

Mailing Date: APR 26 2013

[Appeal](#)

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

PENNSYLVANIA STATE POLICE	:	In Re Citation No. 12-1348
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W03-440483
v.	:	
	:	
DERRY STREET PUB INC.	:	PLCB LID No.: 59887
2312 DERRY ST.	:	
HARRISBURG, PA 17104-2760	:	
	:	PLCB License No.: R-AP-SS-EHF-12671

**ADJUDICATION**

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: John H. Pietrzak, Esquire

FOR LICENSEE: William C. Kollas, Esquire and James W. Kollas, Esquire

**BACKGROUND:**

This proceeding arises out of a citation, containing one count, that was issued on September 13, 2012, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Derry Street Pub 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 February 17 and July 15, 2012.<sup>1</sup>

I presided at an evidentiary hearing on February 27, 2013 at the Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania. The matter was submitted by way of agreement of facts.

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

**FINDINGS OF FACT:**

1. The Bureau began its investigation on December 19, 2011 and completed it on August 17, 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 August 28, 2012. The notice alleged the violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 5)
3. On or about November 28, 2011, Licensee's President and the Chief Counsel of the Pennsylvania Liquor Control Board (PLCB) signed a Conditional Licensing Agreement (CLA). The CLA was effective December 6, 2011, the day the PLCB approved the CLA. By letter of December 8, 2011, Licensee was notified of the PLCB's action. (Commonwealth Exhibit No. C-3, N.T. 74)
4. During the investigation, the Bureau conducted twelve visits to the licensed premises. On ten of those visits, no violations were uncovered. One of the ten was an Age Compliance Check which Licensee passed. (N.T. 62)
5. On February 17, 2012, an undercover Bureau Enforcement Officer entered the premises at 11:00 p.m. without being required to show any identification. The Officer subsequently purchased an alcoholic beverage. (N.T. 14-19)

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<sup>1</sup> As more fully expressed in the Discussion, the charge is grounded in Liquor Code Section 470 [47 P.S. §4-470]. The citation's statutory reference to Liquor Code Section 404, though immaterial, is incorrect.

6. a. On July 15, 2012, an undercover Bureau Enforcement Officer entered the premises at 10:40 p.m. without being questioned as to age and without undergoing a metal detection device search. The Officer subsequently purchased an alcoholic beverage. (N.T. 3235)

6. b. There was a man situated inside the premises at the entrance. He stood by a table with a cash register on it. He was dressed in dark clothing, typically an outfit that a security person wears. He held a metal detection wand. (N.T. 36-37)

6. c. The Officer remained at the premises from 10:40 p.m. to 11:50 p.m. on July 15, 2012. Licensee provided amplified music the entire time. (N.T. 35-36)

### **CONCLUSIONS OF LAW:**

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

#### ***February 17, 2012***

2. Because the undercover Officer was served an alcoholic beverage, but Licensee failed to verify the Officer's age prior to serving the Officer, by using a transaction scan device (Finding of Fact 5), Licensee violated the CLA, specifically Paragraph 8.g.

#### ***July 15, 2012***

3. The three legal conclusions which follow independently mandate dismissal.

a. The CLA's effective term ended on February 29, 2012, by agreement of the parties.

b. Alternatively, the statutory *supersedeas* provided for in Liquor Code Section 464 [47 P.S. §4-464] prevails over the CLA.

c. Alternatively, by operation of law, a license renewal CLA expires at the end of the licensing term for which it was issued.

### **DISCUSSION:**

Curiouser and curiouser have Adjudications alleging CLA violations become. Instantly, this matter is so intricately convoluted that one may wonder if the statutory scheme can ever be

unraveled. We begin this journey with an abridged version of the environment in which the operative and undisputed facts are embedded, the procedural history.<sup>2</sup>

**A. Procedural History**

The PLCB refused to renew Licensee's license for the two years term beginning March 1, 2010. Licensee challenged that refusal. While the matter was in litigation before the PLCB, Licensee continued to operate by virtue of temporary authority. Licensee's temporary authority ended when the PLCB finalized its decision to refuse to renew and notified Licensee of same (Licensee Exhibit Nos. 1-5).

