

Mailing Date: July 30, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 13-1516
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
BARTLETT TRAYNOR &	:	License No. R-4643
LONDON, LLC	:	
t/a Harrisburg Midtown Arts Center	:	LID 61720
1110 North 3 <sup>rd</sup> Street	:	
Harrisburg, PA 17102-2018	:	

Counsel for Licensee (on appeal):	Frank C. Sluzis, Esquire 2000 Linglestown Road Suite 106 Harrisburg, PA 17110
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Counsel for Bureau:	John H. Pietrzak, Esquire Pennsylvania State Police, Bureau of Liquor Control Enforcement 3655 Vartan Way Harrisburg, PA 17110
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**OPINION**

Bartlett Traynor & London, LLC (“Licensee”) appeals from the Amended Adjudication and Order of Administrative Law Judge (“ALJ”) Daniel T. Flaherty, Jr., mailed April 24, 2014, wherein the ALJ sustained Citation No. 13-1516 and

imposed a fine of one thousand five hundred fifty dollars (\$1,550.00), as well as a suspension of Licensee's amusement permit for three (3) days<sup>1</sup>.

On August 1, 2013, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee, charging it with three (3) counts. The first count charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and subsection 637.6(a)(2) of the Clean Indoor Air Act [35 P.S. § 637.6(a)(2)] in that on February 13 and 14, March 13 and 24, and May 18, 2013, Licensee, by its servants, agents, or employees, smoked and/or permitted smoking in a public place where smoking is prohibited. The second count charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] in that on February 15 and 16, March 1, 3, and 7, April 2, 5, 25, 27, and 28, and May 18, 2013, the licensed establishment was operated in a noisy and/or disorderly manner. The third count charged Licensee with violating subsection 493(34) of the Liquor Code [47 P.S. § 4-493(34)] in that on February 15 and 16, March 1, 3, and 7, April 2, 5, 25, 27 and 28, and May 13, 2013, Licensee, by its servants, agents, or employees, used or permitted to be used on the outside of the licensed premises a loudspeaker or similar device whereby the

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<sup>1</sup> The "Penalty" section of the Adjudication references a four (4)-day suspension; however, the Order states that the amusement permit shall be suspended for a period of three (3) days. The Amended Adjudication issued two (2) days later corrected the error and made it clear it was a three (3)-day suspension.

sound of music or other entertainment, or the advertisement thereof, could be heard beyond Licensee's property line.

A hearing was held on January 28, 2014, in which John H. Pietrzak, Esquire, appeared as counsel for the Bureau, and John Traynor, member of the licensed limited liability company, appeared on Licensee's behalf. By Amended Adjudication and Order mailed April 24, 2014, the ALJ sustained the three (3) charges and imposed a five hundred fifty dollar (\$550.00) fine at count one and a fine of one thousand dollars (\$1,000.00) and amusement permit suspension of three (3) days at counts two and three, which were merged for penalty assessment purposes. Licensee filed a timely appeal with the Board on May 2, 2014.<sup>2</sup>

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. The Board may only reverse the decision if the ALJ committed an error of law or abuse of discretion, or if his decision was not based upon substantial evidence. [47 P.S. § 4-471(b)]. The Commonwealth Court has defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876

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<sup>2</sup> The appeal acts as an automatic supersedeas. [47 P.S. § 4-471(b)].

A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984). Furthermore, the Pennsylvania Supreme Court has defined an abuse of discretion as “not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 297, 602 A.2d 1300, 1305 (1992) (citations omitted).

On appeal, Licensee essentially restates the standard of review in alleging that the ALJ committed an error of law and that the ALJ’s Findings of Fact are not supported by substantial evidence. Because Licensee did not provide any further explanation for the basis of its appeal, the Board has conducted a general administrative review of the certified record, including the ALJ’s Adjudication and Order, Licensee’s Appeal, and the Notes of Testimony and Exhibits from the hearing held on January 28, 2014. Based upon its review, the Board has concluded the ALJ did not commit an error of law in sustaining the Citation, and further, the ALJ’s Findings of Fact were supported by substantial evidence.

