

Mailing Date: JUL 15 2013

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

PENNSYLVANIA STATE
POLICE, BUREAU OF
LIQUOR CONTROL ENFORCEMENT

v.

DSD ENTERTAINMENT, INC.
254-256 S 12th ST.
PHILADELPHIA, PA 19107-5638

In re Citation No.	BLCE Incident No.
12-1198C	W01-447557
12-1503	W01-449954
13-0186	W01-452039
13-0385C	W01-456682

(consolidated for adjudication only)

PLCB LID No. 63643

PLCB License No. R-AP-SS-EHF-7680

JUDGE SHENKLE

BLCE COUNSEL: Andrew R. Britt, Esq. (12-1198C, 12-1503, 13-0186)
Erik S. Shmukler, Esq. (13-0385C)

LICENSEE COUNSEL: Edward A. Taraskus, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued these citations on the dates set forth below. Each of the citations alleges that Licensee violated §493(1) of the Liquor Code, 47 P.S. §4-493(1), by selling, furnishing, and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to a minor. In addition, Citation No. 12-1503 alleges that Licensee violated §493(14) of the Liquor Code, 47 P.S. §4-493(14), by permitting that minor to frequent its licensed premises. The particulars are as follows:

Citation No.	Date Citation Issued	Age of Minor	Date(s) of Alleged Violation(s)
12-1198C	August 14, 2012	19	July 11, 2012
12-1503	October 16, 2012	18	1. Frequenting: August 4, 2012, and four other unknown dates in preceding year. 2. Sales: August 4, 2012
13-0186	February 12, 2013	19	September 27, 2012
13-0385C	March 5, 2013	20	January 31, 2013

The Bureau's investigation in each case was assigned to an officer and completed on the dates set forth below. The Bureau mailed notice of the results of its investigation on the dates indicated in each case:

Citation No.	Date Assigned	Date Completed	Date Notice Mailed
12-1198C	June 5, 2012	July 11, 2012	August 1, 2012
12-1503	August 9, 2012	September 5, 2012	September 14, 2012
13-0186	October 9, 2012	November 25, 2012	December 11, 2012
13-0385C	January 31, 2013	February 4, 2013	February 12, 2013

A hearing was held on May 30, 2013, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation, and to a summary of facts.

FINDINGS OF FACT:

1. On July 11, 2012, a man whose birth date was September 11, 1992, who was participating in the Bureau's age compliance check program, entered the licensed premises and purchased a bottle of beer. His age was not questioned. The man did not drink any beer, but left the premises. An enforcement officer then entered and informed the bartender of the violation. On July 13, 2012, a notification of noncompliance was sent to the licensed premises.

2. On August 4, 2012, a man whose birth date was March 8, 1994, entered the licensed premises and purchased two mixed drinks and a bottle of beer. His age was not questioned. He had also purchased alcoholic beverages in the premises on four other unknown dates within the preceding year, not accompanied by a parent or legal guardian.

3. On September 27, 2012, a man whose birth date was December 3, 1992, entered the licensed premises with a friend. The friend ordered and paid for three mixed drinks, which the minor consumed. His age was not questioned. Afterwards, the friend went behind the bar while no employees were present, and took two bottles of liquor, from which he poured shots for himself and the minor. The minor later passed out and found that items had been taken from his bag. He then contacted the police, who reported the incident to the Bureau, resulting in Citation No. 13-0186.

4. On January 31, 2013, a man whose birth date was September 8, 1992, who was participating in the Bureau's age compliance check program, ordered beer in the licensed premises. When his age was questioned, he produced his valid Pennsylvania driver's license, proving that he was a minor. The bartender looked at it and then served the beer. The man did not drink any beer, but left the premises. A liquor enforcement officer then entered and informed Licensee's employee of the violation. On February 4, 2013, notice of noncompliance was sent to the licensed premises.

CONCLUSIONS OF LAW:

All four of these citations are sustained as charged.

DISCUSSION:

The unusual feature of this case is that all four of these citations were listed for hearing, for the first time, on May 30, 2013. Neither party took any action which would explain this fact, so far as is reflected in the docket.

There was no violation of procedural rules. The Bureau gave timely notice of the results of its investigation in each case, and each citation was filed within the time allowed. I usually have no role in scheduling, so I can only speculate that the appearance of counsel for Licensee (an attorney who practices frequently before this tribunal) in each case and a desire to achieve administrative efficiency contributed to the scheduling coincidence (N.T. 10).

Counsel for Licensee moved to consolidate two cases, Nos. 12-1503 and 13-0186, on the basis that the dates of violation were close in time (there were 54 days between August 4 and September 27, 2012. Actually, there was a smaller gap, of 24 days, between the first two cases).

Even a closer proximity in time would not justify consolidation, so long as the Bureau's separate investigations do not overlap, as they do not in these cases. The Bureau is entitled to punctuate each successful investigation with its own citation. Consolidation must be refused.

