**.

DISCUSSION:

COUNT NO. 1

The record establishes that during an inspection conducted by officers of the Bureau on October 27, 2010, the officers found twelve open bottles of liquor which contained insects which appeared to be fruit flies. Since these bottles were obviously contaminated, I have little trouble concluding that Count No. 1 of the citation is sustained.

COUNT NO. 2

The incidents spread upon the record by the Bureau do not establish that Licensee operated the licensed business in a noisy and disorderly manner.

The appellate court decisions that deal with the concept of noisy and disorderly operation as "other sufficient cause" are ***Appeal of Ciro's Lounge, Inc.***, 358 A.2d 141 (Pa. Cmwlth 1976) and ***In re: AJC, Inc.***, 401 A.2d 421 (Pa. Cmwlth 1979). These two seemingly contradictory decisions were analyzed by Administrative Law Judge Thau in ***Wendell and Woolridge, Inc.***, Citation No. 88-0608 Vol IV, Sel.Op. Pg. 145. Judge Thau concluded that the test which has evolved from these cases is: "…whether, taking all of the circumstances into consideration the disturbance constitutes an invasion of the public welfare, peace and morals and is indicative of the way the licensee operates his business." This test has been generally accepted in this office for more than 20 years.

Initially, it is important to note that with the exception of the incident which occurred on April 25, 2010 (Findings 6, 7, 8 and 9) all of the incidents occurred outside of the licensed premises on public property. Furthermore, in three of the incidents the police became involved at the request of personnel working for the Licensee.

In none of the incidents which are part of this record is there any indication that personnel on duty at the time of the incident did anything wrong or failed to do something that they should have done.

With respect to the incidents of March 13, 2010, May 13, 2010 and May 22, 2010 intoxicated patrons who had been asked to leave the licensed premises were trying to re-enter. It is entirely proper for a licensee to remove visibly intoxicated patrons from the licensed premises. Moreover, the record does not indicate that any of these patrons were even served alcohol on the licensed premises. They may have come to the premises in that state, and were then ejected. The Bureau has argued that these patrons were allowed to become intoxicated on the premises before being ejected onto the public streets. The record simply does not bear this out.

It must also be remembered that a liquor licensee has committed no violation of the Liquor Code [47 P.S. §1-101 et seq] by serving alcohol to a patron until that patron exhibits symptoms of intoxication. Once such symptoms are present service of alcohol to the patron must cease, and it is perfectly legitimate to remove that patron from the premises.

It seems inconsistent and unfair to cite licensees on the basis of police reports where the licensee has legitimately called the police to handle a potentially violent incident where licensee may very well be subject to citation or even prosecutions if the licensee attempts to handle the situation by itself. This places the licensee in a situation where he is "damned if he does and damned if he doesn't."

As to the incident on April 25, 2010, security personnel of Licensee legitimately removed a belligerent and combative female from the premises after she was found to be engaged in improper activities. Any minor injuries, which she received were the result of her own actions (See Findings 6, 7, 8 and 9). The actions of the security personnel were completely appropriate.

The incident of June 5, 2010 involved an attack by an off duty employe of Licensee on an individual outside the licensed premises. The individual who was attacked had not even been on the licensed premises for some hours. Nothing about this incident is attributable to the Licensee and cannot therefore be said to be indicative of the way the Licensee operates his business.

Based upon the foregoing, I conclude that nothing in the record indicates that Licensee conducted its business in such a manner as to constitute an invasion of the public welfare, peace and morals and Count No. 2 of the citation must be dismissed.

PRIOR RECORD:

Licensee has been licensed since March 12, 2010, and has had no prior violations. Licensee is, therefore, entitled to be treated as a first time offender.

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.

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

Count 1 - $150.00 fine
Count 2 - Dismissed

ORDER

THEREFORE, it is hereby ordered that Licensee KR SCRANTON ASSOCIATES, LLC, pay a fine of $150.00 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.

Dated this 23RD day of March, 2012.

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.

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

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KR Scranton Associates, LLC