

Mailing Date: JUL 17 2012

[Appeal](#)

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

PENNSYLVANIA STATE POLICE	:	In Re Citation No.: 11-0491
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
:	:	BLCE Incident No.: W03-413992
v.	:	
	:	
37 WEST HIGH ENTERPRISES, INC.	:	PLCB LID No.: 52204
37-41 W. HIGH ST.	:	
CARLISLE, PA 17013-2923	:	
	:	PLCB License No.: R-AP-SS-16343

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: John H. Pietrzak, Esquire

FOR LICENSEE: James M. Petrascu, Esquire

BACKGROUND:

This proceeding arises out of a citation, containing four counts, that was issued on March 23, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against 37 West High Enterprises, Inc. (Licensee).

The first count charges Licensee with violations of Section 471 of the Liquor Code [47 P.S. §4-471]. The charge is that, your licensed establishment was operated in a noisy and/or disorderly manner, on May 11, 22, June 13, 26, 27, July 2, 18, September 5, 19, 24, October 6,

10, 22, November 20 and December 18, 2010.¹

The second count charges Licensee with a violation of Sections 406(a)(2) and 493(16) of the Liquor Code [47 P.S. §§4-406(a)(2) and 4-493(16)]. The charge is that Licensee, by your servants, agents, or employees, sold, furnished and/or gave alcoholic beverages between 2:00 a.m. and 7:00 a.m., on July 19, 2010.

The third count charges Licensee with violations 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) minor, twenty (20) years of age, on August 31 and September 5, 2010.

The fourth count charges Licensee with violations of Sections 493(14) of the Liquor Code [47 P.S. §4-493(14)]. The charge is that Licensee, by your servants, agents, or employees, permitted one (1) minor, twenty (20) years of age, to frequent your licensed premises, on August 31 and September 5, 2010 and 8-10 divers occasions within the past year.²

I presided at an evidentiary hearing on May 14, 2012 at the Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

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

FINDINGS OF FACT:

1. The Bureau began its investigation on June 3, 2010 and completed it on February 15, 2011. (N.T. 21)
2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested, on March 15, 2011. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 16)

¹ The Bureau requested the dates of September 19, 2010 and May 11, 2011 in Count No. 1, be withdrawn. I granted that request. (N.T. 11-12)

² See **3745 Enterprises, Inc.**, In Re Citation No.: 11-0804, www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2011&adjudication_sequence=0804&appeal=n, for a discussion concerning proving a licensee permitted a minor to frequent the premises.

3. I take Official Notice (40 Pa. Code §15.52), that the licensed premises is located on the same side of High Street, approximately ninety feet from another licensed premises which trades as Blondie's.³ (N.T. 142)

Independent Bureau Investigative Activity

4. A Bureau Enforcement Officer conducted three undercover visits to the licensed premises on June 12, 2010, August 19, 2010, and December 17, 2010, observing no violations. (N.T. 22-23; 26-30; 64)

5. A Bureau Enforcement Officer conducted a fourth undercover visit on September 5, 2010, as more fully described in Finding of Fact No. 14.

Count No. 1

6. Carlisle Police Officers are trained for about six months. The training includes familiarity with criminal law, proper use of firearms, first aide, CPR, conflict resolution, effective communication, interviewing techniques, physical fitness, defensive combat tactics, restraining out-of-control individuals.⁴ (N.T. 33-41)

May 22, 2010

7. At approximately 1:50 a.m., four Carlisle Police Department Officers (CPDO) were on duty, in full uniform, and on foot patrol. A woman departed the premises. She was loud and staggering. She was intoxicated. She demanded a ride home from one of the CPDOs. While continuing to demand a ride home, she shouted obscenities. She "chest bumped" one CPDO, for which action she was arrested. The entire incident lasted no more than two minutes. (N.T. 89-105)

June 13, 2010

8. Three CPDOs were in full uniform and on foot patrol in the area of the premises. At 2:20 a.m., one of Licensee's employees requested assistance to remove all patrons from the premises. The CPDOs provided that assistance and continued to monitor the conduct of an estimated twenty

³ Testimony indicates that Licensee is located approximately forty yards, or 120 feet, from Blondie's.

