

Mailing Date: NOV 14 2013

[Appeals](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	IN RE Citation No.: 13-0399 LIQUOR
CONTROL ENFORCEMENT :	:	
	:	BLCE Incident No.: W04-455037
v.	:	
	:	PLCB LID No.: 53913
BIR, INC.	:	PLCB License No.
	:	R-AP-SS-EHF-11032
721 WHITE ST.	:	
MCKEESPORT, PA 15132-2245	:	
	:	
	:	

BEFORE: JUDGE RICHARD O'NEILL EARLEY

APPEARANCES:

BLCE COUNSEL: MICHAEL NICKLES, ESQUIRE
LICENSEE COUNSEL: HOLLY L. GUNA, ESQUIRE

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on March 6, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Bir, Inc., License Number R-AP-SS-EHF-11032, (hereinafter the Licensee).

The citation contains three counts.

Count one of the citation charges the Licensee with violation of the Liquor Code at 47 P.S. §4-471 and the Clean Indoor Air Act at 35 P.S. §637.6(a)(2), alleging that on January 10 and 11, 2013,

the Licensee, by its servants, agents or employees, smoked and/or permitted smoking in a public place where smoking is prohibited.

Count two of the citation charges the Licensee with violation of the Liquor Code at 47 P.S. §4-471 and the Clean Indoor Air Act at 35 P.S. §637.6(a)(1), alleging that on January 10, 11 and 26, 2013, the Licensee, by its servants, agents or employees, failed to post signage as required by the Clean Indoor Air Act.

Count three of the citation charges the Licensee with violation of the Liquor Code at 47 P.S. §4-404, alleging that on January 11 and 26, 2013, the Licensee, by its 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.

An administrative hearing was held on this matter on October 15, 2013, at Two Parkway Center, Suite G-8, in Pittsburgh, Pennsylvania.

At the administrative hearing, counsel for the Licensee stipulated to counts one and two. Counsel for the Licensee stipulated that the notice requirements as set forth at 47 P.S. §4-471(c) of the Liquor Code have been satisfied, and the facts set forth in the Bureau's Pre-Hearing Memorandum. (Exhibit C-8). However, both parties wished to supplement the record with witness testimony.

FINDINGS OF FACT:

Counts one and two:

1. On the dates charged, a Liquor Enforcement Officer entered the premises and observed patrons smoking and the Licensee did not display Clean Indoor Air Act signage. (Stipulated, Exhibit C-8, pp. 1-2.)
2. The Licensee was not in possession of an exception to the Clean Indoor Air Act during the period December 29, 2012 through January 26, 2013. (Stipulated, Exhibit C-8, pp. 2-3.)

Count three:

3. The Licensee and the Pennsylvania Liquor Control Board (Board) executed a Conditional Licensing Agreement (CLA) that the Board approved on July 7, 2011, for the license term ending May 31, 2013. The CLA provides, in pertinent part, as follows:

10(b) states: "BIR shall employ at least (2) McKeesport police officers as security guards on all Wednesday, Friday, and Saturday nights, who will be present and working at the licensed premises from 10:00 p.m. until closing. In the event that the City of

McKeesport should discontinue the practice of making Officers available for such duties, BIR shall employ private security guards to perform said duties;”

10(c) states: “BIR shall use a transaction scan device, as that term is defined in the Liquor Code, to scan the identifications of all patrons entering the licensed premises on all Wednesday, Friday and Saturday nights from 10:00 p.m. until closing, notwithstanding the fact that the patron may have had his or her identification scanned on a previous occasion. For purposes of this section “occasion” shall mean from 7:00 a.m. until 2:00 a.m. the following day;”

* * * 10(g) states: “BIR shall prohibit patrons from entering the licensed premises with weapons. On all Wednesday, Friday and Saturday nights from 10:00 p.m. until closing, BIR shall scan all patrons entering or re-entering the licensed premises for weapons by metal detection and/or pat down.” (Stipulated, Exhibit C-5.)

