

Mailing Date: January 30, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 11-0545
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
ROOSEVELT CLUB	:	License No. CC-5614
Store E 16 B Basement	:	
Woodlyn Shopping Center	:	
Woodlyn, PA 19094-2005	:	LID 2565

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OPINION

Roosevelt Club (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Tania Wright (“the ALJ”), mailed October 19, 2012, wherein the ALJ sustained Citation No. 11-0545 (“the Citation”), and ordered

Licensee to pay a fine of one thousand dollars (\$1,000.00) and to serve a license suspension of ninety (90) days.

On April 12, 2011, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation to Licensee, charging it with violating section 471 of the Liquor Code [47 P.S. § 4-471] in that on May 23 and 29, June 27, July 11, 18, 24, 25, and 31, August 8 and 15, September 12, October 3, 16, 24, and 30, December 5, 2010, and February 19 and 20, 2011, the licensed establishment was operated in a noisy and/or disorderly manner.¹ Administrative hearings were held on December 8, 2011, January 24, 2012, and January 26, 2012. Erik S. Shmukler, Esquire, appeared at the hearings as counsel for the Bureau. John J. McCreesh III, Esquire, appeared on behalf of Licensee. By Adjudication and Order mailed October 19, 2012, the ALJ sustained the Citation. Licensee timely filed the appeal on November 16, 2012.

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

¹ The date of May 29, 2010 was withdrawn by the Bureau at the December 8, 2011, administrative hearing. (N.T. 48, December 8, 2011).

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, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984). Furthermore, the ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Board of Probation and Parole, 98 Pa. Cmwlth. 28, 510 A.2d 877 (1986).

In addressing this appeal, the Pennsylvania Liquor Control Board (“Board”) has reviewed the certified record provided by the Office of the Administrative Law Judge (“OALJ”), including the ALJ’s Adjudication and Order mailed October 19, 2012, Licensee’s Appeal, and the Notes of Testimony and Exhibits from the hearings held on December 8, 2011, January 24, 2012, and January 26, 2012. Licensee’s appeal states only that “Findings of fact 1 through 157 are not supported by substantial evidence.” The Bureau did not file a response to the appeal.

Section 17.21 of the Board’s Regulations provides, in pertinent part:

The appeal shall include a concise enumeration and explanation, in the numbered paragraphs, as to each finding of fact which the appellant believes is not supported by substantial evidence.

[40 Pa. Code. § 17.21(b)(4)].

Although Licensee's appeal refers generally to all findings of fact, asserting that "Findings of fact 1 through 157 are not supported by substantial evidence," Licensee's appeal does not contain any explanation or specific reasons why Licensee is challenging all of the ALJ's findings of fact. Thus, Licensee's appeal fails to conform to the requirements for such appeals found in section 17.21 of the Board's Regulations, and could be dismissed on that basis alone. However, the Board has further determined that the ALJ's findings of fact substantially reflect the testimony and exhibits of record. Therefore, in the absence of any specific challenge, the Board finds that the facts in the record are supported by substantial evidence.

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 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).

In this case, a general review reveals ample evidence to support the ALJ's ultimate finding that Licensee operated in a noisy and disorderly manner. As noted in the ALJ's opinion of October 19, 2012, "numerous incidents . . . culminated in three (3) people being shot inside the licensed premises." The record reflects shootings, roaring engines, loud radios, yelling, cursing, fighting, public drinking, and public urination.

On May 23, 2010, Corporal Gerard Scanlan received a call that the bar was letting out and wanted help in moving a crowd of up to one hundred (100) people who were trying to get into the establishment, notwithstanding the fact that the establishment was closed. As a result, Corporal Scanlan and several other police officers assisted in moving the large and disorderly crowd at approximately 3:13 a.m. (N.T. 43-47, December 8, 2011).

On June 27, 2010, Corporal Scanlan observed a large fight involving approximately twenty (20) people in a group of about sixty (60) people in front of the establishment at approximately 3:21 a.m. The persons not involved in the fight were "hooting and hollering." After Corporal Scanlan and numerous other police officers broke up the fight, Corporal Scanlan determined that a cell

phone been stolen, retrieved the cell phone, and took into custody the woman who had allegedly stolen the cell phone. (N.T. 48-53, December 8, 2011).

