

Mailing Date: FEB 12 2014

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	IN RE: Citation No.: 13-0909
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	BLCE Incident No.: W08-455545
	:	
KIMBERLY E. MCKUHN	:	
23432 STATE HWY 89 & 77	:	PLCB LID No.: 48884
SPARTA TWP.	:	
SPARTANSBURG, PA 16434	:	PLCB License No.: H-AP-4112
	:	
	:	
	:	
	:	
	:	

BEFORE: JUDGE RODERICK FRISK

APPEARANCES:

BLCE COUNSEL: Nadia L. Vargo, Esquire
LICENSEE COUNSEL: No Appearance

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on May 1, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Kimberly E. McKuhn, License Number H-AP-4112 (hereinafter Licensee).

The citation charges Licensee with a violation of Section 471 of the Liquor Code, [47 P.S. §4-471] and Section 637.6(a)(1) of the Clean Indoor Air Act, [35 P.S. §637.6(a)(1)] (the CIAA), in that on January 11, February 8 and March 1, 2013, Licensee, by its servants, agents or employees, failed to post signage as required by the CIAA.

An administrative hearing was conducted on December 19, 2013 at 2:30 p.m., 2084 Interchange Road, Erie, Pennsylvania. The Bureau was represented by Nadia L. Vargo, Esquire. The hearing was held ex-parte.¹

After hearing the testimony presented, and upon review of the evidence submitted, the following Findings of Fact and Conclusions of Law are entered:

FINDINGS OF FACT:

1. The Bureau commenced its investigation of Licensee's premises on January 9, 2013, and completed its investigation on March 11, 2013. (N. T. 8, Exhibit C-1)
2. The Bureau notified Licensee of the nature of the alleged violation(s) disclosed by its investigation in a letter dated March 20, 2013, which was sent by certified mail and was unclaimed and unable to be forwarded. (N. T. 9, Exhibit C-1, C-2)
3. This citation was issued on May 1, 2013, was sent by certified mail and was unclaimed and unable to be forwarded. (N. T. 11, Exhibits C-3, C-4)
4. The notice relative to the date, time and place of the evidentiary hearing was mailed to Licensee's premises on October 30, 2013 by first class mail as well as certified mail. The aforementioned certified mailing of the notice of hearing was returned "unclaimed." (Official Notice)
5. On January 11, 2013 at 9:30 p.m., a Liquor Enforcement Officer entered Licensee's premises in an undercover capacity and observed a bartender rendering service of alcoholic beverages to patrons. The Enforcement Officer noted that Licensee failed to post CIAA signage anywhere on the exterior or interior of the premises. A second Liquor Enforcement Officer found identical circumstances during his undercover visit on February 8, 2013 at 8:36 p.m. (N.T. 8-18)
6. On the dates charged, Licensee possessed an exception to the CIAA permitting smoking on its licensed premises. (N.T. 13-14, C-5)

DISCUSSION:

This action is brought under the "other sufficient cause" language of Section 471 of the Liquor Code setting forth a single charge alleging that Licensee failed to post CIAA signage on its licensed premises in violation of Section 637.6(a)(1) of the CIAA.

¹It is further noted that Licensee's hotel liquor license was and continues to be in safekeeping with the Board and that Licensee, Kimberly E. McKuhn, also listed in the Board's safekeeping file as the contact person, was unavailable after numerous attempts were made by this Court and Bureau Counsel to engage Licensee in a phone conference relative to this citation matter.

The Bureau's investigation involved three visits to Licensee's premises, individually, by three Liquor Enforcement Officers on January 11, February 8 and March 1, 2013. It is noted that Licensee possessed an exception to the CIAA to permit smoking on the dates charged.

On November 27, 2013, Bureau Counsel requested a continuance as one of the three Liquor Enforcement Officers scheduled to testify as to the date of March 1, 2013 became unavailable. Upon seeking further justification for this continuance, Bureau Counsel simply advised this Court that it wished to proceed on all three of the dates charged.

On December 11, 2013, this Court issued a letter again seeking justification for the Bureau's continuance request given the nature of the charge and the fact that proceeding with cumulative dates involving repetitive facts would be highly unlikely to alter the outcome of this case or the penalty imposed. In that letter, this Court further expressed its concern with incurring additional costs and inconveniences relating to the rescheduling given these circumstances since this hearing involved travel to a satellite office. Bureau Counsel was given until December 16, 2013 to respond. Upon receiving no response from Bureau Counsel, a Pre-Hearing Order was issued on December 17, 2013 denying the Bureau's request.

