

Mailing Date: AUG 14 2012

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

PENNSYLVANIA STATE POLICE,	:	In Re Citation No.: 11-2089
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W03-432799
v.	:	
	:	
552 ST. JOSEPHS, INC.	:	PLCB LID No.: 60712
T/A STARTING GATE TAVERN	:	
554 ST. JOSEPH ST.	:	
LANCASTER, PA 17603-5238	:	PLCB License No.: R-AP-SS-EHF-13935

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: John H. Pietrzak, Esquire

FOR LICENSEE: Steve C. Nicholas, Esquire

BACKGROUND:

This proceeding arises out of a citation, containing one count, that was issued on December 15, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against 552 St. Josephs, Inc. (Licensee).

The citation charges Licensee with violations of Section 404 of the Liquor Code [47 P.S. §4-404]. The charge is that Licensee, by your servants, agents, or employees, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license, on August 20, September 26 and October 14, 2011.¹

¹ The Bureau moved to withdraw the date of September 26, 2011. I granted that Motion. (N.T. 10)

I presided at an evidentiary hearing on June 18, 2012 at 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 June 28, 2011 and completed it on November 8, 2011. (N.T. 6)

2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested, on November 17, 2011. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 5-6)

3. On December 27, 2010, Licensee's Corporate President and the Chief Counsel, Pennsylvania Liquor Control Board entered into a Conditional Licensing Agreement (CLA) which was approved by the Pennsylvania Liquor Control Board on January 12, 2011. (Commonwealth Exhibit No. C-3, N.T. 7)

4. On Saturday, August 20, 2011, a Bureau Enforcement Officer entered the premises in an undercover capacity at 7:55 p.m. At 8:05 p.m., a man ordered a draft beer at the bar. He then played a video gaming device. He put on a shirt that identified him as Licensee's security. He continued to play the video gaming device. Two additional men wore shirts identifying them as security. One held a metal detecting wand. The two departed the premises through the front door. There was no one sitting at the door inside the premises acting as security. (N.T. 20-21)

5. For a short while, a patron took position inside the premises, at the front door. The patron pretended to be a security guard. She jokingly patted down one customer upon entry. She was not a security guard. She was just having some fun. (N.T. 30-31)

6. The Officer exited the premises at 9:20 p.m. seeing one security guard outside who was not holding a metal detecting wand. (N.T. 32)

7. The Officer returned to the premises in an undercover capacity on October 14, 2011, arriving at approximately 8:40 p.m. There were patrons waiting in line to enter. There were three security personnel at the entrance. One patted down the Officer. Another checked the Officer's identification. Other patrons received the same treatment upon entry. Licensee did not use a metal detecting wand. (N.T. 41-45)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. I dismiss the charge as to August 20, 2011.
3. I sustain the violation as charged for October 14, 2011.

DISCUSSION:

August 20, 2011

The relevant portion of the CLA provides:

- 6.f. St. Josephs shall...employ at least two (2) security persons, dressed in clothing that clearly identifies such persons as “security,” whose duties will include maintaining order in and immediately outside the premises...

The Bureau suggests that Licensee failed to comply because one person, wearing clothing identifying him as “security” played a video gaming device. Following the Bureau’s argument, I must penalize Licensee because one of its security staff was not maintaining order.

However, taking the CLA’s words literally, Licensee has complied. The CLA mandates that Licensee employ at least two security staff. Put another way, the CLA can be read to require Licensee to employ no more than two security staff. The Officer identified two additional persons as security. Whether the third person was engaged in security activity is consequently irrelevant as Licensee met the CLA’s minimum requirements.

The Bureau further suggests, because the two security personnel were outside the premises, Licensee violated the CLA. The CLA specifically permits Licensee to position security staff immediately outside the premises. Therefore, there is nothing of any consequence that can be gleaned from the fact that two security personnel departed the premises through the front door. Since the Bureau carries the burden of proving Licensee violated the CLA, the Bureau must provide evidence as to what occurred immediately outside the premises.

There is proof Licensee did not employ a metal detecting wand within the premises. However, the CLA does not specifically require the use of a metal detecting wand in the premises; the CLA mandates such use when a patron enters. It is possible that Licensee complied with the CLA immediately outside the premises, especially since the Officer observed one security employee carrying a metal detecting wand as he left the premises. Having failed to preclude all possibilities, the Bureau has not met its burden.²

The Bureau's case is also insufficient when based on the Officer's observations of only one security person outside the premises. The Bureau did not support that observation by evidence showing there was no other security person within the premises. In order for me to sustain the violation there must proof there was no other security person on duty immediately outside or within the premises.

Bureau counsel remarked, Licensee's video recording of that date showed only one security person outside and showed "no problem." (N.T. 26) I responded by saying, security personnel can only respond if inappropriate behavior occurs. Ideally, we want security personnel to have little to do; hopefully, their very presence serves to control behavior.³

October 14, 2011

Licensee did not employ a metal detecting device when patrons entered the premises as required by the CLA, Paragraph 6.c. Licensee explains that the device often drains its batteries. Licensee did not maintain a large supply of replacement batteries because they quickly disappeared. I responded by saying the CLA is quite clear; it provides for no exceptions however justified.

PRIOR RECORD:

Licensee has been licensed since February 12, 2009, and has the following Adjudication history:

In Re Citation No.: 09-2557. Fine \$450.00.

1. Permitted smoking in a public place where smoking was prohibited on June 6, 19, 20, July 4, 5, August 21, 22 and September 16, 2009.

² The Officer acknowledged the patron who sat at the door inside the premises was simply being funny.

³ Counsel's offer of proof regarding an Officer's observation of Licensee's video security footage for the day in question is inadmissible hearsay. Counsel included this testimony in the Bureau's Pre-Hearing Memorandum but did not list that video footage as an exhibit for me to evaluate.

2. Failed to post signage required by the Clean Indoor Air Act on June 6, 19, 20, July 4, 5, August 21, 22 and September 16, 2009.

In Re Citation No.: 10-0763C. Fine \$1,250.00 and R.A.M.P. training mandated.

Sales to minors on September 19, October 7, 2009 and February 18, 2010.

In Re Citation No.: 11-0911. Fine \$450.00.

1. Operated the licensed establishment without a valid health permit or license during the period February 5 through March 5, 2011.
2. Failed to post signage as required by the Clean Indoor Air Act on March 5, April 9, 12 and 18, 2011.
3. Failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions on the license on April 9 and 12, 2011.

PENALTY ASSESSMENT CRITERIA:

Mandatory Requirement(s)

Liquor Code Section 471 [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 violation found herein.

Discretionary Component(s)

By patting down customers upon entry, Licensee employed a search system I believe to be superior to a metal detecting wand. In that light, Licensee complied with CLA's spirit, if not its letter. While I cannot excuse the violation based on that distinction, I can and will recognize that Licensee complied in kind.

Therefore, I impose a \$50.00 fine.

ORDER:

In Re Citation No.: 11-2089; Licensee, 552 St. Josephs, Inc.; PLCB LID No.: 60712; PLCB License No.: R-AP-SS-EHF-13935

Imposition of Fine

Licensee must pay a \$50.00 fine within twenty 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

I retain Jurisdiction to ensure compliance with this Adjudication.

Dated this 9TH day of August, 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.

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.** Make 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