⁴ I reiterate the comment I made in Rolo's regarding the law's failure to provide minimum standards for security/bouncer personnel.

customers while outside the premises. There were two women who were engaged in the pushing and shoving match. Two CPDOs intervened by issuing commands for everyone to depart the area. The patrons separated into two groups, each going in opposite directions. (N.T. 147-154)

June 26, 2010

9. At 1:45 a.m., approximately twenty to thirty patrons departed the premises at once. There was a CPDO in full uniform and on foot patrol near the licensed premises. It appeared to the CPDO that everyone in the group knew each other. They were arguing among themselves. They appeared to be intoxicated. A short while later, a second group of approximately twenty individuals departed the premises. That group also appeared to be intoxicated. The first group was arguing with the second group. It appeared to the CPDO as if members of both groups knew each other well. Some in each of the groups were attempting to hold others in the same group back. Members of both groups seemed to be involved in either yelling at each other or by restraining fellow group members. The CPDO radioed for assistance. Two State Police Troopers happened to be in a marked vehicle and in full uniform, passing the licensed premises. Two State Police Troopers exited their vehicle to assist local police. Both groups remained outside the premises for about twenty to thirty minutes and eventually quieted the situation down. (N.T. 190-195)

June 27, 2010

10. At approximately 2:22 a.m., a CPDO was in full uniform and on foot patrol in the area of the licensed premises. At 2:22 a.m., approximately ten to twenty patrons departed the premises. The CPDO watched the group because they were arguing as they made their way along the sidewalk. The group walked around the corner at a distance of approximately 1½ blocks away from the premises. A fight ensued at that location. The CPDO radioed for assistance. A contingent of CPDOs stopped the fighting. (N.T. 198-203)

July 2, 2010

11. A CPDO was in full uniform and on foot patrol in the area of the licensed premises. At 2:06 a.m., the CPDO noticed approximately four to six men depart the premises. They were acting aggressively toward each other and yelling obscenities. It appeared to the CPDO that a fight was imminent. The CPDO called for assistance as she approached the group. Two members of the group began fighting. The CPDO attempted to intervene. The Officer employed a taser three times

to stop the fight. The CPDOs intervention occurred approximately twenty seconds after the fight began. It took no more than a minute and a half for the disturbance to end. (N.T. 304-308)

July 18, 2010

12. At 1:44 a.m., a CPDO was in full uniform on foot patrol near the licensed premises. An employee came out the door and advised the CPDO there was a fight inside. The CPDO radioed for assistance and then entered the premises. The CPDO attempted to stop some of the customers from fighting. After the fights were over, the CPDO called for EMT assistance as several patrons were injured. About fifteen of the 150 patrons at the premises were involved in the fights. (N.T. 124-134)

13. Because it was near closing time, all customers were directed to depart the premises. The sidewalk and street were crowded with patrons. Many of the patrons displayed their displeasure regarding the events that occurred inside. There were no fights outside the premises. (N.T. 136-139)

September 5, 2010

14. A Bureau Enforcement Officer heard amplified music escaping the premises as far away as thirty feet, both east and west on High Street. (N.T. 47-48)

September 24, 2010

15. A CPDO was in full uniform, in a marked patrol vehicle about three-fourths of a block away from the licensed premises. At 1:54 a.m., the CPDO heard yelling and screaming. He made his way towards the area of the licensed premises. There were approximately twelve individuals standing in front of the licensed premises. The CPDO determined the source of the yelling and screaming, he previously heard, was from this group. There were no physical altercations. The CPDO did not observe any members of the group depart the licensed premises. The CPDO directed the crowd to disperse. After a bit of effort, the entire group departed the area. (N.T. 328-338)

October 6, 2010

16. A CPDO was in full uniform in an unmarked police vehicle. At 12:45 a.m., the CPDO responded to a dispatch indicating there was a disturbance in front of the licensed premises. As

the CPDO approached the area, he noticed a loud commotion. There were two women yelling at each other. The closer the CPDO approached the more the two became agitated. The CPDO could not determine whether the two were intoxicated. The CPDO did not see the two depart the premises. However, as the CPDO approached, the two women entered the licensed premises. (N.T. 341-345)

