

The citation charges Licensee with violations of Section 471 of the Liquor Code [47 P.S. §4-471]. The charge is that, your licensed establishment was operated in a noisy and/or disorderly manner, on October 12, 26, November 12, December 2, 4, 22, 24, 25, 2010, January 1, March 15, 25, 27 and April 15, 2011.¹

I presided at an evidentiary hearing on April 3, 2012 at 2221 Paxton Church Road, Harrisburg, Pennsylvania.

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

FINDINGS OF FACT:

The Investigation

1. The Bureau began its investigation on April 27, 2011. (N.T. 44)
2. The investigation was ongoing and continuing until August 9, 2011. (N.T. 44; 48-49)
3. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested on, August 19, 2011. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1)
4. In the course of the investigation, a Bureau Enforcement Officer conducted undercover visits at the licensed premises on May 8, 2011, June 5, 2011, and July 17, 2011. Each of the visits lasted approximately forth-five minutes. The Officer observed no violations. The Officer also attempted an undercover visit on June 19, 2011 but the establishment was closed. (N.T. 46-47)
5. The Officer received police reports from the West York Borough Police Department (WYBPD). The reports included dates, occurrences, and names of citizens involved for each incident charged. The Officer did not contact those individuals. (N.T. 22; 49-50)

¹ The Bureau withdrew two dates: January 1, 2012 and March 27, 2012. (N.T. 292) Based on the Bureau's Pre-Hearing Memorandum, on the former date, Licensee's Corporate Officer called the police for assistance to remove an unruly patron who refused to leave. During the telephone conference call of March 2, 2012, I was unabashedly vitriolic in expressing how supporting a charge because a licensee calls for police assistance collides with society's best interest. For years, I have been coercing, cajoling, lecturing, begging, urging licensees to engage the police whenever trouble appears neigh. It is a message which every police officer I have questioned fully supports. While I do not know why the Bureau withdrew January 1, 2012, I presume my commentary, in some measure, influenced that decision.

6. Prior to the Bureau issuing the instant citation, the Officer's investigative file passed through three review levels as follows: Officer's Supervisor; District Office Commander; Bureau's Report Examining Unit. (N.T. 23-25; 50-52)

7. The Officer concluded the police reports he received from the WYBPD were sufficient to close the investigation and issue a citation. (N.T. 50)

8. Having received the file after the instant citation was issued, Bureau counsel submitted a Pre-Hearing Memorandum on December 5, 2011. It was not until the telephone conference call of March 2, 2012, which I initiated, that Bureau counsel first recognized the inadmissible hearsay components of the Bureau's case. Bureau counsel questioned the lay persons involved in the events in order to avoid inadmissible hearsay and present a *prima facie* case. Based on those interviews, Bureau counsel submitted an Amended Pre-Hearing Memorandum which added the lay persons as witnesses. (N.T. 4-14)

Procedural Timeline

9. The following represents the procedural timeline in this matter:

<u>Event</u>	<u>Date</u>	<u>Elapsed Days</u>
Investigation Begins	April 27, 2011	--
Investigation Ends	August 9, 2011	104
Notice Of Alleged Violations Sent	August 19, 2011	114
Citation Issued	October 6, 2011	162
Bureau's Pre-Hearing Memorandum Submitted	December 5, 2011	222
ALJ Initiates Telephone Conference Call	March 2, 2012	310
Citation Hearing Notice Sent	March 5, 2012	313
Bureau's Amended Pre-Hearing Memorandum Submitted	March 22, 2012	330
Hearing Date	April 3, 2012	342

General Substantive Matters

10. There are three establishments licensed to serve alcoholic beverages within two-tenths of a mile of the licensed premises. (N.T. 56-59)

11. For each of the dates which follow, a West York Borough Police Officer (PO) was on duty, in uniform, and in a marked police vehicle.

Events of October 12, 2010

a. At 11:34 p.m., a PO was situated about one-tenth of a mile from the licensed premises. He noticed Ms. A. in the street. She was staggering. Vehicles had to swerve to avoid striking her. The PO approached her. Ms. A. was intoxicated. Her speech was slurred and her eyes bloodshot. When the PO spoke to her, Ms. A. was not aware that she was in the street. The PO cited Ms. A. for public drunkenness. (N.T. 60-67)

Events of October 26, 2010

b. At approximately 12:10 a.m., a PO was situated approximately two blocks from the licensed premises but one-half a block from another licensed premises. He noticed Mr. B. staggering in front of his police vehicle. The PO stopped Mr. B. Mr. B. was intoxicated. The PO cited Mr. B. for public drunkenness. (N.T. 99-103)

Events of November 12, 2010

c. Two customers, Mr. C. and Ms. D. arrived at the licensed premises at 9:30 p.m. Each received beer. At approximately 10:15 p.m., Mr. Franklin, Licensee's Owner and Manager, went to the rear of the premises to speak to Mr. C. Mr. Franklin discussed the use of another patron's personal pool stick. The discussion resulted in Mr. Franklin asking the Mr. C. and Ms. D. to leave. They first refused. One became irate and cursed at Mr. Franklin. The two finally began walking to the front door of the premises along with Mr. Franklin. There were two bouncers walking behind Mr. Franklin. The bouncers did not follow Mr. Franklin out the door with the two patrons as everything appeared to be under control. None of Licensee's staff touched the two individuals in any way. As Mr. C., Ms. D., and Mr. Franklin exited the front door, Mr. C. turned around and grabbed Mr. Franklin by the shirt. Mr. Franklin and Mr. C. wrestled on the sidewalk. Ms. D. struck Mr. Franklin in the eyeball with her fingernails. The fight lasted no more than thirty seconds. (N.T. 333-340)

d. A PO was situated two blocks from the licensed premises at 11:00 p.m. He saw the altercation outside the front door of the licensed premises. The PO went to the scene. He charged Ms. D. with public drunkenness and disorderly conduct. He also charged Mr. C. with harassment and disorderly conduct because Mr. C. caused the fight. The PO filed no charges against Mr. Franklin. (N.T. 199-205)

Events of December 2, 2010

e. At 12:35 a.m., a PO was approximately one block from the licensed premises. His police vehicle was stationary as he was observing traffic. He noticed Mr. E. and Mr. F. on foot. They were leaning on each other and stumbling. They displayed slurred speech and bloodshot eyes. The PO cited both Mr. E. and Mr. F. for public drunkenness. (N.T. 121-124)

Events of December 4, 2010

f. At 2:10 a.m. a PO arrived at the parking lot of the licensed premises after being dispatched there. He noticed Mr. G. sleeping against a vehicle in the parking lot. The PO awakened Mr. G. Mr. G. displayed slurred speech. Concluding Mr. G. was intoxicated, the PO issued a citation to Mr. G. for public drunkenness. (N.T. 158-159)

Events of December 22, 2010

g. At 2:05 a.m., a PO noticed Mr. H. who was standing in the alleyway, a public thoroughfare adjacent to the building that houses the licensed premises. Mr. H. was urinating from that position onto the building. The PO cited Mr. H. for scattering rubbish. (N.T. 138-145)

