

Mailing Date: FEB 22 2012

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

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Docket No.: 10-2583
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W05-417247
v.	:	
	:	PLCB LID No.: 52699
MATTIS FAMILY, INC.	:	
T/A THE COUNTRY INN BAR & GRILL	:	PLCB License No.: R-AP-SS-13766
615 RAGERS HILL RD.	:	
SOUTH FORK, PA 15956-9801	:	
	:	
	:	
CAMBRIA COUNTY	:	

BEFORE: Administrative Law Judge Felix Thau

FOR BLCE: Nadia L. Vargo, Esquire

FOR LICENSEE: David A. Raho, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation, containing two counts, that was issued on December 15, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Mattis Family, Inc. (Licensee).

The first count charges Licensee with a violation of Section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code §5.32(a)]. The charge is that Licensee, by your servants, agents, or employees, used, or permitted to be used on the inside of your licensed premises, a

loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside, on October 2, 2010.

The second count charges Licensee with a violation of Section 404 of the Liquor Code [47 P.S. §4-404]. The charge is that Licensee, by your servants, agents, or employees, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license, on October 2, 2010.

I presided at an evidentiary hearing on October 24, 2011 at the Hampton Inn, 180 Charlotte Drive, Altoona, Pennsylvania.

Therefore, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

1. The Bureau began its investigation on August 4, 2010 and completed it on November 15, 2010. (N.T. 11)

2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested on, November 17, 2010. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 5)

Count Nos. 1 and 2

3. Two Bureau Enforcement Officers entered the premises in an undercover capacity at 11:40 p.m., Friday, October 1, 2010. Mr. M. Sr., Licensee's Corporate Officer, was the karaoke provider. Customers were allowed to come to the microphone and sing. When there were no customers singing, the karaoke system, which included an amplifier and speakers, still provided music. (N.T. 36-37; 60)

4. The Officers exited the premises at 12:15 a.m., Saturday, October 2, 2010, when karaoke continued. One Officer heard karaoke music escaping the premises as far away as 200 feet. (N.T. 39-40)

5. On February 7, 2008, Licensee and the Pennsylvania Liquor Control Board (PLCB) endorsed a Conditional Licensing Agreement (CLA). (Commonwealth Exhibit No. C-3, N.T. 8-9) In relevant part, the CLA, Paragraph 6, provides:

6. The Board and Mattis therefore agree that the following additional conditions be placed on R-13766 as well as the premises.

- a. Mattis shall prohibit the performance of live, amplified music at the licensed premises, except as set forth in subsection (c) of this paragraph;
- b. Mattis shall limit all entertainment to Thursday, Friday and Saturday evenings between 8:00 p.m. and 11:45 p.m.;
- c. Mattis shall limit entertainment on Thursday and Friday evenings to karaoke;
- d. Mattis shall limit live entertainment on Saturday evening to acoustic music consisting of no more than three (3) musicians playing music at one (1) time;
- e. During all hours that Mattis offers amplified music of any type on the licensed premises, Mattis' employees or manager shall, at least once per hour, patrol the entire exterior of the licensed premises to ensure that amplified music cannot be heard off of the licensed premises. Mattis shall keep a record of the time and date of such patrols as part of its business records;

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. Count Nos. 1 and 2 are sustained as charged.

DISCUSSION:

Count No. 2

How often do we conclude we are communicating clearly and succinctly only to discover that which we intended to convey was not that which the other party to our communication understood? We attribute a degree of precision to language well beyond its capabilities. Even when we commit our thoughts to writing, we cannot guarantee that which is intended is that which is understood.

Our system of laws begs for, demands clarity. Yet, we are unable to honor that goal uniformly or consistently. Witness the Statutory Construction Act of 1972 (1 Pa. C.S.A. §1501, *et seq*), for the most part designed to facilitate understanding. No doubt because that Act is an

umbrella, all-encompassing interpretational aide, every rule has an equal and opposing counterpart. Also witness any statutory scheme, such as the Liquor Code. Without an exhaustive survey, my experience leads me to conclude an overwhelming majority of them incorporate a general declaration of purpose and a list of definitions, both of which are dedicated to promote understanding.

The fundamental reason contracts are drafted is so the parties comprehend their respective rights and obligations. We prepare contracts to advance harmonious understanding. More often than we wish, no matter the effort to achieve clarity, we still miss the mark. When parties disagree, our legal system has ready at the hand a community of interpretational rules formulated to settle disputes. That is the rub in this matter.

The parties dispute the meaning of the CLA, more particularly Paragraph 6¹. As I have consistently mentioned in every Adjudication involving CLA interpretation, Contract Law is where I am to find guidance².

