

Mailing Date: MAR 13 2014

[Appeal](#)

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

PENNSYLVANIA STATE	:	In re Citation No. 12-1417
POLICE, BUREAU OF	:	
LIQUOR CONTROL ENFORCEMENT	:	BLCE Incident No. W09-444371
	:	
v.	:	PLCB LID No. 40001
	:	
851 PENN STREET, INC.	:	PLCB License No. R-AP-SS-526
851-853 PENN ST.	:	
READING, PA 19601-3607	:	

JUDGE SHENKLE
BLCE COUNSEL: Roy Harkavy, Esq.
LICENSEE COUNSEL: Francis X. O'Brien, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on September 26, 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, on April 14, 2012, by operating the licensed establishment in a noisy and/or disorderly manner.

The second count alleges two violations: **first**, that Licensee violated §471 of the Liquor Code, P.S. §4-471, and §§2701, 2702, 2705, 2709 and 5503 of the Crimes Code, 18 Pa. C.S. §§2701, 2702, 2705, 2709 and 5503, on April 14, 2012, on the basis that its servants, agents or employees committed simple and aggravated assault, recklessly endangering another person, harassment and disorderly conduct; and **second**, on the same date, that it violated §471 of the Liquor Code, P.S. §4-471, and §6105(a)(1) of the Crimes Code, 18 Pa. C.S. §6105(a)(1), on the basis that its servant, agent or employee, Victor Manuel Melendez-Rivera possessed, used, manufactured, controlled, sold or transferred firearms.

A hearing was held on December 19, 2013, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. At about 2:00 a.m. on April 14, 2012, a Reading police officer was sitting in his vehicle in front of another licensed restaurant known as the Jet Set, at 118 S. 9th Street. He was speaking to one of the security guards there when he heard a series of gunshots nearby, north of his location. The officer looked towards Penn Street and saw a couple of people running. He entered his vehicle and drove to that area, advising dispatch of what he heard and requesting help (N.T. 9-11).

2. On the way to the 800 block of Penn Street the officer heard additional gunfire. When he was half a block away from the Italian Garden (Licensee's premises), the officer parked his vehicle and proceeded on foot, using the building for cover. He saw a group of people in front of the licensed premises. He did not see anyone shooting. The officer drew his weapon and approached the group. As he did, the officer saw a man tucking a handgun into his waistband. He ordered everyone to drop to the ground, and waited for backup to arrive (N.T. 11-12).

3. The officer recognized one of Licensee's bouncers, who assisted him in keeping the group on the ground. After other police arrived, the officer retrieved the weapon from the man who had put it in his waistband, and arrested him. The police kept everyone inside the licensed premises for interviews, and a short time later located a shooting victim (N.T. 12-13).

4. The police contacted Licensee's manager, who came to the scene and assisted them by retrieving the footage from his security camera system. The officer reviewed this footage, as well as footage from the City's cameras, which recorded the shooting scene outside (N.T. 13-14).

5. The group which the officer ordered to the ground outside the premises consisted of between five and seven people. Two firearms were recovered from this group; both were handguns possessed by Licensee's security personnel (N.T. 18-19).

6. A City of Reading police detective reported to the shooting scene and interviewed three of Licensee's security personnel. They stated that numerous shots were fired in the front of the bar, outside, and they believed everyone inside the bar was in danger, so they went outside with their firearms and fired several shots (N.T. 21-22).

7. The outside video of the event shows the three bouncers in front of the licensed premises. A car drives by with its window open. Muzzle flash is seen. The bouncers return fire. The video from inside the licensed premises shows what happened first: the bouncers react to shots outside by retrieving their handguns, which were hidden behind the bar. Victor Menendez is seen to handle a firearm, which he is prohibited from doing as he is a convicted felon (N.T. 22-25).

8. Police charged José Ortiz, one of Licensee's bouncers, with aggravated and simple assault, recklessly endangering another person, and propulsion of missiles into an occupied vehicle on the roadway. He pled guilty to recklessly endangering another person (N.T. 26-27).

9. Police charged Cory Bryant, one of Licensee's bouncers, with recklessly endangering another person and propulsion of missiles into an occupied vehicle on the roadway. He pled guilty to recklessly endangering another person (N.T. 27).

10. Police charged Victor Melendez-Rivera, one of Licensee's employees, with possession of a firearm by person prohibited from doing so, and he was convicted. (N.T. 27).

11. Police charged Raymond Garcia-Ortiz, one of Licensee's employees, with aggravated assault, recklessly endangering another person, and possession of a firearm by person prohibited from doing so. The gunshot victim was uncooperative, so he was convicted only of the firearm violation (N.T. 28).

12. The security personnel referred to in findings #8 and 9, above, were licensed to carry firearms, and it would have been lawful for them to carry firearms openly inside the licensed premises, although they did not do this (N.T. 28-29).

13. In the late evening and early morning of April 13-14, 2012, José Ortiz was working as a bouncer at the licensed premises. There had been an altercation inside involving two separate groups, who were escorted out. As soon as this had been done, before the door closed, Ortiz heard gunshots outside. Everybody ducked. He thought people were coming in, shooting. Ortiz jumped over the bar to retrieve his firearm, grabbed it, jumped back over the bar, and heard another last shot. He went to the door to go outside and saw a BMW, with a gun inside it pointing in his direction. Ortiz shot twice in the air as a warning. The person in the car fired one shot in his direction, and then a shootout commenced (N.T. 33-35).

