

Mailing Date: November 14, 2012

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 11-0491
ENFORCEMENT	:	
	:	
v.	:	
	:	
37 WEST HIGH ENTERPRISES, INC.	:	License No. R-16343
37-41 West High Street	:	
Carlisle, PA 17013-2923	:	LID 52204

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**OPINION**

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appeals from the Adjudication and Order of Administrative Law Judge (“ALJ”) Felix Thau, mailed July 17, 2012, wherein the ALJ dismissed count one of Citation No. 11-0491 (“the Citation”) issued against 37 West High Enterprises, Inc. (“Licensee”). The ALJ sustained the remaining counts two

through four and imposed a fine of two thousand dollars (\$2,000.00) and a license suspension of three (3) days.

On March 23, 2011, the Bureau issued the Citation to Licensee, charging it with four (4) counts. The first count charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] in that 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, the licensed establishment was operated in a noisy and/or disorderly manner. The second count charged Licensee with violating sections 406(a)(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(2), 4-493(16)] in that on July 19, 2010, Licensee, by its servants, agents, or employees, sold, furnished and/or gave alcoholic beverages between 2:00 a.m. and 7:00 a.m. The third count charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that on August 31 and September 5, 2010, Licensee, by its 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. The fourth count charged Licensee with violating section 493(14) of the Liquor Code [47 P.S. § 4-493(14)] in that on August 31 and September 5, 2010, and eight (8) to ten (10) divers occasions within the prior year, Licensee, by its

servants, agents, or employees, permitted a minor to frequent the licensed premises.

The hearing was held on May 14, 2012. John Pietrzak, Esquire, appeared at the hearing as counsel for the Bureau. James Petrascu, Esquire, appeared on behalf of Licensee. By Adjudication and Order mailed July 17, 2012, the ALJ dismissed count one of the Citation and sustained counts two through four. The Bureau filed the instant appeal to the Pennsylvania Liquor Control Board (“Board”) on August 16, 2012, raising two (2) averments, each of which will be addressed in turn.<sup>1</sup>

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. The Board may only reverse the decision of the ALJ if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. [47 P.S. § 4-471(b)]. The Commonwealth Court has 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, 484 A.2d 413 (Pa. Cmwlth. 1984). Furthermore, the

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<sup>1</sup> Licensee did not appeal the ALJ’s decision to sustain counts two, three, and four and, therefore, they are not at issue at this time.

Pennsylvania Supreme Court has defined an abuse of discretion as “not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 297, 602 A.2d 1300, 1305 (1992) (citations omitted).

The Bureau’s first averment alleges an error of law. Specifically, the Bureau argues that the ALJ applied an incorrect legal standard in dismissing count one of the Citation, which alleged “noisy and/or disorderly” operations. The Bureau argues that the proper test is whether Licensee engaged in a “course of business practice” that led to incidents in and around the licensed establishment rising to the level of noisy and disorderly operations. (Bureau’s Brief, p. 3). It further contends that there is no need to show specific misconduct by the licensee in order to connect it to an instance of patron misconduct outside the premises. (Bureau’s Brief, p. 5).

In his discussion, the ALJ begins by citing his adjudication in Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Rolo’s, LLC, Citation No.

11-1681 (June 6, 2012)<sup>2</sup>, as controlling precedent in regard to count one of this case. Although the Board affirmed the decision of the ALJ in Rolo's, it was necessary to examine the legal standard to be applied in noisy and disorderly operations charges. In light of the ALJ's reliance on his opinion in Rolo's with regard to count one here, the Board will again highlight the applicable case law bearing on the charge of noisy and disorderly operations.

The Commonwealth Court in In Appeal of Ciro's Lounge, Inc., 358 A.2d 141 (Pa. Cmwlth. 1976), held that the operation of a licensed establishment in a noisy and disorderly manner is sufficient cause for suspension of its license under section 471 of the Liquor Code [47 P.S. § 4-471]. Ciro's Lounge, 358 A.2d at 143. It is well settled that one (1) instance of noisy and disorderly conduct is insufficient to violate section 471. Banks Liquor License Case, 429 A.2d 1279, 1280 (Pa. Cmwlth. 1981); Banks Liquor License Case, 447 A.2d 723, 724 (Pa. Cmwlth. 1982) (“to be in violation of [section 471], the licensed premises must be operated in a noisy and disorderly fashion on a routine basis.” (emphasis added)). However, a violation may be found where there is recurrent noise and disorder of a “relatively continuous nature causing disturbance and

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<sup>2</sup> The Board issued its opinion in Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Rolo's, LLC, Citation No. 11-1681, on October 18, 2012.

effrontery to the public welfare, peace and morals.” Ciro’s Lounge, 358 A.2d at 143.