October 10, 2010

17. At 2:30 a.m., three CPDOs were in full uniform and on foot patrol in the area of the premises. Two men exited the licensed premises. They were engaged in a fight. Before the CPDOs reached them, the two separated. One was a bouncer while the other a patron. The bouncer stood at the front door. The patron attempted to re-enter the premises. A CPDO intervened by instructing the patron to leave. After several minutes, the patron did so. The CPDO determined the patron was intoxicated. (N.T. 347-351)

October 22, 2010

18. A CPDO was in full uniform and on foot patrol in the area of the premises. At about 1:30 a.m., a group of about three to four customers departed the premises and walked westbound on High Street. A second group also walked westbound on High Street, maintaining an approximate ten feet distance behind the first. A woman in the second group was arguing with a man in the first. As the second group was at a distance of sixty to seventy yards away from the premises, a bouncer departed the premises, running towards the second group with a knife in hand. The CPDO ran towards the second group yelling at the bouncer. The CPDO and bouncer reached the second group at approximately the same time. The CPDO spoke to the bouncer and calmed him down. The bouncer returned to the licensed premises. (N.T. 254-262)

November 20, 2010

19. A CPDO was in full uniform and on foot patrol in the area of the premises. At 2:20 a.m., three patrons departed the premises. Two of them were arguing. A CPDO separated the two and directed them to go home. The CPDO allowed one of the two to depart the area first, subsequently releasing the other. Both walked in the same direction. The CPDO lost sight of them as they rounded a corner. One returned shortly thereafter screaming and yelling for help that she had been "jumped." The customer returned with scrapes, bruises and contusions but refused medical treatment. The CPDO did not seek emergency medical treatment for the woman. (N.T. 170-175)

December 18, 2010

20. At approximately 2:10 a.m., a CPDO was dispatched to the area of the premises. Upon arrival, the CPDO found a man lying on the sidewalk, near the premises, with injuries. He was conscious. He was transported to a hospital. The CPDO spoke to one of Licensee's bouncers who advised that he saw two individuals fighting as he looked through the front window of the premises. One was hitting the other. The "aggressor" quickly ran away. (N.T. 364-375)

21. A second CPDO was in full uniform and on foot patrol in the area of the premises. At approximately 2:17 a.m., the CPDO observed a bouncer physically removing a highly intoxicated woman from the premises. While outside, the woman yelled and screamed. The CPDO directed the woman to stop as she ran towards the bouncer who was standing at the open front door. The woman continued to attack the bouncer. The woman and the CPDO became engaged in an altercation on the sidewalk. In the altercation, the woman scratched the CPDOs face. The woman was finally subdued and arrested. (N.T. 316-325)

Count No. 2

22. A CPDO was in full uniform conducting bar checks at 2:22 a.m. The CPDO looked through the front window of the licensed premises, he saw a bartender pouring a draft beer. The CPDO entered the premises. The bartender claimed the customer purchased the drink before 2:00 a.m. While the CPDO spoke to the bartender, the customer finished the beer that was served at 2:22 a.m. (N.T. 380-382; 384)

Count Nos. 3 and 4

23. On September 5, 2010, a twenty year old, approximately nine months short of his twenty-first birthday, was served beer and whiskey at the subject premises without question as to age. He was questioned as to age on some prior visits during which he displayed a false South Carolina photo identification card. (N.T. 387-407)

CONCLUSIONS OF LAW:

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

Count No. 1

2. I dismiss the violations as charged.

Count Nos. 2 - 4

3. I sustain the violations as charged.

DISCUSSION:

At the outset, I commend the Carlisle Police Department for what I consider to be an extremely judicious application of discretion. Based on this record, the Department's primary goal is to maintain peace and safety rather than rack up points by issuing citations willy-nilly.