Events of December 24, 2010

h. At 8:26 p.m., a PO saw Mr. I., Mr. J. and Mr. K. walking through the alleyway, about one-half block from the licensed premises. They were loud and leaning on each other. They were staggering. One leaned on a car to keep from falling. All three displayed bloodshot, glassy eyes, and slurred speech. The PO issued each of the three a citation for public drunkenness. (N.T. 237-240)

Events of December 25, 2010

i. At 10:45 p.m., a PO was alerted to Mr. L. lying near the licensed premises. The PO went to the scene where he observed Mr. L. lying on the ground, partly on the sidewalk and partly in Licensee's parking lot. The PO revived Mr. L. The PO recognized Mr. L. as a "town drunk." Although Mr. L. was conscious, he was still unresponsive. The PO summoned EMTs who transported Mr. L. to the hospital. The PO cited Mr. L. for public drunkenness. (N.T. 265-270)

j. Mr. Franklin looked outside the window of the premises and saw Mr. L. lying on the ground. He went outside to see what the matter was. The PO told Mr. Franklin to go back inside. Mr. Franklin complied. (N.T. 329-331)

k. Licensee placed Mr. L. on the barred patron list prior to December 25, 2010. (N.T. 327-328)

Events of March 15, 2011

l. At 12:35 a.m., while proceeding past the licensed premises, a PO looked through his police vehicle's rear view mirror. He saw Mr. M. depart the premises. The PO contacted Mr. M. about one-half a block from the licensed premises. Mr. M. was staggering, swaying, leaning on cars and buildings. While leaning on the PO's vehicle, Mr. M. fell to the ground. The PO issued Mr. M. a citation for public drunkenness. (N.T. 276-277)

Events of March 25, 2011

m. At 11:49 p.m., a PO saw Mr. N. sitting on the steps. Mr. N. vomited. The PO spoke to Mr. N. who displayed slurred speech and glassy eyes. Mr. N. was unsteady on his feet. The PO issued Mr. N. a citation for public drunkenness. (N.T. 160-162)

Events of April 15, 2011

n. A PO saw Mr. O. and Mr. P. exit the licensed premises. Their arms were across each other's backs. Both fell down. The PO approached Mr. O. and Mr. P. The PO determined they were intoxicated. The PO cited Mr. O. and Mr. P. for public drunkenness. (N.T. 293-295)

CONCLUSIONS OF LAW:

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

2. The Bureau has failed to prove that Licensee operated in a noisy and/or disorderly manner on October 12, 26, November 12, December 2, 4, 22, 24, 25, 2010, March 15, 25, and April 15, 2011.

3. The charge is withdrawn as to January 1 and April 15, 2011.

DISCUSSION:

Overview

In my fast approaching quarter century as an Administrative Law Judge, I cannot recall a case which presents such combined and palpable complications as this.² They are: undeveloped investigation; procedural misuse; nebulous legal theory.

I lead with the above two sentences for their obvious alarm value in order to stimulate studied thought. I and some of my colleagues have begun to see an unsettling trend of similarly based citations. Theoretical discussions among us, in which we challenge each other's arguments, have not lead to unanimity. Nevertheless, those with whom I have spoken are equally troubled by this developing pattern which diverts precious government resources for fallow yield, all the while compelling licensees to incur the fiscal and emotional cost of facing and defending a charge which arguably never should have been brought.

My unequivocating commentary throughout this Discussion is not only the product of an exchange of ideas with some of my colleagues. Knowing full well my words likely will be taken by some as unnecessary attack, despite my intentions to the contrary as above expressed, I researched every conceivable issue. I needed to be clear that I was not shooting from the hip and that my reasoning was firmly planted in a fertile precedential field.

² Two Adjudications come to mind. In *BLCE v. Riverside Beer Distributor, Inc.*, Docket No. 90-0652, Vol. 26 Sel.Op.ALJ, Page 125, a charge of unlawful pecuniary interest was based entirely on the testimony of federal authorities who largely provided inadmissible hearsay. The Bureau conducted no independent investigation. More recently, in *BLCE v. Two City Brothers, Inc.*, Docket No. 06-1183, www.lcp.apps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2006&adjudication_sequence=1183&appeal=n, among six charges, five were related to an alleged unlawful pecuniary interest. I dismissed the five as their evidentiary underpinnings were inadmissible hearsay, newspaper articles, for example. The Bureau suggested I excuse my inadmissible hearsay observations because the case was difficult to prove. I was therefore compelled to discuss the investigative failings, to review the attributes of inadmissible hearsay, and the more restrictive Legal Residuum Rule, which, though I must apply, find unnecessary in this administrative process. I also reminded the Bureau of the consequences attendant to ignoring rules of evidence, rules forged over centuries by judges, legislative bodies, and legal scholars, all of whom weighed competing policy considerations. At page 10 of the Adjudication, I remarked: "Woe unto each of us if judges and juries are permitted to consider innuendo, rumor, gossip or conjecture. It may very well be our neck next in line for the governmental chopping block. From the time we are accused until seconds before the axe is lowered, no doubt each of us would have railed against a system that has so wrongly treated us."

The Investigation

In more than a handful of Adjudications, I found it necessary to comment upon investigative shortcomings. In *BLCE v. D & M Shumbris, Inc.*, Docket No. 01-0899³, the licensee was charged with failing to provide food upon request on three dates. I initially noted, there is no *per se* illegal conduct when a licensee fails to provide food. I was further puzzled by the investigator's reasoning for not gathering more information while surveilling the licensee's operations on these three undercover visits. Once the Officer was denied food service, he must have closed his mind. Otherwise, why would he not have applied the entire time he visited the premises to searching for other attributes of a *bona fide* restaurant in order to solidify or discard his initial conclusion?

Even more jaw-dropping was the discovery that the Officer spoke to the licensee's representative by telephone to complete Bureau inspection documents. The Officer requested data regarding the licensee's gross sales of food and beverages. Even though the values provided demonstrated the licensee sold a substantial amount of food, the Officer chose to ignore the pronounced contradiction between the licensee's data and the Officer's investigatory conclusion.

He did so because the licensee provided statistics by telephone. Since the Officer did not actually see the source documents, he concluded the licensee's telephonic recitation was unreliable. If the telephonically transmitted values were unreliable, on what theory did the Officer accept those values for his investigative report⁴?

In *BLCE v. S.D.C. Enterprises, Inc.*, Docket No. 04-0520⁵, I expressed my amazement as to why the investigation Officer did not review the licensee's records which are a readily available and powerful investigative tool.⁶

³www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2001&adjudication_sequence=0899&appeal=n

⁴ That logic is enough to addle almost anyone's brain. It also promotes the thesis that exculpatory statements offered by a licensee are presumptively untrue; yet, statements offered on behalf of a licensee that can be interpreted as having even the slightest inculpatory ring become Gospel. The Officer could have inspected those documents at the licensed premises or requested they be provided by telefax or email.

⁵www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2004&adjudication_sequence=0520&appeal=n

⁶ I also could not fathom why the investigation went no further than accepting inculpatory, written statements without questioning the licensee's staff. This is a head-scratcher in harmony with my comments regarding *BLCE v. D & M Shumbris, Inc.* (supra), above.