With respect to count one, section 637.6(a)(2) of the Clean Indoor Air Act provides that it is unlawful to “[p]ermit smoking in a public place where smoking is prohibited.” [35 P.S. § 637.6(a)(2)]. Here, Bureau officers observed people smoking in the licensed establishment on multiple occasions. (N.T. 8-12). The officers’ testimony in conjunction with the attestation from the Pennsylvania Department of Health [Ex. C-3], indicating Licensee was not exempt from the smoking prohibition, clearly demonstrate that Licensee allowed smoking in a public place where smoking was prohibited by law on the dates charged. These violations of the Clean Indoor Air Act [35 P.S. § 637.6(a)(2)] constitute sufficient cause to find Licensee in violation of section 471 of the Liquor Code [47 P.S. § 4-471].

Turning to count two, the courts have held that noisy and disorderly operations by a licensee may constitute a violation of section 471 of the Liquor Code [47 P.S. § 4-471]. A violation may be sustained where there is recurrent noise and disorder of a “relatively continuous nature causing disturbance and effrontery to the public welfare, peace and morals.” Appeal of Ciro’s Lounge, 358 A.2d 141, 143 (Pa. Cmwlth. 1976). However, it is well settled that a single instance of noisy and disorderly conduct is insufficient to violate section 471. See Banks Liquor License Case, 429 A.2d 1279, 1280 (Pa. Cmwlth. 1981); Banks

Liquor License Case, 447 A.2d 723, 724 (Pa. Cmwlth. 1982) (“to be in violation of [section 471], the licensed premises must be operated in a noisy and disorderly fashion on a routine basis”).

Here, the record shows that the licensed premises was operated in a noisy manner on several occasions. A Bureau officer testified that from a position beyond Licensee’s property line, he heard amplified music emanating from the licensed establishment on April 25, 2013. (N.T. 15-17). On April 27 and 28, 2013, a Bureau officer again was able to hear amplified music from public streets, and he confirmed that the music was coming from the licensed establishment. (N.T. 21-25). A similar violation was observed by another Bureau officer on May 18, 2013. (N.T. 28-33). Additionally, two (2) residents who live near the licensed establishment testified that from their respective homes they heard amplified music originating from the licensed premises on February 15 and 16, March 1, 3, 7, and 31, April 2, 5, 25, and 27, and May 18, 2013. (N.T. 36, 44). The neighbors testified that they were disturbed by the noise. (N.T. 36, 38, 42-48). Thus, it is clear that Licensee’s operation created noise of a relatively routine and continuous nature, causing a disturbance to the community.

Finally, the above evidence also demonstrates several violations of subsection 493(34) of the Liquor Code [47 P.S. § 4-493(34)] pertaining to amplified noise. Subsection 493(34) provides that a licensee may not:

. . . use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard beyond the licensee's property line . . . .

[47 P.S. § 4-493(34)]. Based on the testimony of the law enforcement officers as well as Licensee's neighbors, there is substantial, undisputed evidence that Licensee's loudspeakers produced music which could be heard beyond Licensee's property line on the dates charged. Therefore, the ALJ's decision regarding count three was well supported and was not an error of law.

Based on the undisputed testimony<sup>3</sup> at the hearing, there is no question that the ALJ's Findings of Fact are supported by substantial evidence and that his decision was not an error of law. Consequently, for the foregoing reasons, the Adjudication and Order of the ALJ is affirmed.

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<sup>3</sup> Mr. Traynor testified to some mitigating circumstances but admitted the violations as charged.

## **ORDER**

The appeal of Licensee is denied.

The decision of the ALJ is affirmed.

The fine of one thousand five hundred fifty dollars (\$1,550.00) has not been paid. Licensee is hereby ordered to pay the fine in the amount of one thousand five hundred fifty dollars (\$1,550.00). Failure to pay the fine within twenty (20) days of the mailing date of this Order will result in license suspension and/or revocation.

It is further ordered that Licensee's amusement permit be suspended for a period of three (3) days, beginning at 7:00 a.m. on Thursday, September 11, 2014, and ending at 7:00 a.m. on Sunday, September 14, 2014.

This case is hereby remanded to the ALJ to ensure compliance with this Order.

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Board Secretary