Mailing Date: FEB 13 2012

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT (BLCE)	:	Docket No.: 11-0804
v.	:	BLCE Incident No.: W03-427630
3745 ENTERPRISES, INC. 3745 N. 6TH ST. HARRISBURG, PA 17110-1519	:	PLCB LID No.: 51633 PLCB License No.: R-AP-SS-7022
DAUPHIN COUNTY	:	

BEFORE: Administrative Law Judge Felix Thau

FOR BLCE: John H. Pietrzak, Esquire

LICENSEE: George Giannaris, Sole Corporate Officer and Stockholder

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation, containing one count, that was issued on May 12, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against 3745 Enterprises, 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)(1) of the Clean Indoor Air Act [35 P.S. §637.6(a)(1)]. The charge is that Licensee, by your servants, agents, or employees, failed to post signage as required by the Clean Indoor Air Act, on March 4, 5, 17 and April 1, 2011.

I presided at an evidentiary hearing on October 5, 2011 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 March 4, 2011 and completed it on April 5, 2011. (N.T. 45)

2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested on, April 28, 2011. The notice alleged violations as charged in the citation. (Commonwealth Exhibit Nos. C-1, C-2, N.T. 43)

3. On the four dates charged, a Bureau Enforcement Officer conducted an undercover surveillance of the licensed premises. Although Licensee acquired an exception to permit smoking on the licensed premises, there were no signs indicating that smoking was permitted. (N.T. 46)

CONCLUSIONS OF LAW:

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

2. The violations are sustained as charged.

DISCUSSION:

I was particularly intrigued by the sign Licensee placed on a portion of the licensed premises where Licensee was permitted to allow patrons to smoke. The sign advised customers that one had to be at least eighteen years old to patronize the excepted area. The sign's message prompted an on-the-record discussion concerning the interplay between the Liquor Code (LC) and the Clean Indoor Air Act (CIAA).

I remarked, the CIAA can readily confuse licensees who may conclude they are now permitted to allow unsupervised minors, older than eighteen, on the licensed premises, or at least that portion where smoking is permitted. And so, as between the LC and the CIAA, it is much like two celestial bodies, the gravitational fields of which increasingly warp the space around the other as the two get closer.

The colloquy first addressed this general observation, yet neither the LC nor the CIAA have any directive suggesting one supersedes the other when they cross paths. Consequently, when interpreting provisions of one that implicate portions of the other, one must construe them together as if they are one statute, when possible[1]. I have discovered three instances where the LC and the CIAA demand they be read together but frustrate each other's purpose. I pray I find no more.

The CIAA prohibits smoking in a public place, as defined by the CIAA, subject to a host of exceptions. Two exceptions apply to what the CIAA defines as a drinking establishment (35 P.S. §637.2). In relevant part, a drinking establishment is a place which operates pursuant to an eating place retail dispenser's (sic) license, restaurant liquor license, or retail dispenser's (sic) license issued pursuant to the LC or an enclosed area within such a licensed premises.

These alternative definitions, i.e. either an entire licensed premises or a portion thereof, have two additional and identical components. A drinking establishment is prohibited from permitting anyone under eighteen years old on the premises and must have annual on-premises food sales no greater than twenty percent of combined gross sales attributed only to the area intended for exception[2].

The CIAA's definition of drinking establishment frustrates Liquor Code policy. Additionally, the definition suggests there are three license types issued pursuant to the LC. In fact, there are just two. There is no "retail dispenser's" license as identified in the CIAA. The term, retail dispenser, is defined in Liquor Code Section 102 (47 P.S. §1-102). That definition delineates specific sales authority granted to an eating place licensee[3]. Eating place and restaurant are both defined in Liquor Code Section 102.

Subject to slight differences, an eating place licensee may only sell malt or brewed beverages (beer). In addition to selling beer, a restaurant liquor licensee may also sell liquor, which, in LC parlance, includes wine.

The notion of a drinking establishment, that is a place dedicated to serving alcoholic beverages, is anathema to the LC. As similarly defined, a restaurant and an eating place are

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[1] See 1 Pa. C.S.A. §1932 relating to laws ***in pari materia***.

[2] The Department of Health of the Commonwealth describes the two exceptions as a Type I (entire premises excepted) or a Type II (part of premises excepted) Moonlite Café, Inc. v. Dept. of Health 23 A.3d 1111 Pa. Cmwlth. 2011 and House of Leung, Inc. v. Dept. of Health, unreported opinion of the Commonwealth Court, Docket No. 2485 C.D. 2010, decided December 21, 2011. Although unreported opinions have no precedential value, they are still instructive.

[3] The CIAA employs the terminology: eating place retail dispenser's licensee, which also does not follow LC nomenclature.

principally eating establishments; alcoholic beverage sales are secondary. Now, if a licensee wishes to permit smoking on the premises, the licensee may actively discourage food sales in order to qualify for a smoking exception.

