

Mailing Date: JUNE 28 2012

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

PENNSYLVANIA STATE POLICE,	:	In Re Citation No.: 11-0502
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W07-422923
v.	:	
	:	
IRONWOOD GRILL, INC.	:	PLCB LID No.: 44536
1830 OAKLAND AVE.	:	
STE. B	:	
INDIANA, PA 15701	:	PLCB License No.: R-AP-SS-18212

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Nadia L. Vargo, Esquire

FOR LICENSEE: Stanley J. Wolowski, Esquire

BACKGROUND:

This proceeding arises out of a citation, containing one count, that was issued on April 1, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Ironwood Grill, Inc. (Licensee).

The citation charges Licensee with violations of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 637.6(a)(2) of the Clean Indoor Air Act [35 P.S. §637.6(a)(2)]. The charge is that Licensee, by your servants, agents, or employees, smoked and/or permitted smoking in a public place where smoking was prohibited, on December 12, 2010, January 23, 24 and February 11, 2011.

I presided at an evidentiary hearing on April 13, 2012 at the Hampton Inn, 180 Charlotte Drive, Altoona, Pennsylvania.

The matter was submitted by way of agreement of facts. Licensee agreed the Bureau complied with the applicable and investigatory requirements of the Liquor Code.

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

FINDINGS OF FACT:

1. On the dates charged, Licensee permitted patrons to smoke in a portion of the licensed premises identified as the “outside bar” or “deck area.” (N.T. 15-16)

2. The “deck area” is part of a larger common area which is surrounded by ceiling and walls comprised of varying materials. While there is a bulkhead that runs between the “inside serving area” and the “outside bar,” there is no floor-to-ceiling wall that separates the two. The “inside serving area” is enclosed by solid, floor-to-ceiling walls and a ceiling. The “outside area” is enclosed by a series of see-through panels, which may be raised or lowered, and a canopy for a ceiling. At all relevant times, the panels were lowered and fixed to a point where there were virtually no openings. (N.T. 16-36)

CONCLUSIONS OF LAW:

The violations are sustained as charged.

DISCUSSION:

In **BLCE v. 3745 Enterprises, Inc.**, In Re Citation No.: 11-0804¹, I recently discussed how the Clean Indoor Air Act (CIAA) and the Liquor Code contain patently competing provisions. This matter extends that analysis.

To a large degree, I find the parties have fallen into the trap of distinguishing between portions of the licensed premises based entirely on differences in construction material. However, the CIAA does not differentiate between the category of material which encloses an area. Rather, the CIAA defines areas by function, i.e. to what purpose is the area dedicated. Licensee is certainly free to identify portions of the licensed premises by differing nomenclature. In reality, the relevant licensed premises is one common area, enclosed by a variety of construction materials.

¹http://www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2011&adjudication_sequence=0804&appeal=n

Since the panels in the “outside area” are readily raised to allow for greater air exchange, Licensee argues the “outside area” is not enclosed within the meaning of the CIAA. Consequently, Licensee needs no exception for that area and still permit smoking. In **Moonlite Café, Inc. v. Dept. of Health**, 23 A.3d 1111 (Pa.Cmwlt. 2011), an applicant for a Type II exception, authorizing the applicant to dedicate a portion of the licensed premises to allow patrons to smoke, was denied. Writing for a three Judge panel, Judge Brobson reasoned the definition of “enclosed area” in the CIAA, as applied by the Department of Health, was reasonable. The Department of Health concluded that an “enclosed area” is one enclosed on all sides.

At first glance, that decision seems to end the inquiry in this matter in favor of Licensee. Digging a little deeper however, I find otherwise. In **Moonlite Café, Inc. v. Dept. of Health**, the Court addressed the meaning of “an enclosed area” as it relates to an exception to allow smoking. The Court addressed the statutory environment in which “an enclosed area” is located. Quoting other statutory requirements attendant to a Type II exception, the Court found a clear statutory pattern intended to separate an accepted smoking area from the remainder of a licensed premises. The statutory description of a qualifying exception is clearly structured to isolate the air within an accepted area in order to prohibit that air from infiltrating the remaining portion of a licensed premises. Thus, the indoor air within that remaining portion is free of contaminants and the dangers of second hand smoke.

