

Mailing Date: MAR 13 2014

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

PENNSYLVANIA STATE : In re Citation No. 12-1488
POLICE, BUREAU OF :
LIQUOR CONTROL ENFORCEMENT : BLCE Incident No. W02-450902
 :
v. : PLCB LID No. 66673
 :
JHKR, INC., T/A LEONARD'S FINE DINING : PLCB License No. R-AP-SS-4317
REAR 615 E. BROAD ST. :
HAZLETON, PA 18201-6823 :

JUDGE SHENKLE
BLCE COUNSEL: Craig A. Strong, Esq.
LICENSEE COUNSEL: Sean W. Logsdon, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on October 12, 2012. The citation alleges that Licensee violated §§491(1), 492(2) and 493(16) of the Liquor Code, 47 P.S. §§4-491(1), 4-492(2) and 4-493(16), on September 5, 2012, by selling alcoholic beverages after its restaurant liquor license expired on August 31, 2012, and had not been renewed and/or validated.

A hearing was held on December 12, 2013, in Scranton, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. The Bureau opened this investigation on September 5, 2012, in response to a complaint from the Board regarding an expired liquor license. A liquor enforcement officer visited the licensed premises at 6:00 p.m. on September 5, 2012, and found it open for business, with a bartender and four people seated at a table. The officer sat at the bar and purchased beer. He then identified himself and asked to see a current liquor license. The license posted on the wall had expired on August 31, 2012. Licensee did not have authority to sell alcohol on September 5, 2012 (N.T. 6-7, Exhibits C-2, C-3).

2. The next day the officer received a fax from Licensee's owner forwarding correspondence from the Department of Labor and Industry, and a letter from the Board authorizing Licensee to sell alcohol at the licensed premises as of September 6, 2012 (N.T. 8).

3. George R. Hetherington II is Licensee's vice president and manager, as of June 12, 2012. Previously this license was held by L. Rossi Holdings Corp., using the same trade name. Mr. Hetherington had been the head chef when the restaurant opened; he and the other investors in Licensee purchased the license and went to settlement on June 17, 2012. Shortly afterwards, Mr. Hetherington made a payment of \$810 to the Board, submitted along with Licensee's renewal application for the period ending August 31, 2014. This document was added to the database on July 2, 2012, and states on its face that Licensee's tax status with the Departments of Revenue and Labor & Industry was "not clear" (N.T. 12-15, Exhibit L-1, PLCB licensing document library).

4. Mr. Hetherington understood that he needed to obtain a tax clearance from the Department of Labor & Industry, and obtained the same on July 6, 2012. He obtained a fax number from the Board, 1-717-772-2165, and transmitted the clearance on July 12, 2012. To the best of his knowledge, this was all that needed to be done, and Mr. Hetherington heard nothing further from the state until the liquor enforcement officer's visit (N.T. 16-22, Exhibits L-3, L-4).

5. The day after the liquor enforcement officer's visit, Mr. Hetherington received a letter dated September 4, 2012, signed by Tisha Albert, the Board's Director of Licensing, stating that the Bureau of Licensing "objects to the renewal of your license for the period effective September 1, 2012, based on the following:

CERTIFIED \$100.00 LATE FILING FEE REQUIRED
RENEWAL/VALIDATION NOT CLEAR—LABOR & INDUSTRY
ADDITIONAL CERTIFIED \$150.00 LATE FILING FEE REQUIRED." (Exhibit L-5).

6. Enclosed with the letter was PLCB Form 4688, "Correction Sheet for Applications and Permits," which advised Licensee that UC-61, Tax Certification Statement for PLCB licensee from the Dept. of Labor and Industry, was required. This is the form received as Exhibit L-4, which had been faxed to the Board on July 12, 2012. Mr. Hetherington faxed the document again, to the same number at the Board, on September 6, 2012 (N.T. 23-26, Exhibits L-3, L-4).

7. Mr. Hetherington was not required to pay the late fees referred to in Ms. Albert's correspondence of September 4 prior to receiving the Board's temporary authority on September 6, 2012, and the Board has made no further request for the fees mentioned in that correspondence and its enclosure (N.T. 26-28).

8. On November 30, 2012, Mr. Hetherington received a fax from the Board, pursuant to numerous requests he had made by telephone. The second page of this two-page fax is a copy of the same renewal application which had been entered in the Board's database on July 2, 2012 (Finding #3, above), except that a typewritten notation reading "CLEAR 7/6/12" had been pasted in block 10 of the form regarding both Revenue and L&I clearances (N.T. 28-30, Exhibit L-8).

CONCLUSION OF LAW:

Licensee violated §§492(2) and 493(16) of the Liquor Code, 47 P.S. §4-492(2) and 4-493(16), on September 5, 2012, by selling alcoholic beverages after its restaurant liquor license expired on August 31, 2012, and had not been renewed.

DISCUSSION:

The conclusion of law stated above is narrower than the allegation in the citation, in that there was no evidence of a sale of liquor in this case, as controlled by 47 P.S. §4-491(1).

The evidence demonstrates without question that an administrative breakdown in the operations of the Pennsylvania Liquor Control Board prevented the renewal of this license in a timely manner. Licensee asks me to rule as a chancellor in equity would; i.e., to consider as done that which should have been done. This tribunal is not a court of equity, however¹. The Liquor Code provides its own rule of interpretation:

(c) Except as otherwise expressly provided, the purpose of this act is to prohibit the manufacture of and transactions in liquor, alcohol and malt or brewed beverages which take place in this Commonwealth, except by and under the control of the board as herein specifically provided, and every section and provision of the act shall be construed accordingly
- 47 P.S. §1-104(c)

There is nothing in the law which authorizes a judge to correct the acts of an administrative agency *ex post facto*. Like every other agency and part of government, the PLCB is a human institution, capable of human error. It has erred in the past and it will err again in the future.

A result of these errors will be that some persons who should have had licenses will not have them, and some persons who should not have had licenses will have them. Whether the Board has erred (as it did in this case) is not germane to the only relevant question: was this corporation the holder of a valid license at the time in question?

There is no avoiding the conclusion it was not. I am reminded of a notice posted in the rehearsal room of a musical group I once belonged to:

<p style="text-align: center;"><u>RULES FOR PERFORMERS</u></p> <ol style="list-style-type: none">1. The conductor is always right.2. If the conductor is wrong, refer to Rule #1.
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So it is with the Board. The Liquor Code authorizes sales of liquor and malt or brewed beverages only by holders of current liquor licenses. On the date in question, Licensee should have been such a holder, but it was not.

PRIOR RECORD:

Licensee has been licensed since June 12, 2012, and has had no prior violations.

¹ Licensee has a right to appeal this decision, first to the PLCB and then to the Common Pleas Court, which has the power to decide the case *de novo*, and which may not feel itself as bound by administrative law as I do.

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 this type.

I am imposing the minimum fine, for obvious reasons. In my opinion this is the least penalty I can impose (because of the public embarrassment suspensions cause), but if Licensee would prefer a one-day suspension on a Monday with no fine I will modify this order upon request.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, JHKR, Inc., t/a Leonard's Fine Dining, License No. R-AP-SS-4317, shall pay a fine of one thousand dollars (\$1,000.00) 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.

Dated this 25TH day of February, 2014.



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; Note Citation Number on Check

The fine must be paid by cashier's check, money order, or a check drawn on the business or trust account of an attorney licensed in Pennsylvania. **Personal and business checks are not acceptable unless bank certified.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail it, along with any required documentation, to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661