

Mailing Date: MAR 21 2013

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

PENNSYLVANIA STATE	:	In re Citation No. 12-0120
POLICE, BUREAU OF	:	
LIQUOR CONTROL ENFORCEMENT	:	BLCE Incident No. W01-438033
	:	
v.	:	PLCB LID No. 60971
	:	
NEW CLUB LLC	:	PLCB License No. R-AP-SS-EHF-4565
6130 W PASSYUNK AVE	:	
PHILADELPHIA PA 19153-3508	:	

JUDGE SHENKLE
BLCE COUNSEL: Erik S. Shmukler, Esq.
LICENSEE COUNSEL: Edward A. Taraskus, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on February 6, 2012. There are two counts in the citation.

The first count alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5902 of the Crimes Code, 18 Pa C.S. §5902, on November 23, 2011, in that its servants, agents or employees promoted prostitution on the licensed premises or in rooms contiguous to or used in connection with it.

The second count alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5902 of the Crimes Code, 18 Pa. C.S. §5902, on November 23, 2011, in that its servants, agents or employees engaged in prostitution on the licensed premises or in rooms contiguous to or used in connection with it.

A hearing was held on January 10, 2013, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. The Bureau of Liquor Control Enforcement received an anonymous letter, with enclosures, which alleged that Licensee was permitting prostitution on the licensed premises. In response, liquor enforcement officers visited the premises in an undercover capacity on November 9, 2011. They stayed an hour and did not see any illegal activity (N.T. 6-7).

2. On November 23, 2011, officers of the Philadelphia Police, Citywide Vice Unit, entered the licensed premises at about 8:00 p.m. They saw scantily clad women, some of whom had no covering on the tops of their bodies. There were three dancing poles on a stage enclosed by and behind the bar (N.T. 16-18, 26, Exhibit L-1).

3. Shortly after 8:00 p.m. two officers of the Citywide Vice Unit (a man and a woman) were seated at the bar in the licensed premises when a performer in a blue bikini approached them and asked if they wanted some company. The performer sat on the male officer's lap, or on the chair between his legs. He gave her a dollar tip from a pile of money he had on the bar. She put it in her purse and asked the officers if they were husband and wife or boyfriend and girlfriend. The man told her that they were husband and wife and that they made it a tradition to go to a strip club on the night before Thanksgiving every year. The woman asked if they ever did couch dances or visited the champagne room. The female officer asked what that was. The woman said it was "a private room where we could have fun." She said it cost \$190, that the club got \$90 and she got \$100 (N.T. 31-34, 41-42).

4. The female officer asked the woman if she could "play with my man, also?" The woman said "I can do whatever you're comfortable with me doing with him." The woman then said that she would like to perform oral sex on the male officer. While they were discussing this the woman said she would talk to her manager to see if she could get them a discount on the champagne room. She then left and returned a short time later with a man who said he was the club manager and understood they were interested in going to the champagne room. He gave them a tour of the champagne room area. When the male officer spoke of sexual acts, the manager directed his attention to the sign prohibiting such (N.T. 34-35, 82).

5. The manager said he couldn't give them a discount because they were two people; he would have to charge them each \$190, but would provide an extra girl. He said that the girl would be "a wild girl" but that no sexual acts were allowed in the room. The couple returned to their seats at the bar. A short time later the manager came to them with a dancer dressed in a leopard bikini. This dancer sat down and conversed with them. She said that she heard they "wanted another girl to go to the champagne room" with them. This woman later gave a written statement to police in which she stated that the male officer asked her to blow him. In the statement, she said that in response she looked at him and said "you will have a good time." The statement says that she was "trying to get them to feel comfortable enough to go back w/o exactly saying yes to anything specific. The club prohibits any sexual indecency" (N.T. 35, 82-83, Exhibit L-1).

6. The woman in the blue bikini was with them at the bar also. The woman in the leopard bikini pointed to the male officer and said "as long as you wear a condom because we all have to protect ourselves from diseases." He told her that was fine and asked if she had ever been with a woman before. She said that she had and that she thought his wife was hot. The female officer asked her what they could do. The performer pointed to the female officer and said that she'd like to start with her, eat her pussy, and then later have the other woman start with the male officer and then they would switch (N.T. 36, 42).