Before I address the party's conflicting approaches to Paragraph 6, I find it essential to describe the environment in which that commentary will be made. I have no intention of embarrassing or offending. However, I am not one who will permit collateral repercussions to deter me from a larger mission though I regret these tangential outcomes. The reality is, no matter how a decision is written, there will always be personal reactions unintended by the author. The closest I know to avoiding displeasing anyone is to write nothing or to compose vacuous drivel.

The overriding purpose of this administrative process, as it relates to the Administrative Law Judge, is to hear and decide cases. Nevertheless, there is much more going on at any number of levels. Although I could devote pages to this point alone, there is one that has special relevance to this matter.

Bureau counsel are well acquainted with my unrelenting, some might say obsessive, commitment to excellence in this tiny and obscure recess of the law we often refer to as Liquor

¹ In *B.L.C.E. v. Club Polaris Corp.*, Docket No. 09-2416, the PLCB acknowledged that a CLA is a contract (footnote no. 5). It was indirect but an acknowledgement nonetheless. In doing so, footnote no. 5 declares that a CLA is very much similar to a lawfully promulgated regulation. That may be so, but a CLA is not subject to the rigorous process and oversight a regulation must endure as a means of circumscribing agency authority and discretion as mandated by the Commonwealth Documents Law (45 P.S. §1102, *et seq*). In *P.S.P. v. Pardners, Ltd.*, Docket No. 10-2012 and *P.S.P. v. Kathy J. Whiteman*, Docket No. 08-0818, I spoke to this precise point.

² Interestingly, there are many parallels between Contract Law interpretational principles and those embodied in the Statutory Construction Act of 1972. For pertinent Contract Law principles, see PLE, Contracts §§141, 143, 146, 155, 171.

Law. It is not excellence for its own sake, however. When we call a licensee on the carpet through the citation process, we subject that licensee to the full authority, power, and resources of the Commonwealth. We in government ought not to subject any citizen to the consequences of this legal process unless we have done our best. When we do so, we not only serve well the greater citizenry but also those who are brought to this arena by way of citation.

CLAs ought to be drafted with eyes on the same prize. An inartfully drafted CLA presents challenges not just for licensees. The Bureau, Bureau Counsel, and the Administrative Law Judge are directly impaired when precious governmental resources are unnecessarily tasked with clarifying and understanding an inadequately drafted CLA, only to have the PLCB explain a CLA's intended meaning on appeal³.

It would be unreasonable for me to expect that every CLA be archetypical. A well drafted contract which includes definitions and careful forethought may still become the center of an interpretational dispute. As the Eighteenth Century Scottish Poet, Robert Burns wrote in "To A Mouse" (1785): "The best laid schemes o' mice an' men gang aft agley."

Returning to the CLA, Paragraph 6, I became frustrated after reading it. The Paragraph is not readily understood and I do not have the luxury or the legal authority to go beyond the text unless there is some ambiguity. If an Administrative Law Judge, with training and expertise in the law, struggles to comprehend a contract's meaning, a lay person faces a task geometrically more difficult.

Sub-sections a. through e., Paragraph 6, are confusingly arranged. Critical terminology, such as "entertainment," is undefined. Sub-section b. and c. mention entertainment while sub-section d. speaks of live entertainment. Live amplified music is prohibited by sub-section a., but subject to an exception in sub-section c. Karaoke is limited to Thursday and Friday "evenings," a term desperately wanting of meaning, in sub-section c. I need not go on addressing additional

³ The Legislature has granted the PLCB permission to draft a CLA. If a dispute arises, the law also authorizes the PLCB to sit as an appellate court and adjust whatever prior determinations are at issue. It is no surprise when the PLCB reads a CLA to conform to the PLCB's intention as exemplified by the PLCB's commentary in P.S.P v. 1125 Madison, Inc., Docket No. 09-2102 in which the following remark appears: While the language of the CLA provision in question could have been more detailed, the intention was clearly to require the presence (sic) of an Act-235 certified, ... Thus, the use of the term "employ" was not just meant in the narrow sense..., but in the broader sense....

It is disconcerting to read appellate decisions, written from the dual-role perspective of contracting party and reviewing authority, which are sometimes highly critical of an Adjudication when the issuing Administrative Law Judge is genuinely attempting to untangle CLA terminology. Occasionally, the task becomes yet more difficult when Advisory Notices and/or Advisory Opinions are added to the mix. An Administrative Law Judge's decisions may be unpleasant for some. Nonetheless, Administrative Law Judges are charged with the statutory duty to address issues regardless of whose ox may be gored. In addition to the appellate decisions already referenced in this Discussion, also see the PLCB's decision in P.S.P. v. Wycombe Vineyards, Inc., Docket No. 10-0921.

examples in Paragraph 6 where the ability to differentiate the meaning of key terms is unnecessarily encumbered by their labyrinthine and intertwined use.