Licensee filed an appeal to the Dauphin County Court of Common Pleas (DCCCP). The appeal permitted Licensee to operate while the matter was pending, as provided for in Liquor Code Section 464, relating to a licensee's authority to continue to operate while the Court considers the *de novo* appeal. Less than three months before the end of the licensing term in question, the PLCB and Licensee entered into the CLA. Effective December 6, 2011, the CLA terminated the refusal-to-renew litigation.<sup>3</sup>

In the meantime and before the CLA became effective, Licensee was already processing a license renewal for the second two years term beginning March 1, 2012.<sup>4</sup> The PLCB also challenged that renewal. On June 13, 2012, the PLCB notified Licensee that the license would not be renewed and simultaneously withdrew Licensee's temporary authority to operate. (Licensee Exhibit No. 14)

On June 15, 2012, Licensee filed an appeal to the DCCCP challenging the second refusal to renew. Licensee continued to operate while that *de novo* appeal was pending as provided for in Liquor Code Section 464. The alleged violation of July 15, 2012 occurred just one month after the appeal was filed and while a statutory *supersedeas* was in place. (Licensee Exhibit No. 1)

On January 8, 2013, the DCCCP entered an Opinion and Order. Judge Curcillo granted the license renewal. (Licensee Exhibit No. 17)

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<sup>2</sup> Licensee's Exhibit Nos. 1-17 were admitted to demonstrate that procedural history.

<sup>3</sup> The first charged violation of February 17, 2012 occurred within the two years licensing term then at issue. Consequently, Licensee's arguments for dismissal, as well as those herein, cannot apply.

<sup>4</sup> The application was filed on November 21, 2011. (Licensee Exhibit No. 7)

***B. Licensee's Arguments for Dismissal***

Licensee's counsel argues the legal theories which follow, independently or in some combination, render the CLA unenforceable beyond the two years licensing interval: Equitable Estoppel; Covenant of Good Faith; Doctrine of Necessary Implication. (N.T. 111) These three theories strike similar chords. In essence, counsel argues that extending a CLA's operative effect beyond the renewal interval for which it was issued is unfair.

Counsel claims the necessary facts to apply these theories are within the framework of the proceeding before Judge Curcillo. (N.T. 102, 104, 113-114, 124, 128-129, 131) At the hearing, I repeatedly asked counsel to direct me to of-record facts and to Judge Curcillo's Opinion and Order in order for me to invoke any of the theories. It was not by lack of imagination or effort that counsel could not do so. The facts were simply not present.

Counsel also argues the PLCB's Order of February 13, 2012, granting Licensee temporary authority to operate while the second refusal to renew was in litigation before the PLCB (Licensee Exhibit No. 13), rescinds the CLA's continued operative effect. What can be accurately said about the Order is that it neither confirms nor denies the CLA's continuing application.<sup>5</sup>

***C. Bureau's Argument that an Administrative Law Judge Cannot Assess a CLA's Validity***

At the hearing, Bureau counsel remarked that an Administrative Law Judge cannot determine a CLA's validity. Put another way, a tribunal required to determine whether an agreement has been violated, precisely the assigned task in this matter, has no authority to determine the agreement's validity.<sup>6</sup>

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<sup>5</sup> The letter of February 13, 2012 (Licensee Exhibit No. 12) which accompanies the Order does refer to the CLA. Appearing in the letter's first page, final paragraph, that reference is clearly not intended to convey the CLA's continuing effect. The CLA is mentioned as added foundation to refuse to renew the license.

<sup>6</sup> Apparently, the statutory authority in Liquor Code Sections 404 and 470, mandating CLA judicial evaluation, are to be ignored.