A more substantial issue arose when I remarked on the record that, if the cases had been adjudicated at different times I would have been required to suspend or revoke the license in the third and fourth cases, because the Licensee would have had two and then three prior sales-to-minors violations in a four-year period (N.T. 14).

Mr. Britt expressed his contrary understanding, that mandatory minimum suspensions would be required, because of the separateness of the citations (N.T. 16). The day after the hearing, Mr. Britt supported his point with a letter brief, citing the decision of the Board on the Bureau's appeal of Judge Flaherty's adjudication of Citation No. 08-1248C, *Alki, Inc.*

In *Alki, Inc.*, the licensee was charged with a sale of alcoholic beverages to a minor who was working with the Bureau under its age compliance check program. Judge Flaherty ordered the licensee to pay a fine of \$4,500.00. The Bureau requested reconsideration on the basis of its view that suspension or revocation of the license was required under 47 P.S. §4-471(c):

(c) The administrative law judge may consider the licensee's prior citation history when imposing a penalty. If the violation in question is a third or subsequent violation of any offense referred to in subsection (b) or Title 18 of the Pennsylvania Consolidated Statutes (relating to crimes and offenses), occurring within a period of four years, the administrative law judge shall impose a suspension or revocation.

Judge Flaherty refused reconsideration because the prior violations which would have triggered the mandatory penalty had not been mailed longer than thirty days prior to the mailing of his adjudication. Since the prior cases could still have been appealed they were not final adjudications and could not be considered, in Judge Flaherty's view. The Bureau appealed to the Board. The reason for Judge Flaherty's decision is best expressed in his order upon remand:

The Board has, with this Opinion overturned a policy of this Office which has been in effect since 1987. The reason for the policy was an attempt to protect licensees from serving suspensions, which would appear to be mandatory, in cases where the third enhanced penalty violation was overturned on appeal, thus making the imposition of a suspension in the case unnecessary. However, since that policy is now overturned, a new policy will have to be established by the Office of Administrative Law Judge.

The Board's opinion in *Alki, Inc.*, cites the opinion of Commonwealth Court in *Ball Park's Main Course, Inc. v. PLCB*, 641 A.2d 713 (Pa. Cmwlth. 1994), to support its conclusion that Judge Flaherty's focus on the age of the prior adjudication was misplaced. According to the Board's opinion, the issue is not whether the citation is outside the appeal period, but "whether a violation exists."

Ball Park's Main Course, Inc., involved a licensee's appeal from a common pleas court decision affirming the PLCB's refusal to renew the license. The Board had given timely notice of its intent, and following the licensee's timely protest, its examiner conducted a hearing and filed a report recommending refusal. At the time of the hearing, two of the eleven citations relied upon by the examiner had not yet been adjudicated by an administrative law judge. The other nine citations were on appeal to the court of common pleas. Nonetheless, the examiner heard evidence on all of the citations, including the two not yet adjudicated.

In explaining its decision to consider the not-yet-adjudicated citations, the Board wrote:

This Board is making its own independent determination that the incidents underlying these citations actually occurred, so the intervening determinations of liability on the citations are not the basis of the Board's determination.

-- 641 A.2d at 715, footnote 3.

Commonwealth Court agreed with the licensee that the Board should not have considered the citations which had not yet been adjudicated, but did not agree that the nine adjudicated citations which were on appeal to the common pleas court were off limits:

...Licensee argues that the Board is precluded from considering citations which have been adjudicated, but are still on appeal to a trial court. We disagree. The ALJs are the ultimate finders of fact and the Board is limited to an appellate function in reviewing their decisions. Section 471(a) of the Code, *47 P.S. § 4-471(a)*. Once an ALJ has issued an order finding that a licensee has violated the Code, the citation has been adjudicated. Once the citation has been adjudicated, Section 470(a) of the Code, which governs the renewal of licenses, permits the Board to consider the violation in determining whether to renew the license. *See* Section 470(a) of the Code, *47 P.S. § 4-470(a)*.

-- 641 A.2d at 718-719, footnote 3.

This holding provides strong support for the result in *Alki, Inc.*, in that the Board is explicitly permitted to base its licensing renewal decisions on adjudicated citations, even though a case remains open in a court which has the power to dismiss the citation entirely.

Mr. Britt's letter brief, in explaining the Board's decision in *Alki, Inc.*, states:

In interpreting the language of 4-471(c), the Board equates an adjudication of a citation to a violation under the Liquor Code. Therefore, each adjudication within a four year period is considered in applying the mandatory suspension, regardless of any other time proximity between the adjudications. (emphasis added).

There is a difficulty with Mr. Britt's argument, although I do not hold it against him. He uses the word "adjudication" when actually I think he meant to use "adjudicated violation" or "violation." The argument that each adjudication is to be considered is the position one would expect Mr. Britt's opponent to advocate.