Furthermore, in Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 554 A.2d 931 (1988), the Supreme Court acknowledged that licensees are strictly liable for violations of the Liquor Code and the Board’s Regulations, but it declined to apply the rigid standard of strict liability to conduct prohibited by the Crimes Code or other penal legislation. In section 471 cases involving illegal activity of a licensee’s employees or patrons, the Supreme Court held that a licensee can only be held accountable for such conduct when there is an element of scienter shown, i.e., the licensee knew or should have known of the activity. TLK, Inc., 518 Pa. at 504, 544 A.2d at 933. A second principle, which goes “hand in hand” with the element of scienter, is that a licensee may defend its license by demonstrating it took substantial affirmative steps to guard against known criminal activity. Id.

Additionally, in Commonwealth v. Graver, 461 Pa. 131, 334 A.2d 67 (1975), the Supreme Court, in the context of an action under section 611 of the Liquor Code [47 P.S. § 6-611], determined that licensees can be held accountable for activity occurring off-premises where there is a causal connection between the licensed premises and the activity.

Finally, it should be noted that the Commonwealth Court recently shed some light on what is required to show a causal connection between off-premises nuisance activity and a licensee's operation. In a license renewal matter, the Board denied the renewal application of a club licensee based on, *inter alia*, eight (8) incidents of nuisance activity occurring inside the licensed premises or in the licensee's parking lot. The trial court affirmed the Board's decision. In affirming the trial court, the Commonwealth Court was unpersuaded by the licensee's contention that the nuisance incidents were not causally connected to the operation of the licensed premises, noting that "[i]t is simply not plausible that violence occurring in an area under the Licensee's control, during or shortly after Licensee's hours of operation, involving Licensee's members who had been drinking inside Licensee's establishment, is not causally linked to the operation of Licensee's business." St. Nicholas Greek Catholic Russian Aid Society v. Pennsylvania Liquor Control Bd., 41 A.3d 953, 960 (Pa. Cmwlth. 2012). As the ALJ reasoned herein, however, the instant matter is distinguishable in that it involves a restaurant liquor licensee and its patrons, rather than a club licensee and its members. Additionally, the conduct at issue here primarily did not occur in an area under Licensee's control.

The Board recognizes the extreme difficulty in applying these principles to determine whether a charge of noisy and disorderly operations should be sustained. Much of the problem likely stems from the fact that the relevant case law predates the establishment of the “Nuisance Bar Program” in 1990. [See 47 P.S. § 4-470]. Under the Nuisance Bar Program, incidents of nuisance activity occurring on or immediately adjacent to the licensed premises, along with evidence of prompt and substantial remedial measures proffered by the licensee, are considered by the Board in deciding whether to renew a liquor license. This discretionary regime allows for a totality-of-the-circumstances-type of analysis, which the Bureau argues should be used in the instant citation matter. (See Bureau’s Brief, p. 2).

However, this is not a section 470 license renewal matter subject to the Board’s discretion. This case involves an enforcement action, with the burden on the Bureau to prove by a preponderance of the evidence<sup>3</sup> that the licensee should be fined or have its license suspended or revoked based on “other sufficient cause,” particularly by operating in a “noisy and/or disorderly manner.” For the relevant standard, the Board must therefore apply the case law involving noisy and disorderly charges, discussed *supra*, notwithstanding

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<sup>3</sup> See *In re Omicron Enterprises*, 449 A.2d 857, 859 (Pa. Cmwlth. 1982).

the fact that such decisions were issued in the context of license renewal matters, section 611 actions, or license suspensions and revocations predating the Nuisance Bar Program legislation.

With that foundation laid, the Board agrees with the ALJ's legal determination that in order for a particular incident of alleged noisy and disorderly operations to be held against a licensee, the Bureau is required to establish a causal nexus between the operation of the licensed establishment and the noisy and disorderly behavior involved. This causal analysis is consistent with Graver. Additionally, based on the principles enunciated in TLK and Ciro's Lounge, the Bureau is required to show that the incidents amounted to recurrent noise and disorder, of which Licensee knew or should have known, and which was of such a relatively continuous nature as to cause disturbance and effrontery to the community. Although he did not use this precise language (see Adjudication, p. 9 (discussion of "causation/spillover")), the Board is convinced the ALJ did not commit an error of law in identifying the standard for a noisy and disorderly charge.