It is unquestionably within an Administrative Law Judge's general authority to interpret an agreement and evaluate its application. Otherwise, the statutory imperative of applying a CLA to facts is meaningless. In actuality, every CLA violation determination has, as its underpinnings, the affirmative duty to evaluate a CLA's applicability to conduct.

***D. Reasoning For Conclusion of Law No. 3.a.***

***1. Relevant Contract Interpretation Principles***

The object of all contract interpretation is to ascertain and effect the intent of the parties (PLE, Contracts §§141 and 144). Ordinarily, a tribunal is to interpret and enforce a contract as written (PLE, Contracts §143). The sense of words used should be adopted which best harmonizes with the context (PLE, Contracts §148). A contract must be construed reasonably to avoid an absurdity, injustice or an unlawful end (PLE, Contracts §153). A contract is to be construed against the party responsible for the selection of the words used or the form adopted (PLE, Contracts §155).

***2. Applying Contract Interpretational Principles to the CLA***

The CLA has no distinct provision providing for its effectiveness beyond the renewal term for which it was issued. In so remarking, I have not forgotten about Paragraph 10 of the CLA, which, at the hearing, I read as extending the CLA. After more deliberate consideration, I now conclude I misapplied the law.<sup>7</sup>

The conditions in which the CLA was created convey the intent to contain its operative effect to the two years licensing term beginning March 1, 2010. The CLA settled the litigation then in progress at the DCCCP.

In fact, Paragraphs 1 through 7 of the CLA are what may be characterized as preamble, often otherwise introduced by "**WHEREAS.**" Contract preamble does not express obligations. Preamble functions as a means of memorializing a contract's purpose thereby assisting in meaning. Paragraph 6, part of that preamble, mentions the then pending *de novo* appeal.

By letter of December 6, 2011 (Licensee Exhibit No. 8), PLCB counsel advised

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<sup>7</sup> Paragraph 10's first sentence, while not identical to Liquor Code Section 404, seems to have been extracted from there. Moreover, Liquor Code Section 404 is not the statutory basis for the CLA. The Discussion which follows demonstrates that Liquor Code Section 404 has no connection whatsoever with the CLA in controversy.

Licensee's counsel the CLA was finalized. Counsel further requested Licensee to withdraw the then pending appeal. That litigation had one issue, i.e. the appropriateness of the PLCB's refusal to renew the license for the two years term beginning March 1, 2010.

In this posture, the CLA cannot be extended beyond its terms as the CLA was intended to settle the matter then pending before the DCCCP.

***E. Reasoning For Conclusion of Law No. 3.b.***

The July 15, 2012 alleged violation occurred when a *supersedeas* was in place. Liquor Code Section 464 provides that an appeal to the Court of Common Pleas of a refusal to renew acts as a *supersedeas* (commonly referred to as an automatic *supersedeas*). In ordinary use, a *supersedeas* is an Order halting a proceeding or the effect of another Order. As the word's derivation implies, a *supersedeas* supplants, replaces, or substitutes. Liquor Code Section 464 goes on to provide for the *de novo* Court's authority to alter an automatic *supersedeas* "upon sufficient cause shown." As the opposing party in a refusal-to-renew *de novo* appeal, the PLCB could have applied to the DCCCP for an automatic *supersedeas* modification.<sup>8</sup>

Liquor Code Section 464 initially sets the scales in favor of a licensee while the matter is pending before the *de novo* Court. That *supersedeas* overrides any refusal-to-renew CLA, subject to the PLCBs ability to seek a modification upon sufficient cause shown.

***F. Reasoning For Conclusion of Law No. 3.c.***

***1. Relevant Statutory Construction Principles***

The object of all statutory interpretation is to ascertain and effectuate the intention of the General Assembly [1 Pa. C.S.A. §1921]. In ascertaining the General Assembly's intent, a tribunal shall presume that the General Assembly did not intend a result that is absurd, impossible of an execution, or unreasonable [1 Pa. C.S.A. §1922]. A statute's title and preamble may be considered in the construction thereof, although not controlling [1 Pa. C.S.A. §1924].

