

Mailing Date: JUN 18 2014

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

PENNSYLVANIA STATE	:	In re Citation No. 13-1557
POLICE, BUREAU OF	:	
LIQUOR CONTROL ENFORCEMENT	:	BLCE Incident No. W09-455890
	:	
v.	:	PLCB LID No. 15208
	:	
MARVIS LEAF T/A FRANK'S PLACE	:	PLCB License No. R-AP-SS-11873
400 S. 7 <sup>th</sup> ST.	:	
READING, PA 19602-2413	:	

JUDGE SHENKLE  
BLCE COUNSEL: Roy Harkavy, Esq.  
LICENSEE COUNSEL: Michael D. Dautrich, Esq.

**ADJUDICATION**

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on August 7, 2013. There are two counts in the citation.

The first count alleges that Licensee violated §404 of the Liquor Code, 47 P.S. §4-404, on February 1, March 1, 2, 21 and April 22, 2013, by failing to adhere to the conditions of a Conditional Licensing Agreement (CLA) placing additional restrictions on the license.

The second count alleges that Licensee violated §493(34) of the Liquor Code, 47 P.S. §4-493(34), on March 1 and 2, 2013, by permitting the use on the inside of the licensed premises of a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard beyond Licensee's property line.

The Bureau withdrew the date of March 21, 2013, from the first count on April 21, 2013.

A hearing was held on April 24, 2014, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On February 1, 2013, at 11:20 p.m., liquor enforcement officers visited the licensed premises in an undercover capacity. One of them saw two cameras prior to entering. There was a security person at the door. The officers approached the bar and ordered alcoholic beverages. No one asked for identification (N.T. 6-7).

2. One of the officers saw a television on the wall, at about the middle of the licensed premises, near a pool table, which displayed video. The screen was divided into four parts. Two of the parts were blank and the other two displayed the feed from the cameras the officer had seen outside. The officer did not see any employees who were wearing any type of security uniform or who were identified as security (N.T. 7-8).

3. On March 1, 2013, the officers arrived in the area of the licensed premises at about 11:00 p.m. They heard music coming from the licensed premises, which was confirmed as the source when the officers entered and heard the same music coming from loudspeakers inside. Again, they saw two security cameras on the outside of the licensed premises. No one checked the officers for weapons at the door. The officers purchased alcoholic beverages from the bartender, who did not request identification. The same television displayed images from the outside cameras. There was an altercation in the premises, and a person who was referred to as a security officer intervened, but he was not wearing anything to show his function (N.T. 9-10).

4. The officers left at about five minutes after midnight, and again they heard the music outside, at a distance of 100 feet (N.T. 11).

5. On April 22, 2013, a liquor enforcement officer entered the licensed premises and identified himself to Licensee's manager, telling her that he was there to conduct a routine inspection. He found no violations based on the items included in a routine inspection, but told the manager that he was also looking for compliance with the CLA. Therefore he asked the manager about the cameras in the premises – how many working cameras there were. The manager stated that they had only two working cameras (N.T. 18-19).

6. On February 24, 2012, the Board's Chief Counsel and Licensee signed a CLA. The document recites its premises: (1) that Licensee holds this license and (2) has filed an application to renew it for the term effective April 1, 2011; (3) that the Bureau of Licensing is authorized to object to the renewal; (4) that the Bureau of Licensing (Licensing) did object to the renewal of this license for the term effective April 1, 2009, based on five adjudicated citations and a late-filed renewal application; (5) that the parties resolved that matter with a CLA dated October 20, 2010; (6) that Licensing has objected to the current renewal, based on ten adjudicated citations, eleven incidents of disturbances at or adjacent to the premises, and the conviction of Licensee's then-manager of various crimes; and (7) that Licensee proffers that many of the alleged problems will be alleviated in the conditions contained in the present agreement are imposed.