In its second issue on appeal, the Bureau argues that the ALJ's findings of fact are not supported by substantial evidence. The Bureau in its brief proceeds incident by incident and identifies specific testimony which the ALJ

failed to include in his findings of fact. It contends that this missing testimony establishes the requisite causal link and that it was not controverted by Licensee. According to the Bureau, the ALJ's omission of this testimony was a capricious disregard of competent evidence, and but for this disregard, the noisy and disorderly charge should have been sustained.

The ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Bd. of Probation and Parole, 510 A.2d 877 (Pa. Cmwlth. 1986). It is well settled that the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 480 A.2d 1253 (Pa. Cmwlth. 1984). A capricious or arbitrary disregard of evidence exists only "when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result." Station Square Gaming L.P. v. Pennsylvania Gaming Control Bd., 927 A.2d 232, 237 (Pa. 2007) (quoting Arena v. Packaging Systems Corporation, 507 A.2d 18, 20 (Pa. 1986)). The Commonwealth Court has noted, however, that the "express consideration and rejection of evidence . . . does not constitute capricious disregard of evidence." Nelson v. State Bd.

of Veterinary Medicine, 938 A.2d 1163, 1170 n. 13 (Pa. Cmwlth. 2007); In re Nevling, 907 A.2d 672, 675 n. 4 (Pa. Cmwlth. 2006).

With these principles in mind, the Board has reviewed the Notes of Testimony from the hearing held on May 14, 2012, as well as the Adjudication and the Bureau's brief, and has determined that the decision of the ALJ in dismissing count one was not supported by substantial evidence of record. The record shows the Bureau in fact met its burden in demonstrating that Licensee caused noise and disorder of a relatively continuous nature such as to cause disturbance and effrontery to the community. This conclusion is bolstered by competent police testimony, which the ALJ capriciously disregarded in his findings of fact.

Beginning with the incident on July 18, 2010, the ALJ disregarded testimony from Carlisle Police Department ("CPD") Officer Alan Mace which implicated Licensee's security personnel in the disorder occurring outside the premises. Officer Mace stated that at around 1:44 a.m. he responded to a report of a fight at the licensed premises, where he observed some "agitated" patrons exiting loudly. (N.T. 277-280). The officer also stated that while monitoring the scene, he encountered a man who appeared drunk and was trying to get into the establishment to check on a friend he believed was inside.

(N.T. 281). The man asked to be handcuffed, so Officer Mace restrained the man to allow him to calm down and watch the exiting crowd for his friend.

(N.T. 284). According to Officer Mace, Licensee's security personnel were "antagonizing" the restrained man from the front of the establishment. (N.T. 285). The officer's testimony quoted Licensee's employees shouting obscenities and threats at the man, urging the officer to let the man go so they could "take care of him." (Id.)

The ALJ did not include any of this evidence in his findings of fact dealing with the incident. (Finding of Fact Nos. 12, 13). In his discussion, the ALJ disregarded the incident entirely because "[w]hat is missing is proof to connect that uncivil behavior outside the premises to the manner in which Licensee operated the business." (Adjudication, p. 13). Clearly that is not the case; Officer Mace's testimony showed that Licensee's employees were actively contributing to the uncivil behavior, rather than attempting to subdue it, by antagonizing an already agitated man in the street. Officer Mace's testimony was not contradicted by Licensee, and the Board finds no reason to doubt the officer's credibility. Yet the ALJ did not mention this evidence anywhere in his Adjudication, nor did he indicate that he did not find the officer

credible. Therefore, the Board must conclude that it was capricious disregard for the ALJ to ignore this evidence.<sup>4</sup>

A second incident of disturbance attributable to Licensee occurred on September 5, 2010. The ALJ found that on that date a Bureau officer heard amplified music coming from the licensed premises at a distance of thirty (30) away. (Finding of Fact No. 14). In his discussion, the ALJ correctly notes that this constituted a violation of section 5.32 of the Board's Regulations [40 Pa. Code § 5.32(a)], which was in effect on September 5, 2010.<sup>5</sup> Nonetheless, the ALJ refused to consider the violation to be evidence of noisy and disorderly operations because of a perceived lack of notice. According to the ALJ, "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." (Adjudication, p. 13).