Noisy And Disorderly Operation-Due Process

The Bureau presented evidence describing an Enforcement Officer's observations, while in an undercover capacity on August 19, 2010. (Finding of Fact No. 4) When I inquired as to the relevance of this very detailed testimony, Bureau counsel advised the Officer's observations were offered to show a course of conduct that Licensee permits to occur within the establishment, thus furthering the Bureau's case. (N.T. 29)

I reminded Counsel the charge does not allege a violation on August 19, 2010. Counsel nevertheless requested I consider the events of that day as an element in the Bureau's case. I responded by saying that doing so would unquestionably violate the notice requirements of Due Process. Counsel pressed on by suggesting there was no Due Process issue as the Bureau provided the requisite notice to Licensee; the Bureau's Pre-Hearing Memorandum (PHM) includes a summary of the testimony under discussion. (N.T. 29-35)

Indeed, the Bureau's PHM does alert Licensee to expect testimony regarding August 19, 2010. However, the PHM lists that testimony under the classification of, "Ongoing Nature of the Investigation." The PHM goes on to list a series of witnesses and dates under the heading, "Count One." Given the description of the testimony provided in the Bureau's PHM, counsel's at-hearing assertion is flagrantly disingenuous.

Putting that alarming point aside, counsel still misses the point. It is now well settled, the fundamental elements of notice, for purposes of Due Process, are a description of the nature(s) and date(s) of alleged unlawful misconduct. In this system, those elements are set forth in the formal charging document, the citation.

The instant citation alleges no illegality on August 19, 2010. Moreover, the Officer's testimony describes patron behavior that may be considered uncivil but is certainly not unlawful with respect to the manner in which Licensee operates the business.

Noisy And Disorderly Operation-Substance Causation/Spillover

My analysis in Rolo's LLC, In Re Citation No.: 11-1681⁵, controls the result in this matter. The Commonwealth Court of Pennsylvania has recently offered further guidance in **St. Nicholas Greek Catholic Russian Aid Society v. PLCB**, 41 A3d. 953 (Pa.Cmwlth. 2012). In a refusal to renew environment, the Commonwealth Court remarked that violence occurring in an area under a licensee's control, during or shortly after a licensee's operating hours, is an element in denying a license renewal.

The Commonwealth Court also considered the licensee's failure to control the conduct of its members within the licensed premises and its private parking lot. Finally, the Commonwealth Court remarked there must be a causal connection between the manner in which a licensed premises is operated and the activity under scrutiny.

The ruling is in agreement with the Adjudications and case law I referred to in Rolo's LLC, with one addition. Subsumed in the Commonwealth Court's discussion is the recognition that a club licensee has a greater ability to control member behavior.⁶ With respect to patron conduct in locations beyond a licensee's direct control, the question arises as to what exactly is required to establish the causal connection between the manner in which a licensee operates and patron activity.

Causation is a familiar element in many areas of the law. Generally, causation refers to a connection between an event and its antecedent; the first event must directly precipitate the second; an intervening event or occurrence aborts the connection.

⁵

www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2011&adjudication_sequence=1681&appeal=n

⁶ It is true that other licensed classes may bar patrons from returning, but loss of club membership is a more severe penalty. As such, membership loss is more likely to dampen a member's inclination to behave uncivilly when compared to merely being barred from a licensed premises.

The concept of “spillover,” referred to in any number of Adjudications sited in Rolo’s LLC, is no more than causation dressed in less technical terminology. Spillover defines a direct connection between the manner in which a licensee operates and patron conduct occurring subsequent to a licensee’s control. In terms of time or distance, once that nexus is interrupted, a licensee’s liability no longer exists.

As the testimony regarding each event unfolded, on several occasions, I asked Bureau counsel to specify precisely what actions Licensee engaged in that are unlawful, or what conduct would have forestalled the violation had Licensee done so. Rather than specifics, I heard a repetition of standard legal principles applicable to the charge in question. Thinking that Bureau counsel might need more time, I requested that Bureau counsel submit a brief, addressing the inquiry I posed during the hearing, for each event the Bureau claims Licensee violated law.

Bureau Counsel's Letter Brief

In response, I received a letter brief in which counsel asserts that Licensee violated the law because patrons engaged in fights both inside and outside the licensed premises and engaged in loud, raucous behavior outside the licensed premises. Anyone accepting this rather vague and nebulous theory must agree, the Bureau is required to establish that those behaving in the manner consistent with the theory are patrons. In support of the theory, the letter brief goes on to paint a picture of the testimony with very broad strokes, choosing to blend most of the incidences into one general description. The letter brief directly addresses only two of the thirteen dates.

Counsel's letter brief argues that two Adjudications compel a decision in favor of the Bureau. The first, **BLCE v. Finnigan's Castle Inc.**, In Re Citation No.: 99-0912⁷, is argued as being on all fours with the instant matter.

