

Mailing Date: FEB 28 2014

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

PENNSYLVANIA STATE	:	In Re Citation No.: 13-1341
POLICE, BUREAU OF	:	
LIQUOR CONTROL ENFORCEMENT	:	BLCE Incident No.: W04-459258
	:	
v.	:	
	:	PLCB LID No.: 6147
INTERNATIONAL HOTEL, INC.	:	
1173-75 ISLAND AVENUE	:	PLCB LICENSE NO.: H-AP-SS-825
STOWE TWP.	:	
MCKEES ROCKS, PA 15136	:	
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	:	
	:	

BEFORE: JUDGE RICHARD O'NEILL EARLEY

APPEARANCES:

BLCE COUNSEL: NADIA VARGO, ESQUIRE
LICENSEE COUNSEL: PRO SE

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 3, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against International Hotel, Inc., License Number H-AP-SS-825, (hereinafter Licensee).

The citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-471 and the Clean Indoor Air Act (the CIAA) at 35 P.S. §637.6(a)(2), alleging that on April 5, 19 and May 3, 2013, Licensee, by its servants, agents or employees, smoked and/or permitted smoking in a public place where smoking is prohibited.

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An administrative hearing was conducted on Thursday, January 16, 2014, at Two Parkway Center, Suite G-8, in Pittsburgh, Pennsylvania. The Bureau was represented by Nadia Vargo, Esquire. Licensee, Dr. Max Homer, appeared pro se and designated his son and manager, Michael Homer, to present Licensee's case.

At the administrative hearing, Licensee stipulated that the notice requirements as set forth at 47 P.S. §4-471(c) of the Liquor Code have been satisfied. (Licensee's Pre-Hearing Memorandum, paragraph 4; N.T. pp. 6-7)

I make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. The Bureau commenced its investigation of Licensee's premises on March 27, 2013, and completed its investigation on May 28, 2013. (N.T. p. 10)
2. The notice-of-violation letter was mailed to Licensee on June 7, 2013. (Ex. C-1; N.T. pp. 6-7)
3. The citation was mailed to Licensee on July 3, 2013. (Ex. C-2; N.T. pp. 6-7)
4. The notice-of-hearing letter was mailed to Licensee on December 3, 2013.
5. Liquor Enforcement Officer Beswick-Uzarski testified that she investigated this case as a result of an anonymous tipster alleging Licensee was serving visibly intoxicated patrons and minors. (N.T. p. 10)
6. Officer Beswick-Uzarski visited the licensed premises in an undercover capacity on three occasions, April 5, 19, and May 3, 2013. (N.T. pp. 10-11) On all three visits, she saw patrons smoking in view of the bartender and ashtrays on the bar. (N.T. pp. 10-11) Officer Beswick-Uzarski did not observe violations of the type alleged by the anonymous tipster. (N.T. p. 12)
7. Licensee did not dispute Officer Beswick-Uzarski's testimony that she witnessed patrons smoking on all three of her visits.
8. On May 22, 2013, Officer Beswick-Uzarski received an attestation from the Pennsylvania Department of Health certifying that Licensee did not possess an exception to the CIAA permitting smoking on the premises during the period of April 5 through May 3, 2013. (Ex. C-3)
9. Licensee, through its manager, Michael Homer, testified it held an exception from the CIAA before the dates at issue here, (N.T. pp. 33-34) and for the dates cited here. (N.T. pp. 34-36, 38-40, 47) However, Mr. Homer conceded it was possible the exception could have lapsed. (N.T. pp. 35-38)

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10. Licensee's owner, Dr. Max Homer, also testified that he believed he possessed an exception from the CIAA for the dates cited. (N.T. p. 53) However, Dr. Homer also acknowledged it was possible the exception could have lapsed. (N.T. pp. 53-54)
11. Licensee did not present any documentary evidence to support its belief it possessed an exception for the dates at issue despite claiming it possessed such documents when it received the citation in this matter.
12. Licensee currently possesses an exception to the CIAA.