7. The female officer asked the performer if they just had to pay the \$190 [each] and the performer said yes, but she would also like a tip of at least \$75. The male officer said, "okay, you want \$75. Does she want \$75 also?" The woman in the leopard bikini said "I'd like at least \$100 if

I satisfy you.” The undercover police officers then notified their backup officers, who entered the club and arrested the two women (N.T. 37, 43).

8. At about 8:30 p.m. another officer of the Citywide Vice Unit, a man, was sitting at the bar in the licensed premises when a woman who had been performing on one of the stages asked if she could sit next to him. The officer agreed. After a brief conversation, the performer gave the officer her telephone number and told him that she would have sex with him for \$300. The officer said he would give the woman a call on a Sunday to meet her at a motel for sex, and the woman agreed. A little later the woman asked him if he was able to ejaculate two times. He asked her why. She said that they could go to a private couch room where she would make him cum and then, when she got off work at 10 p.m. she would also meet him outside and they would go somewhere else where she would make him cum again. He said he couldn't do anything that night. Moments later, backup officers arrested this woman. This woman later gave a written statement to police in which she admitted giving a phone number to the officer, but stated that this was only for dinner and that the phone number she gave was expired (N.T. 26-28, Exhibit L-1).

9. The officer did not pay this woman any money, nor did he have sexual contact with her. She did not expose herself to him or contact him orally or with her genitals. The officer declined the woman's invitation to go with her to a private room (N.T. 29-30).

10. At 9:20 p.m. another undercover officer sat down at the bar. A woman who had been performing on one of the poles approached him and engaged in conversation while rubbing her leg against his. She told the officer that she wanted to take him to the “champagne room.” He asked what that was. The woman said that she would be naked, and that she would get his “dick hard.” He said, “okay and then what?” She said that she would rather show him than say, and that the fee to go to this room was \$160 (N.T. 16-19).

11. The officer agreed, and the two went back to the room, which was in another part of the club, away from the bar. There were several dimly lit rooms, each with a couch. A woman dressed in regular clothing met the officer and the dancer. She requested \$190. The officer gave her \$200 in pre-recorded buy money. The woman gave the dancer \$100 of that money (N.T. 19-20).

12. In the room, the scantily-clad woman took off the officer's belt and performed a “couch dance,” which involved her rubbing her crotch against his, in several different positions. She also rubbed her buttocks against his crotch and reached her hand several times inside the zipper of his pants, where she grabbed his penis and stroked it. The officer stopped her from continuing this activity, identified himself, and called in his backup officers (N.T. 20-21).

13. The woman did not disrobe while she and the officer were in the champagne room. She did not pull his pants down. She did not contact any part of the officer with her mouth, her vagina, or her breasts. This woman later gave a written statement to police in which she denied performing any sexual acts (N.T. 23, Exhibit L-1).

14. On January 14, 2011, liquor enforcement officers inspected the licensed premises and saw a patron smoking a cigarette, using an ashtray on the bar. There were no “no smoking” signs posted. Licensee was not exempt from the laws prohibiting indoor smoking on that date, so this resulted in Citation No. 11-0266. The officers observed no other violations. During the course of that inspection Licensee's manager, in response to a question from the Bureau officer in charge, stated that there was no prostitution being conducted on the premises (N.T. 10-14).

15. This licensed company posted signs at various locations in the premises welcoming customers which read in part: “The law prohibits all lewd and sexual acts and the use and/or possession of any illegal drugs. Anyone performing these acts or using and/or possessing illegal drugs will be escorted from the building immediately. No Exceptions” (N.T. 54-56, Exhibit L-2).

16. Entertainers at the licensed premises are required to sign a document which states: “CHRISTINE’S CABARET HAS A ZERO TOLERANCE POLICY WHEN IT COMES TO DRUGS AND LEWD SEXUAL ACTS. IF YOU ARE CAUGHT SELLING, BUYING OR USING DRUGS YOU WILL BE FIRED IMMEDIATELY. CHRISTINE’S CABARET IS NOT RESPONSIBLE FOR ANY SEXUAL ACTS THAT OCCUR. THERE ARE ABSOLUTELY NO EXCEPTIONS. WE WILL BE WATCHING.” (N.T. 57, Exhibit L-3).

17. When asked why the document signed by the entertainers included the sentence, “Christine’s Cabaret is not responsible for any sexual acts that occur,” a member of the licensed company explained, “We just thought it would be a good sentence to put in there. There’s no reason why it was included. But we wanted to announce to the entertainers that we’re not going to accept any kind of sexual acts to take place. I mean it wasn’t written by an attorney . . .” (N.T. 60).