Administrative Law Judge Wright's reasoning in Finnigan's Castle is consistent with everything discussed in Rolo's; to the point where ALJ Wright refers to a family of Adjudications mentioned in Rolo's. The distinguishing factor between this citation and that addressed by ALJ Wright appears in the third paragraph of ALJ Wright's Discussion. ALJ Wright noted that there was "total pandemonium in the premises," which spilled over to the outside.

Counsel next refers to **BLCE v. Spin's Bar & Lounge, Inc.**, In Re Citation No.: 00-1745⁸, an Adjudication I authored. I'll not draw distinctions between that Adjudication and the matter before me. There are some to be sure. More significantly however, I question whether I would be inclined to rule similarly today. Since I decided Spin's Bar some eleven years ago, I clearly see how my analysis of noisy/disorderly operation was in the developmental stage.

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www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=1999&adjudication_sequence=0912&appeal=n

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www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2000&adjudication_sequence=1745&appeal=n

I am most disappointed with the letter brief because Bureau counsel did not describe precisely what behavior Licensee should have taken or avoided in each situation the Bureau presented. I hesitate to think counsel contemptuously opted to disregard the directive to do so. Certainly, if counsel had any responses, they would have been included in the letter brief.⁹ Consequently, I reach the inescapable conclusion, that the Bureau has nothing explicit to offer.

Bureau's Liability Theory

The Bureau has yet to enlighten me as to where the line differentiating the lawful from the illegal exists. As I indicated in Rolo's, what I have gleaned is an ever moving standard. If a licensee does not call police, that is a violation; if a licensee engages the police for assistance, that also is a violation. If a licensee obeys the law by removing patrons at the required time, the licensee is liable for patron conduct. If the police have taken charge of a situation, a licensee must nevertheless intervene.

As a general consideration, the worth of a legal theory is directly related to the theory's application to observable, definitive events. The more a theory fails to provide discernible attributes, the less likely the theory should be rewarded with meaningful credentials. A theory that defies containment is said to be unconstitutionally vague.¹⁰

Evaluating Each Event

May 22, 2010

The Bureau has supplied no evidence to prove anything unlawful occurred within the premises. I cannot conjecture that the patron who departed the premises was served while visibly intoxicated or even to the point of intoxication. If conjecture were the rule, I could just as easily conclude the patron was refused service prior to leaving. Once the local police take charge, there is nothing for a licensee to do other than obey lawfully issued commands. There is no proof of spillover for an incident that lasted no more than two minutes. (N.T. 102-104)

⁹ At a minimum, counsel should have offered some explanation as to why he did not comply.

¹⁰ If a law contains no standards of conduct or prohibits constitutionally protected behavior, the law is unconstitutionally vague. **BLCE v. Home Assn. Charles Nitterhouse Post 1599**, No. 1234 C.D. 2011, decided June 12, 2012.

June 13, 2010

Licensee was doing no more than what the Liquor Code requires, which is to have all patrons depart the premises by 2:30 a.m. Noting some difficulty, Licensee's staff requested the assistance of several CPDOs. By obeying the law and wisely calling for police assistance, Licensee is now being held accountable without any evidence Licensee's on-premises operation precipitated that which occurred in public. (N.T. 159)

June 26, 2010

This is yet another situation which demonstrates the Bureau's most consistent failure to provide proof. The Bureau has no evidence to show that Licensee's business practices within the licensed premises proximately caused the disturbances outside the licensed premises. (N.T. 197)

June 27, 2010

This incident occurred at a time when Licensee is legally required to remove patrons. The Bureau produces no evidence regarding Licensee's on-premises business operation prior to patron removal. Local police took control of the fight, which occurred one and one-half blocks away from the licensed premises. Even if the Bureau proved Licensee's on-premises operation proximately caused the patrons to behave uncivilly outside the premises, the causation is attenuated because the fight occurred one and one-half blocks away. (N.T. 211)

July 2, 2010

In an incident which was under direct police control involving patrons, which lasted no more than ninety seconds, the Bureau would have me find a violation without proof demonstrating Licensee's on-premises operation caused the disturbance.