About six months later, in *BLCE v. Sheri-Den, Inc.*, Docket No. 04-1702⁷, I opined that a superficial investigation does nothing but waste precious resources and that the added effort to proceed with a thorough investigation is often marginal in relationship to the return.

In *BLCE v. Lucky Speros, Inc.*, Docket No. 08-1945⁸, I was presented with a nine months investigation complicated by the Bureau's inability to speak to an essential witness who, through counsel, refused to provide the Bureau any information. The investigation did not evaluate the licensee's records or statements of staff. There was no attempt to determine whether there were other eye witnesses.

The citation rested on two components. One was the contents of a document prepared by local police. The second was a telephonic interview of the licensee's representative, conducted by a Bureau Enforcement Officer Supervisor, who prepared written notes of the telephonic interview which paraphrased the representative's comments. There was no attempt to secure the representative's acknowledgement as to the accuracy of those paraphrased notes.⁹

This investigation is right in the mix. During an approximate six weeks investigation, the Bureau conducted three undercover visits, finding no violations. Other than that, the Officer sifted through local police incident reports. I heard no evidence as to whether the Officer interviewed the local police officers upon whose observations form the contents of those reports.

The reports contain additional investigative resources in the form of names and addresses of eyewitnesses, yet there was no attempt to interview them. Lastly, and as is eminently pellucid in most lackluster investigations, no genuine effort was made to question Licensee's corporate officers or staff.

Procedural Misuse

Before I address my conclusions regarding the specific procedural misuses in this matter, I present thirteen Adjudications in which there is a discussion and ruling upon a procedural matter. These Adjudications serve as an environment in which the before-hearing process in this matter may be readily evaluated.¹⁰

⁷www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2004&adjudication_sequence=1702&appeal=n

⁸www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2008&adjudication_sequence=1945&appeal=n

⁹ These four cases represent an unscientific sampling.

¹⁰ I cannot say these thirteen Adjudications, which I discuss in chronological order, represent an exhaustive list.

In *BLCE v. Ronald L. Fenton*, Docket No. 88-1392, Vol. VI, Sel.Op.ALJ, Page 115, Bureau counsel filed an Amended Pre-Hearing Memorandum (PHM) listing additional, unnamed witnesses. Although the licensee's counsel objected, I allowed the Bureau to present the additional witnesses as the licensee could not demonstrate harm.

In *BLCE v. Penn Monroe, Inc.*, Docket No. 89-2098, Vol. 5, Sel.Op.ALJ, Page 197, former Administrative Law Judge (ALJ) Howard Elbling was faced with the licensee's objection to the Bureau's providing any testimony because the Bureau filed its PHM late. After receiving briefs, ALJ Elbling ruled in favor of the Bureau as the licensee could show no resulting harm.¹¹

In *BLCE v. Cobra, Inc.*, Docket No. 90-1852, Vol. 6, Sel.Op.ALJ, Page 107, the Bureau's PHM listed the testimony of one Enforcement Officer. There was a second Enforcement Officer who also witnessed the events in controversy. At the hearing, the licensee presented a defense, Bureau counsel called the second Enforcement Officer to the stand. The licensee objected. Bureau counsel candidly remarked the second witness was essential to the Bureau's case, not merely rebuttal. Without discussing the issue directly, I ruled the Bureau could not present the unlisted witness.

In the spring of 1992, ALJ Flaherty confronted a related procedural issue in *BLCE v. The Legion Home Assn. of Lock Haven PA*, Docket No. 91-0868, Vol. 10, Sel.Op.ALJ, Page 115. There, an Enforcement Officer's testimony differed on a substantial point from that indicated in the Bureau's PHM. The licensee's counsel moved to strike the Officer's testimony to the extent it was inconsistent with that indicated in the Bureau's PHM. In a discussion which traversed procedural regulations and case law, ALJ Flaherty concluded the licensee was deprived of the ability to prepare a defense.¹²

In *BLCE v. Lawrence M. Metz and Mark A. Metz*, Docket Nos. 92-0399 and 92-0660, Vol. 12, Sel.Op.ALJ, Page 35, I determined the pre-hearing procedure warranted extensive analysis. I first addressed the Bureau's submission of an additional PHM listing testimony for a time period not within the original PHM. Bureau counsel submitted the amendment less than two days prior to the hearing and six months after the investigation ended. I prohibited counsel from proceeding based on the amended PHM, reasoning that doing so would reinforce and endorse an inadequate level of investigative responsibility and diligence.

¹¹ Bureau counsel also filed the brief late. In response, the licensee filed yet another Motion to Dismiss based on this second late filing. ALJ Elbling imposed the sanction of disregarding the Bureau's brief.

¹² ALJ Flaherty's approach sounds in a Due Process violation because of inadequate notice.

I also provided statutory construction analysis along with relevant case law to demonstrate the Liquor Code implicitly prohibits the Bureau from presenting evidence acquired after an investigation is closed. I then distinguished between investigating in contemplation of litigation, which I classified as rebuttal, and further investigation due to a lack of a *prima facie* case.¹³

The next Adjudication is *BLCE v. SNJ, Inc.*, Docket No. 92-2030, Vol. 14, Sel.Op.ALJ, Page 207, in which I authored an Opinion on behalf of a three ALJ Panel. The Opinion extended a principle in *BLCE v. Lawrence M. Metz and Mark A. Metz* (supra), above.¹⁴ We concluded the Liquor Code prohibits the Bureau from presenting evidence essential to a *prima facie* case, if acquired after the Bureau's investigation ends.

Further, in *BLCE v. Glaush, Inc.*, Docket No. 93-1016, Vol. 17, Sel.Op.ALJ, Page 131, ALJ Skwaryk prohibited the Bureau from modifying the dates of unlawful activity as alleged in the citation. ALJ Skwaryk noted, although the Bureau is given wide latitude in the generality of its charges, because the request to amend the citation occurred at the hearing, the licensee's right to adequate notice as required by Due Process was offended.

In *BLCE v. Red Devil's Cave, Inc.*, Docket No. 94-0854, Vol. 22, Sel.Op.ALJ, Page 36, ALJ Wright had to contend with a licensee who requested multiple, last minute continuances. The first was based upon the licensee's inability to defend as the licensee did not receive the Bureau's PHM until one day before the hearing. ALJ Wright determined no sanction was required, choosing to continue the matter so the licensee would have sufficient time to prepare.

In *BLCE v. Post No. 7 Home Association*, Docket No. 95-2321, Vol. 25, Sel.Op.ALJ, Page 75, I discussed variations on *BLCE v. Lawrence M. Metz and Mark A. Metz* (supra), above. In response to the information provided in the licensee's PHM, Bureau counsel requested a continuance to engage in additional investigation for the purpose of determining whether the Bureau would proceed or withdraw the citation. On the hearing date, Bureau counsel submitted a letter requesting the Bureau's PHM be supplemented to include two new witnesses as part of the Bureau's case in chief. The licensee's counsel objected.

¹³ Bureau counsel suggested my rulings were neither even-handed nor in the interest of justice. Both at the hearing, and in the Adjudication's Discussion, I reminded counsel that this administrative process does not provide for a level playing field. Based upon statute, constitutional restrictions and responsibilities, the Bureau carries the burden of proving a case while Licensee may sit at a hearing, with wide grin and twittering thumbs, neither offering nor opposing, yet still be discharged from liability. I also noted, it is not surprising that litigants tend to see a judge's ruling as a loss or a win rather than evaluating the ruling's validity.

