



loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside, on August 28 and 29, 2010.

The second count charges Licensee with a violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Sections 2701, 2702, and 2705 of the Crimes Code [18 Pa. C.S. §§2701, 2702, and 2705]. The charge is that Licensee, your servants, agents, or employees, committed assault, aggravated assault or recklessly endangered another person, on August 15, 2010.

The third count charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that Licensee, by your servants, agents, or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron, on August 29, 2010.

I presided at an evidentiary hearing on September 20, 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 18, 2010 and completed it on December 13, 2010. (N.T. 17-18)

2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested on, December 17, 2010. The Bureau sent an amended notice of alleged violations to Licensee at the licensed premises by certified mail, return receipt requested on, January 11, 2011. The notices alleged violations as charged in the citation. (Commonwealth Exhibit Nos. C-1, C-2, N.T. 12)

Count No. 1

3. On August 28, 2010 a Bureau Enforcement Officer arrived at the establishment at 11:33 p.m. He parked his vehicle in the establishment's parking lot, approximately 80 feet away from the premises. The Officer heard music emanating from the premises. The Officer entered the premises. He noted that there was a band providing entertainment through an amplification system. The Officer departed the premises at 12:15 a.m., August 29, 2010. He heard amplified music escaping the premises as far away as 125 feet. (N.T. 45, 46, 48-50)

Count No. 2

4. On August 14, 2010, a customer entered the premises with five friends at approximately 10:00 p.m. He consumed six to seven 12 ounce cans of beer in about two hours. Sometime after midnight, August 15, 2010, the customer noticed several other customers rolling on the floor, punching each other. The fight was broken up. The two who were involved in the fight approached the six customers who entered at 10:00 p.m. The two began arguing with the six. The two were also drinking quite a bit. During the argument, one customer was “suckered-punched.” Other fights occurred. (N.T. 70-83)

5. Mr. and Mrs. L. attempted to break up fights inside the premises as well as in the parking lot. (N.T. 189-190)

6. Mr. T., who was a bartender that evening, witnessed the fights in the parking lot. He took a baseball bat with him when he left the premises. His intention was to use the bat to scare people away. He neither intended nor used the baseball bat as a weapon. (N.T. 199-203)

Count No. 3

7. A Bureau Enforcement Officer entered the premises in an undercover capacity on August 28, 2010. His attention was immediately drawn to a patron who seemed startled when the Officer opened the door. The patron fell backwards, somewhat off balance. The Officer positioned himself within one or two barstools of the patron. The patron occasionally had loud outbursts of: “let’s party.” He was drinking beer. As he did so, he tipped the can back to a point where he lost his balance and fell against the wall behind the barstools. The patron made his way from one side of the bar almost to the direct opposite side. As he did so he leaned on patrons as if to maintain his balance. He almost pulled some patrons off balance. (N.T. 45-48)

8. The customer’s face was red. He had difficulty lighting a cigarette as he could not line up the cigarette with the lighter flame. He tried to put the cigarette back into his pocket while he was seated at the bar. He dropped the lighter. At 12:12 a.m., a bartender poured vodka into a plastic cup. The Officer did not see the visibly intoxicated patron consume any of that vodka. The Officer did not see the visibly intoxicated patron pick up the cup of vodka. The Officer did not hear any conversation between the bartender and the visibly intoxicated patron. (N.T. 45-59)

CONCLUSIONS OF LAW:

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

Count No. 1

2. Sustained as charged.

Count Nos. 2 and 3

3. The Bureau has failed to meet its burden of proof.

DISCUSSION:

Count No. 2

In this long and arduous record review process, I find it impossible to determine who did what to whom and when. It is abundantly clear that fists were flying within the premises and in the parking lot. That is the limit of my ability to extract the essential components of the Bureau's case.

The Bureau's witnesses fall into three categories which render their combined testimony virtually worthless. The witnesses were untruthful, or recalled nothing of significance, or were highly impaired by excessive consumption of alcoholic beverages. Alternatively, I have no reason to discount the testimony of Licensee's witnesses. Consequently, the Findings of Fact are bereft of any indicia implicating Licensee, servants, agents, or employees as having been engaged in the charged criminal conduct. (N.T. 148; 160-163; 170; 178)

Had Licensee been charged with operating in a noisy and/or disorderly manner, I would have been quite comfortable in finding a violation. I am still mystified when I hear a statement that a noisy and/or disorderly operation charge may only be sustained if there are three or more dates of violation. That thinking runs counter to extant case law which I discussed in *Wendel & Woolridge, Inc.* (IV Sel. Op. ALJ 145). It is not the quantity of evidence which will carry the day for the Bureau. It is the quality of that evidence which prevails.

This record is replete with demonstrations of noisy and/or disorderly operation although the events occurred in no more than several hours. The factors which contribute to this conclusion are: the number and frequency of fights within the premises and the parking lot; serving unruly patrons inordinate amounts of alcoholic beverages; Licensee's failure to recognize a volatile situation; Licensee's failure to engage remedial action well in advance of the highly predictable fisticuffs, as exemplified by Mr. L.'s testimony. He provided a plethora of illogical excuses for failing to control the business.

Count No. 3

In order to sustain this charge, the Bureau must prove two elements: a customer was visibly intoxicated; the customer was served in that condition. There is abundant evidence showing the targeted customer was visibly intoxicated. I cannot say the same for the second requirement.

The Officer testified he saw an alcoholic beverage served to the visibly intoxicated patron. On the surface, that observation may be considered entirely factual. However, there is an element of opinion whether it became apparent when the Officer was questioned about the particulars. The Officer could not say whether the drink was placed on the bar or whether there was a hand-to-hand exchange between the server and the visibly intoxicated patron. He also did not recall whether the patron consumed any of the alcoholic beverages. (N.T. 56-59, 63)

Given this scant evidence, I am unable to conclude the visibly intoxicated patron was actually served an alcoholic beverage.

ADJUDICATION HISTORY:

Licensee has been licensed since April 8, 2008, and has the following Adjudication history:

Docket No. 09-0129. Fine \$700.00.

1. Used loudspeakers or devices whereby music could be heard outside.  
November 14, 15 and December 13, 2008.
2. Permitted smoking in a public place where smoking was prohibited.  
November 28 and December 13, 2008.
3. Failed to post signage required by the Clean Indoor Air Act.  
November 28 and December 13, 2008.

Docket No. 10-0098. Fine \$300.00.

Used loudspeakers or devices whereby music could be heard outside.  
December 31, 2009.

Docket No. 10-1082C. Fine \$1,250.00.

Sales to minors.  
April 22, 2010.

Docket No. 10-1369. Fine \$300.00.

1. Sold alcoholic beverages on credit in contravention of the Liquor Code and Title 40 of the Pennsylvania Code.  
May 31, 2010.

2. Operated the licensed establishment without a valid health permit or license.  
May 31, 2010.

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

I impose a \$400.00 fine.

ORDER:

**Fine Imposition**

Licensee must pay the \$400.00 fine within 20 days of the mailing date of this Adjudication. The mailing date is located in this Adjudication's first page, upper left corner. If Licensee fails to comply, the Liquor Code requires me to suspend or revoke the license.

**Dismissals**

I dismiss Counts No. 2 and 3.

**Retaining Jurisdiction**

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 10<sup>TH</sup> day of February, 2012.



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](http://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