7. The CLA of February 24, 2012, goes on to recite the additional conditions to be placed on the license: (a) that Licensee shall remain R.A.M.P. – compliant; (b) that the conviction of any employee for a drug-related occurrence at the premises will require the employee's discharge, or failing such discharge, the Board will take the license into safekeeping; (c) that two or more adjudicated citations for after-hours sales or possession will constitute a violation of the CLA; (d) that two or more adjudicated citations for service to minors and/or visibly intoxicated patrons will constitute a violation; (e) that Licensee shall prohibit patrons from entering the premises with weapons, using a metal-detecting wand from 9:00 p.m. until ½ hour after patrons are required to vacate the premises<sup>1</sup>; (f) that Licensee "shall purchase and use a 'transaction scan device,' as that

---

<sup>1</sup> Certainly the author of this document did not intend to require security guards to remain on the premises one-half hour after the patrons have left. Probably the intent was to require their presence until one-half hour after sales of alcoholic beverages are required to cease, which is the time when patrons are required to vacate.

term is defined in the Liquor Code, to scan the identification of all patrons purchasing alcoholic beverages...”; (g) that Licensee shall install and maintain four exterior and four interior surveillance cameras, and record the output of each, during all operating hours; (h) that Licensee shall maintain as a business record and enforce a written barred patrons list; (i) that lighting shall be adequate for the cameras to record clear images; and (j) that Licensee shall employ at least two security personnel, clothed to make their function readily apparent, on all days it is open, from 9:00 p.m. until ½ hour after patrons are required to vacate the premises.<sup>2</sup>

#### CONCLUSIONS OF LAW:

Licensee violated §404 of the Liquor Code, 47 P.S. §4-404, on February 1, March 1, 2, and April 22, 2013, by failing to adhere to the conditions of an agreement with the Board placing additional restrictions on the license.

Licensee violated §493(34) of the Liquor Code, 47 P.S. §4-493(34), on March 1 and 2, 2013, by permitting the use on the inside of the licensed premises of a loudspeaker, whereby music could be heard beyond Licensee's property line.

#### DISCUSSION:

After presenting the jurisdictional documents and the testimony of two witnesses, the Bureau rested its case without putting the CLA into the record.

In every previous contested case I have heard involving a CLA, the government has presented a “Board Attestation/Certification of Official Records (pursuant to 42 Pa. C.S.A. §6103 et seq.)” signed by a person identified as “acting legal custodian, or deputy custodian” attesting that the document attached is a true and correct copy of the signed CLA retained by Licensing concerning the license in question. This document also bears the signature of the Board's Secretary, under the Board's embossed seal, certifying that the other person is the official custodian or deputy custodian of the record attached.

I noticed that counsel had not put the CLA into evidence. My experience as a criminal defense attorney made me sensitive to the moment in time when the government's counsel says “we rest.” This is often a dramatic point in a criminal trial, because defense counsel now has the opportunity to test the sufficiency of the government's case. Because of the constitutional rights of criminal defendants, a failure to have proven each element of the case at this point might require acquittal; for that reason prosecutors are generally careful to review their checklists before resting.

Trial judges presiding at criminal jury trials usually keep their fingers off the scales of justice. They may notice a defect in the prosecution's case, but will not comment upon it until after the government has rested, because to do so would tilt the playing field in the government's favor.

---

<sup>2</sup> The comment made in the previous footnote also applies here.

This was on my mind when the government rested its case in this matter. On the other hand, I am aware of the differences between administrative and criminal law practice. I know that I am enjoined as an administrative law judge to interpret procedural rules liberally "to secure just, speedy and inexpensive determination of the issues presented." 1 Pa. Code §31.2.

I therefore remarked, after the government had finished its case and Licensee presented its witness, "Well, this is administrative law so I'm going to do something that probably would be a bad thing to do in Common Pleas. I'm going to point out that I do not have any evidence that there is a CLA in this case. And rather than fuss around with that, I'm going to allow you to reopen to put that in if you can." (N.T. 25-26).

Counsel for the government was not prepared to hand up the usual attestation/certification. He had only an unverified copy of the CLA. I asked how he was going to get that in. Counsel replied that it was "an internal document" that I could take notice of. Counsel for Licensee objected, pointing out that as there was no attestation, the document should not be received, and also that this was not a document kept in the normal course of the Board's business, and therefore not subject to notice. I took the objection under advisement.

I have come to the conclusion that I am authorized to take notice of documents on file with the Pennsylvania Liquor Control Board, because of this provision of the Pennsylvania Code:

***1 Pa. Code § 35.164. Documents on file with agency.***

In case any matter contained in a report or other document on file with the agency is offered in evidence, such report or other document need not be produced or marked for identification, but may be offered in evidence by specifying the report, document, or other file containing the matter so offered.