On July 11, 2010, Officer Robert Ruskowski of the Ridley Township Police Department observed a group of fifteen (15) to twenty (20) people standing in line attempting to enter Licensee's front door. (N.T. 5, 7-10, January 24, 2012).

On July 18, 2010, Corporal Scanlan responded to a 911 call for a fight in front of the establishment at approximately 2:45 a.m. Corporal Scanlan did not observe a fight, but did observe a disorderly crowd of approximately one hundred (100) people whose members were yelling and screaming. A female manager for Licensee repeatedly asked Corporal Scanlan and other police officers to clear the crowd. Corporal Scanlan informed her that she could not keep calling the police solely for crowd control. (N.T. 53-59, December 8, 2011).

On July 24, 2010, at approximately 2:00 a.m., Corporal Michael Bongiorno was in Licensee's parking lot and observed a crowd of approximately twenty (20) to twenty-five (25) people in line to enter the licensed premises. After leaving briefly and returning at approximately 2:31 a.m., Corporal Bongiorno observed that although the lights at the door were off, there were still approximately ten (10) people outside in line. He told them that the club was

closed and that they had to go. One (1) person refused to leave the area and was arrested for disorderly conduct. (N.T. 17-23, January 26, 2012).

On July 25, 2010, Corporal Anthony D'Ambrosio was in Licensee's parking lot when he received a call at approximately 2:30 a.m. for a possible disorderly group in the parking lot. Corporal D'Ambrosio responded that he was on location; however, he observed nothing disorderly about the people trying to enter the club. (N.T. 24-27, January 26, 2012).

On July 31, 2010, Officer Brian Judge of the Ridley Township Police Department observed a person urinating in between two (2) vehicles about thirty (30) feet from the door of Licensee's establishment. The officer observed that the person was intoxicated, as indicated by her slurred speech and the strong odor of alcoholic beverages coming from her breath. She was taken into custody for public drunkenness. Around 2:00 a.m., the officer observed a loud and disorderly crowd of thirty (30) to fifty (50) people gathering outside the front door of the establishment. After entering the establishment, the officer observed two (2) to three (3) individuals at the bottom of the stairs pushing and shoving one another. The officer observed only two (2) security personnel. The one (1) was at the top of the stairs, and directed the officer down the stairs. The other was at the bottom of the stairs.

The officer drew his Taser and advised the individuals involved in the altercation to break it up and separate. They did not disperse. Meanwhile, a scuffle broke out at the entrance. The officer observed that there were approximately one hundred (100) to one hundred and fifty (150) patrons on the premises. Other police officers arrived and the crowd became hostile and began screaming at the officers. A pushing and shoving match started in the bar room, where there was no security. Officers arrived from Collwyn, Eddystone, Ridley Park, Nether Providence and Swarthmore, as well as Ridley Township. The crowd was required to exit the establishment and clear the area. However, the crowd reassembled in the parking lot, blaring their radios and refusing to leave. There were approximately two hundred (200) to two hundred and fifty (250) people in the parking lot at 2:00 a.m. (N.T. 11-29, January 24, 2012).

On August 8, 2010, Corporal Daniel Smith of the Ridley Township Police Department observed a man urinating openly in the first row of cars parked outside the licensed premises. The officer spoke to the man at that time. The officer saw twenty-five (25) to thirty (30) people coming out of the licensed club as the man was urinating in front of the officer and other members of the

public. The officer arrested him for disorderly conduct and transported him back to headquarters. (N.T. 33-37, January 24, 2012).

On August 15, 2010, Officer Edmond Kienzle of the Ridley Township Police Department arrived at the licensed premises at approximately 2:55 a.m. While he was watching patrons leave the establishment, he observed about twenty (20) people gather and noted that there was a fight taking place in the middle of the crowd. A woman was in the center and was fighting, yelling, and screaming. Her friends were holding her back and she was flailing her arms trying to get away from her friends, but continued fighting. The officer took her into custody for disorderly conduct. The officer described the scene as chaotic, with at least ten (10) police officers dealing with other disturbances occurring in the parking lot at the same time. (N.T. 103-107, December 8, 2011).

