

Mailing Date: SEP 11 2012

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

PENNSYLVANIA STATE POLICE,	:	In Re Citation No.: 12-0447
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W07-440705
v.	:	
	:	
THE ELK CLUB OF ST. MARYS, INC.	:	PLCB LID No.: 2875
33 LAFAYETTE ST.	:	
SAINT MARYS, PA 15857-1385	:	
	:	PLCB License No.: CC-209

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Nadia L. Vargo, Esquire

LICENSEE: Shelley D. Glatt, Secretary

BACKGROUND:

This proceeding arises out of a citation, containing one count, that was issued on March 21, 2012, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against The Elk Club of St. Marys, Inc. (Licensee).

The citation charges Licensee with a violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 637.6(a)(2) of the Clean Indoor Air Act [35 P.S. §637.6(a)(2)]. The charge is that Licensee, by your servants, agents, or employees, smoked and/or permitted smoking in a public place where smoking is prohibited, on February 22, 2012.¹

Licensee has executed a Statement of Waiver, Admission and Authorization in which Licensee: admits to the violation charged in the citation and that the Bureau complied with the applicable investigatory and notice requirements of the Liquor Code, authorizes the Administrative Law Judge to enter an Adjudication without a hearing based on a summary of facts as provided by the Bureau and prior Adjudication history, and waives the right to appeal this Adjudication.

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

FINDINGS OF FACT:

On the date charged, Licensee posted no signs on the outside of the premises regarding smoking. Licensee posted a “no smoking” sign in the dining area of the premises on Thursday, when Licensee provides food for the public. It was Licensee’s practice to permit smoking in one bar room at all times.

CONCLUSION(S) OF LAW:

I sustain the violation as charged.

DISCUSSION:

This Adjudication is another in a series demonstrating inconsistencies between the Clean Indoor Air Act (CIAA) and the Liquor Code.² Standing alone, the CIAA provides for exceptions within exceptions, rendering it cumbersome difficult to understand.

¹ The charge specifically references 15 P.S. §637.6(a)(2) of the Clean Indoor Air Act, a provision which defines violations. The substantive provisions which the Bureau alleges has been violated are 15 P.S. §637.3(b)(6)(i) and §637.4.

² **3745 Enterprises, Inc.**, Docket No. 11-0804, www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2011&adjudication_sequence=0804&appeal=n, and **Ironwood Grill, Inc.**, Docket No. 11-0502, www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2011&adjudication_sequence=0502&appeal=n.

The CIAA generally prohibits smoking in a public place. Found in 15 P.S. §637.3(a), that prohibition has been placed in a sentence which begins with a qualifying phrase limiting the smoking ban's scope. Subsection (a) first refers to a list of twelve exceptions more completely described in subsection (b) [15 P.S. §637.3(b)], immediately following. Some of those exceptions themselves include exceptions so that smoking may not occur when the conditions of an exception to an exception prevail.

The pertinent exception is of that type.³ Subsection (b)(6) [15 P.S. §637.3(b)(6)] provides:

(b) Exceptions, -- Subsection (a) shall not apply to any of the following:

(6) Subject to subsection (c)(2), a private club, except where the club is:

- (i) open to the public through general advertisement for a club sponsored event; or
- (ii) leased or used for a private event which is not club sponsored.

Subsection (c)(2) [15 P.S. §637.3(c)(2)] provides:

(c) Conditions and qualifications for exceptions.--

- (2) In order to qualify for the exception under subsection (b)(6), a private club must take and record a vote of its officers under the by-laws to address smoking in the private club's facilities.⁴

The CIAA provides no clear guidance whether a private club, which qualifies for an exception to permit smoking within its facility, is prohibited from allowing smoking within the entire licensed facility when a portion of the premises is dedicated to a public event. By way of example, if a private club provides for a public function on one floor of a two floor facility, must the private club prohibit smoking in the entire facility or just on the first floor?

³ Licensee is a private club as defined by 15 P.S. §637.2.

⁴ This exception is not self-executing. The CIAA does not require a private club to submit documentation to the Department of Health showing compliance with (c)(2). Certainly, this is an area begging for regulatory implementation.

The CIAA was enacted to protect the public's health and safety from the well-documented dangers of second-hand smoke, in an indoor environment, where pollutants are ever present and recirculated. The exceptions to the ban were enacted to provide those who choose to smoke with the option of doing so under limited circumstances.

Given this intention and in combination with two supporting CIAA provisions, I conclude that a private club, which otherwise permits smoking, must prohibit smoking in its entire facility even when only a portion of the premises is open to the public.⁵ Subsection 10 of 637.3(b), which allows for smoking in a drinking establishment, in combination with 15 P.S. §637.2, which defines a drinking establishment, leads me in that direction.

When allowing for smoking in a portion of a drinking establishment, the CIAA carefully details a list of requirements obviously intended to insure the contaminated air within an excepted area does not infiltrate the air in the non-smoking portion of the premises. With these considerations in mind, I cannot imagine the General Assembly intended to permit the contaminated air within a private club's smoking permitted area to mix with the air in that portion of the facility where, temporarily, no smoking may occur due to a public event.

The fouled air of the facility where smoking is permitted will inevitably reach the non-smoking area through recirculation. Moreover, unless a private club's entire premises is smoke free when a portion of the facility is open to the public, it is possible for those who wish to participate in the public event to be compelled to run the gauntlet of passing through smoking permitted areas.

The convolution does not end. The CIAA demands signage be posted pursuant to 15 P.S. §637.4. This mandate was clearly adopted to alert the public of a venue's status with respect to smoking, prior to entry, so that a choice could be made whether to enter.

A private club which is authorized to permit smoking is required to post and maintain "Smoking Permitted" signs prominently at every entrance. The CIAA provides no clear guidance when a private club, which permits smoking but has temporarily committed a portion of its facility to a public event, must alter signage. On these occasions, the purpose for requiring signage is defeated if the private club maintains a "Smoking Permitted" sign. By necessary implication, it follows that a private club must temporarily replace "Smoking Permitted" signs with "No Smoking" signs.⁶

⁵ In this matter, Licensee continued to permit smoking on Thursday evenings when a portion of the premises was open to the public.

⁶ In the absence of guidance in the CIAA, appropriate regulations defining, clarifying regulations are unavoidable.

PRIOR RECORD:

Licensee has been licensed since January 1, 1934, and has had three prior Adjudications since July 1, 1987, the date the Office of Administrative Law Judge was established.

In Re Citation No.: 88-1463. Fine \$375.00.

Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on a licensed premises (machine and tickets).

In Re Citation No.: 91-1771. Fine \$55.00.

Failed to notify the Board within 15 days of a change of Officers, Directors and/or Stockholders.

In Re Citation No.: 91-2178. Fine \$350.00.

Sales to nonmembers without prior arrangement.

PENALTY ASSESSMENT CRITERIA:

Mandatory Requirement(s)

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension, or revocation, or a fine of not less than \$50.00, or more than \$100.00, or both for the violation found herein.

Discretionary Component(s)

Licensee advises that since this incident Licensee has become educated in the requirements of the Clean Indoor Air Act. Licensee no longer permits smoking anywhere on the premises and now maintains the appropriate signs.

Accordingly, I impose a \$200.00 fine.

ORDER:

In Re Citation No.: 12-0447; Licensee, The Elk Club of St. Marys, Inc.;
PLCB LID No.: 2875; PLCB License No.: CC-209

Imposition of Fine

Licensee must pay a \$200.00 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 7TH day of September, 2012.



Felix Thau, A.L.J.

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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.

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

The Elk Club of St. Marys, Inc.
In Re Citation No.: 12-0447