

Mailing Date: APR 03 2015

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

PENNSYLVANIA STATE : In Re Citation No.: 14-0642  
POLICE, BUREAU OF :  
LIQUOR CONTROL ENFORCEMENT :  
v. : BLCE Incident No.: W04-471836  
R & G, INC. :  
T/A LEFTYS IN THE STRIP : PLCB LID No.: 56072  
2021 PENN AVE. : PLCB LICENSE NO.: R-SS-19951  
PITTSBURGH, PA 15222 :  
ALLEGHENY COUNTY :  
:

**BEFORE:** JUDGE RICHARD O'NEILL EARLEY

APPEARANCES:

**BLCE COUNSEL:** NADIA VARGO, ESQUIRE  
**LICENSEE COUNSEL:** HOLLY L. GUNA, ESQUIRE

**ADJUDICATION**

BACKGROUND:

This proceeding arises out of a citation that was issued on April 11, 2014, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against R & G, Inc., t/a Leftys in the Strip, License Number R-SS-19951, (hereinafter Licensee).

The citation contains five counts.

Count one of the citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-471 and the Clean Indoor Air Act (CIAA) at 35 P.S. §637.6(a)(2), alleging that on December 13, 2013, Licensee, by its servants, agents or employees, smoked and/or permitted smoking in a public place where smoking is prohibited.

R & G, INC.  
T/A LEFTYS IN THE STRIP  
IN RE CITATION NO. 14-0642

Count two of the citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-471 and the Clean Indoor Air Act (CIAA) at 35 P.S. §637.6(a)(1), alleging that on December 13, 14, 2013; and January 17, 2014, 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 Licensee with violation of the Liquor Code at 47 P.S. §1-102, alleging that on December 13, 14, 2013; and January 17, 2014, Licensee's licensed premises was not a bona fide restaurant in that Licensee, by its servants, agents or employees, maintained insufficient food items and seating.

Count four of the citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-471 and the Crimes Code at 18 Pa. C.S. §5513, alleging that on December 13, 14 and 18, 2013, Licensee, by its servants, agents or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises.

Count five of the citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-493(1), alleging that on December 13, 2013, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one minor, 15 years of age.

An administrative hearing was conducted on Tuesday, January 27, 2015, at Two Parkway Center, Suite G-8, in Pittsburgh, Pennsylvania. The Bureau was represented by Nadia L. Vargo, Esquire. Licensee was represented by Holly L. Guna, Esquire. Licensee stipulated to the facts in the Bureau's Pre-Hearing Memorandum (PHM) concerning counts one through four. (Licensee's PHM, ¶4.)

Based on Licensee's stipulations and evidence from the hearing, I make the following Findings of Fact and reach the following Conclusions of Law. Unless otherwise specified, the Bureau's PHM is the source of the facts in counts one to four.

FINDINGS OF FACT:

1. On December 13, 2013, at 11:35 p.m., Liquor Enforcement Officers entered Licensee's premises as part of the Pittsburgh Police Nuisance Bar Task Force to conduct an open inspection. (Bureau's PHM) This is commonly referred to as a "raid" because it is a surprise inspection. The task force was comprised of personnel from the Bureau of Liquor Control Enforcement; the Pittsburgh Police; the Pittsburgh Department of Permits, Licenses, and Inspections; the Allegheny County Health Department; and the Pennsylvania Board of Probation and Parole. (N.T. 9) The task force departed at 12:10 a.m., on December 14. (Bureau's PHM)
2. When the task force entered the premises, the police turned on all the lights and Officers in raid gear entered from the front and back doors. (N.T. 52, 61,

R & G, INC.  
T/A LEFTYS IN THE STRIP  
IN RE CITATION NO. 14-0642

69) One of the Pittsburgh Police Officers involved in the raid was Lt. Cristyn Zett. Lt. Zett testified at the hearing that the Pittsburgh Police's primary objective during a raid is to "make sure that everything is secured, that there's no weapons, that nobody runs, who is armed, anything that's more serious." (N.T. 51)

3. At the time of the raid, Licensee's premises was being run by the bartender and a bouncer. There were approximately 35 patrons present. (Bureau's PHM)

Counts one and two:

4. During the raid a Liquor Enforcement Officer observed two patrons smoking cigarettes and approximately 10 ashtrays on the bar top. Licensee could not produce a CIAA exception. No CIAA signage was posted.
5. On December 13, 2013, Licensee did not possess a CIAA exception permitting smoking.
6. On January 17, 2014, a Liquor Enforcement Officer conducted a routine inspection of Licensee's premises in the presence of Licensee's corporate president. No CIAA signage was posted.