18. A photograph of the foyer entryway of the licensed premises shows a framed copy on the wall of the notice mentioned in finding #15, above (Exhibit L-2). Exhibits L-2 and L-3 are also shown in photographs of bulletin boards in the entertainers’ dressing room. Photographs of the bar area of the club show that there are three dancers’ poles rising from a raised stage entirely surrounded by a bar counter, and that the principal color scheme is various shades of purple and orange (N.T. 68-70, Exhibit L-4).

19. Photographs of the club’s “couch room” show at least 16 black couches, each in its own alcove, which has been formed by dividers approximately four feet high by three feet deep by six inches thick. The dividers are purple with a light top which appears to be wood. The area referred to as the “champagne room” appears to include at least six rooms furnished with substantially larger black couches than those in the “couch room.” The construction provides a greater degree of privacy in that the dividers between the rooms appear to be eight feet high. However, none of the rooms is equipped with a door, and the photographs show that there are numerous security cameras throughout the club, including the room in which the activities described in finding #12 took place. The manager can monitor the output of all of these cameras in his office (N.T. 70-78, Exhibit L-4).

20. Licensee had not previously received reports of involvement in sexual activity regarding any of the four women described above. The fee of \$190 for the champagne room is divided \$100 for the entertainer and \$90 for the house. It includes four drinks (two each for the customer and the entertainer) or a bottle of house champagne. The fee for the couch room is \$20 for four minutes; the entertainer gets \$15 and the house \$5. None of Licensee’s service staff or management had previously been arrested for prostitution-related offenses. Licensee had never previously received a citation alleging such offenses. The club closed for business on March 17, 2012. This license was received by the Board for safekeeping on April 2, 2012 (N.T. 80-89).

21. Although the manager did not see any sexual acts between the officer and the entertainer in the champagne room, described in finding #12, he fired the entertainer because she then had an arrest record for prostitution, and couldn’t be allowed on the premises. She never worked at the club again. Asked if there were any policy prohibiting entertainers from arranging for sexual acts

for money to take place off the licensed premises, Licensee's manager stated that "I have nothing to do with what goes on off premise. I only monitor what's on premises . . ." (N.T. 90-92).

DISCUSSION:

This case presents a variety of problems involving the admission of evidence, the sufficiency of the evidence to prove the underlying crimes, the sufficiency of notice to Licensee of the danger of such crimes, and the sufficiency of the steps Licensee took to prevent them.

Admission of Evidence

The Bureau offered the anonymous letter which resulted in this investigation (Exhibit B-3). I made the exhibit part of the record in order to facilitate appellate review, but I sustain Licensee's objection; the offer of Exhibit B-3 as evidence is refused. This document is not probative of any issue in the case, i.e., whether Licensee's agents, servants or employees promoted or engaged in prostitution in the licensed premises on November 23, 2011.

A liquor enforcement officer testified to a routine inspection he conducted at the premises on January 14, 2010, during which he advised Licensee's manager about the smoking violation. The officer was present when Sergeant LaTorre informed the manager "about the prostitution of . . ." (N.T. 12). Counsel for Licensee objected at that point.

I advised the witness that he could not tell me what the sergeant said. Licensee's motion to strike the remark was granted. I have considered these rulings again, and I find no need to reverse myself, in light of the disposition I am making. I am less certain that the rulings were correct, because the out-of-court statement attributed to Sergeant LaTorre was not relevant for the truth of its content, so hearsay analysis does not apply.

Licensee's counsel also objected to words attributed to an entertainer, but I overruled this objection and the words spoken are set forth in finding #10, above. This was not hearsay, as the truth of the statement was not in issue, only the fact that it was made. *In the Matter of Revocation of Restaurant Liquor License No. R-149*, 46 Pa. Cmwlth. Ct. 581, 407 A.2d 902 (1979).

For the same reason I overruled the objection to the words reported in finding #8. I remain persuaded that these evidentiary rulings were correct.

Sufficiency of the Evidence

Prostitution is "the offering or using of the body for sexual intercourse for hire." Penal Code of 1939, §103, 18 P.S. §4103. 18 Pa. C.S. §5902, enacted in 1972, made no change in the definition apart from broadening it to include "homosexual and other deviate sexual relations," but the official comment says that only sexual activity as a "business" or "for hire" is covered.

