

Mailing Date: APR 17 2013

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

PENNSYLVANIA STATE POLICE,	:	In Re Citation No.: 12-0880
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W02-446481
v.	:	
	:	
FG CANTINA TAKE OUT LTD.	:	PLCB LID No.: 57410
44 N WYOMING ST.	:	
HAZLETON, PA 18201-6032	:	
	:	PLCB License No.: R-AP-SS-EHF-4417

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Craig A. Strong, Esquire

FOR LICENSEE: Stephen A. Seach, Esquire

BACKGROUND:

This proceeding arises out of a citation, containing four counts, that was issued on August 31, 2012, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against FG Cantina Take Out Ltd. (Licensee).

The first count charges Licensee with a violation of Section 493(34) of the Liquor Code [47 P.S. §4-493(34)]. The charge is that Licensee, by your servants, agents, or employees, used, or permitted to be used on the inside of your licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard beyond the licensee's property line, on May 6, 2012.

The second count charges Licensee with a violation of Section 499(a) of the Liquor Code [47 P.S. §4-499(a)]. The charge is that Licensee, by your servants, agents, or employees, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m., on May 6, 2012.

The third count charges Licensee with a violation of Section 499(a) of the Liquor Code [47 P.S. §4-499(a)]. The charge is that Licensee, by your servants, agents, or employees, failed to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages, on May 6, 2012.

The fourth count charges Licensee with a violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 5503 of the Crimes Code [18 Pa. C.S. §5503]. The charge is that Licensee, by your servants, agents, or employees, engaged in disorderly conduct on May 6, 2012.

I presided at an evidentiary hearing on January 31, 2013 at 100 Lackawanna Avenue, Scranton, Pennsylvania.

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

FINDINGS OF FACT:

1. The Bureau began its investigation on May 10, 2012 and completed it on May 15, 2012. (N.T. 8)
2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested, on May 22, 2012. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 7)
3. A City of Hazleton Police Officer (PO) was on duty, in full uniform, driving a marked vehicle. At approximately 2:25 a.m., the PO saw a crowd gathering in front of the licensed premises. He radioed for assistance as a precautionary measure because he determined police intervention might be required. (N.T. 12-13)

Count No. 1

4. The PO approached the licensed premises on foot. At fifteen feet away from the building housing the licensed premises and while standing on the sidewalk, the PO heard music emanating from within. He subsequently determined the music was being provided by a Disc Jockey. (N.T. 13-15; 17-18)

Count Nos. 2 and 3

5. Five additional Hazleton POs arrived at the scene. All six entered the premises at approximately 2:25 a.m. One PO observed bartenders serving bottles of beer to patrons (N.T. 15-17)

6. There were approximately 150 patrons on the premises. Licensee's security staff were dressed in police style uniforms. They carried TASERS and firearms. They were having difficulty marshaling patrons out the door. (N.T. 17-19; 49-51)

Count No. 4

7. The POs remained on the premises until approximately 2:58 a.m. They directed patrons to depart the premises. Several fights broke out between patrons. Licensee's security staff did not assist the POs in quelling those fights although the POs requested their assistance. (N.T. 19; 36-37)

Mitigation

8. Licensee's Sole Corporate Officer and Shareholder, Ms. Garcia, was disappointed with the Manager's failure to control the operation in accordance with her instructions. She fired the Manager for that reason. Ms. Garcia normally spends a significant amount of time at the licensed premises but a family member was sick which required her to be away. (N.T. 52-54; 55-61)

CONCLUSIONS OF LAW:

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

Count Nos. 1 and 2

2. I sustain the violations as charged.

Count No. 3

3. Although Licensee permitted patrons to remain on the premises in an area habitually used for the service of alcoholic beverages after 2:30 a.m., Licensee had authority to do so by virtue of an Extended Hours Food Permit.

Count No. 4

4. The Bureau has failed to prove that Licensee engaged in disorderly conduct on May 6, 2012.

DISCUSSION:

Count No. 3

I dismiss Count No. 3 because Licensee was issued an Extended Hours Food Permit (EHFP) which was in effect on the date in question. The EHFP relieves Licensee of the duty to remove patrons from that portion of the licensed premises habitually used to serve alcoholic beverages by no later than 2:30 a.m.¹

At the hearing, I mentioned the extended operating hours authority conferred upon Licensee by virtue of the EHFP. When the POs directed patrons to depart the premises after 2:30 a.m., the power to do so does not reside in the Liquor Code. In response to that statement, the PO who first arrived at the scene and who, immediately after I made the statement, remarked he was not aware there was such authority. Whether the POs may have had some other basis to require patrons to depart the premises is not an issue for me to decide.

Eligibility for an EHFP requires no more than paying a fee [47 P.S. §4-499(b)]. The EHFP is intended to permit licensees to remain open only for the purpose of providing food. In the instant matter, there was direct, weak evidence that Licensee was not providing food after 2:30 a.m.

¹ During the hearing, I indicated I could not understand why Licensee was not charged with sales after 2:00 a.m. as the evidence unequivocally established a violation (Finding of Fact No. 5). I commented similarly to Licensee's providing entertainment after 2:00 a.m. The latter statement was improvidently uttered. Liquor Code Sections 493(10) and 499(b) [47 P.S. §§4-493(10) and 4-499(b)] in combination, authorize a licensee to provide entertainment during hours when a licensee is open for business. Therefore, Licensee was authorized to provide entertainment after 2:00 a.m.