The CIAA also defines a public place in part, as an enclosed area [35 P.S. §637.2]. Licensees whose entire premises, or a portion thereof, do not qualify for an exception, are public places. For purposes of maintaining an indoor environment free of the dangers of second hand smoke, “an enclosed area,” as applied to a public place, cannot be defined in the same manner as an “enclosed area” in which smoking is permitted.²

The broadest dictionary definition I have found is: an area bounded by something. In this sense, a corral may be considered an enclosure. In the context of a public place, I conclude an “enclosed area” is one which substantially restricts the free and relatively rapid exchange of air between the designated area and the rest of the world. Therefore, an area, open on all sides but covered by a canopy, may be considered “an enclosed area” because the canopy sufficiently suppresses the free and relatively rapid exchange of air.³

I come now to another intriguing provision of the CIAA. It is so inartfully worded that anyone attempting to glean its meaning is likely to suffer a first degree migraine. I refer to the affirmative defenses available in a criminal or administrative matter.

² Although unusual in my experience, I see nothing to preclude varying meanings to a term applied in a unified statutory scheme when that term appears in differing contexts.

³ In this matter, Licensee operated one common area which, at all relevant times, was virtually enclosed on all sides and from top to bottom. Even when in an entirely open area, one can readily attest to experiencing second hand smoke, which may not rapidly dissipate for any number of reasons.

The CIAA, at 35 P.S. §637.6(b), provides:

(b) Affirmative defenses.—Any of the following shall be an affirmative defense to a prosecution or imposition of an administrative penalty under this act:

- (1) When the violation occurred, the actual control of the public place was not exercised by the owner, operator or manager but by a lessee.
- (2) The owner, operator or manager made a good faith effort to prohibit smoking.
- (3) The owner, operator or manager asserting the affirmative defense shall do so in the form of a sworn affidavit setting forth the relevant information mentioned under paragraphs (1) and (2).

The first confusing element that smacks an interpreter squarely in the face is the promise of three affirmative defenses. However, only two are listed. Paragraph (3) is not an affirmative defense; it does not even pretend to be one. Paragraph (3) refers to Paragraphs (1) and (2) as affirmative defenses. Paragraph (3) describes a procedure for implementing the affirmative defenses of Paragraphs (1) and (2), immediately above.⁴

Finally, as applied to licenses granted pursuant to the Liquor Code, Paragraph (b)(1) describes an affirmative defense that creates a fundamental Liquor Code illegality. The Liquor Code prohibits licensees who might otherwise qualify for the affirmative defense in question from relinquishing entire control of the licensed business. Particularly offensive to the Liquor Code is the notion of leasing a license.⁵

As applied to this matter, Licensee promoted smoking based on an incorrect belief that the area in question was not enclosed. Furthermore, Licensee has not established an affirmative defense. For all of the above reasons, I conclude Licensee violated the law as charged.

⁴ When an affirmative defense is raised by affidavit, is the fact finder prohibited from assessing the affiant's truthfulness. May the fact finder determine the weight to be given an affidavit? If, on its face, the affidavit responds to Paragraphs (b)(1) and (2), does that release liability?

⁵ See Liquor Code Section 404 [47 P.S. §4-404].

PRIOR RECORD:

Licensee has been licensed since July 16, 1999, and has the following Adjudication history:

In Re Citation No.: 04-0708. Fine \$50.00.

Possessed or operated gambling devices or permitted gambling on your licensed premises (horse races) on December 20, 2003.

In Re Citation No.: 08-1211C. Fine \$1,250.00 and R.A.M.P training mandated. Sales to a minor on April 26, 2008.

In Re Citation No.: 09-0906. Fine \$300.00.

1. Permitted smoking in a public place where smoking is prohibited on March 5, 7 and 8, 2009.
2. Failed to post signage as required by the Clean Indoor Air Act on March 5, 7 and 8, 2009.

In Re Citation No.: 09-1897. Fine \$1,800.00.

1. Sales to a minor on June 6 and 7, 2009.
2. Minor frequenting on June 6 and 7, 2009.

In Re Citation No.: 09-2912. Fine \$650.00.

1. Used loudspeakers or devices whereby music could be heard outside on June 26, 27 and October 17, 2009.
2. Permitted smoking in a public place where smoking was prohibited on June 26, September 24, October 17 and 31, 2009.
3. Permitted a person under 18 years of age to be in a portion of the licensed premises where smoking was permitted on September 24 and October 31, 2009.

In Re Citation No.: 11-2204. Fine \$200.00.

Operated the licensed establishment without a valid health permit or license during the period August 1 through October 26, 2011.

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)

I impose a \$500.00 fine.

ORDER:

In Re Citation No.: 11-0502; Licensee, Ironwood Grill, Inc.; PLCB LID No.: 44536;
PLCB License No.: R-AP-SS-18212

Imposition of Fine

Licensee must pay a \$500.00 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.

Retaining Jurisdiction

I retain Jurisdiction to ensure compliance with this Adjudication.

Dated this 25TH day of June, 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