The citation has two counts. In the first the allegation is that Licensee “promoted” prostitution, and in the second, that it “engaged in” prostitution. The statute cited by the Bureau clarifies this distinction:

§ 5902. Prostitution and related offenses.

(a) Prostitution. -- A person is guilty of prostitution if he or she:

- (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or
- (2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

....

(b) Promoting prostitution. -- A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in subsection (c) of this section. The following acts shall, without limitation of the foregoing, constitute promoting prostitution:

- (1) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business;
- (2) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate;
- (3) encouraging, inducing, or otherwise intentionally causing another to become or remain a prostitute;
- (4) soliciting a person to patronize a prostitute;
- (5) procuring a prostitute for a patron;
- (6) transporting a person into or within this Commonwealth with intent to promote the engaging in prostitution by that person, or procuring or paying for transportation with that intent;
- (7) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or
- (8) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this subsection.

It may be seen that a charge of “engaging” in prostitution would require proof that the person carries on a business in which sexual activity is sold. In the case of a limited liability

company such as Licensee, this could be established by proof that it was the duty of Licensee's employees or contractors to engage in sexual conduct.

There is no evidence in this case from which I could conclude that Licensee required the women working in its establishment to perform sexual services – whether as employees or as independent contractors. To the contrary, all of the evidence presented by both sides points to the conclusion that Licensee expressly forbade such conduct – by contract, by notice to the public and to the performers, and by verbal reminder when necessary. I therefore believe that the second count of the citation must be dismissed.

Turning to the first count, it must be admitted that an employer could implicitly allow prostitution on its premises by turning a blind eye to “any sexual acts that occur” and thereby accomplish the objective of promoting prostitution without overtly appearing to do so. There is evidence which could be construed to support a violation of this count.

The most obvious example is the evidence described in finding #8, above. This woman was clearly loitering in a public place (i.e., the licensed premises) “for the purpose of being hired to engage in sexual activity.” She offered specific services for a specific price. But for the illegality, the officer's acceptance of the woman's offer would have obliged the woman to perform the services described, as a common law contract.

But there was no evidence that Licensee or any of its personnel condoned or permitted the woman's conduct. A prosecution for prostitution against the woman who made the offer might have been successful, but that is a very different thing from this case.

In the same way, the incident described in findings #10-13¹ might be sufficient to convict that woman in a criminal court although it would be insufficient to convict this Licensee of promoting or directing the behavior.

The best example of how this can be so is found in *Commonwealth v. DeStefanis*, 658 A.2d 416 (Pa. Super. 1995). In that case, Superior Court reversed a judgment of sentence on two counts of promoting prostitution and one of conspiracy. An undercover police detective went to the Executive Fitness Center in Bristol Borough (which defendant managed) and paid \$60 for a body massage. Near the end of the massage, the masseuse asked the officer if he wanted a “hand release.” He asked what that was and the price. She said it meant a “hand job” and that a tip would be appreciated, but no other sexual activity was available.

The detective declined, but returned two weeks later and received another massage from a different masseuse, with whom he initiated a conversation about the availability of sexual activity. The second masseuse also ruled out anything other than a hand release, saying it was a “house rule.”

¹ The findings are more explicit than the actual testimony, because I felt a need to be more forthright than the officer seemed to be comfortable with on the witness stand: “A. Okay. During our conversation, again, I asked what the champagne room was, what goes on back there. She said we will go back there. She will be naked and I'm going to spell what she said, she said, she would get my D-I-C-K hard and get me aroused. I said, okay and then what? She said I'd rather show you [than] to say . . . During that time [in the champagne room], several times, she reached inside my zipper in my pants and with a partially closed hand, grab my male genitalia and stroke[d] it back and forth --- in a back and forth motion. At which time, I stopped it and called in my backup.” (N.T. 19-20)

About six weeks later a female detective was interviewed by the defendant for the position of masseuse. She asked him if he had any problem with her giving a “hand release” to patrons to make more money.

The defendant said “that’s up to you, but I don’t think anybody’s doing that.” He made it clear that sexual intercourse was not permitted, that she would be paid \$20 per massage and would keep her tips. The civilian women later admitted providing “hand releases” to a few customers. The jury convicted and DeStefanis appealed.