In an enforcement action, the citation must at the very least inform the licensee of the "type and date of the alleged violation," in order to satisfy the

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<sup>4</sup> The 447-page transcript of the May 14, 2010, hearing is replete with admonitions and soliloquies by the ALJ, voicing his displeasure with the Bureau's legal theory as well as its use of government resources. Without commenting on the propriety of the ALJ's behavior, the Board notes that in applying the capricious disregard standard, it finds additional support in these statements for the "willful and deliberate" nature of the ALJ's disregard for some of the Bureau's evidence.

<sup>5</sup> In 2011, a new subsection of the Liquor Code [47 P.S. § 4-493(34)] superseded section 5.32(a). The new statute states 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 beyond the licensee's property line.

due process notice requirement. Pennsylvania Liquor Control Bd. v. Reda, 463 A.2d 108, 109 (Pa. Cmwlth. 1983). In this case, the Citation listed September 5, 2010, among the dates on which Licensee allegedly operated in a “noisy and/or disorderly manner.” A loudspeaker violation is a straightforward instance of “noisy” operation.<sup>6</sup> Licensee therefore had sufficient notice of the alleged unlawful activity on September 5, 2010, and it was an error for the ALJ to disregard the uncontroverted testimony demonstrating off-premises noise on that date.

Relative to a third incident, CPD Corporal Adolfo Heredia testified that on October 22, 2010, at approximately 1:30 a.m., he observed a group of people exit the licensed premises while arguing and being loud. (Finding of Fact No. 18). Corporal Heredia believed that a woman in the group who was yelling, Alicia Murray, was Licensee’s employee at the time. (N.T. 241, 247). Corporal Heredia also stated that a man he believed to be Licensee’s bouncer exited the licensed premises, shouted obscenities, and chased the group down the street while carrying a knife. (N.T. 251-252). The corporal had to intervene by separating the bouncer from the group, calming him down, and convincing him to return to work. (N.T. 254-255). As the ALJ recognized, this expert

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<sup>6</sup> See Banks Liquor License Case, 429 A.2d 1279 (Pa. Cmwlth. 1981).

intervention by Corporal Adolfo defused a dangerous situation. (Adjudication, p. 14).

The portion of Corporal Heredia's testimony regarding Ms. Murray's employment relationship was not mentioned in the ALJ's adjudication; nor was the portion of his testimony indicating Licensee's bouncer was shouting obscenities. Based on the distance of the incident from the licensed premises, which was approximately sixty (60) to seventy (70) feet, and a perceived lack of scienter, the ALJ concluded there is no legal basis to hold Licensee responsible. (Adjudication, p. 14).

However, the ALJ need only have looked to TLK for the legal basis to hold Licensee accountable for the noise and disorder caused by its bouncer. In TLK, the licensee was found to have violated section 471 when its doorman sold drugs to an undercover agent at an off-premises location, because of prior drug activity of which the licensee knew or should have known. Here, Licensee's on-duty employee was involved in a disturbance a short distance from the establishment. Licensee at the very least should have known of the earlier instance, on July 18, 2010, of its bouncers causing a disturbance by making threats and shouting obscenities in public while on duty. Further, Licensee offered no substantial affirmative measures to remedy the conduct of

its staff.<sup>7</sup> The incident thus provides further evidence of noisy and disorderly operations, which the ALJ erroneously omitted from his findings of fact.

A fourth incident occurred on December 18, 2010. CPD Officer Antanina Klinger testified that at approximately 2:17 a.m., she observed Licensee's bouncer physically drop or throw a woman onto the pavement outside the establishment. (N.T. 309-310). The officer stated that the woman was highly intoxicated and was screaming profanity as she lunged at the bouncer after getting back on her feet. (Id.)

In his findings of fact, the ALJ excluded Officer Klinger's testimony pertaining to the manner in which Licensee's bouncer ejected the woman, as well as her testimony that the woman screamed profanity at the bouncer. (Finding of Fact. No. 21). The ALJ also did not make a finding on the portion of Officer Klinger's testimony indicating that the woman had a bill totaling one hundred four dollars (\$104.00) at the licensed establishment that night. (N.T. 316). There was no evidence that the woman was served alcoholic beverages by Licensee, but clearly the woman was a customer. The other pertinent details of Officer Klinger's testimony were included in the ALJ's findings,

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<sup>7</sup> Licensee's principal, Braam Hattingh, testified to some measures taken a few months later directed at improving patron behavior. These include: updating the video surveillance system, vacating the premises earlier, and using a barred patrons list. It should be noted that Mr. Hattingh conceded he was required to implement some of these measures as a result of Licensee's entry into a conditional licensing agreement with the Board. (N.T. 420).

including that the woman also attacked Officer Klinger, scratching the officer's face. (Id.)