July 18, 2010

There is clear evidence of patron fighting within the premises. However, Licensee's staff sought police assistance. As I remarked in Rolo's, we are to encourage Licensee's to call for the assistance of trained, governmentally authorized officials to take charge. Fights within a licensed premises do not necessarily equate to an unlawful business operation. Absent from this record is any

indication of how Licensee's business practices contributed to those fights, such as serving the visibly intoxicated patron.

It must be remembered, that licensees enjoy the privilege of profiting from selling alcoholic beverages. A licensee's business is entirely lawful. Generally, customers drink for the express purpose of loosening inhibitions, perhaps to take a time-out from the pressures of everyday living. It is not surprising that fights between customers may erupt from time to time, without any unlawful activity on the part of a licensee.

There was a second incident that business day related to Licensee's obligation to remove patrons no later than 2:30 a.m. No wonder High Street and the sidewalk outside the licensed premises were crowded with customers, some of whom were behaving uncivilly. What is missing is proof to connect that uncivil behavior outside the premises to the manner in which Licensee operated the business.

September 5, 2010

By allowing amplified music to escape the premises, Licensee violated (40 Pa. Code §5.32). However, there is no charge worded in a manner that places Licensee on notice that the basis for alleging unlawful activity on September 5, 2010 was permitting amplified music sound to escape the premises. Moreover, violating the regulation does not automatically equate to noisy and disorderly operation.

Noisy and disorderly conduct must not be used as a catchall or dragnet for prosecution of behavior that is uncivil, annoying, or irritating. Not every act which annoys or disturbs people is necessarily noisy and disorderly; noisy and disorderly conduct is not to be used as a dragnet for all irritations which breed in public ferment.¹¹

September 24, 2010

There is no proof that any of the individuals involved at the disturbances were patrons. I need not address the lack of any evidence connecting those events to the manner in which Licensee operates the business. I cannot draw the inference that the crowd standing outside the licensed premises

¹¹ **Comm. v. Gilbert**, 674 A.2d 284 (Pa.Super. 1996); **Comm. v. Greene**, 189 A.2d 141 (Pa.Super. 1963); **BLCE v. Knight Out II, Inc.**, In Re Citation No.: 07-2349, www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2007&adjudication_sequence=2349&appeal=n

were patrons who had just departed therefrom, especially since there is another licensed premises nearby.

October 6, 2010

The Bureau provides no evidence that the two women who entered the licensed premises when the CPDO approached, were patrons immediately prior to their argument on the sidewalk.

October 10, 2010

With not an iota of evidence revealing any unlawful business operation within the licensed premises, the Bureau argues that administrative law liability attaches for the transaction outside the licensed premises. To the contrary, this record supports a conclusion that Licensee's staff acted prudently, within the law.

Had Licensee's bouncer not removed the patron at 2:30 a.m., Licensee would have been subject to citation. Interestingly, the basis for charging a violation on June 13, 2010 is that Licensee called for police assistance to remove patrons from the premises, only two of whom behaved uncivilly. On this occasion, Licensee removed a patron without calling for assistance.

What is a licensee to do? I am at a loss to grasp what expectations the Bureau has of licensees in order to avoid being charged with noisy and disorderly operation based on events such as these herein presented.

October 22, 2010

In an event occurring over 200 feet from the licensed premises, on a public thoroughfare, the Bureau argues there is enough to sustain the charge without establishing a causal connection to Licensee's business practices.

Must a licensee provide an escort for every patron, who is to monitor and control the patron's actions, lest the licensee be charged with noisy and disorderly operation? If so, how long after departing and how far from the licensed premises does that obligation endure? If such an escort who is vigilantly performing her duties observing a former patron ten minutes after leaving the premises and while walking on a public thoroughfare to go home, predicts her charge is about to break the law and responds by restraining her ward, isn't it the employee who is likely to face criminal charges?

I also cannot consider the bouncer's threatening conduct when he ran from the licensed premises with a knife to the second group of patrons who were then about 200 feet from the licensed

premises. I see no legal basis to hold Licensee responsible for the behavior of an employee outside both the employment relationship and environment.

If the above is insufficient to end the discussion, the requirement of **scienter** should suffice. There is no evidence for me to conclude that Licensee should have predicted the bouncer's behavior. In any event, the CPDO's expert intervention diffused the situation so that, thankfully, nothing of any real consequence occurred.

