

Mailing Date: July 16, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 12-1417
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
851 PENN STREET, INC.	:	License No. R-526
851-853 Penn Street	:	
Reading, PA 19601-3607	:	LID 40001

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DISSENTING OPINION

I respectfully dissent from my colleagues in their affirmance of the ALJ's dismissal of Count 2 of the Citation. The decision of the ALJ was an abuse of discretion, where there was substantial evidence presented, based

upon which the ALJ could have, and I would submit *should* have sustained Count 2 of the citation.

The ALJ's conclusion that Licensee was not liable for the criminal acts of his employees under the circumstances presented at the administrative hearing defies not only reason and logic, but the very essence of the heightened duties to which licensees assent. As our courts have held, "anyone who receives permission from the Commonwealth to carry on the liquor trade assumes the highest degree of responsibility to his fellow citizen." Halter v. Com., Pennsylvania Liquor Control Bd., 579 A.2d 983, 985 (Pa. Cmwlth. 1990) citing Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959).

In applying the standard set forth by our Supreme Court in TLK, the ALJ reasoned that "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." (Adjudication, p. 4). Further, the ALJ found that Licensee took reasonable affirmative measures to

“ensure the safety of its patrons in all respects.” (Adjudication, p. 5). These conclusions are patently erroneous.

By his own admission, starting two (2) or three (3) months prior to April 14, 2012, Licensee’s owner permitted his security staff to bring firearms into his licensed establishment, at their request, due to events occurring on the premises involving fights and threats from some individuals. The security personnel wanted to have guns for their own protection. (N.T. 40, 49).

Licensee took no affirmative measures to prevent the events of April 14, 2012 from happening. No policy as to the usage or safe storage of the guns was implemented, nor did Licensee take any measures to ensure that its staff was trained or skilled in firearm usage. Licensee knew of the problems that the bar was having with certain clientele, yet took no reasonable or responsible measures to correct them. It can hardly be said that permissively and thoughtlessly allowing guns to be brought into an apparently already dangerous environment, with no further instruction or implementation of security measures, is an “affirmative measure” designed to *ensure* the safety of patrons. Here, the proof is in the record where, in the absence of policies

implemented by Licensee, the danger was pursued and escalated by its armed employees.

I agree with the Bureau's assertion that *scienter* was established through the undisputed evidence that "Licensee's business practice in allowing his security employees to bring weapons onto the premises and keep the weapons behind the bar facilitated or enabled and made it more likely that gun violence would occur." (Bureau's Brief, p. 8). Licensee's permissive behavior made it nearly inevitable that gun violence (inherently criminal conduct) would occur. Licensee took no corresponding measures to prevent such conduct from occurring, thus the requirements of TLK have been satisfied.

The majority opinion distinguishes the facts herein from those in TLK, whereby TLK cited a lengthy series of criminal acts to establish the requisite *scienter*, and "the criminal conduct by Licensee's employees here took place within minutes." However, the undisputed evidence from the hearing established that Licensee had knowledge of problems with his clientele for at least two (2) or three (3) months prior to April 14, 2012. (N.T. 49). Those problems are what gave rise to Licensee's owner allowing his security staff to bring guns to the establishment. (N.T. 40, 49). A licensee cannot

simply allow his employees, even if licensed to carry firearms, to bring their guns to its establishment to protect themselves, keep the guns in an unsecured area, accessible and known to other employees, and then be absolved by a cloak of proclaimed ignorance when the employees engage in a “shoot-out” outside the bar, in the name of “self-protection”. (N.T. 35)¹. The fact that two (2) of the gun-toting employees were licensed to carry concealed weapons is of no import here, given the reckless manner in which the guns were used.

The inherent dangerousness of guns is only intensified when, as here, they are not safely stored and improperly handled by persons who seemingly have no meaningful training in appropriate firearm usage. To allow Licensee to perpetuate such a hazardous “wild-west” environment shirks not only its duties and responsibilities as a licensee, but the duties of this Board to regulate licensed establishments for the protection of the public.

¹ This claim of self-protection is belied by the testimony presented at the hearing, which established that the employees left the bar and shot at a fleeing vehicle, thus not only escalating the violence of the situation and the risk of injury to themselves, patrons, and the general public, but also putting themselves further into harm’s way, rather than remaining or retreating into the safety of the bar to ensure the safety of its patrons. Furthermore, Licensee’s employees were convicted of multiple crimes stemming from the April 14, 2012, shooting. In particular, two (2) employees pled guilty to recklessly endangering another person, and two (2) employees were convicted of possessing a firearm while being prohibited from doing so because of prior felony convictions.

The Bureau presented substantial evidence to support its citation as to Count 2, including the requisite *scienter* establishing that Licensee knew or should have known about the criminal conduct that occurred on April 14, 2012. For several months prior to April 14, 2012, Licensee knew that the guns being brought into the establishment would be used, but did nothing to control or prevent their usage. The finding of the ALJ to the contrary was a clear abuse of discretion.

For the foregoing reasons, I would reverse the Adjudication and Order of the ALJ as to Count 2.

Joseph E. Brion, Board Chairman