

Mailing Date: FEB 17 2012

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

PENNSYLVANIA STATE :
POLICE, BUREAU OF : Citation No. 11-1550
LIQUOR CONTROL ENFORCEMENT :
 : Incident No. W01-432648
 :
 v. :
 : LID - 50352
 :
 413 MARY INC :
 413-415 BURMONT RD :
 DREXEL HILL PA 19026-3003 :
 :
 :
 DELAWARE COUNTY :
 LICENSE NO. R-SS-7130 :

JUDGE SHENKLE
BLCE COUNSEL: Erik S. Shmukler, Esq.
LICENSEE COUNSEL: John J. McCreesh, III, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on September 6, 2011. There are five counts in the citation.

The first count alleges that Licensee violated §5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), on July 16, 2011, by permitting the use on the inside of the licensed premises of a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The second alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §637.6(a)(2) of the Clean Indoor Air Act, 35 P.S. §637.6(a)(2), on July 16 and 30, 2011, by smoking or permitting smoking in a public place where smoking is prohibited.

The third count alleges that Licensee violated §§406(a)(2) and 493(16) of the Liquor Code, 47 P.S. §§4-406(a)(2) and 4-493(16), on July 30, 2011, by selling, furnishing and/or giving alcoholic beverages between 2:00 a.m. and 7:00 a.m.

The fourth count alleges that Licensee violated §499(a) of the Liquor Code, 47 P.S. §4-499(a), on July 30, 2011, by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages.

The fifth count alleges that Licensee violated §499(a) of the Liquor Code, 47 P.S. §4-499(a), on July 30, 2011, by permitting patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

A hearing was held on Tuesday, January 17, 2012, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. The Bureau assigned the investigation of this matter to a liquor control enforcement officer on July 5, 2011. The officer visited the premises twice on Sundays, once in the early morning hours and once in the afternoon, without observing any violations (Ex. B-1, N.T. 5-6).

2. On July 16, 2011, his third visit, the officer arrived outside the licensed premises at 1:30 a.m. He heard loud music emanating from the establishment at distances as great as 300 feet. The officer entered and saw a bartender serving approximately 30 patrons. The music he had heard outside was coming from six loudspeakers inside the premises. There were signs posted prohibiting smoking, but there were ashtrays on the bar, and numerous patrons were smoking (N.T. 7-8).

3. On July 30, 2011, the officer entered the licensed premises at 1:30 a.m. and saw a bartender and approximately 25 patrons. The officer approached the bar, but the bartender looked at him, as well as a few other patrons, for about ten minutes, without doing anything. As the officer thought he was not going to be served, he left the premises and walked across the street to where his vehicle was parked (N.T. 8-9).

4. The officer maintained an outside surveillance until about 2:40 a.m. He could see through the windows of the establishment that the bartender was distributing ashtrays around the bar. Numerous people began smoking cigarettes. A man approached and spoke to the bartender, who retrieved a bottle of beer and placed it on the counter. The man put some money on the bar, which the bartender took (N.T. 9-12).

5. At 2:15 a.m. a man who appeared to be an employee walked behind the bar, opened a cooler, and pulled out a six-pack carrier which had one bottle of beer in it. He removed the bottle and began drinking from it behind the bar. At 2:40 the officer left his car and walked in front of the establishment's windows, through which he could see that there were six people inside, including the bartender, and all of them had drinks in front of them. Two of the people were drinking beer which they obtained as described in this and the preceding finding. The other four had "rocks" glasses containing juices, but the officer did not see any liquor poured into them (N.T. 12-13).

6. Records of the Pennsylvania Department of Health show that on July 16 and 30, 2011, Licensee was not exempt from the provisions of the Clean Indoor Air Act (Exhibits B-3, 4).

CONCLUSIONS OF LAW:

Licensee violated §5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), on July 16, 2011, by permitting the use on the inside of the licensed premises of a loudspeaker, whereby music could be heard outside.

Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §637.6(a)(2) of the Clean Indoor Air Act, 35 P.S. §637.6(a)(2), on July 16 and 30, 2011, by permitting smoking in a public place where smoking is prohibited.

Licensee violated §§406(a)(2) and 493(16) of the Liquor Code, 47 P.S. §§4-406(a)(2) and 4-493(16), on July 30, 2011, by selling alcoholic beverages between 2:00 a.m. and 7:00 a.m.

The evidence was insufficient to prove that Licensee violated §499(a) of the Liquor Code, 47 P.S. §4-499(a), on July 30, 2011, by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages.

Licensee violated §499(a) of the Liquor Code, 47 P.S. §4-499(a), on July 30, 2011, by permitting patrons to possess alcoholic beverages in that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

DISCUSSION:

I am dismissing the fourth count because I think the evidence showed that all of Licensee's "patrons" were required to vacate the premises by the required time. I am satisfied from Licensee's evidence that the six people who were in the premises at 2:40 a.m. on July 30, 2011, were employees, having drinks and a smoke at the end of their work day.

I believe, however, that when Licensee's employees began smoking and drinking after all of the regular patrons had left the premises, those employees became patrons themselves. Therefore, Licensee properly required the public to leave the premises on time, but then its employees became patrons when they were not involved in work activity and had possession of alcoholic beverages after 2:30 a.m.

PRIOR RECORD:

Licensee has been licensed since October 24, 2002, and has had prior violations as follows:

Citation No. 05-2259. \$150.00 fine.

1. Discounting in excess of 2 hours in a business day. August 3, 2005.

Citation No. 10-2772. \$1,400.00 fine.

1. Sales between 2:00 a.m. and 7:00 a.m. October 8, 2010.
2. Failed to require patrons to vacate the premises by the required time. October 8, 2010.
3. Permitted patrons to possess alcoholic beverages after 2:30 a.m. October 8, 2010.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine, or both, for violations of the type found in this case. For violations of the type found in the third count, any fine must be in the \$1,000.00 to \$5,000.00 range. For violations of the type found in the other counts, any fine must be in the \$50.00 to \$1,000.00 range. Penalties are assessed as follows:

- Count No. 1 – a fine of \$300.00.
- Count No. 2 – a fine of \$100.00.
- Count No. 3 – a fine of \$1,000.00
- Count No. 4 – DISMISSED.
- Count No. 5 – a fine of \$200.00.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, 413 Mary, Inc., License No. R-SS-7130, shall pay a fine of one thousand six hundred dollars (\$1,600.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

Dated this 15TH day of FEBRUARY, 2012.



David L. Shenkle, J.

jb

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.

WHETHER OR NOT RECONSIDERATION HAS BEEN REQUESTED, AGGRIEVED PERSONS MAY APPEAL TO THE PLCB, NORTHWEST OFFICE BUILDING, HARRISBURG, PA 17124 WITHIN 30 DAYS AFTER THE MAILING DATE OF THIS ORDER.

THE PLCB CHIEF COUNSEL'S TELEPHONE NUMBER IS 717-783-9454.

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