I agree with the Opinion and Order of the Pennsylvania Liquor Control Board (PLCB) in PSP, BLCE v. Club XS, Inc., In Re Citation No.: 08-0681. There, the Bureau argued the licensee was required to remove patrons at 2:30 a.m., the charged violation being that Licensee failed to do so. The licensee was issued an EHFP but, because no food was served after 2:30 a.m., when patrons were present, the Bureau argued the EHFP was void.

The PLCB's determination turned on statutory construction of Liquor Code Section 499(b). The PLCB concluded the term, "purpose of serving food," conveys a goal or objective. The PLCB went on to say, because no food was served at a particular moment does not abrogate the effect of the EHFP. Furthermore, the evidence did not demonstrate the licensee failed to have the objective of providing food.

Here, we have yet another example of the frailty of the adage that intent is not an element in this administrative process. While the principle is generally true, there are charges which, by their nature, implicate intent. When we say one has an objective or a goal, we necessarily include intent. Having a goal/objective is a state of mind. A licensee enjoying the EHFP privilege does so for the purpose of, with the intention of providing food.

Intent may be established circumstantially. A momentary snapshot of a lack of food will not suffice to overcome the presumption of intent to observe EHFP requirements. However, if a licensee's kitchen is closed at 3:00 a.m., there is no menu, and a waitress asserts that no food will be served, the inference the licensee does not intend to provide food can be readily drawn.

Even if it is established that an EHFP licensee does not intend to provide food and patrons remain after 2:30 a.m., the licensee has not violated Liquor Code Section 499 by permitting patrons to remain on the premises after 2:30 a.m. In actuality, the licensee has failed to comply with the conditions for which the EHFP was issued. Accordingly, that licensee ought to be so charged.

Count No. 4

Count No. 4 presents a unique application of law. In essence, the Bureau argues the failure of Licensee's security staff to take action as directed by the POs somehow constitutes noisy and disorderly conduct. I could find no case law to support the notion that a citizen who takes no action under the circumstances herein, has committed a crime. To be guilty of noisy and disorderly conduct, there must be affirmative/visible conduct. Doing nothing is not unlawful.

During testimony, I learned Licensee employed a private security firm whose staff wore paramilitary uniforms, were armed, and carried more defensive equipment than the POs. The Bureau's argument intimates that a licensee who provides first-class, well-trained, professional security is obligated to assist police when directed to do so. Somehow, because Licensee opted for sophisticated security service, a legal obligation to assist police arises.

Taking the next logical step, one may conclude that a licensee who employs untrained, unsophisticated security staff is relieved of that obligation. Aside from the pellucid silliness of the argument, the result would be to penalize licensees for being especially careful consequently promoting ever lower personnel security standards.²

In thinking about this issue more, I thought there might be some law that permits police to deputize citizens. If so, the security staff's failure to assist when directed to do so might be construed as unlawful. I found no relevant law. Consequently, I directed counsel to conduct independent research. They also found nothing helpful.

If one considers the implications of requiring citizens to obey a police directive to assist, the argument that a failure to comply is unlawful, even by implication, weakens. If a citizen takes action pursuant to police directive, will the citizen enjoy the benefit of all defenses available to the police if the citizen is sued as a result of taking action? Will the citizen's legal fees be paid for by the government? If injured, is the citizen entitled to lost wages, health care, or any other benefit inuring to the police?

PRIOR RECORD:

Licensee has been licensed since January 17, 2007, and has the following Adjudication history:

In Re Citation No.: 07-2005. Fine \$1,250.00 and RAMP training mandated.

Sales to minors on May 7, 2007.

² Presently, there are no minimum requirements for security staff in the Liquor Code, attendant Regulations, or Conditional Licensing Agreements. My experience informs me that most security personnel are not trained in defensive physical tactics, crowd control, effective communication, or any other skill that promotes effective and safe use of security staff. It is unfortunate that standards do not exist because untrained security staff are more likely to elevate an already charged environment thus causing more harm than might have otherwise occurred without their presence.

In Re Citation No.: 09-2641. Fine \$250.00.

Used loudspeakers or devices whereby music could be heard outside on October 10, 2009.

In Re Citation No.: 11-1106. Fine \$1,800.00.

1. Sales to a minor on April 30, 2011.
2. Minors frequenting on April 30 and May 1, 2011.
3. Used loudspeakers or devices whereby the sound of music could be heard outside on May 1, 2011.

In Re Citation No.: 12-0502. Fine \$550.00.

1. Failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions on the license on December 9, 2011, February 11 and 12, 2012.
2. Operated the licensed establishment without a valid health permit or license on February 11 and 12, 2012.
3. Fortified, adulterated, and/or contaminated liquor on February 12, 2012.

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 violations found herein.

Discretionary Component(s)

I impose:

Count No. 1 - \$200.00 fine.

Count No. 2 - \$1,000.00 fine.

ORDER:

In Re Citation No.: 12-0880; Licensee, FG Cantina Take Out Ltd.;
PLCB LID No.: 57410; PLCB License No.: R-AP-SS-EHF-4417

Imposition of Fine

Licensee must pay a \$1,200.00 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.

Dismissals

I dismiss Count Nos. 3 and 4.

Retaining Jurisdiction

I retain Jurisdiction to ensure compliance with this Adjudication.

Dated this 12TH day of April, 2013.

A handwritten signature in cursive script that reads "Felix Thau". The signature is written in black ink and is positioned above a horizontal line.

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