Like the incident on July 18, 2010, in which Licensee's security personnel antagonized a man in the street outside the establishment, here is another example of Licensee's employee contributing to a patron's disorderly behavior by the employee's actions. After being hurled onto the sidewalk in front of the licensed premises, the intoxicated woman responded by attacking the employee as well as the CPD officer who had to intervene. While the woman is largely to blame for her own actions, the manner in which Licensee's employee ejected the patron provides a sufficient causal connection to consider the incident among a series of recurrent noisy and disorderly events surrounding the licensed premises.

As for the remaining incidents raised in the "Substantial Evidence" section of the Bureau's brief, the Board finds that the rest of the ALJ's findings of fact were supported by substantial evidence. The testimony relating to incidents on June 13, June 26, June 27, July 2, September 24, and November 20, 2010, lacked evidence of a causal nexus between the individuals' behavior and Licensee's operation. With respect to the Bureau's evidence of Licensee's operation on August 19, 2010, the ALJ correctly disregarded the testimony

pertaining to this incident because of due process and relevance concerns. The Bureau did not list August 19, 2010, among the dates charged in the Citation, which must provide Licensee notice of the date and type of any alleged violations. Even if Licensee was put on notice by the Bureau's discussion of the incident in its pre-hearing memorandum, which is not part of the record reviewed by the Board, there was no evidence of misconduct by Licensee on August 19, 2010, nor was there evidence it operated in a noisy and disorderly manner on that date. (N.T. 26-39). The Board disagrees with the Bureau's insistence that the proper test in a noisy and disorderly operations charge is whether a licensee "engaged in a **course of business** practice" that resulted in disruptive incidents. (Bureau's brief, p. 7). Rather, as discussed *supra*, an incident must be causally related to the operation of the licensed premises in order to be relevant to a noisy and disorderly operations charge. Therefore, the ALJ was correct in disregarding the testimony pertaining to August 19, 2010, as it was irrelevant, and Licensee lacked notice of any alleged misconduct on that date.

In sum, the ALJ's findings of fact, upon which the dismissal of count one was based, were not supported by substantial evidence with respect to July 18, September 5, October 22, and December 18, 2010. The record shows that

Licensee's operation contributed to noise and disorder of a relatively continuous nature causing a disturbance in the community. The decision of the ALJ in dismissing count one of the Citation is therefore reversed.<sup>8</sup>

For the foregoing reasons, the Adjudication and Order of the ALJ is reversed as to count one; it is affirmed as to counts two through four.

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<sup>8</sup> In reaching the opposite conclusion in Rolo's, the Board found in that case there was substantial evidence to support the ALJ's decision to dismiss the noisy and disorderly charge. The dismissal was based on the lack of a causal connection between the off-premises citations for public intoxication, shown by police testimony, and the operation of the licensed establishment. The Bureau attempted to establish a causal nexus through the testimony of several lay witnesses, who generally stated that they were patrons and had consumed alcohol at the establishment before being cited for public intoxication later that night. However, the ALJ found the Bureau's lay witnesses to be not credible, and thus the Board, bound by this credibility determination, affirmed the ALJ's dismissal of the noisy and disorderly charge for lack of a causal nexus.

**ORDER**

The appeal of the Bureau is granted.

The decision of the ALJ is reversed as to count one. The ALJ's decision as to counts two, three, and four is affirmed.

The fine of two thousand dollars (\$2,000.00) has been paid in full. The three (3)-day suspension was served October 1 through October 4, 2012.

The case is hereby remanded to the ALJ for the imposition of an appropriate penalty as to count one.

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Board Secretary

**AMENDED ORDER**

The appeal of the Bureau is granted.

The decision of the ALJ is reversed as to count one. The ALJ's decision as to counts two, three, and four is affirmed.

The fine of two thousand dollars (\$2,000.00) has been paid in full. The three (3)-day suspension was served October 1 through October 4, 2012.

Licensee shall maintain compliance with section 471.1 of the Liquor Code [47 P.S. § 4-471.1] pertaining to responsible alcohol management for a period of one (1) year from the Administrative Law Judge's Order of July 17, 2012.

The case is hereby remanded to the ALJ for the imposition of an appropriate penalty as to count one.

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Board Secretary