On September 12, 2010, Officer Scanlan and other local police officers responded to a call at approximately 2:15 a.m. regarding a disorderly group in front of the establishment. Officer Scanlan observed approximately one hundred (100) people outside the establishment. Officer Scanlan also observed Licensee's bouncer selecting various people in the line and then allowing them to enter the establishment. This infuriated the people that were in front of them in line, causing a stampede of people to enter the club as soon

as the door opened. The crowd was pushing and shoving in attempts to enter the premises. The officers also had to control the crowd in the parking lot, by directing the crowd to line up on the sidewalk. There were cars entering and leaving the parking lot, as well as people yelling and screaming. No arrests were made. (N.T. 61-68, December 8, 2011).

On October 3, 2010, Officer Edmond Kienzle received a call at approximately 2:37 a.m. regarding a fight at the establishment. When he arrived, he saw no fight, but he did see approximately one hundred (100) unruly people exiting the premises and entering the parking lot area. The officer testified that the police had to deal with the crowd almost every night that the establishment was open. Officer Kienzle was on the scene for about a half-hour. (N.T. 106-107, December 8, 2011).

On October 16, 2010, Officer James Gieder of the Ridley Township Police Department was patrolling in his vehicle at approximately 2:09 a.m. when he noticed an individual urinating in Licensee's parking lot between two (2) parked vehicles, approximately forty (40) to fifty (50) feet from the establishment. He approached the individual, identified himself, and took the man into custody. (N.T. 29-33, January 26, 2012).

On October 24, 2010, at approximately 2:15 a.m., a Bureau officer arrived in the vicinity of the licensed premises and saw approximately eighty (80) to one hundred (100) cars and four (4) police cars in the parking lot. The Bureau officer identified himself to the local police and observed a group of people in front of the premises, as well as a group of people exiting. At one point, there were between two hundred (200) and two hundred and fifty (250) people in the parking lot area. They were talking extremely loud, as well as joking and arguing; some people possessed drinks. Officer Edward Howley of the Ridley Township Police Department was also called to the scene for a disorderly crowd report and arrived at 2:24 a.m. There were about thirty (30) to fifty (50) people hollering and banging on the front door trying to get into the premises. As people exited, others would rush the door. Officer Howley stayed on the scene nearly an hour trying to calm and disperse the crowd. (N.T. 8, 10-13, 128-136, December 8, 2011; N.T. 26-27, January 24, 2012).

On October 30, 2010, officers were at the licensed club sitting in the parking lot. At approximately 3:06 a.m., the officers saw a crowd of forty (40) to fifty (50) people gather around in a big circle in the parking lot. Several people were fighting in the middle of the crowd and the rest of the crowd was

either yelling, screaming, or pushing. Ten (10) police cars eventually responded to get the crowd to disperse. (N.T. 110-113, December 8, 2011).

On December 5, 2010, Corporal Scanlan and other officers responded to a 911 call from a female customer for a domestic situation, which involved an argument between the caller and someone she had previously dated. The officers arrived and observed yelling, screaming, pushing, and shoving by an unspecified number of people in the establishment's parking lot, but no fight. The police officers were told that the person the caller had previously dated, pulled a gun on the caller and then fled by car. The officers attempted to locate the car. (N.T. 67-71, December 8, 2011).

On February 19, 2011, Officer Howley was monitoring the parking lot as patrons entered and exited the licensed premises. He arrived at approximately 2:30 a.m. A fight erupted in the parking lot in a crowd of thirty (30) to fifty (50) people. When Officer Howley heard several glass bottles breaking, he called for assistance from other police officers, who responded to help disperse the group. (N.T. 137-140, December 8, 2011).

On February 20, 2011, Officer Howley received a call for a possible fight and shooting inside the bar. People were running through the front door as officers were trying to make their way to the area where the victims were

located. The officers had to force their way through the crowd. Once inside, they saw two (2) people lying on the ground. One (1) had a gunshot wound on the outer thigh and the other one had a gunshot wound to the upper thigh. Medical personnel responded and transported the victims to the hospital. One (1) victim was sitting on the floor right in front of the bar and the other was about ten (10) feet away, sitting on the dance floor, which is in front of the bar. The officers noted that both victims had a large amount of blood on their pant legs. There was a t-shirt on the floor that was covered with blood. Both victims indicated that they had been shot. Officers observed three (3) shell casings and remained on the scene for at least an hour. (N.T. 141-144, December 8, 2011).

