

Mailing Date: JAN 30 2012

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

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|-----------------------------|---|-------------------------|
| PENNSYLVANIA STATE | : | |
| POLICE, BUREAU OF | : | Citation No. 11-0806 |
| LIQUOR CONTROL ENFORCEMENT | : | |
| | : | Incident No. W04-426582 |
| v. | : | |
| | : | LID -54536 |
| HILLSBOROUGH MANAGEMENT INC | : | |
| T/A TRADESMAN INN | : | |
| 1769 E NATIONAL PIKE | : | |
| NORTH BETHLEHEM TWP | : | |
| SCENERY HILL PA 15360-1704 | : | |
| | : | |
| | : | |
| WASHINGTON COUNTY | : | |
| LICENSE NO. R-AP-SS-14590 | : | |

BEFORE: JUDGE SKWARYK

APPEARANCES:

BLCE COUNSEL: Emily Gustave, Esquire
LICENSEE COUNSEL: Holly Guna, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on May 13, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Hillsborough Management, Inc., t/a The Tradesman Inn, License Number R-AP-SS-14590 (hereinafter Licensee).

The citation contains two counts.

Count One of the citation charges Licensee with violation of Section 5.32(a) of the Liquor Control Board Regulations, [40 Pa. Code 5.32], in that on February 19, March 26 and 27, 2011, Licensee, by its servants, agents or employees, used, or permitted to be used on the inside of its licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

Count Two of the citation charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] in that on February 19, March 26 and 27, 2011, its licensed establishment was operated in a noisy and/or disorderly manner.

An administrative hearing was conducted on October 18, 2011, at Two Parkway Center, 875 Greentree Road, Pittsburgh, Pennsylvania. The Bureau was represented by Emily Gustave, Esquire. Licensee was represented by Holly Guna, Esquire.

The Bureau began its investigation of this matter on February 16, 2011, and completed its investigation on April 19, 2011. The notice of violation letter was sent by certified mail on April 22, 2011, and received by Licensee on April 23, 2011.

After hearing the testimony presented, and upon review of the evidence submitted, the following Findings of Fact and Conclusions of Law are entered:

FINDINGS OF FACT:

Counts One and Two

1. Licensee is a corporation located in Washington County, Pennsylvania and holds Restaurant Liquor License Number No. R-AP-SS-14590. (N.T. 4)
2. On Saturday, February 19, 2011, an enforcement officer contacted RM concerning his complaint of Licensee's loud band music he heard at his residence. (N.T. 9)
3. On Saturday, February 19, 2011, the officer called Licensee's manager and informed him of a loud music complaint. (N.T. 9)
4. On Saturday, February 19, 2011, at 9:45 p.m., the enforcement officer entered the licensed premises in an undercover capacity and paid a \$5.00 cover charge. (N.T. 10)
5. At 10:05 p.m., a band called "Rough Creek" began playing music in a back room. (N.T. 10-12)
6. At 10:45 p.m., the officer went into the back room where the music was extremely loud and found it was electronically amplified through two speakers. (N.T. 10-11)
7. The officer left the premises and drove approximately 150 yards to a neighbor's (RM) house and heard Licensee's music at RM's front porch. (N.T. 10-11)

8. The area surrounding the premises is approximately 95% rural and RM's residence is the closest house to the premises, at approximately 100 to 150 yards away. (N.T. 10-12, 15)
9. On March 25, 2011, the officer visited the licensed premises and found no violations. (N.T. 12)
10. On Saturday, April 9, 2011, the enforcement officer took a statement from RM at his residence that on Saturday, March 26, 2011, from 9:30 p.m. until 1:45 a.m., then being Sunday, March 27, 2011, RM heard loud booming music inside his home with the windows shut, which was emanating from the licensed premises. (N.T. 12-13)
11. The neighbor has been disturbed by Licensee's music for the past five years. (N.T. 17)

CONCLUSIONS OF LAW:

- Count One – Sustained as charged.
Count Two – Sustained as charged.