¹⁴ Former Chief ALJ Ruth and ALJ Flaherty heard the case with me and concurred in the result.

I denied the Bureau's request for reasons expressed in *BLCE v. Lawrence M. Metz and Mark A. Metz* (supra), and *BLCE v. SNJ, Inc.* (supra), above. I also noted, the added witnesses would have been readily available to the Bureau during the investigation had just a little more effort been exerted. At page 4 of that Adjudication, I remarked: "An attempt to repair a case within a few hours of the hearing should tweak any reasonable person's sense of fairness. Trial by ambush or surprise offends the purpose of exchanging Pre-Hearing Memoranda. This discovery process is designed to insure that all cards are played facing up."

In *BLCE v. Nytime Enterprises, Inc.*, Docket Nos. 96-0127 and 96-1045, Vol. 28, Sel.Op.ALJ, Page 32, at the hearing, Bureau counsel sought to amend the citation in three distinct manners. I denied the request as a matter of discretion without considering Due Process. My main concern was that acceding to the Bureau's request would work against supporting governmental precision.

Next in line is *BLCE v. Italian Sons & Daughters of America Loggia Vittorio Veneto No. 17*, Docket No. 03-2095.¹⁵ There, the Bureau motioned to amend the citation to incorporate alleged unlawful conduct at a location adjacent to and connected with the licensed premises. I denied the request, once again finding that the Liquor Code bars me from permitting the amendment. I also volunteered, were this request to be directed at my discretion, I would not have been disposed to allow it.

The motion was filed six months after the citation was issued and nearly three months after the licensee's counsel filed a PHM. It was the information within licensee's PHM that prompted the Bureau's request. In addition to what I classified as an unjustifiable delay in filing the amendment, I acknowledged I would be frustrating the purpose of exchanging information embodied in the PHM process were I to allow the Bureau's amendment. What right minded lawyer, representing a licensee, would dare complete a PHM if the information provided therein could be employed by the Bureau to expand the number and type of allegations?

In *BLCE v. Central Hotel of Patton Pennsylvania, Incorporated*, Docket No, 04-1436¹⁶, five months prior to the hearing, Bureau counsel filed a Motion to Amend a charge. As originally worded, the charge alleged the licensee interfered with an Enforcement Officer. The Bureau's proposed amended language was the licensee refused an Enforcement Officer the right to inspect.

¹⁵www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2003&adjudication_sequence=2095&appeal=n

¹⁶www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2004&adjudication_sequence=1436&appeal=n

Counsel asked for the modification because an allegation of “interference” demands proof of physical force, a requirement which I addressed in several prior Adjudications. I denied the amendment as a matter of statutory construction and Due Process. I volunteered, even if the request were addressed to my discretion, I would not have granted it. The Bureau did file the Motion well in advance of the hearing, but the Motion was not filed until two months after the citation was issued.

Lastly, in *BLCE v. The New Holland Pub, Inc.*, Docket No. 10-1203¹⁷, I remarked, once the Bureau transmits the letter notifying Licensee of an alleged violation as required by Liquor Code Section 471, it is virtually inevitable that a citation will follow. Consequently, any attempt to gather information after an investigation is closed cannot be considered a true investigative endeavor.

That a citation has issued indicates that the Bureau has concluded there is sufficient evidence to call a licensee to appear before an ALJ. Once that determination occurs, any subsequent information gathering has a radically different goal. Now, where to look and what questions to ask are in contemplation of litigation.

The pre-hearing procedure of this matter is readily positioned within the varied textures and hues of the landscape depicted by the above Adjudications. Had I not convened a telephone conference, on March 2, 2012, there can be little doubt the Bureau would have proceeded with its case as outlined in its initial PHM. My purpose in speaking to both counsel was to gain an understanding of the Bureau's theory and facts. I certainly did not intend to push the emergency alert button so that the Bureau could plug holes in its case.¹⁸

¹⁷www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2010&adjudication_sequence=1203&appeal=n

¹⁸ I asked Bureau counsel how he intended to proceed as the case seemed to hang upon inadmissible hearsay as further complicated by the Legal Residuum Rule. Because the Bureau's theory strained my sense of reasonableness and further being aware of similar citations in the system, I advanced the hearing date. Communicating with our Hearing Clerk in our central office, Bureau counsel asked for a continuance without alleging harm or inconvenience. Counsel's reason was that hearings are not ordinarily scheduled so quickly. I denied that request. Counsel quickly filed a second continuance request. Now, counsel asked for more time to prepare the case; there was a pressing need to interview and, perhaps, subpoena additional witnesses, if the witnesses were able to testify consistent with the Bureau's burden, thereby avoiding inadmissible hearsay. I also denied that request. From this experience, I learned, when I see weaknesses in the Bureau's case, especially one likely to be hotly contested, rather than poking my nose into the case as I did here, it may be better to prepare for the hearing without benefit of additional insight.

Before hearing testimony and after Licensee's counsel placed his objection to the Bureau's intention to call additional witnesses as indicated in the second PHM on the record, I engaged Bureau counsel in a discussion. During that sometimes heated exchange, I pressed counsel to tell me if counsel agreed with my evidentiary evaluation expressed during the March 2, 2012 telephone conference. The discussion may best be described as circular. Counsel maintained his client's first PHM provided sufficient evidence to satisfy the burden of proof. At the same time, counsel accepted responsibility for failing to catch the inadmissible hearsay problem.¹⁹

Although my intended ruling was abundantly evident early in the proceedings, I opted to allow the Bureau to present the additional witnesses.²⁰ For judicial economy, I thought it was better to hear the witnesses lest I be required to do so on remand.

Late in the Bureau's presentation, I ruled the testimony of Bureau witnesses listed on the second PHM was barred as a matter of law and discretion as principally presented in *BLCE v. Lawrence M. Metz and Mark A. Metz* (supra), and *BLCE v. SNJ, Inc.* (supra), above. (N.T. 215) In order to avoid unnecessary remand, I ruled the testimony offered by the lay witnesses was not trustworthy; I could not accord their testimony any significant weight.

The Bureau's second witness barrage consisted of thirteen lay persons; I watched and listened to a parade of drunks whose memory was afflicted by much drinking. Ms. H., the first to provide little insight, was so drunk that she had almost no memory of where she was drinking. She remarked that she was probably at many bars. (N.T. 89-97) Mr. U., next in line, told me he drank at the licensed premises. He consumed ten beers and six mixed drinks. He concluded his memory was gone as he was drunk. (N.T. 110; 114) Mr. L., also did not remember that evening.²¹ (N.T. 127-128)

¹⁹ More telling than any verbal acknowledgement that the added witnesses were essential to the Bureau's case was counsel's actions. In the time between the telephone conference and the hearing, counsel interviewed possible witnesses subsequently listing them in the second PHM; they were to provide testimony as part of the Bureau's presentation. Before counsel was of record, the file passed through three review levels. Counsel's assessment of the case as described in the first PHM, must have coincided with mine. Otherwise, there would have been no need to gather more information.