Count three:

7. During the raid a Liquor Enforcement Officer asked the bouncer about the availability of food. The bouncer said they do not have food in the premises, or a kitchen. Menus from other establishments are not provided to patrons. The Officer inspected the premises and did not find any food.
8. On January 17, 2014, at 3:00 p.m., a Liquor Enforcement Officer conducting a routine inspection found that Licensee did not have seating for 30 people. Licensee had only 26 chairs.

Count four:

9. During the December 13, Nuisance Bar raid, an Enforcement Officer and a Pittsburgh Police detective examined a Crazy Bugs video slot machine which was in the bar. The Officers found the machine contained a credit-clearing mechanism, and they marked the machine for future seizure.
10. On December 18, 2013, an Enforcement Officer and Pittsburgh Police detectives and officers served a search warrant for gambling devices at Licensee's premises. The bartender provided the Officer with a clipboard of payoff records. Three video gaming devices were powered on and operational:

R & G, INC.  
T/A LEFTYS IN THE STRIP  
IN RE CITATION NO. 14-0642

a Cherry Master slot machine, a Super Draw poker machine, and a Crazy Bugs slot machine.

11. A Pittsburgh Police detective examined the machines. The machines possessed the following features: they required no skill to play, they possessed accounting that tracked coins in and credits cleared, and they utilized remote controls to clear credits on all machines.

Count five:

12. At approximately 11:00 p.m., 30 minutes before the Nuisance Bar Task Force raid, undercover Pittsburgh Police Detectives entered the licensed premises. (N.T. 41) One of these detectives, Andrew Baker, testified at the hearing. He was present undercover for approximately 35 minutes. (N.T. 41, 48) He saw a young-looking female whom he believed held a short glass containing an amber liquid. (N.T. 36-37, 38, 40, 44) This female turned out to be a 15-year-old juvenile. (N.T. 15, 25) He observed her for approximately one minute. (N.T. 48) His observation was cursory in nature. Detective Baker testified that "I mean, I saw her and as I said, she just looked really young. But that was about the extent of my observation. We were looking for other stuff...." (N.T. 43) He acknowledged that his observation was made in dim light under crowded conditions. (N.T. 44-45)
13. When the Nuisance Bar Task Force entered the premises approximately 15 minutes after Detective Baker's observation (N.T. 42), Lt. Zett saw a "really young" female. (N.T. 51) This female turned out to be the juvenile described by Detective Baker. Lt. Zett thought she saw the juvenile place a glass behind her back on a drink rail. (N.T. 51, 54, 58-59) Lt. Zett continued with her primary objective of securing the premises. (N.T. 51) Lt. Zett specifically testified that dealing with minors' violations "wasn't really our primary objective for the raids." (N.T. 53) Several minutes later, she approached the juvenile because of her apparent age. (N.T. 51, 59)
14. Neither Detective Baker nor Lt. Zett observed the juvenile consume alcohol or observed Licensee serve her alcohol. (N.T. 44, 48, 60) There was no odor of alcohol detected on the juvenile by Liquor Enforcement Officers or Lt. Zett. (N.T. 26, 62) There is no evidence in the record that the juvenile presented physical indications of alcohol consumption. There is no evidence in the record that anyone who spoke with the juvenile asked her if she possessed or consumed alcohol. (N.T. 8-35, 64)
15. Lt. Zett testified that when she asked the juvenile's age, the juvenile gave a false birthdate. (N.T. 53) When Lt. Zett asked her again, an adult friend, Megan Stockdale, interceded and asserted that the juvenile was 21. (N.T. 53) Stockdale was 32 years old at the time. (N.T. 66) Lt. Zett and Stockdale got

in a physical confrontation that resulted, ultimately, in Lt. Zett placing Stockdale under arrest. (N.T. 15, 19-20) Before arresting Stockdale, Lt. Zett sought a Liquor Enforcement Officer to handle the juvenile to allow Lt. Zett to address the situation with Stockdale. (N.T. 53-54)