The CLA in this case is a "document on file with the agency." The regulation says it "may" be offered in evidence, which seems to imply some room for discretion. One is tempted to sanction the Bureau's departure from a procedure we have become used to; otherwise what point was there in bothering with all those attestations/certifications in all the other cases?

The deciding factor, however, is that the document in question was signed by Licensee, who has no reason to be surprised by its contents. The document I have reviewed is the same "image" of the original document signed by the parties which the Board's custodian of records would have certified in the usual procedure. Standing on the ceremonial requirement that the same be formally offered and received in evidence during an administrative hearing seems quaint and not in the interests of judicial economy.

In addition, a decision on this point adverse to the Bureau could be appealed, eventually to the court of common pleas, which would hear the matter *de novo*. The Bureau could then correct the error, if it was such. This course of action would not contribute to a "just, speedy and inexpensive determination" of the matter.

Therefore counsel's objection to the admission of the CLA is overruled.

The citation does not specify in what manner it alleges Licensee violated the CLA, but since all licensees are given advance notice of what the evidence will be, the failure to spell it out in the

citation does no injury to Licensee's rights. In fairness to a future reader of this opinion, however, these are the specific ways in which I found Licensee to be in violation of the CLA:

1. On February 1 and March 1, 2013, liquor enforcement officers purchased alcoholic beverages without being required to present identification – CLA ¶8(f)
2. On the same dates, as well as on April 22, 2013, the premises did not maintain the required number of surveillance cameras (I have resolved the conflict in the evidence on this point in the government's favor) – CLA ¶8(g)
3. On February 1 and March 1, 2013, any security officers who might have been on duty were not attired so as to show their function – CLA ¶8(j)

PRIOR RECORD:

Licensee has been licensed since October 14, 1975, and has had prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, as follows:

In re Citation No. 89-1772. \$250.00 fine.

1. Sold, furnished or gave liquor for consumption off premises.

In re Citation No. 91-1138. \$250.00 fine and 1 day suspension with conditions.

1. Not a *bona fide* restaurant (insufficient food and chairs at tables).

In re Citation No. 99-0170. \$800.00 fine and 1 day suspension with conditions.

1. Gambling (numbers bets).
2. Unlawfully possessed liquor obtained from a source other than a PA state store.
3. Not a *bona fide* restaurant in that chairs at tables were insufficient.

In re Citation No. 07-1975. \$1,250.00 fine.

1. Sales on Sunday after 2:00 a.m. July 29, 2007.

In re Citation No. 07-3009C. \$1,500.00 fine and R.A.M.P. – certification mandated.

1. Sales to a minor. November 15, 2007.

In re Citation No. 08-1786. \$600.00 fine.

1. Permitted patrons to possess alcoholic beverages after 2:30 a.m. June 21, 2008.
2. Failed to require patrons to vacate the premises by the required time. June 31, 2008.

In re Citation No. 08-2788. \$650.00 fine.

1. Failed to require patrons to vacate the premises by the required time. October 25, 2008.

In re Citation No. 09-0738. \$1,600.00 fine.

1. Loudspeakers heard outside. November 21, 22, 2008; January 4 & February 14, 2009.
2. Failed to require patrons to vacate the premises by the required time. October 19, 2008 and January 4, 2009.
3. Permitted smoking in a public place where smoking was prohibited. November 21, 22, December 18, 2008; January 4 and February 14, 2009.
4. Failed to post signs required by the Clean Indoor Air Act. November 21, 22, December 18, 2008; January 4 and February 14, 2009.

In re Citation No. 10-1711C. \$1,000.00 fine and 1 day suspension.

1. Sales to a minor. July 23, 2010.

In re Citation No. 11-0312. \$300.00 fine.

1. Loudspeakers could be heard outside. January 30, 2011.

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 \$50.00 to \$1,000.00 range, or both, for violations of this type. Penalties are assessed as follows:

Count 1 – a fine of \$350.00.

Count 2 – a fine of \$150.00.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Marvis Leaf, t/a Frank's Place, License No. R-AP-SS-11873, shall pay a fine of five hundred dollars (\$500.00) 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 9<sup>TH</sup> day of JUNE, 2014.



David L. Shenke, J.

**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.** If you are paying by guaranteed check, please make it 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

**Credit/debit cards may be used:** visit [www.lcb.state.pa.us](http://www.lcb.state.pa.us)  
and look under LEGAL/Office of ALJ for instructions.