At the hearing, the Bureau's third witness relating to the date of March 1, 2013 did not appear and Bureau Counsel restated her objections to the denial of the Bureau's continuance request and offered Exhibits C-6 through C-9 into evidence in support of her arguments. Exhibit C-6 is the Bureau's initial continuance request dated November 27, 2013; C-7 is the December 11, 2013 letter requesting justification for the continuance; C-8 is a letter that was intended to be a response to this Court, but never transmitted²; and C-9 is the December 17, 2013 pre-hearing Order denying the Bureau's request.

Bureau's argument, in part, is that a continuance might provide Licensee an opportunity to participate. Bureau Counsel explained in great detail at the hearing her numerous attempts to contact Licensee regarding possible settlement of this case (N.T. 5-7). As a matter of fact, these numerous unsuccessful attempts to contact Licensee renders it unlikely that Licensee would become available even if this hearing were rescheduled. Finally, Exhibit C-8 reflects Bureau Counsel's peculiar attempt to seek this continuance by suggesting that another case to which she has no involvement might be continued.³

After taking into consideration the totality of the circumstances surrounding this case, this Court struggles to find any real Commonwealth interest in pursuing a third date of the same

²Exhibit C-8 was admitted into the record as a memorialization of Bureau's argument despite the fact that it was never transmitted or communicated to anyone.

³On the scheduled hearing date, this Court also heard another unrelated citation matter, In Re Georgia City Lights, 13-0081. The location of these hearings involved travel to a satellite location in Erie, Pennsylvania. Bureau Counsel suggests that Georgia City Lights, which she had no involvement with, be continued to add further justification for her request. It must be noted that Georgia City Lights was continued on a previous occasion and involved numerous witnesses with an alleged violation date approaching two years ago. No judicial economy would be furthered by continuing the instant case when this Court had another hearing in Erie the same day.

charge as it is merely cumulative. Therefore, the Bureau's renewed request for continuance is denied.

Accordingly, upon proceeding with the hearing, the Bureau produced the testimony of an Enforcement Officer establishing that on January 11, 2013 he arrived at Licensee's premises and was unable to observe smoking signage posted anywhere visible from inside or outside the premises. Similarly, the Bureau presented the testimony of a second Enforcement Officer who again testified that during an undercover visit to Licensee's premises on February 8, 2013, he also was unable to find smoking signage posted anywhere inside or outside the premises. Consequently, the Bureau failed to produce any testimony relative to the date of March 1, 2013 which purportedly would have established that a third Enforcement Officer was also unable to observe CIAA signage. Therefore, this Court cannot find a violation for March 1, 2013.

Upon thorough review of the testimony and evidence presented, this court concludes that the Bureau has established the violation as charged on the dates of January 11, and February 8, 2013. *Pennsylvania Liquor Control Board v. Leggens*, 542 A.2d 653 (Pa. Cmwlth. 1988); *Omicron Enterprises*, 449 A.2d 857 (Pa. Cmwlth. 1982); *Com. v. Moreno*, 14 A.3d 133 (Pa.Super. 2011).

CONCLUSIONS OF LAW:

1. The notice requirements as prescribed by Section 471 of the Liquor Code have been satisfied.
2. On January 11 and February 8, 2013, Licensee, by its servants, agents or employees, failed to post signage as required by the CIAA, in violation of Section 471 of the Liquor Code, and Section 637.6(a)(1) of the CIAA.
3. The Bureau failed to establish that on March 1, 2013, Licensee, by its servants, agents or employees, failed to post signage as required by the CIAA, in violation of Section 471 of the Liquor Code, and Section 637.6(a)(1) of the CIAA.

PRIOR RECORD:

Licensee has been licensed since January 14, 2002, and has had one prior violation.

IN RE:

Citation No. 10-1273X. 1 day suspension.

1. Issued worthless checks in payment for malt or brewed beverages.
March 3 and 10, 2010.

PENALTY:

Section 471 of the Liquor Code 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.

The record discloses that this license is presently in safekeeping with the Board.

For the foregoing reasons, Licensee's hotel liquor license shall be suspended for a period of one (1) day. However, the suspension period is deferred pending the reactivation of Licensee's license, at which time the suspension period will be fixed by further Order.

ORDER:

THEREFORE, IT IS HEREBY ORDERED that the hotel liquor license (including all permits and Licensee Discount Card) of Kimberly E. McKuhn, License No. H-AP-4112 be suspended for a period of one (1) day. However, the suspension period is deferred pending the reactivation of Licensee's license, at which time the suspension period will be fixed by further Order.

The Bureau of Licensing is directed to notify the Office of Administrative Law Judge upon reactivation of the license so an order may be entered fixing the dates for suspension.

Jurisdiction is retained to ensure compliance with this Order.

Dated this 29TH day of January, 2014.



Roderick Frisk, J.

clm

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.