Corporal Smith was also present at the licensed premises on February 20, 2011, as were five (5) other officers. At approximately 3:05 a.m., the call came in regarding a fight/shooting. He went to the right side of the parking lot and saw frantic people exiting the premises. A woman came up to him with a gunshot wound to her arm and kept losing consciousness. He put her in the back of his car, and later transported her to the hospital. When he returned, there were still people milling around the parking lot. (N.T. 38-44, January 24, 2012).

Officer Leo Doyle of the Ridley Township Police Department was also called to the premises for the shooting. He described the scene as utter chaos, with approximately two hundred (200) people in the parking lot, many of whom were trying to get back in the premises. He had to take out his rifle to control the crowd. When he went inside the club, he saw pools of blood, but people were still sitting around drinking. (N.T. 63-70, January 24, 2012).

Officer Kienzle was also called to the scene on February 20, 2011 and arrived to mayhem in the parking lot, which he characterized as a “combat zone.” There were more than twenty (20) police officers who responded from various areas and many were tied up at the scene for hours. (N.T. 114-119, December 8, 2011).

Officer Shaun McGee of the Ridley Township Police Department was also at the scene. He was in the process of arresting a person for public urination in the parking lot when the call about the fight/shooting came in. He placed the man he had arrested into the police car and headed towards the premises. People rushed past him and he was grabbed, punched, and pushed as he tried to get through the hostile crowd. He saw some people in the bar continuing to sit/stand and drink, and he attempted to get them to leave. He estimated that there were about two hundred (200) to two hundred and fifty (250)

people outside the premises and it took nearly an hour for the police to get them to leave. (N.T. 49-60, January 24, 2012).

Ann Marie Jowder, who is the club secretary and manager, acknowledged that she was at the licensed establishment on February 20, 2011, which was the night of the shooting, and she did call 911. She heard an argument and what sounded like balloons popping; when she realized they were not balloons, she called 911. In other words, she heard loud voices and then gunshots. (N.T. 36-38, January 26, 2012).

The ALJ's findings of fact with respect to the above incidents substantially reflected the testimony and exhibits of record. However, upon review, the Board finds that the ALJ's conclusion of law improperly included May 29, 2010, a date that was withdrawn by the Bureau and for which no evidence was presented, as one of the incidents of noisy and/or disorderly operation. Additionally, while the ALJ's findings of fact pertaining to July 11 and 25, August 8, October 16, and December 5, 2010, were supported by substantial evidence, the incidents should not be held against Licensee, consistent with TLK and Graver.² Nonetheless, the incidents of May 23, June

² Regarding July 11, 2010, there was no evidence of noise or disorder in the crowd observed by Officer Ruskowski. Similarly, Corporal D'Ambrosio did not observe anything disorderly about the people waiting to enter the club on July 25, 2010. Regarding the public urination on August 8, 2010, no evidence was presented

27, July 18, 24, and 31, August 15, September 12, October 3, 24 and 30, 2010, and February 19 and 20, 2011, provide ample evidence that the establishment was operated in a noisy and/or disorderly manner.

In sum, there was substantial evidence to support the ALJ's decision to sustain the Citation. The record shows a series of incidents amounting 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. Moreover, Licensee has failed to comply with the Board's Regulations with regard to appeals, by challenging all of the ALJ's findings of fact with neither specificity nor explanation. [See 40 Pa. Code. § 17.21(b)(4)]. Therefore, the Board affirms the decision of the ALJ, but it remands for reconsideration of an appropriate penalty in light of the foregoing.

that the man arrested by Corporal Smith was in any way connected to the licensed premises, whether as employee or patron. The evidence as to the public urination on October 16, 2010, similarly lacked a nexus, as the individuals questioned by Officer Gieder indicated they had just arrived in the parking lot. Finally, regarding December 5, 2010, there was again no evidence that the individuals involved in the domestic dispute had any connection to the licensed establishment as patrons or employees.

ORDER

The decision of the ALJ in regard to Citation 11-0545 is affirmed as to all dates except May 29, July 11 and 25, August 8, October 16, and December 5, 2010. The ALJ's conclusion of law as to these six (6) dates is reversed.

The appeal of Licensee is dismissed.

The fine of one thousand dollars (\$1,000.00) has been paid.

The ninety (90)-day license suspension ordered by the ALJ has not been served.

The case is hereby remanded to the ALJ for the imposition of an appropriate penalty based upon the twelve (12) remaining incidents indicating the noisy and disorderly operation, and to ensure compliance with this Order.

Board Secretary