4. On Friday, January 11, 2013, at 10:18 p.m., a Liquor Enforcement Officer working undercover arrived at the premises. In the foyer area, a McKeesport Police Officer checked the Enforcement Officer’s identification and looked into her purse. (Stipulated, Exhibit C-8, p. 2; pp.8-9.) He did not scan her ID, and he did not use a metal detection device or pat her down to check the Enforcement Officer for weapons. (Stipulated, Exhibit C-8, p. 2.) She later ordered and received an alcoholic drink from the bartender and her ID was not scanned. (N.T. pp. 13-14.)
5. On Saturday, January 26, 2013, at 10:01 p.m., the Liquor Enforcement Officer entered the foyer and found no staff present. (Stipulated, Exhibit C-8, p. 2; N.T. p. 10.) She proceeded into the bar area where she saw a McKeesport Police Officer seated at the bar. (Stipulated, Exhibit C-8, p. 2; N.T. p. 10.) No one checked the Liquor Enforcement Officer’s ID or conducted a weapons check on her. (N.T. p. 10.) At 10:10 p.m., a second McKeesport Police Officer entered the bar area and sat with the first Officer at the bar. (Stipulated, Exhibit C-8, p. 2; N.T. p. 10.) Thereafter, patrons entered the bar area and the McKeesport Police Officers conducted a pat down search of the male patrons and looked in purses of the females. (N.T. pp. 1516.) The Officers did not scan any IDs. (Stipulated, Exhibit C-8, pp. 2-3; N.T. pp. 11, 17.) The Liquor Enforcement Officer later ordered and received an alcoholic drink from the bartender and her ID was not scanned. (N.T. pp. 10, 16.)
6. The Licensee’s corporate Officer, Ilona Ranelli, and the Licensee’s assistant manager, William Doyle, testified at the hearing. Neither witnessed the events of January 11 or 26, (N.T. pp. 23, 47), and there is no evidence in the record contradicting the Bureau’s description of the events.

7. The Licensee had been using McKeesport Police Officers for security since approximately 2004, long before the CLA required the Licensee to hire them. (N.T. p. 49.)
8. Section 10(b) of the CLA does not require McKeesport Police Officers to perform the duties required of the Licensee at §§10(c) and (g). The Licensee decided to use the McKeesport Police Officers to perform the security functions required at §§10(c) and (g) of the CLA and took steps to have them instructed in the requirements of the CLA. (N.T. p. 45.)
9. Mr. Doyle acted as the Licensee's coordinator of the McKeesport Police Department matters. (N.T. p. 44.) On some dates, Mr. Doyle saw McKeesport Police Officers scanning IDs and conducting weapons checks in accordance with the CLA. (N.T. pp. 48, 58.)
10. Ms. Ranelli noted she had, unrelated to the issues here, previously instructed the McKeesport Police Department that she wanted certain specific Officers removed from her detail and the Department honored her requests. (N.T. p. 38.)
11. Upon receiving this citation, the Licensee requested that one of the Police Officers be removed from the security detail supplied to the Licensee. (N.T. p. 47.) The Licensee also re-instructed the McKeesport Police Officer in charge of the Licensee's police detail on the CLA requirements. (N.T. p. 47.)

CONCLUSIONS OF LAW:

Count one: The Licensee violated the Liquor Code at 47 P.S. §4-471 and the Clean Indoor Air Act at 35 P.S. §637.6(a)(2) on January 10 and 11, 2013, when its servants, agents or employees, smoked and/or permitted smoking in a public place where smoking is prohibited.

Count two: The Licensee violated the Liquor Code at 47 P.S. §4-471 and the Clean Indoor Air Act at 35 P.S. §637.67(a)(1) on January 10, 11 and 26, 2013, when its servants, agents or employees, failed to post signage as required by the Clean Indoor Air Act.

Count three: The Licensee violated the Liquor Code at 47 P.S. §4-404 on January 11 and 26, 2013, when its 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.

DISCUSSION:

Because the Licensee has stipulated to the charges at counts one and two, the sole issue remaining to be decided in this case is whether the Licensee violated §4-404 of the Liquor Code by breaching the terms of the CLA on January 11 and 26, 2013.

In order to establish a violation of §4-404, the Bureau must prove with a preponderance of evidence that the Licensee violated the terms of the CLA. Here, the CLA requires the Licensee to use an ID scanning device, and to perform a pat down or metal detector scan of all patrons on the nights in question.

However, the Licensee argues that Pennsylvania law requires additional analysis of the language in the CLA due to the peculiar contract nature of CLAs generally. The Licensee suggests that Pennsylvania law interprets CLAs as contracts and applying contract law principles to the interpretation of the CLA in this case reveals the parties did not intend every technical violation to be a breach of the agreement. The Licensee cites Lane v. Commonwealth, 954 A.2d 615 (Pa.Super. 2008), in support of this argument and for the proposition that contracts must be interpreted in a manner that requires reasonable conduct by the parties.