²⁰ I did so as the witnesses were clearly inconvenienced; if this case reaches the York County Court of Common Pleas, the witnesses may be saved a second appearance.

²¹ Mr. L.'s testimony was so out-of-line with counsel's expectation that counsel attempted rehabilitation. (N.T. 130-132)

Mr. K., says he was drinking in more than one establishment. (N.T. 181-187) Ms. R. and her companion, offered testimony that conflicted with that of the local police officer. He determined that Ms. R. was drunk while her companion was not. Ms. R. testified that her companion was drunk but she was not. She also had a reason to be untruthful because she claims Licensee would not return personal property she left at the licensed premises.

In the end, the Bureau's case rests entirely on the testimony of local police officers.²²

Liability Theory

In this matter, I can no longer count the times I insisted that Bureau counsel provide me with some guidance as to the scope of the Bureau's theory. I have yet to receive any meaningful response. As best as I can determine, the Bureau finds within the contours of the Liquor Code an affirmative obligation to allow no patron to be served to the point of intoxication. If a licensee does so, the licensee assumes responsibility for all undignified, uncivil, impolite, aggressive, or illegal behavior a drunken patron manifests after leaving the premises.

When I tested the theory at the hearing by asking counsel to define time and distance limitations, i.e., how long and how far away from the premises does liability extend, I was rewarded with vague, non-specific responses. After a time, the theory also seemed to hold a licensee accountable for anyone's conduct at or near the premises.²³

The Bureau's argues, liability attaches by virtue of an amalgam of Liquor Code Section 104(a) [47 P.S. §1-104(a)] and 471 [47 P.S. §4-471(a)]. The former is a guide to interpreting the Liquor Code. Liquor Code Section 104(a) was enacted to protect the public welfare, health, peace and morals of the Commonwealth. To that end, the Liquor Code is to be liberally construed.

Liquor Code Section 471(a) authorizes citations based upon any other sufficient cause shown. It has been judicially accepted as a provision which incorporates illegal acts outside the Liquor Code, such as criminal conduct. Every violation of Liquor Code Section 471(a) is derivative. If a Licensee directly violates the Liquor Code, there need be no connection to Liquor Code Section 471(a) for substantive purposes. In fact, Liquor Code Section 104(a) provides no substance; it describes no illegal conduct.

²² The several paragraphs above are a representative short list of specifics.

²³ Much like an amoeba sending out pseudopods, the theory seemed to be morphing.

To the contrary, there are three Liquor Code provisions which indicate otherwise. Liquor Code Section 493(1), among other matters, renders it unlawful for a licensee to furnish alcoholic beverages to anyone manifesting signs of visible intoxication. Liquor Code Section 497 [47 P.S. §4-497], commonly referred to as the Dram Shop Act, does not directly confer a right to suit. The General Assembly approaches civil liability from the opposite direction. The provision restricts a licensee's civil liability to damages caused by a customer, only if the customer were served while visibly intoxicated.

Liquor Code Section 499 [47 P.S. §4-499] is also at odds with the Bureau's interpretation. As I've commented too many times now to remember, this provision was enacted to eliminate evidentiary difficulties the Bureau faced when attempting to prove after-hour sales. Liquor Code Section 499 provides a method to stop after-hours sales indirectly.

More importantly, Liquor Code Section 499 unintentionally promotes some of the chaos occurring in public thoroughfares near a licensed premises. At "last call," patrons not exhibiting visible intoxication purchase alcoholic beverages.²⁴ By law, a licensee must remove previously served alcoholic beverages and direct all patrons to leave no later than thirty minutes after a licensee must cease serving which, for Licensee, is 2:30 a.m.

Having paid for their drinks, customers tend to finish beverages purchased at "last call" lest they be removed. Customers are then hustled out the door. They leave with blood-alcohol levels on the rise, with increasingly impaired judgment that fuels all manner of behavior, which would not occur were they departing sober. Many local police forces do not have the resources to contain what may be dozens of misbehaving drunks, some of whom will invariably become human weapons of destruction as they shift their vehicles into drive. It is partly by force of law that our streets and sidewalks become quickly flooded with minds and bodies responding to high blood-alcohol levels.

When interpreting a statute, one must be guided not only by what is said but also by what is not said, *Pa Medical Society v. DPW*, 39 A3.d 267 (Pa. 2011). It inevitably follows, it is lawful for a licensee to serve a customer alcoholic beverages to the point of intoxication *BLCE v. Jade, Inc.*, Docket No. 09-2372.²⁵ It has also been held that licensees do nothing unlawful when a visibly intoxicated patron is permitted to remain on a licensed premises *BLCE v. J.E.K. Enterprises, Inc.*, 680 A2d 53, (Pa.Cmwlt. 1996).

²⁴ The Liquor Code places no restrictions on the quantity of alcoholic beverages a customer may purchase at one time. Other than Liquor Code Section 499, there is no duty to remove alcoholic beverages from a patron who was served while marginally sober but who crosses the line after that service.

²⁵ www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2009&adjudication_sequence=2372&appeal=n

As the discourse between Bureau counsel and me concerning how liability attaches progressed, I posed several questions: What happened to personal responsibility? Under what conditions does liability transfer from a licensee to one who drinks to excess and subsequently behaves uncivilly? (N.T. 67-70) No one forced the lay witnesses to drink; it is not as if Licensee funneled gallons of alcoholic beverages into them against their will.

What happened to free will? Regrettably, one of the down-sides to our freedom is that we may make unhealthy or unwise, yet legal decisions. (N.T. 137) I imagine the day our government can tell us what and when to eat, and how fast to chew, is the day most of us will sadly remember as the end of personal freedom.

Bureau counsel acknowledged a licensee has no legal authority to prevent any customers from leaving the premises. In fact, a licensee may be subjected to civil liability for doing so. (N.T. 72-73) On several occasions, after hearing testimony about a certain incident, I asked Bureau counsel to identify that which Licensee did or failed to do. As an example, what actions might Licensee have taken to avoid liability when someone urinates from a public thoroughfare onto the building housing the licensed premises? Counsel had no specifics to offer.²⁶

The Bureau's liability theory is so expansive, it may be said licensees are required to act *in loco parentis* with respect to patrons in public thoroughfares. Similarly, as to citizens in those public thoroughfares who happen to be near the licensed premises, the theory obliges licensees to become private police forces which may not step aside when local police arrive. (N.T. 149-152)

²⁶ I do not fault counsel who was commissioned to do the impossible. In our jurisprudence, when we speak of a law, using predicates that betoken obscurity and vastness at the same time, we are reciting the Constitutional limitations of over breadth and vagueness.

As I continued to test the Bureau's theory, I discovered a licensee could do no right. If a licensee called police for help, the licensee failed to predict and control behavior. If a licensee took the opposing tack, that was also subject to punishment. If someone is injured outside the premises, a licensee is apparently also obligated to administer emergency medical care.²⁷ (N.T. 265-270)

Applying Law To The Charge Of Noisy/Disorderly Operation

Having rejected the Bureau's liability theory, I am still required to evaluate the Findings of Fact consistent with prior cases involving the charge in question. Bureau counsel correctly notes, each case presents a unique set of facts. The following represents a series of Adjudications, some sustaining noisy/disorderly operation, others ending in dismissal. The number of Adjudications on one side of the ledger is greater than the other. No inference should be drawn, as the Adjudications are not equally weighted. I present them as guides to steer me in the correct direction.