16. When Lt. Zett finished addressing the matter with Stockdale, she found what she believed was the juvenile's glass. (N.T. 54) Lt. Zett estimated this occurred approximately 8 to 13 minutes after first seeing the juvenile. (N.T. 54, 59-60) While she was securing the premises and dealing with Stockdale she regularly checked on the area where she believed the juvenile placed a glass. Because of this Lt. Zett believes it was not likely she mistakenly identified the glass. (N.T. 54-55) However, she acknowledged there were multiple drink glasses within approximately two feet of where the juvenile was standing, including another short glass and several tall glasses which she believed held beer. (N.T. 55, 59)
17. Lt. Zett described the glass she examined as short, and containing approximately one inch of an amber liquid that smelled of either whiskey or scotch. (N.T. 54, 61) She did not test any other glasses to determine their contents. (N.T. 64) There is no evidence anyone asked the juvenile to identify the glass she held. (N.T. 8-35, 64)
18. The juvenile testified she did not consume any alcohol, but lied about her age to Lt. Zett because she believed that her age made it illegal for her to be in the licensed premises. (N.T. 28, 34) She arrived at the licensed premises at 10:00 p.m. that evening. (N.T. 26) She was served one drink which was a glass of pineapple juice. (N.T. 31) She denied attempting to hide her glass during the raid. (N.T. 31-32) Although the police cited the juvenile for underage drinking, the charge was dropped without any plea or admission of wrongdoing in return for the juvenile participating in alcohol safety classes. (N.T. 28-29, 55-56, 63-64)
19. The juvenile did not describe the glass she held. However, Stockdale testified it was a tall glass and was provided to her by Stockdale's boyfriend. (N.T. 84-85, 86) Stockdale confirmed that there were many glasses near the juvenile, but stated that the other members of their group drank bottles of beer. (N.T. 89) The bartender, Ben Hamm, considered Stockdale's crowd to be regulars who always drank beer from bottles. (N.T. 93)
20. Licensee serves pineapple juice as well as several other juices. (N.T. 101) Hamm thought juice would normally be served in a tall plastic cup, but he did not remember serving the juvenile's drink. (N.T. 93-94) Patrons who arrive early in the evening are often served in glasses but there is no business policy dictating the type of glass in which juice is served. (N.T. 93-95) Licensee, Rick Chris, testified that everything other than liquor on the rocks is served in

R & G, INC.  
T/A LEFTYS IN THE STRIP  
IN RE CITATION NO. 14-0642

a tall glass. (N.T. 99) The register system used by Licensee cannot track service of juice based on sales receipts. (N.T. 102) Often juice is given free to patrons and not rung up as a courtesy to “designated drivers.” (N.T. 102)

CONCLUSIONS OF LAW:

1. Notice provisions of the Liquor Code at 47 P.S. §4-471 have been satisfied.
2. Count one: Licensee violated the Liquor Code at 47 P.S. §4-471 and the Clean Indoor Air Act (CIAA) at 35 P.S. §637.6(a)(2), when on December 13, 2013, Licensee smoked and/or permitted smoking in a public place where smoking is prohibited.
3. Count two: Licensee violated the Liquor Code at 47 P.S. §4-471 and the Clean Indoor Air Act (CIAA) at 35 P.S. §637.6(a)(1), when on December 13, 14, 2013; and January 17, 2014, Licensee failed to post signage as required by the Clean Indoor Air Act.
4. Count three: Licensee violated the Liquor Code at 47 P.S. §1-102 when on December 13, 14, 2013; and January 17, 2014, Licensee’s licensed premises was not a bona fide restaurant in that Licensee maintained insufficient food items and seating.
5. Count four: Licensee knew or should have known that illegal gambling was occurring on the licensed premises and took no steps to prevent the illegal activity. Licensee violated the Liquor Code at 47 P.S. §4-471 and the Crimes Code at 18 Pa. C.S. §5513, when on December 13, 14 and 18, 2013, Licensee possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises.
6. Count five: There is insufficient substantial evidence to sustain a violation of the Liquor Code at 47 P.S. §4-493(1), on December 13, 2013, for selling, furnishing and/or giving or permitting the same to a minor.