DISCUSSION:

Pennsylvania courts have long held that "substantial evidence" to support a violation or defense is relevant evidence that a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc., v. WCAB (Hogue), 876 A.2d 1098 (Pa.Cmwlt. 2005). In addition, the Bureau has the burden of proving a violation by a clear preponderance of the evidence. Omicron Enterprises, 449 A.2d 857 (Pa.Cmwlt. 1982).

The question in §637.6(a)(2) cases is whether Licensee knew or should have known smoking was taking place without an exception to the CIAA. PLCB v. TLK, 544 A.2d 931 (Pa. 1988). The Board has held that a violation is "clearly" demonstrated where there is substantial evidence that patrons smoked on the premises in view of Licensee or its agents, and the Department of Health attests Licensee does not possess an exception. In Re: Nostalgia, Inc., 09-2792 (PLCB 4/20/11).

In this case, the Bureau presented uncontested evidence that Licensee permitted smoking on the licensed premises on April 5, 19, and May 3, 2013. (N.T. pp. 10-11) The Bureau also presented evidence that Licensee lacked an exception from the CIAA on those dates (C-3). Thus, the Bureau has established a prima facie case that Licensee violated the CIAA on April 5, 19, and May 3, 2013, when it permitted smoking on the licensed premises without an exception from the CIAA's prohibition against smoking.

In response, Licensee raises several arguments. Initially, Licensee suggests that the Department of Health caused Licensee to be late renewing its exception. However, whether the Department of Health was late in supplying renewal forms is not a defense to the citation here. (TLK; In Re: Nostalgia). Rather, I am entitled to consider Licensee's argument as mitigation when imposing a penalty, and I have done so.

Next, Licensee suggests the citation is suspect because it was initiated by an anonymous tip, and the Bureau made repeated visits to the premises despite finding no violations of the type reported by the tipster. As with the previous argument, Licensee has not raised a defense to the CIAA. Furthermore, the Bureau is permitted to visit all licensed premises with or without a tip, whether or not there is any reason to know in advance if they will find a violation of the Liquor Code. 47 P.S. §4-493(21). Thus Licensee's exploration of the reasons for the Bureau's visits is

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ultimately irrelevant and cannot constitute substantial evidence of any defense in this case, pursuant to Joy Global, Inc., 876 A.2d 1098 (Pa.Cmwlt. 2005).¹

Finally, Licensee's last argument is in conflict with its initial claim, above, in that Licensee argues it possessed an exception and that the Department of Health's attestation is in error. Specifically, Licensee presented testimony that after it was cited for permitting smoking, Licensee immediately took its only copy of its exception to the Bureau and left it with unidentified individuals. (N.T. 35, 39-40, 42, 51) As a consequence, Licensee argues it could not present its allegedly valid exception certificate at the hearing. (N.T. pp. 38-39)

Licensee's claim that it possessed a valid CIAA exception on the dates at issue is not credible. First, because Licensee's testimony on this point is equivocal. Both Mr. and Dr. Homer testified they believed Licensee possessed the exception, but both also conceded the exception may have lapsed. Even were I to find Licensee's testimony on this point credible I would lack authority to find Licensee established a defense to the citation because equivocal evidence is incapable of rising to the level of substantial evidence necessary to prove Licensee's defense. In Re: Nomination Pet. Of Mary Flaherty for Office of Judge of the Commonwealth Court v. Appeal of: John A. Hanna, 770 A.2d 327 (Pa. 2001) (citing Feinberg, D.D.S. v. UCBR, 635 A.2d 682, 684 (Pa.Cmwlt. 1993)) (quoting Novaselec v. WCAB, 332 A.2d 581, 583-584 (Pa.Cmwlt. 1979)). "Testimony which is so ... equivocal ... as to make ... findings of a trial judge or the findings of an administrative fact finder mere conjectures is not ... substantial in administrative proceedings as a matter of law."

Second, Licensee wholly failed to present any evidence in support of its claimed defense. The entirety of Licensee's defense depends upon the existence of a valid exception. However, Licensee inexplicably failed to produce the certificate or photocopy at the hearing. Furthermore, Licensee neither requested the Bureau return the certificate Licensee says it gave to them nor requested a subpoena to do so. Thus, Licensee attempts to establish this claim based exclusively on its testimony which I have already found to be equivocal as well as not credible. As such, there is no substantial evidence in the record to contradict the Bureau's evidence that Licensee lacked an exception on the dates at issue here.