November 20, 2010

This incident took place when Licensee is required to remove patrons from the premises. There is no information as to what went on within the premises that allegedly precipitated the two women's argument on the sidewalk. Other than argument between the two, nothing happened. The CPDO artfully allowed the two to leave at differing times to avoid further contact with each other. One of the two was attacked around the corner, out of the CPDO's sight. The Bureau asks me to conclude one customer was attacked by the other. That is a stretch that defies fairness. My remarks regarding the events of October 22, 2010 are equally relevant here.¹²

December 18, 2010

There is no proof that the injured man or the unidentified attacker were patrons. In fact, the CPDO's discussion with Licensee's bouncers suggests otherwise, as the bouncers described what little they saw from the inside of the licensed premises.

As to the later incident in which Licensee's bouncer physically removed a patron who attempted to re-enter the premises, I do not know what is it that the Licensee did or failed to do? Without any knowledge of what went on inside the premises, how am I to assess liability? It could very well have been, the woman entered in an intoxicated condition, was refused service, thereafter causing a disturbance which required the bouncer's intervention.

PRIOR RECORD:

¹² Through inadmissible hearsay, the Bureau attempted to prove the aggressor was the other woman, as the patron who returned to the CPDO with injuries told the CPDO she was attacked by that woman. Bureau counsel argues her declaration is an excited utterance. As to her initial reaction, when she told the CPDO she was "jumped," I agree. Anything the injured woman told the CPDO regarding the attack after that assertion does not come under that hearsay exception umbrella.

Licensee has been licensed since December 12, 2003, and has the following Adjudication history:

In Re Citation No.: 09-1639. Fine \$ 1,250.00.

Sales to a visibly intoxicated person on April 4, 2009.

In Re Citation No.: 10-1030. Fine \$ 350.00.

Possessed or operated gambling devices or permitted gambling on your licensed premises (sports pool) on March 18, 2010.

PENALTY ASSESSMENT CRITERIA:

Mandatory Requirement(s)

Count Nos. 2 - 4

Liquor Code Section 471 prescribes a penalty of license suspension, or revocation, or a fine of not less than \$1,000.00, or more than \$5,000.00, or both for the violations found herein.

Further, Liquor Code Section 471.1 [47 P.S. §4-471.1], relating to responsible alcohol management, mandates that Licensee participate in the Pennsylvania Liquor Control Board's Responsible Alcohol Management Program (RAMP), since this is Licensee's first violation as found in Count No. 3.

Further, as this is Licensee's third violation of the Liquor Code and/or Crimes Code within four years, I must impose, at least, a suspension.

Discretionary Component(s)

Dismissal

I dismiss Count No. 1.

I impose:

Count No. 2 - \$1,000.00 fine and 1 day suspension.

Count Nos. 3 and 4 merged - \$1,000.00 fine and 2 days suspension.

ORDER:

In Re Citation No.: 11-0491; Licensee, 37 West High Enterprises, Inc.;
PLCB LID No.: 52204; PLCB License No.: R-AP-SS-16343

Imposition of Fine

Licensee must pay a \$2,000.00 fine within twenty 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.

Imposition of Suspension

I suspend the license, as well as all other permits or licenses issued by the Pennsylvania Liquor Control Board attendant to the License, for three days, beginning Monday, October 1, 2012, 7:00 a.m., and ending Thursday, October 4, 2012, 7:00 a.m.

I order Licensee to post a Notice of Suspension Placard (PLCB Form 1925) in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from the outside of the licensed premises, on or before Monday, October 12012, 7:00 a.m. The Suspension Placard may not be removed until the suspension ends.

In the event Licensee does not comply with all conditions herein, the Bureau may issue an additional citation claiming Licensee has violated this Order. Alternatively, the Bureau may assert the same claim by requesting this Adjudication be reopened.

RAMP Compliance

I order Licensee to maintain its compliance with Liquor Code Section 471.1, pertaining to responsible alcohol management, for one year from the mailing date of this order.

Retaining Jurisdiction

I retain Jurisdiction to ensure compliance with this Adjudication.

Dated this 16TH day of July, 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. 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.** 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

37 West High Enterprises, Inc.
In Re Citation No.: 11-0491