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<sup>8</sup> As an example, in **BLCE v. Sammark, Inc.**, In Re Citation No.: 09-1453, [www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication\\_year=2009&adjudication\\_sequence=1453&appeal=n](http://www.lcbapps.lcb.state.pa.us/webapp/Legal/PublicAdjudicationDisplay.asp?adjudication_year=2009&adjudication_sequence=1453&appeal=n), the Bureau issued a citation which charged the licensee with violating an Order of the Centre County Court of Common Pleas. The Order was a modification of the automatic *supersedeas* granted the licensee when it appealed the PLCB's refusal to renew to that Court.

When the words of a statute are clear and unambiguous, a Court cannot disregard them under the pretext of pursuing the spirit of a statute, **Grom v. Burgoon**, 672 A.2d 823 (Pa.Super. 1996). In ascertaining legislative intent for purposes of construing a statute, the practical results of a particular interpretation may be considered, **Lehigh Valley Co-Op. Farmers v. Com., Etc.**, 447 A.2d 948 (Pa. 1982). A court need not defer to an agency where its construction of a statute frustrates legislative intent, **Velocity Express v. Human Relations**, 853 A.2d 1182 (Pa.Cmwlth. 2004).

## ***2. Scope of Agency Authority***

Administrative agencies have only those statutory powers as have been granted to, or conferred on them by law. (PLE, Administrative Law and Procedure §31).

## ***3. Relevant Liquor Code Provisions***

The PLCB's power to enter into CLAs resides in Liquor Code Sections 404, 431 [47 P.S. §4-431], 432 [47 P.S. §4-432], and 470.<sup>9</sup> The first three are parallel provisions, each addressing a different license class. The last, Liquor Code Section 470, is an umbrella provision similarly applying to the prior three Sections. In relevant part, Liquor Code Sections 404, 431, and 432 identically provide:

*The board may enter into an agreement with the applicant concerning additional restrictions on the license in question. If the board and the applicant enter into such an agreement, such agreement shall be binding upon the applicant... If the board enters into an agreement with the applicant concerning additional restrictions, these restrictions shall be binding on subsequent holders of the license until the license is transferred to a new location or until the board enters into a subsequent agreement removing those restrictions. If the application in question involves a location previously licensed by the board, then any restrictions imposed by the board on the previous license at that location shall be binding on the applicant unless the board enters into a new agreement rescinding those restrictions.*

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<sup>9</sup> Also see Liquor Code Section 102 [47 P.S. §1-102], definition of "license period" as more fully discussed in Section 5, which follows.

**4. *Applying Relevant Statutory Construction, Administrative Law, Scope of Agency Authority Principles, and Liquor Code Provisions***

Liquor Code Section 404 applies to restaurant licensees like Licensee. That Section defines the PLCB's authority with respect to initial license applications, transfers, and extension of premises. The PLCB may enter into a CLA when a license is first granted, transferred, or premises extended at a given location. There is no ambiguity in the above excerpted text. It plainly and clearly provides for a CLA's extension to subsequent licensees and licensing intervals.

However, the power to extend a CLA ends when a license is transferred to a new location. Moreover, if a license is transferred in-place, an in-place (initial) CLA may be extended to the new licensee. The PLCB's Liquor Code Section 404 CLA authority is directed at location. It is similar to a deed restriction; it encumbers a location.<sup>10</sup>

In distinction, Liquor Code Section 470 is all about license renewal. The CLA enabling provision does not completely track the above excerpt. Liquor Code Section 470 is limited to the excerpt's first two sentences.<sup>11</sup> Liquor Code Section 470 contains no comparable language to permit a CLA extension, beyond the two years renewal term for which it applies.