I believe *Ball Park's Main Course, Inc.* requires the conclusion that the date of the violation is of no importance; the controlling date is the mailing of the ALJ's adjudication.

Another factor militates in favor of a finding that it is the adjudication's mailing date which controls: it is common for citations to contain multiple counts and to state multiple dates of violation within each count. To avoid the administrative headache which would ensue, this Office has always considered the mandatory penalty parameters set forth in 47 P.S. §4-471 as applicable to each separate count (no matter how many dates are involved).

Thus, a citation which alleges sales to minors on four different dates does not authorize a separate penalty for each date. In the case of four distinct citations, each alleging a sale to a minor on a single date, the ALJ is constrained by the law's penalty parameters as they apply to each case. Therefore, if a fine is involved it must be at least \$1,000 and not more than \$5,000 in each case.

It is my opinion that adjudicated citations become a part of "the licensee's prior citation history" (as that phrase is used in 47 P.S. §4-471(c)) as of the date they are mailed from this Office. I can see no principled reason why the procedure should be different in nonrenewal cases than it is in enforcement cases.

Therefore, Licensee has, as of the date these adjudications are mailed, the following:

PRIOR RECORD:

Licensee has been licensed since November 1, 2010, and has had one prior violation:

In re Citation No.11-1643. \$300.00 fine.

1. Loudspeakers. August 21, 2011.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$1,000.00 to \$5,000.00 range, or both, for violations of the type found in this case. Mandatory R.A.M.P. – certification is required by 47 P.S. §4-471(d) in these circumstances.

It is my opinion that 47 P.S. §4-471(c) does not require a suspension or revocation of license under these circumstances. This conclusion does not depend, like Judge Flaherty's adjudication in *Alki, Inc.*, on the continuing existence of a period of time within which a prior adjudication might still be appealed. My conclusion depends on the fact that none of the adjudications I am announcing in this opinion can be said to be prior or subsequent to any of the others.

This important difference is what distinguishes this case from *Alki, Inc.*

All of this having been said, I am mindful of my responsibility to participate in the regulation of the beverage industry in a way which promotes the Liquor Code's values. Four adjudicated violations for sales to minors in a seven-month period is a serious matter, and a serious penalty must be imposed.

Suspension of a restaurant liquor license entails costs – to the licensee, obviously, but also to the government, the community, and the people involved in the enterprise. As a way to recoup the Commonwealth’s considerable expense in this area, I have, therefore, generally preferred fines over suspensions. To be sure, an unreconstructed repeat offender deserves worse, but it is my judgment that this is not what I have before me in this case.

In discharging my responsibility to impose a penalty which is commensurate with the nature of the violation and the surrounding circumstances, I consider in every case the option I have to suspend or revoke a license. It will come as no surprise that I prefer a degree of latitude in this area, because there are cases in which application of a mandatory suspension requirement works an injustice.

I consider as well the point made by counsel for Licensee that this restaurant has a seating capacity of 600, and that the number of violations found during this time period, as a proportion of the total number of customers served, is hardly excessive (N.T. 11). This is especially so when one recalls other cases in which licensed premises have been found to contain large numbers of minors.

I wish to make it clear that my penalty assessment in this case does not include a suspension of license because (1) it is my opinion that one is not required by the law and (2) it is my opinion that one is not warranted by the particular circumstances of these cases. In the event that a reviewing authority finds otherwise, it is not my intention that Licensee should serve such a suspension in addition to the monetary penalty I am imposing.

The recommendation of the parties as to fine is adopted. Penalties are assessed as follows:

Citation No. 12-1198C – a fine of \$1,250.00.

Citation No. 12-1503 – a fine of \$2,000.00 (counts merged for penalty).

Citation No. 13-0186 – a fine of \$2,500.00.

Citation No. 13-0385C – a fine of \$3,000.00.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, DSD Entertainment, Inc., License No. R-AP-SS-EHF-7680, shall pay a fine of eight thousand seven hundred fifty dollars (\$8,750.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee’s license will be suspended or revoked. Jurisdiction is retained.

IT IS FURTHER ORDERED that Licensee shall comply with the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management in the following manner. The Licensee is directed to contact the Bureau of Alcohol Education, Pennsylvania Liquor Control Board (toll free telephone: 1-866-275-8237; www.lcb.state.pa.us) within thirty (30) days of the mailing date of this adjudication in order to receive assistance in the compliance process. Licensee must receive certification within ninety (90) days of the mailing date of this adjudication. Licensee must remain in compliance for a period of one year from the date such certification is

issued. The Bureau of Liquor Control Enforcement is further directed to monitor compliance with this adjudication.

Failure to comply with this order will be grounds for modification of penalty in this case. Failure to comply may also constitute grounds for issuance of a new citation as authorized by Section 471(d) of the Liquor Code, 47 P.S. Section 4-471(d).

Dated this 8TH day of JULY, 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.

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. Please make your 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