Although structurally equivalent to other sub-sections, Paragraph 6, sub-section b. reads as a distinct and overriding requirement. Licensee must limit all entertainment to Thursday, Friday, and Saturday evenings, between 8:00 p.m. and 11:45 p.m. As I already mentioned, even though “entertainment” is a critical and undefined term, reading Paragraph 6 as an integrated whole, “entertainment,” particularly “all entertainment,” must include karaoke, as I interpret the CLA. By providing karaoke after 11:45 p.m. on a Friday, Licensee violated the CLA, Paragraph 6, b.

ADJUDICATION HISTORY:

Licensee has been licensed since April 19, 2004, and has the following Adjudication history:

Docket No. 05-1409. Fine \$100.00.

Used loudspeakers or devices whereby music could be heard outside on April 2 and May 14, 2005.

Docket No. 05-2751. Fine \$700.00.

1. Used loudspeakers or devices whereby music could be heard outside on 17 dates between September 22 and November 27, 2005.
2. Noisy and/or disorderly operation on 19 dates between September 22 and November 27, 2005.

Docket No. 06-0210. Fine \$300.00.

Used loudspeakers or devices whereby music could be heard outside on December 3, 4 and 31, 2005.

Docket No. 07-0033. Fine \$1,000.00.

Noisy and/or disorderly operation on 10 dates between August 4 and November 9, 2006. (October 7, 2006 dismissed by A.L.J.)

Docket No. 07-2590. Fine \$2,000.00, 2 days suspension and 9 days suspension of amusement permit. Licensee’s appeal to board dismissed.

1. Used loudspeakers or devices whereby music could be heard outside on 11 dates between February 23 and June 22, 2007. (February 23, March 10, 29, April 7, 19, May 5, 28 and June 21, 2007 dismissed by A.L.J.)

2. Noisy and/or disorderly operation on 13 dates between February 23 and May 28, 2007. (March 24, April 26, 28 and May 28, 2007 dismissed by A.L.J.)

PENALTY ASSESSMENT CRITERIA:

Mandatory Requirement(s)

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 the violations found herein.

Discretionary Component(s)

Count No. 1

Although the violation is a repeat, the last occurred more than three years ago. Therefore, I impose a \$250.00 fine.

Count No. 2

Because Paragraph 6 of the CLA is confusingly arranged, I am loathe to penalize Licensee with anything but a token fine. I cannot, in good conscience, punish an offender when a rule, manifestly wanting more clarity, is violated⁴. Therefore, I impose a \$50.00 fine.

ORDER:

Imposition of Fine

Licensee must pay a \$300.00 fine within 20 days of the mailing date of this Adjudication. The mailing date is located on this Adjudication's first page, upper left corner. If Licensee fails to comply, the Liquor Code requires that I suspend or revoke the license.

⁴ Indeed, if the PLCB's portrayal of a CLA as akin to a lawfully promulgated regulation (see footnote no. 1 herein), is correct, does it not necessarily follow that Due Process concepts apply to a CLA, i.e. when a CLA's text is unclear, may I dismiss a charge alleging a violation of that unclear CLA based upon Due Process, the notice concept of void for vagueness?

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 21ST day of February, 2012.

A handwritten signature in cursive script that reads "Felix Thau". The signature is written in black ink and is positioned above a horizontal line.

Felix Thau, A.L.J.

bc

General Information

This Adjudication is a legal document. It affects your rights, privileges, and obligations. The information which follows is a general guide. Therefore, you may want to consult with an attorney.

Applying for Reconsideration

If you want the Administrative Law Judge to reconsider this Adjudication, you must submit a written application and a nonrefundable \$25.00 filing fee. Both must be received by the Office of Administrative Law Judge, (PLCB - Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, PA 17110-9661) within fifteen days of this Adjudication's mailing date. Your application must describe the reasons for reconsideration. The full requirements for reconsideration can be found in Title 1 Pa. Code §35.241.

Appeal Rights

If you wish to appeal this Adjudication, you must file an appeal within thirty days of the mailing date of this Adjudication by contacting the Office of Chief Counsel of the Pennsylvania Liquor Control Board (717-783-9454). For further information, visit www.lcb.state.pa.us. The full requirements for an appeal can be found in 47 P.S. §4-471.

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

Docket No. 10-2583
Mattis Family, Inc.