Having only that renewal CLA authority granted in the Liquor Code Section 470 and that authority being described differently in two relevant Liquor Code provisions, the more limited being in the refusal-to-renew setting, the PLCB cannot extend a renewal CLA to a future two years renewal period.<sup>12</sup>

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<sup>10</sup> The excerpt confusingly uses "shall," a word generally construed as mandatory, yet permits the PLCB to exercise discretion.

<sup>11</sup> The relevant text provides: The board may enter into an agreement with the applicant concerning additional restrictions on the license in question. If the board and the applicant enter into such an agreement, such agreement shall be binding upon the applicant.

<sup>12</sup> There is nothing to prevent the PLCB and a licensee to enter into the same Renewal CLA, they endorsed for the previous two years renewal period.

**5. *The Interpretive Result Meshes with the Liquor Code's General Licensing Structure***

Liquor Code Section 404 CLA's authority primarily concerns itself with location, the operator being secondary. That CLA basis apparently derives from a belief that it is the license's location which promotes added operating concerns no matter how diligent the operator may be. In this manner, it makes sense to permit a CLA to extend to future licensees, subject to the PLCB's ability to eliminate a CLA, most likely when location difficulties are gone.

If the area in which a licensed premises is located continues to contribute to the necessity of limiting a licensee's normal operating privileges, continuing a Liquor Code Section 404 CLA until the neighborhood changes is consistent with that Section's wording.

Moreover, initial applications, transfers, or extensions of premises are one-time processes. As the word implies, renewal is repetitive. Renewal is an opportunity, indeed a mandate, for the PLCB to assess a range of license eligibility requirements based upon a licensee's operating history, which, at every renewal, includes an additional two years operating history. Were the PLCB authorized to adopt and maintain a renewal CLA, perhaps in perpetuity, the duty of biennial license eligibility evaluation would be rendered meaningless.

The two years renewal process envisions that government decisions will be exercised at regular, relevant, and meaningful intervals, with the benefit of the most recent operating history at hand. A renewal CLA with impact beyond the term for which it initially applies abrogates that purpose and duty.

Such a CLA also deprives a licensee of the constitutional right and statutory privilege of challenging a future refusal to renew based upon the licensee's then existing operating history.

Liquor Code Section 102 [47 P.S. §1-102], in which a "license period" is defined, also coincides with the legislative licensing plan. There is much more in that definition than a description of the term's meaning. Therein, the Legislature also described and circumscribed the PLCB's license validation authority. At renewal midterm (validation), the PLCB "shall extend and validate license privileges," so long as the licensee has remitted the proper fees and the Pennsylvania Departments of Revenue and Labor and Industry do not object.

With respect to license compliance at validation time, the definition offers no authority to refuse to renew the license based upon an unsatisfactory operating history. Instead, if a licensee is not in compliance, the definition prescribes the citation process as the government's response.

The PLCB's validation authority is virtually a "rubber stamp" process, concerned only with financial matters. These midterm renewal limitations elevate the significance of evaluating a licensee's eligibility at renewal time.

### **PRIOR RECORD:**

Licensee has been licensed since June 20, 2008, and has the following Adjudication history:

In Re Citation No.: 09-1762. Fine \$1,700.00 and RAMP training mandated.

1. Sales to a minor on June 13, 2009.
2. Minor frequenting on June 13, 2009.

3. Used loudspeakers or devices whereby music could be heard outside on May 30 and 31, 2009.

In Re Citation No.: 10-1215. Fine \$450.00.

1. Failed to require patrons to vacate the premises not later than one-half hour after the required time on January 23, 2010.
2. Permitted patrons to possess or remove alcoholic beverages after 2:30 a.m. on January 23, 2010.
3. Failed to appoint a Board-approved full-time Manager for the licensed premises during the period June 2009 through February 17, 2010.

**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 a \$50.00 fine

**ORDER:**

In Re Citation No.: 12-1348; Licensee, Derry Street Pub Inc.; PLCB LID No.: 59887; PLCB License No.: R-AP-SS-EHF-12671

***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 23<sup>RD</sup> 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](http://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

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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