14. After the car drove off, there was still firing. Another bouncer came out and also fired at the car. The bouncers subdued two individuals on the sidewalk, who had been in an altercation with the first group that had guns. In a short time half of Reading's police force was on the scene. Ortiz pled guilty to misdemeanor reckless endangerment for the two shots he fired in the air (N.T. 35-36).

15. Mr. Ortiz felt threatened on the job "because of the area it's in, you get a lot of not so upstanding citizens in there." When people had to be escorted out of the premises they would turn their attention to the bouncers and threaten them. The rules regarding escorting people out were that the bouncers were not supposed to lay hands on them, but to try to talk to them on the way out, to not let them take alcohol outside, and to touch them only when there was a fight and it was physically necessary. The owner's directions were to have nothing to do with what goes on outside, to leave that to the police (N.T. 37-38).

16. One night there was a group of 20 to 30 guys who were going from bar to bar, trashing the places and fighting. Mr. Ortiz was at the door and saw this group coming down the street. He told them they couldn't come in. The people tried to push their way in. The other bouncer came to assist him and there was a full-blown fight at the door over this. One of the guys showed Mr. Ortiz a handgun he had in his waist; this person told Ortiz he was going to kill him. This was what prompted Mr. Ortiz to ask Licensee's owner if he could bring his gun to work. After the owner talked with police and verified that Ortiz had a permit, he agreed (N.T. 39-40, 49-51).

17. At the time of this incident Licensee had a video surveillance system with eight cameras; afterwards, this number was increased to sixteen. There is a metal detector at the door and a transaction scanner to verify identifications (N.T. 48-52).

18. The recorded video inside the premises shows that the handguns were hidden in a location where they could be seen only by a person behind the bar who was crouching and reaching deeply into a small dark space under the bar. Licensee's owner knew of Victor's previous criminal record, but let him work in the premises as a cleaner, not as a bouncer or bartender. The video shows Victor in possession of a handgun, but he did not take it outside (N.T. 51-57).

CONCLUSIONS OF LAW:

The evidence did not prove that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, on April 14, 2012, by operating the licensed establishment in a noisy and/or disorderly manner.

The evidence did not prove that Licensee violated the Liquor Code or the Crimes Code on April 14, 2012, because the acts of its employees outside the premises on that date were not directed or authorized by Licensee.

The evidence did not prove that Licensee violated the Liquor Code or the Crimes Code on April 14, 2012, because the act of Victor Manuel Melendez-Rivera in possessing a firearm was not directed or authorized by Licensee.

The evidence did not show that Licensee knew in advance or that it should have known in advance of the dangerous events which took place outside the licensed premises on April 14, 2012.

The action of Licensee in permitting its security personnel who were licensed to carry firearms to bring their weapons to work for self-protection was not negligent or causative of the events of April 14, 2012.

DISCUSSION:

As to the first count of this citation, the result is controlled by *In re Ciro's Lounge, Inc.*, 24 Pa. Cmwlth. Ct. 589, 358 A.2d 141 (1976). This was an appeal by the licensee from an order of the Philadelphia Common Pleas Court affirming an order of the Board revoking the liquor license for operating the premises in a disorderly manner. The sole question presented was whether a single act of disorderly conduct was a sufficient basis for the penalty. There was no factual dispute that the licensee's proprietor shot a boisterous patron while attempting to remove him following a dispute.

The court in *Ciro's Lounge* quoted extensively from *Petty Liquor License Case*, 216 Pa. Super. Ct. 50, 258 A.2d 874 (1969). The *Petty* court reviewed the history of noisy and disorderly operation in the context of the "other sufficient cause" provision of 47 P.S. §4-471(a), and found that a penalty for noisy and disorderly operation could be imposed on that basis.

The court in *Ciro's Lounge* agreed with the holding in *Petty*, but added that "where noise and disorderly conduct are isolated, and not of a relatively continuous nature causing disturbance and effrontery to the public welfare, peace and morals, Section 471 should not be the basis for suspension or revocation of a liquor license." 358 A.2d at 143.

In re Revocation of Restaurant Liquor License Issued to Arthur A. Banks, 59 Pa. Cmwlth. Ct. 443, 429 A.2d 1279 (1981) reversed a penalty based on noisy operation because only one instance was shown, relying in *Ciro's Lounge*.

In this case the evidence related only to a single incident, and it was therefore insufficient to support the allegation of the first count.

As to the second count, the result is controlled by *PLCB v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988), in which 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.

I find that there is no evidence of a pattern of illegal activity caused by noisy and/or disorderly operation at the licensed premises prior to the events of April 14, 2012, and therefore Licensee cannot be held responsible for those events.

The proximate cause of the events of April 14, 2012, was the criminal behavior of persons who were not Licensee's agents, servants or employees. Licensee committed no act or omission which facilitated, caused, or contributed to that criminal behavior.

I find that Licensee took reasonable precautions to ensure the safety of its patrons in all respects, and that it is not responsible for the events of April 14, 2012.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 12-1417 is DISMISSED.

Dated this 25TH day of FEBRUARY, 2014.



David L. Shenkle, J.

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.