The earliest case is *BLCE v. Wendel & Woolridge, Inc.*, Docket No. 88-0608, Vol. IV, Sel.Op.ALJ, Page 145. I remember it to be the first citation alleging noisy/disorderly operation I decided. Prior to that case, the mantra I so often heard was the charge of noisy/disorderly operation can only be sustained by alleging a minimum of three violation dates. Although, I had my doubts about its accuracy, it was deeply embedded in Liquor Code jurisprudence.

²⁷ This is not the first time an ALJ determined a liability theory to be baseless. In *BLCE v. Mug Stop, Inc.*, Docket No. 88-1060, Vol. V, Sel.Op.ALJ, Page 288, writing for a three ALJ panel (ALJs Flaherty, Skwaryk and I), the licensee was charged with selling to a visibly intoxicated patron. We dismissed the citation finding the Bureau's liability argument distorted the Liquor Code; just as in this case, the Bureau posited a statutorily unexpressed affirmative duty. We reminded the Bureau, the critical determination is the condition of a patron at the time of service rather than the time a patron departs the premises. A licensee may furnish the ounce of an alcoholic beverage that transforms a patron from marginal sobriety to visible intoxication but not afterwards. Also see *BLCE v. Chef's Table, Ltd.*, Docket No. 89-1420, Vol. 2, Sel.Op.ALJ, Page 90. Licensees are not required to inform staff as to the location of business records; *BLCE v. Bridge Street Hotel and Hi-Level Lounge*, Docket No. 01-2587 and 02-0253, www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2001&adjudication_sequence=2587&appeal=n. A licensee is not the guarantor of clientele behavior. A licensee is not required to predict patron conduct; *BLCE v. Papagallo, Inc.*, Docket No. 09-0311, Liquor Code Section 471(a) does not encompass actions which sound in tort; *BLCE v. Sammark, Inc.*, Docket No. 09-1453, http://www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2009&adjudication_sequence=1453&appeal=n, Liquor Code Section 471(a) is expansive but not without boundaries (PLCB reversed on appeal); *BLCE v. Detrich-Brechbill Home Assn., Inc.*, Docket No. 08-0058, http://www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2008&adjudication_sequence=58&appeal=y, Liquor Code Section 471(a), relating to citations issued upon "any other sufficient cause shown," is limited to a violation of a rule, legislatively enacted, which protects the public interest.

BLCE v. Wendel & Woolridge, Inc. offered an opportunity to synthesize a standard from existing, appellate case law. From those decisions, I extracted the principle that a noisy/disorderly operation allegation may be sustained if the evidence, viewed in its totality, is indicative of the manner in which a licensee operates.

In *BLCE v. Al Jan Inc.*, Docket Nos. 91-2792 and 92-0011, Vol. II, Sel.Op.ALJ, Page 76, I held the licensee accountable for operating in a noisy/disorderly manner because the licensee allowed amplified music to escape the premises which constantly and persistently disturbed the community.

In *BLCE v. T.B.M. Enterprises, Inc.*, Docket No. 92-0578, Vol. 13, Sel.Op.ALJ, Page 1, a three ALJ panel consisting of Chief ALJ Ruth, ALJ Goldberg, and ALJ Wright, determined the licensee operated in a noisy/disorderly manner based upon unprovoked employee assaults upon patrons, stemming from a conscious and deliberate practice supervised by the licensee.

ALJ Wright dismissed a noisy/disorderly operation charge in *BLCE v. Delawareco, Inc.*, Docket No. 94-1751, Vol. 21, Sel.Op.ALJ, Page 111: ALJ Wright echoed the sentiments of former ALJ Goldberg in an earlier Adjudication. ALJ Wright remarked that misconduct on the streets is a matter for local police.

ALJ Skwaryk also dismissed a citation alleging noisy/disorderly operation in *BLCE v. S. & B. Restaurant, Inc.*, Docket No. 95-0540, Vol. 25, Sel.Op.ALJ, Page 109. ALJ Skwaryk stated, the Bureau's witnesses caused the licensee's security staff to respond, albeit with more zeal than required.

When dealing with a citation alleging noisy/disorderly operation, ALJ Shenkle prepared a chart which organized the Bureau's facts in a manner that facilitated understanding (*BLCE v. Original Casey's of Drexel Hill Inc.*, Docket No. 95-1212²⁸). ALJ Shenkle dismissed the charge, finding only two events, at best, that had an arguable connection to the licensed business.

In *BLCE v. Pennino Enterprises Inc.*, Docket No. 97-1291²⁹, I again looked to appellate case law regarding noisy/disorderly operation. I also was guided by my colleagues who expressed their thinking about the breadth of a noisy/disorderly operation charge in several Adjudications referenced in *BLCE v. Pennino Enterprises Inc.* With that help, I determined I must evaluate not only the duration and frequency of noisy/disorderly operation but also the substantive nature of the behavior.

²⁸www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=1995&adjudication_sequence=1212&appeal=n

²⁹www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=1997&adjudication_sequenc=1291&appeal=n

Off premises conduct may be chargeable to a licensee where there is a nexus to the licensed business. A licensee has a duty to see to it that what goes on inside a licensed premises does not spill over to the outside so as to cause an unreasonable disturbance in the community. If a licensee's business practice creates an environment ripe for noisy/disorderly conduct then a violation has been established.

Were I asked to choose one Adjudication that best exemplifies the attributes of noisy/disorderly operation, there would be no contest. Much like the great Thoroughbred, Secretariat, who completed the Triple Crown on June 9, 1973, by crushing his competition to win the Belmont Stakes in record breaking time, my vote goes to *BLCE v. C W Hilliar Inc.*, Docket Nos. 98-1678 and 98-2269.³⁰

The licensee did nothing to prevent outrageously loud behavior within the premises. Patrons mingled outside the premises on property connected to the business operation. Customers were loud; the licensee permitted patrons to race motorcycle engines while on the licensee's property. Licensee's staff refused to cooperate with neighbors; neighbors were consistently disturbed by the licensee's business. While there were a few instances where I could not find the licensee responsible for customer behavior, the overwhelming majority of disturbances occurred within the premises, an outdoor picnic area, and a private parking lot.

In *BLCE v. Rodney L Coppersmith, Rodney L Coppersmith Jr.*, Docket No. 98-1916³¹, the noisy/disorderly operation charge identified three incidents in less than a three months interval. Considering the nature of the events, I concluded they were demonstrative of the manner in which the licensee operated the business, leading me to sustain the charge. The licensee promoted unruly behavior.³²

In *BLCE v. Bryan S Hornberger Jr*, Docket No. 99-0224³³, I dismissed the noisy/disorderly charge which alleged four incidences. The Bureau presented no evidence on two of the four. I concluded the remaining incidents were hardly sufficient to sustain the charge.