DISCUSSION:

The burden of proof is on the Bureau to show by a clear preponderance of the evidence that a violation of the Liquor Code occurred. *Pa. Liquor Control Board v. PPC Circus Bar, Inc.*, 506 A.2d (Pa.Cmwlth. 1986); *In Re: Omicron Enterprises*, 499 A.2d (Pa.Cmwlth. 1982). The phrase "preponderance of evidence" has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. Black's Law Dictionary, Fifth Edition, West Publishing Company, Copyright 1979, Page 1064.

As to Count One, at the hearing held on the matter, Counsel for Licensee stipulated to the facts set forth in the Bureau's Pre-Hearing Memorandum, and did not contest the violation.

As to Count Two, testimony was taken from the enforcement officer and Licensee's neighbor, RM. Licensee did not present any testimony or evidence, but argued that the facts do not support a conclusion of noisy and/or disorder operation. Counsel for the Bureau submitted a post-hearing memorandum in support of sustaining Count Two.

Officer BJ testified that he contacted the secretary/treasurer/manager of the premises on February 19, 2011 at 7:45 p.m. and informed him of a complaint of loud music.

On the same date, Saturday, February 19, 2011, at 9:45 p.m., the officer visited the premises in an undercover capacity where a band was playing loud music amplified by loudspeakers in its back room. Officer BJ testified that he heard Licensee's music at the neighbor's home about 150 yards away.

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Licensee's neighbor, RM, testified that he has lived at his residence for 10 years, and has been disturbed by Licensee's music for the past five years. (N.T. 17) On March 26, 2011, from 9:45 p.m. to 1:45 a.m. on March 27, 2011, he had his windows shut and could hear Licensee's "booming" music and some vocals. He complained to the District Office of the Bureau of Liquor Control Enforcement. He added that since then, "it's been pretty good." (N.T. 16)

Based on the stipulation entered into the record, Count One is sustained as charged.

As to Count Two, Counsel for Licensee argued that one incidence of loud music is not enough to sustain a charge of noisy and disorderly operation. She cited *Appeal of Cirro's Lounge Inc.*, 358 A.2d 141 (Pa.Cmwlth. 1976) and 447 A.2d 723 *Matter of Revocation of Restaurant Liquor License (Appeal of Banks)*, 447 A.2d 723 (Pa.Cmwlth. 1982) to support her argument.

Counsel for the Bureau argued that the OALJ has sustained the charge in similar cases and cited *In Re A-J-C, Inc.*, 401 A.2d 421 (Pa.Cmwlth. 1979), in which one occasion was sufficient to sustain the charge.

Further, the Superior Court upheld a summary conviction of disorderly conduct for loud music by a fraternity house on one occasion. *Commonwealth. v. Alpha Epsilon PI*, 540 A.2d 580 (Pa.Super.1988).

After reviewing the appellate court cases, I find that the Bureau has met its burden of proof under Count Two, and it is sustained as charged.

PRIOR RECORD:

Licensee has been licensed since April 8, 2005, and has two prior violations, to wit:

Citation No. 10-0345. Fine \$800.00.

1. Possessed or operated gambling devise or permitted gambling on your licensed premises (machines).
March 25, 2009 and January 27, 2010.

Citation No. 10-2600. Fine \$250.00

1. Used loudspeakers or devices whereby the sound of music could be heard outside.
November 13, 2010.

PENALTY:

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 violations of the type found in this case.

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As to Count One, Licensee shall be treated as a repeat offender.

After due consideration of the circumstances giving rise to the citation and Licensee's citation history, the following penalty will be imposed in this case:

Count One – \$300.00
Count Two – \$200.00

ORDER:

THEREFORE, it is hereby ordered that Hillsborough Management, Inc., t/a Tradesman Inn, License Number R-AP-SS-14590, pay a fine of \$500.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

Jurisdiction is retained.

Dated this 24TH day of January, 2012.



Robert F. Skwaryk, J.

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NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.

If you wish to appeal the decision of the Administrative Law Judge's Order, the appeal must be filed within 30 days of the mailing date of the Order. Please contact Chief Counsel's Office at 717-783-9454.

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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

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