Pennsylvania law holds that where a contract's terms are free of any ambiguity, courts are constrained to interpret the parties' intent from the contract itself. Vaccarello v. Vaccarello, 757 A.2d 909 (Pa. 2000). The Licensee has not argued that the CLA is ambiguous and I find that its terms are unambiguous. Nor do I find it unreasonable to require the Licensee to check for IDs and weapons of every patron entering the premises on specified weeknights. Therefore, I conclude the CLA requires the Licensee to check all patrons entering the premises in accordance with both §§10(c) and (g), that is, by checking IDs with a scanner and by conducting either a metal-detector-wand search or pat down.

In this case, the Licensee stipulated that on January 11, no one at the premises scanned the Liquor Enforcement Officer's ID or subjected her to a metal detector search. Similarly, on the 26th, the Licensee stipulated that Police Officers working at the premises in accordance with §10(b) of the CLA did not scan the IDs of additional patrons the Liquor Enforcement Officer observed entering the bar. There is no evidence in the record that the patrons observed by the Liquor Enforcement Officer had their IDs scanned at any point on January 26 while they were at the premises. The Licensee performed a pat down on male patrons but merely searched purses of female patrons.

The undisputed facts thus establish that on January 11 and 26, the Licensee did not scan IDs for patrons as required by §10(c) of the CLA, and failed to pat down and/or scan with a metal detector all the patrons entering the premises, as required by §10(g) of the CLA. Therefore, the Bureau has established a violation of §4-404. The fact that the inactions were those of the McKeesport Police Officers in no way excuses the Licensee from liability because the Commonwealth Court has long held that a Licensee is not shielded from responsibility for the inactions of the Licensee's agents. PLCB v. Leggens, 542 A.2d 653 (Pa.Cmwlth. 1988).

However, the Licensee contends that it is entitled to various "justifiable breach" defenses. In particular, the Licensee argues that under Goodfellas, Inc. v. PLCB, 921 A.2d 559 (Pa.Cmwlth. 2007), this Court may find the Licensee is in "substantial compliance" with the CLA, and that under Widmer Engineering v. Dufalla, 37 A.2d 459 (Pa.Super. 2003), inasmuch as the Board is not harmed by minor violations of the CLA where neither minors nor weapons were admitted as a result of the slight violations of the CLA, there is no "material breach." I disagree.

The Licensee's reliance on Goodfellas is misplaced here. That case arose from an appeal from a license non-renewal under 47 P.S. §4-470(a.1). In a non-renewal case the Board is expressly directed to consider whether substantial remedial steps were taken to fix ongoing operational problems. But here the Licensee's case arises pursuant to a citation under §4-471 for violation of §4-404 of the Liquor Code. As a citation for violation of the Liquor Code, PLCB v. TLK, 544 A.2d 931 (Pa. 1988), holds that strict liability applies to this case.

While this Court and the Board have utilized contract law principles to determine the intent of the parties when interpreting CLAs, (e.g., Two City Brothers, Inc., 06-1183, and Lounge Management Inc., 05-2112 and 05-1191), I have found no decision where the contract law defense of non-material or de minimis breach have shielded the Licensee from a violation under §4-404. In fact, the idea of equitable defenses to a CLA breach is in some conflict with TLK's holding that violations under the Liquor Code are strict liability in nature. Without statutory or case authority that permits me to consider equitable contract law defenses to breach, I am constrained, upon interpreting a CLA and finding a breach – no matter how material – to find a violation under §4-404. TLK; PLCB v. Dobrinoff, 471 A.2d 941 (Pa.Cmwlt. 1984).

Yet, the Licensee suggests this Court has previously held that strict liability should not apply to violations of CLAs and that they should be treated as a breach of contract claim. BLCE v. Whiteman, 08-0818. I decline to adopt the analysis found in Whiteman because the Board reversed the decision by order dated May 6, 2009.¹ Also, I have already treated this case, initially, as a breach of contract matter. I simply find no authority to consider the defenses of substantial compliance, de minimis, or “no-harm-no-foul,” once the facts establish a breach of the CLA.

The Licensee made several arguments for consideration as mitigation. Ms. Ranelli notes she is regularly present, the business is her sole livelihood, she has made a good-faith effort to honor her duties under the CLA and the Liquor Code with the result that the Licensee has not been cited for sales to minors since executing the CLA. Further, she notes that the breach here resulted from only two discrete occasions, not an ongoing habitual practice in violation of the Liquor Code. And finally, Ms. Ranelli contends that because the CLA specifies she is to have McKeesport Police for security, she can't fire them for poor performance of their duties, and asks that I consider the difficult position this puts the Licensee in.