Accordingly, upon review of the testimony and evidence presented, the Bureau has established the violation as charged by a clear preponderance of the evidence. Pennsylvania Liquor Control Board v. Leggens, 542 A.2d 653 (Pa.Cmwlt. 1988); Omicron Enterprises; Com. v. Moreno, 14 A.3d 133 (Pa.Super. 2011).

¹ I note that Licensee pursued a similar line of inquiry at the hearing regarding whether it had posted required CIAA signage and whether the Bureau sent Licensee a warning about signage. However, Licensee was not cited under §637.6(a)(1) for failure to post CIAA signage. Thus, that line of inquiry is irrelevant. I mention it here only in the interest of addressing all of Licensee's arguments.

CONCLUSIONS OF LAW:

Notice provisions of §4-471 have been satisfied.

Count one: The Licensee violated the Liquor Code at 47 P.S. §4-471 and the CIAA at 35 P.S. §637.6(a)(2), on April 5, 19 and May 3, 2013, when its servants, agents or employees, smoked and/or permitted smoking in a public place where smoking is prohibited.

PRIOR RECORD:

Licensee has been licensed since October 6, 1988, and has 10 prior violations:

IN RE:

Citation No. 92-1962. Fine \$450.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on a licensed premises.

Citation No. 95-1080. Fine \$1,000.00.

1. Sales between 2:00 a.m. and 7:00 a.m.
2. Failed to require patrons to vacate the premises not later than one-half hour after the required time.
3. Permitted patrons to possess and/or remove liquor or malt or brewed beverages after 2:30 a.m.

Citation No. 95-2304. Fine \$1,500.00 and 2 days suspension.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on a licensed premises (machines).

Citation No. 96-1821. Fine \$7507.00 and 3 days suspension. Licensee's appeal to Board dismissed. Licensee's appeal to Common Pleas Court sustained. Bureau's appeal to Commonwealth Court reversed lower court order. Licensee's appeal to Supreme Court denied.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on a licensed premises (machines).

Citation No. 98-0710. Fine \$600.00 and 3 days suspension. Licensee's appeal to Board dismissed. Licensee's appeal to Court of Common Pleas modified penalty to \$600.00 fine and 1 day suspension.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises (machines).

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Citation No. 99-2069. Fine \$2,000.00 and 14 days suspension. Licensee's appeal to Board dismissed. Licensee's appeal to Court of Common Pleas modified penalty to \$2,000.00 fine and 1 day suspension.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises (machines).
2. Failed to maintain complete and truthful records covering the operation of the licensed business for a period of two years.
3. Failed to keep records on the licensed premises.

Citation No. 00-1467. Fine \$150.00 and 3 days suspension. Licensee's appeal to Board dismissed. Licensee's appeal to Court of Common Pleas modified penalty to \$200.00 fine.

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

Citation No. 06-2287. Fine \$300.00.

1. Failed to maintain complete and truthful records covering the operation of the licensed business for a period of 2 years.

Citation No. 07-1929C. Fine \$1,250.00 and R.A.M.P. training mandated.

1. Sales to a minor.
July 20, 2007.

Citation No. 10-0623C. Fine \$1,900.00 and R.A.M.P. certification mandated.

1. Sales to a minor.
March 11, 2010.

PENALTY:

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.

Some consideration will be given to the fact that there is no evidence suggesting that Licensee was attempting to willfully violate the CIAA.

For the foregoing reasons, a penalty shall be imposed in the amount of \$300.00.

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ORDER:

THEREFORE, it is hereby ordered that International Hotel, Inc., License No. H-AP-SS-825, pay a fine of \$300.00 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, Licensee's license shall be suspended or revoked.

Jurisdiction is retained.

Dated this 11TH day of February, 2014.



Richard O'Neill Earley, J.

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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
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International Hotel, Inc.