The majority opinion held that the Commonwealth had to prove (1) there was a prostitution business and (2) the defendant had a connection with running, controlling, supervising or keeping it. Previous cases had held that masturbating another is sexual activity, but to prove prostitution there must be a payment of money as well, or else there is no business.

The court distinguished the case from another in which nude masseuses provided masturbation as a part of the service, so the fee included sexual activity. In this case, since the fee paid for the massage up front did not include the hand job, what transpired was sex between consenting adults. Therefore the evidence was insufficient to prove the existence of a business and the conviction was reversed, as there was no evidence the defendant received any portion of the masseuses’ tips.

This licensed premises was visited just twice during this investigation. The first visit, on November 9, 2011, was the only visit made by officers of the Bureau of Liquor Control Enforcement; no illegality was found. The second visit, which is the basis for this citation, was by officers of the Citywide Vice Unit. One must ask, if the rampant sexual aggressiveness reported by the vice unit officers was prevalent on November 23, 2011, why was it not observed two weeks earlier?

It is clear to me that Licensee was not operating a brothel or promoting the sale of sexual services. The woman seeking to make an off-premises assignation was working for herself, and her conduct was forbidden by Licensee. The dirty words spoken by performers who were attempting to lure clients into the “champagne room” were nothing more than that.²

In an earlier time the regulation of businesses such as Licensee’s relied primarily on a statute which prohibited “lewd, immoral or improper entertainment” and a regulation which provided that entertainers in licensed establishments could not “be in contact or associate with the patrons in the establishment, room or place for a lewd, immoral, improper or unlawful purpose.” *Conchatta, Inc., et al, v. Miller*, 458 F.3d 258 (2006) held that these provisions, 47 Pa. C.S. §4-493(10) and 40 Pa. Code §5.32(b), were unconstitutional on their face, in that they were substantially overbroad.

The holding did not prevent the legislature or the PLCB from revising the challenged provisions so as to make them narrower and thus more effective for cases such as this one, but at this writing there has been no further legislative or regulatory action. 18 Pa. C.S. §5902, the basis of this case, is not an adequate substitute for the enforcement regime previously used, because it requires a higher level of criminality than was demonstrated in this case.

² In evaluating the sufficiency of the evidence, I note as well the facts which were not found. In an enforcement action against a genuine brothel there would have been physical evidence of sexual activity, such as condoms (new or used), naked patrons, and, especially, doors on the rooms in which the activities took place.

Application of the Rule in *PLCB v. TLK, Inc.*

Even if I am wrong about all of this, there remains one more barrier for the Bureau to overcome. In *PLCB v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988), the court held that, when violations of the Liquor Code and its attendant laws and regulations are not the conduct under review, a licensee is liable only if he knew or should have known of the illegal activity and if he fails to prove substantial affirmative measures to eliminate a known pattern of illegal activity.

In this case the failure to present the testimony of Sergeant LaTorre, which would have been relevant to the question whether Licensee knew or should have known of the danger of illegal activities on its premises, was harmless. I find that persons in Licensee's business are bound in all cases to know that the conduct of their business carries with it a substantial risk that illegal acts may occur. As a matter of fact it is clear in this case that Licensee knew of the problem, since that was the reason for the redundant contracts with performers and notices posted in the premises.

My difficulty with this case is that it appears Licensee took every precaution which could have been taken to control the behavior of its customers and its entertainers. Each of the places in which illegal activity was said to have occurred was thoroughly supervised by Licensee's employees, both in person and through video surveillance. There was no opportunity for privacy in this club (N.T. 54-114). I cannot think of an additional measure Licensee should have taken that it did not take. If the second prong of the *TLK* test has any meaning, it is my opinion that Licensee has satisfied it, and therefore, is insulated from liability.

CONCLUSIONS OF LAW:

The weight of the evidence did not prove that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5902 of the Crimes Code, 18 Pa C.S. §5902, on November 23, 2011, by promoting prostitution on the licensed premises or in rooms contiguous to or used in connection with it.

The weight of the evidence did not prove that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5902 of the Crimes Code, 18 Pa. C.S. §5902, on November 23, 2011, by engaging in prostitution on the licensed premises or in rooms contiguous to or used in connection with it.

Licensee had actual notice of the danger of illegal activities on its premises, but took substantial affirmative measures to prevent such activities from occurring.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 12-0120 is DISMISSED.

Dated this 19TH day of MARCH, 2013.



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.