³⁰www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=1998&adjudication_sequence=1678&appeal=n

³¹www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=1998&adjudication_sequence=1678&appeal=n

³² If one were to conduct an analysis of noisy/disorderly operation citations to see if there is a correlation between the types of witnesses the Bureau entrusts its case to and the result, I'll wager the history shows that a noisy/disorderly charge primarily based on customer testimony is more likely to be dismissed. Cases relying on the testimony of neighbors and government officials have a higher probability of success. Of course, this matter would most definitely skew the results. Nonetheless, I believe the history of cases will reveal that ALJs have been reluctant to rely on the testimony of witnesses whose ability to recall was negatively impaired by alcohol.

³³www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=1999&adjudication_sequence=0224&appeal=n

In *BLCE v. J.C.J.M., Inc.*, Docket No. 99-1647³⁴, there were twenty-four occasions of customer misbehavior in a parking lot, integral to the licensee's business. The licensee conducted Teen Dances simultaneously with its ordinary business. The parking lot was a haven for all types of hooliganism. The operation was a major resource drainer for the local police. It took no great leap for me to conclude the licensee's manner of operation invited unacceptable behavior in the parking lot.

BLCE v. J.C.J.M., Inc., Docket No. 00-1220³⁵, provides an interesting perspective. Among other charges, the licensee faced, one was noisy/disorderly operation on twenty occasions in an approximate fourteen weeks period. I sustained the charge based on five events which occurred during a fifteen days interval. I reiterated the historical development of relevant law as embodied in a series of Adjudications, many of which I reference in this Discussion. I also referenced several Liquor Code provisions, heretofore not discussed³⁶, as additional aids in discerning the difference between events that demonstrate noisy/disorderly operation and those that do not.

In *BLCE v. Hogan's Place, Inc.*, Docket No. 01-0157³⁷, I dismissed the noisy/disorderly operation charge because there were only two brief events of relatively insubstantial consequence in nearly seven months.

In *BLCE v. Buffalo Lodge, Inc.*, Docket No. 01-0414³⁸, I dismissed a citation alleging noisy/disorderly operation, finding no affirmative duty requiring licensees to intervene in bar fights. The licensee did not call the police. While I concluded it would have been prudent for the licensee to do so, poor judgment is not necessarily actionable. Were that the standard, there would be no one left to operate the prisons.

³⁴www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=1999&adjudication_sequence=1647&appeal=n

³⁵www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2000&adjudication_sequence=1220&appeal=n. Also see PLCB decision on appeal.

³⁶ Liquor Code Sections: 406(a)(1) through (6) [47 P.S. §4-406(a)(1) and 494 [47 P.S. §4-494].

³⁷www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2001&adjudication_sequence=0157&appeal=n

³⁸www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2001&adjudication_sequence=0414&appeal=n

I also could not sustain a noisy/disorderly operation charge in *BLCE v. Robert W. Taylor, Dara D. Taylor*, Docket No. 02-0228.³⁹ I described the Bureau's case as "piggy back," meaning the Bureau invested no resources in independent observation of the licensee's business. There were a substantial number of illegal drug transactions outside the licensed premises but no proof of a connection to the licensed business. There was not enough proof to draw reasonable inferences to establish a nexus. What remained was four clandestine drug transactions on the licensed premises during an investigation lasting almost eight months. The four transactions were designed and planned by a Drug Task Force; the intention was to negotiate the transactions in the most secretive manner possible.

In *BLCE v. Shane A. Mrakovich*, Docket No. 03-1277⁴⁰, I sustained the noisy/disorderly charge based, in part, on a fight that occurred across the street from the premises. The fight was instigated by Licensee's employees who were not on-the-clock. The licensee hurled racial epithets. I reasoned the fight, although considerably distant from the licensed premises, was sufficiently connected to the licensee's mode of operation.⁴¹

In *BLCE v. Mattis Family, Inc.*, Docket No. 07-0033⁴², I held the licensee responsible for controlling patrons in its private parking lot. In reaching this result, I also noted, licensees enjoy governmental permission to dispense a dangerous, well-established destructive drug that causes substantial societal damage. Although I sustained the charge, I stood firmly in reinforcing a citizen's personal responsibility to behave civilly when negotiating public thoroughfares.

Assuming for purposes of argument, every aspect of the Bureau's theory is on target, the proof required to apply the theory is incredibly lacking. The Bureau's post-hearing submission correctly recites the principles applicable to a noisy/disorderly operation charge. Regrettably, the writing does not connect the principles to the specific incidences of this case. Counsel further posits the question: "Must the neighbors wait for a 'loaded' patron to cause disturbances?" Counsel argues a licensee must predict unlawful behavior.

³⁹www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2002&adjudication_sequence=0228&appeal=n

⁴⁰www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2003&adjudication_sequence=1277&appeal=n

⁴¹ "Security staff" is often an elegantly clothed version of "bouncer." We hear news reports of death or significant injury arising out of patron-bouncer confrontation. I've listened to cases where I am amazed that no serious injury resulted from a patron-bouncer encounter. I began to wonder why the only requirements for bouncer status is generally bulk. I question why we place no restriction or do not require special training, which ought to include "people skills," for bouncers. Mass does not guarantee an adequate skill set to control patrons without physical contact.

⁴²www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2007&adjudication_sequence=0033&appeal=n

Counsel's submission refers me to two cases. The first, *Commonwealth v. Graver*, 334 A.2d, 667 (Pa. 1975), involved a nuisance action pursuant to Liquor Code Section 611 [47 P.S. §6-611]. The Pennsylvania Supreme Court sustained the action; the Court noted how the licensee's mode of operation deteriorated as evidenced by the many complaints. The decision spoke to neighbors, who suffered abuse, as well a history of numerous Liquor Code violations.

The second case, *Com. ex rel. Ness v. Keystone Sign, Co., Inc.*, 513 A.2d 1066 (Pa.Super. 1986), is also an appellate decision concerning the granting of an injunction pursuant to Liquor Code Section 611. The injunction was affirmed based on the behavior of patrons who, among other unacceptable acts, urinated on the property of neighbors, threw empty beer bottles on the street, and generated loud noises from vehicles. The neighbors could not enjoy peace and quiet.

The cases do not apply the Bureau's legal analysis as propounded in this matter. Absent from this matter is any testimony showing that neighbors were disturbed by the way Licensee did business. In fact, the Bureau's investigation began because municipal police registered a complaint rather than a resident.⁴³

I heard no testimony concerning unlawful activity inside the licensed premises, more particularly serving visibly intoxicated patrons. The Bureau did not offer any proof to show that Licensee served customers to the point of intoxication; such proof is essential to the Bureau's legal theory.

To the contrary, the scant number of independent, undercover visits the Bureau invested confirmed Licensee conducted business in a totally lawful manner. If Licensee's business model were below legally permissible standards, it follows there would have been ample manifestations had the Bureau engaged in additional surveillance. Alternatively, am I to assume the Bureau was unlucky in selecting observation dates because the Licensee just happened to operate legally?

The Bureau offered proof of guilty pleas for the summary offense of public drunkenness [18 Pa. C.S.A. §5505] and scattering rubbish [18 Pa. C.S.A. §5503]. The purpose was to prove the truth of the underlying conduct. Licensee's counsel objected. He directed me to two appellate rulings that prohibit the use of a guilty plea, or a finding of guilt, for minor violations, such as a traffic ticket or "small misdemeanor," to prove the truth of the conduct giving rise to the plea or conviction.⁴⁴

⁴³ There are cynics who would argue the local police have discovered a ready revenue source by issuing citation after citation. I am not suggesting they are correct. I do no more than acknowledge such a perception may exist.