The second distortion between the LC and CIAA relates to what the CIAA phrases in the negative[4]. No one under eighteen is permitted in the area of a licensed premises excepted from the smoking ban. Reading the CIAA alone, one may reasonably infer that customers at least eighteen years of age may patronize an excepted licensed premises. Regrettably, that result offends Liquor Code Section 493(14) [47 P.S. §4-493(14)], which, among other things, renders it unlawful for a licensee to permit minors to frequent a licensed premises[5].

There are those who still cling to the position that a licensee violates Clause (14) only when a minor visits the premises on three or more occasions. This conclusion is based on ***Appeal of Speranza***, 206 A.2d 292 (Pa. 1965), hereafter Speranza, in which the Supreme Court of Pennsylvania engaged in statutory construction. The Court concluded that frequent, as used in Clause (14), means; to visit often, to resort to habitually, or to recur again and again.

Speranza is now nearly fifty years old. Ordinarily, a decision's age has no bearing on its continued validity. Nevertheless, it is easy to forget that Speranza and its progeny are determinations entirely grounded in statutory construction. When a statute is modified, cases interpreting the former provision have questionable application. The degree to which these cases maintain value is inversely proportional to the extent of statutory change. The greater the modification, the less reliance can be placed upon statutory construction decisions pre-dating it.

As presently constituted, Clause (14) is markedly different than that considered by the Speranza Court. Then, the pertinent text read:

> It shall be unlawful –
>
> (14) For any…licensee…to permit…persons of ill repute, known criminals, prostitutes or minors to frequent…

The current version no longer includes known criminals or minors as customer classifications a licensee may not permit to frequent a licensed premises.

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[4] I need not address the third discrepancy which may be found in 35 P.S. §637.6(b), relating to affirmative defenses.

[5] See 1 Pa. C.S.A. §1991 which defines minor as a person under twenty-one years old.

Instead, as applied to minors, the second paragraph of Clause (14) approaches the prohibition from another direction. The paragraph begins:

> Minors may only frequent licensed premises if:…

Clause (14) then goes on to list five situations, each of which independently responds to the "if," above:

> (a) they are accompanied by a parent;
>
> (b) they are accompanied by a legal guardian;
>
> (c) they are under proper supervision;
>
> (d) they are attending a social gathering; or
>
> (e) the hotel, restaurant or retail dispenser licensee has gross sales of food and nonalcoholic beverages equal to fifty per centum or more of its combined gross sales of both food and alcoholic beverages.

The second paragraph continues by defining some of the terms employed in the five conditions above, while also adding qualifiers to them for special circumstances.

The question needs to be asked: Since "frequent" remains an integral part of the current text, why is that Speranza no longer applies? In response, I direct the reader to the five "ifs." Each, plainly and clearly, refers to a single incident. This response provokes a follow-up question: What meaning are we then to apply to frequent?

I long ago concluded, the Speranza Court's chosen definition does not mesh with the policy considerations supporting prohibiting minors to frequent a licensed premises. We can readily agree, the underlying purpose is to protect minors from an environment in which alcoholic beverage sales and consumption may create unsafe or unhealthy conditions and where unsupervised, young adults may readily be enticed to experiment with alcoholic beverages

before they have achieved a minimum level of maturity[6]. The perceived deleterious impact begins to occur immediately upon a minor's entry into a licensed premises[7].

We often say that we frequent a place when our intention is to convey the meaning that we attend or are present there. Other synonyms associated with this meaning are: to appear; to be a guest at; to be at; to be present. This is the sense of frequent that is in harmony with LC's principles.

ADJUDICATION HISTORY:

Licensee has been licensed since July 21, 2003, and has the following Adjudication history:

Docket No. 06-2284C. Fine $1,250.00 and R.A.M.P. training mandated.
Sales to a minor on August 11, 2006.

Docket No. 07-2988. Fine $200.00
Sold malt or brewed beverages in excess of 192 fluid ounces for consumption off premises on September 27, 2007.

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 $100.00 fine.

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[6] The Legislature has fixed that level at twenty-one. Whether one agrees or not, as a society, we must select some age applicable to all, even though we know the requisite maturity to consume alcoholic beverages responsibly does not coincide with the age we may select. Indeed, my Administrative Law Judge experience has led me to conclude there are some who never reach such a level.

I find it interesting to note that conditions (a) through (d) all permit minors to frequent a licensed premises with assurance there is a responsible adult controlling and monitoring a minor's conduct. However, as I understand the law, for all other legal purposes a minor achieves majority at age eighteen. Consequently, adults, who conditions (a) through (d) entrust with controlling and monitoring minors eighteen years old or older, have questionable legal authority to do so.

[7] Also see P.S.P v. Behind the Moon, Inc., Docket No. 99-0813; CIC Investors No. 850, LTD., Docket No. 90-0580, Selected Opinions, ALJ, Volume 5, Page 131; CIC Investors No. 580, LTD v. P.S.P. 612 A.2nd 1105.

ORDER:

Fine Imposition

Licensee must pay a $100.00 fine within 20 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

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 10TH day of February, 2012.

Felix Thau, A.L.J.

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General Information

This Adjudication is a legal document. 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**. Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

Docket No. 10-0125
3745 Enterprises, Inc.