While I recognize the merits of the Licensee's mitigation arguments, I specifically reject the last one. The facts at the hearing revealed that the Licensee had remedies to address the poor performance of the off-duty police working at the premises. The Licensee testified the Department had approximately 60 Officers available to work off-duty (N.T. p. 38) and that she had made specific requests that certain Officers not be assigned to the premises. Additionally, Mr. Doyle testified that he had asked the Department to remove the Officer in charge of the Licensee's detail from his role. (N.T. pp. 49-50, 54-55.) The facts establish that the Licensee

¹ I note that in doing so, the Board specifically held:

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In the present case, the language utilized by the CLA is clear and unambiguous. The CLA requires that Licensee scan the ID of "all patrons entering the licensed premises." The word "all" has long been viewed as an unambiguous word with a plain and common meaning. The word "all" is defined as: "every; any whatsoever; each and every one." Clearly, all means all... The contested CLA provision is clear; mandating that the Licensee scan the ID of all [each and every] patron when they enter the premises.

Whiteman, pp. 4-5, (Citations and footnotes omitted).

could request changes in personnel from the Police Department and, when requested, the Department complied. The Licensee made requests to get rid of at least one Officer who worked there on January 11 and 26. Therefore, I do not consider the Licensee's argument to be founded on the facts in evidence and will not consider it as a mitigating factor here. All the other mitigating factors raised by the Licensee, though, have been taken into consideration.

PRIOR RECORD:

The Licensee has been licensed since December 3, 2004, and has eight prior violations:

IN RE:

Citation No. 07-0703. Fine \$1,000.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises (machines).
On ten dates between May 1, 2006 and February 27, 2007.

Citation No. 07-0735. Fine \$1,100.00 and R.A.M.P. training mandated.

1. Sales to a minor.
July 1, 2 and September 16, 2006. 2.

Minor frequenting.

July 1, 2 and September 16, 2006.

Citation No. 08-1574. Fine \$1,800.00 and 1 day suspension.

1. Possessed or operated gambling devices or permitted gambling on your licensed premises (machines).
November 5, 2007 and June 24, 2008.
2. Engaged in unlawful discrimination in that you admitted female patrons free of charge while charging an admission fee to male patrons. June 30, 2007.
3. Used loudspeakers or devices whereby music could be heard outside. June 30, 2007.
4. Sold an unlimited or indefinite amount of alcoholic beverages for a fixed price.
May 16, 2008.

Citation No. 08-1991. Fine \$300.00.

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1. Failed to comply with the order of the administrative law judge mandating R.A.M.P. training.
June 10 through July 16, 2008.

Citation No. 09-0115. Fine \$300.00 and 1 day suspension.

1. Failed to post in a conspicuous place on the outside of the licensed premises a notice of suspension. January 5, 2009.
2. Notices posted on your licensed premises indicated that your establishment was closed for a reason other than the suspension of the license.
January 5, 2009.

Citation No. 09-2619. Fine \$1,600.00 and 1 day suspension.

1. Sales to a minor.
December 6, 2008.

Citation No. 12-0408. Fine \$400.00.

1. Used loudspeakers or devices whereby the sound of music could be heard outside.
January 27, 2012.

Citation No. 12-1622. Fine \$300.00.

1. Failed to post signage as required by the Clean Indoor Air Act.
September 6, 2012.
2. Smoked and/or permitted smoking in a public place where smoking was prohibited.
September 6, 2012.

PENALTY:

Section 471 of the Liquor Code at 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 violations of the type found in this case.

In consideration of the fact that counts one and two of this citation arose out of the same factual circumstances, they shall be deemed to have merged solely for the purpose of the imposition of a penalty.

For the foregoing reasons, the following penalties shall be imposed: Count one and two (merged) - \$400.00, and count three - \$500.00.

ORDER:

BIR, INC.
IN RE CITATION NO. 13-0399

THEREFORE, it is hereby ordered that Bir, Inc., License Number R-AP-SS-EHF-11032, pay a fine of \$900.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, the Licensee's license shall be suspended be revoked.

Jurisdiction is retained.

Dated this 1ST day of November, 2013.



Richard O'Neill Earley, J. kes

NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.

IF YOU WISH TO APPEAL THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER, THE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE MAILING DATE OF THE ORDER. PLEASE CONTACT CHIEF COUNSEL'S OFFICE AT 717-783-9454.

Detach Here and Return Stub with Payment

The fine must be paid by a check drawn on the business or trust account of your attorney, who must be licensed in this Commonwealth, a treasurer's check, cashier's check, or money order. **Personal and business checks are not acceptable unless they are certified by your bank.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail, along with any required documentation (please use the Return Stub when mailing payment or write your citation number on the check).

PLCB-Office of Administrative Law Judge

BIR, INC.
IN RE CITATION NO. 13-0399

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