⁴⁴ *Hurt v. Stirone*, 206 A.2d 624 (Pa. 1965); *Downs v. Cammarano*, 218 A.2d 604 (Pa.Super. 1966); also see *Loughner v. Schmelzer*, 218 A.2d 768 (Pa. 1966).

Just days ago, I applied these cases in *American Legion Home Assn.*, Docket No. 12-0004⁴⁵, to dismiss a citation on its face, as the citation failed to allege unlawful conduct. I extended the three appellate decisions cited in Footnote 44, above to citations because their reasoning is equally as applicable in this administrative process.⁴⁶ Therefore, I sustain Licensee's objection; I do not consider the pleas or convictions for public drunkenness as proof the conduct resulting in the guilty pleas or convictions actually occurred.

While I did not rule on Licensee's objection during the hearing, I asked Bureau counsel whether the citation could survive an unfavorable ruling. Counsel asserted his client's case was not irreversibly damaged by excluding the convictions. I agree.

One leading case for applying the Crimes Code in a citation hearing is *PLCB v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988). There is abundant case law reciting the principle that an ALJ has the power to apply the Crimes Code to licensees, employees, or patrons. That consistent history, when joined by the Pennsylvania Supreme Court's decision in *PLCB v. TLK, Inc.*, (supra), indicates that an ALJ's authority to apply the Crimes Code is, at a minimum, coextensive with the connection linking a person or place to a licensee facing a citation.⁴⁷

I conclude all persons cited for public drunkenness in this matter are guilty except for the unconscious individual revived by the local police officer and subsequently transported to the hospital. Nevertheless, there is no causal relationship between the intoxicated condition of those individuals and Licensee's business. There is insufficient evidence for me to conclude the individuals were patrons. Even so, there is no proof Licensee served them to the point of intoxication immediately prior to their contact with local police.

⁴⁵ URL yet to be established.

⁴⁶ The cases in Footnote 44 above arise in a civil law setting. Since the Liquor Code has been defined as remedial, civil legislation [*Matter of Quaker City Development Co.*, 365 a.2D 683 (Pa.Cmwlth. 1976)] a stronger basis exists to apply them to this process.

⁴⁷ The citation has given me pause to reflect upon my authority to determine violations of criminal law. Why a lower standard of proof exists for a Crimes Code violation simply because it is presented in an administrative law context baffles me. How it is that I may determine criminal law liability when the putative defendant has no stake in the outcome or may not be required to appear perplexes me.

Assuming for purposes of further argument, those guilty of public drunkenness were immediately stopped by local police after departing the premises and after Licensee allowed them to drink to excess, I would still dismiss the charge. I do not agree with the Bureau's characterization of public drunkenness. In pertinent part, public drunkenness is defined as:

§5505. Public drunkenness and similar misconduct.

A person is guilty of a summary offense if he appears in any public place manifestly under the influence of alcohol... to the degree that he **may** endanger himself or other persons or property... (emphasis mine)

A close reading will reveal the offense is not triggered by conduct. Behavior is required for the arresting authority to conclude a defendant is intoxicated, but the provision does not punish for the indicia of intoxication. It is the potential for harm, the possibility that harm may occur that is the statute's touchstone. The offense of public drunkenness requires two elements. There must first be direct evidence of intoxication followed by an inference that harm may result.⁴⁸

Bureau counsel's explanation as to how a person's public drunkenness translates into licensee liability misses the mark. It is not public drunkenness that is actually dangerous, as counsel argues. (N.T. 282) Rather, it is the arresting authority's prediction of harm. By issuing a citation, the statute aspires to interdict harm and to forestall unlawful conduct.

Had those I ruled guilty of public drunkenness actually engaged in criminal behavior, the local police would have responded by minimally charging the offender with disorderly conduct. [*Comm. v. Kelly Jo Hock*, 728 A.2d 943, (Pa. 1998), *Comm. v. Jennifer Ann Fedorek*, 946 A.2d 93 (Pa. 2008), *Comm. v. Gary Williams*, 574 A.2d 1161 Pa.Super. 1989), *Comm. v. Earl Gilbert*, 674 A.2d 284 (Pa.Super. 1995)]. Had that occurred, one of the many barricades preventing the Bureau from prevailing would have been eliminated.

I reach a different result regarding the crime of scattering rubbish. When construing a criminal law provision, the interpreting tribunal is to apply strict construction, [*Comm. v. Richard J. Reed*, 9 A.3d 1138 (Pa. 2009)]. Guided by this rule, I cannot read the pertinent provision of law so broadly as to include public urination within the definition of littering [*Comm. v. Babb*, 11 Pa. D. & C.3d 360, Columbia County 1979].

⁴⁸ If there is a sincere belief an intoxicated person is likely to cause harm, issuing a citation without insuring the individual's safety or that of others, contradicts the fundamental purpose for issuing the citation in the first place.

Other than November 12, 2010, December 4, 2010, December 25, 2010, and March 15, 2011, the Bureau is unable to establish even the slightest connection to Licensee's business. On November 12, 2010, two patrons, who refused to leave civilly, instigated the entire incident. On December 4, 2010, other than an occurrence in Licensee's private parking lot, I am presented with nothing more than a sleeping drunk without any credible testimony as to where and how he became drunk.

I place the events of December 25, 2010 in this group only for the exceedingly attenuated reasoning that a portion of the unconscious individual's body rested in Licensee's parking lot. When Mr. Franklin left the premises to investigate the matter, the attending local police officer directed him to return to the premises.⁴⁹

Moreover, the record is clear, the unconscious individual could not have been at the licensed premises because he was previously barred. Even if the unconscious individual was a patron and drank to excess at the licensed premises, I am still left to speculate as to what may have caused his unconscious condition. Conjecture would likely have been eliminated if some government official received consent or subpoenaed the "town drunk's" medical records regarding his condition and treatment after being rushed to the hospital.

I also determine the local police officer improvidently issued a citation to the "town drunk" for public drunkenness. The local police officer concluded the patient/defendant had been drinking but had no foundation to claim he was drunk or that his unconscious condition was caused by over-consumption. No inference may be drawn from a history of public drunkenness violations. Were I the Judge hearing the public drunkenness charge, I would swiftly dismiss it.

The remaining event of March 15, 2011 is also deficient for me to find the violation. The customer did depart the premises in a drunken condition. The Bureau's theory mandates proof that Licensee served the customer until drunk. While that is certainly a possibility, it is equally as possible the customer arrived in that drunken condition and, after being denied service, departed the premises.

⁴⁹ Surely the Bureau is not suggesting that Mr. Franklin was required to disobey the local police officer even though the Officer's authority to insist Mr. Franklin return to the premises is highly questionable. Does the Bureau really suggest that Mr. Franklin was required to intercede and take charge of administering emergency medical procedures?

ORDER:

Dismissal

I dismiss the citation.

Dated this 31ST day of May, 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.