DISCUSSION:

The Bureau has the burden of proving a violation by a clear preponderance of the evidence. Omicron Enterprises, 449 A.2d 857 (Pa.Cmwlth. 1982). The preponderance of the evidence standard requires the Bureau to show that it is “more likely than not” that the alleged event occurred. Agostino v. Township of Collier, 968 A.2d 258 (Pa.Cmwlth. 2009). Pennsylvania courts have long held that “substantial evidence” necessary to support either a violation of law or a 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.Cmwlth. 2005).

R & G, INC.  
T/A LEFTYS IN THE STRIP  
IN RE CITATION NO. 14-0642

There is no evidence the juvenile consumed alcohol. (Finding 14) Therefore, the Bureau must prove by a preponderance of substantial evidence that Licensee permitted the juvenile to possess alcohol.

Detective Baker's testimony does not establish a violation. There was no way for him to know what was in the juvenile's glass. Nor do I find his description of the juvenile's glass, or its contents, to be reliable. Under the poor viewing conditions described (Finding 12), I am not prepared to agree with his assertion that pineapple juice would have an obviously different appearance than an alcoholic drink. (N.T. 37) Therefore, Detective Baker's testimony cannot establish a violation because it is not adequately reliable to establish the contents of the juvenile's glass.

Only Lt. Zett offered testimony concerning the contents of the juvenile's alleged glass. Lt. Zett examined a glass resting on a drink rail that she believed was the juvenile's and found it contained whiskey or scotch. (Finding 17) Lt. Zett believes she examined the glass the juvenile set down because she kept an eye on it while she attended to other tasks. (Finding 16) However, under the circumstances described, I am not confident Lt. Zett examined the correct glass.

Lt. Zett initially described noticing the juvenile because she appeared to place a short glass behind her back on a drink rail. (Finding 13) She also testified that the juvenile's companions moved to block the juvenile from her view. (N.T. 51, 52) Both of these circumstances suggest that Lt. Zett's view was not ideal and that I must carefully consider the reliability of this observation.

Next, Lt. Zett's testimony establishes that there was a significant time lapse between noticing the juvenile and examining the drink glass. As Lt. Zett explained, her primary objective was securing the premises, looking for weapons, preventing flight and detecting contraband. (Finding 2) Her primary role was not dealing with minors' violations. (Finding 13) Because of this, Lt. Zett took several minutes handling other matters before approaching the juvenile. (Id.)

The record strongly suggests Lt. Zett did not initially suspect the juvenile was drinking alcohol. When she approached the juvenile she did not ask to examine her drink and could not recall whether she asked the juvenile if she had alcohol. (Finding 14) Although there were multiple glasses within two feet of the juvenile, Lt. Zett did not examine any of them at that time. (Findings 15-17) Rather, Lt. Zett questioned the juvenile about her age because she seemed unusually young. (Finding 13, N.T. 51)

The juvenile then raised suspicions of wrong-doing by reporting a false birthdate. (Finding 15) The juvenile explained that she was frightened during the raid because she mistakenly believed her presence as a 15-year-old violated the law.<sup>1</sup> (Finding 18) When

---

<sup>1</sup> No charge was filed against Licensee for permitting minors to frequent. The Liquor Code does not preclude minors from most licensed establishments if they are properly supervised by a parent, legal guardian, or adult 25 years of age or older. 47 P.S. §493(14). Stockdale was 32 on December 13, 2013,

R & G, INC.  
T/A LEFTYS IN THE STRIP  
IN RE CITATION NO. 14-0642

Lt. Zett asked her age again, Stockdale intervened in a manner that escalated the confrontation. (Finding 15) Lt. Zett and Stockdale got into a physical altercation and ultimately Lt. Zett placed Stockdale under arrest. (Finding 15) From that point on Lt. Zett had no further conversation with the juvenile. (Findings 15-17; N.T. 62) As a consequence, Lt. Zett did not have an opportunity to examine the juvenile's glass "from her hand."

Instead, Lt. Zett attempted to keep track of a glass—behind the juvenile and in the vicinity of multiple other glasses—while engaging in a physical altercation and performing an arrest. The situation was confusing and the space was cluttered. (Findings 1-3) In the midst of dealing with 35 patrons and Stockdale there were many opportunities to lose track of one glass out of many on a drink rail. Possibly compounding the confusion is the fact that no effort was made to check other glasses in the vicinity for the presence or absence of pineapple juice, or to confront the juvenile with the examined glass. (Finding 17)

Given these circumstances there is a significant likelihood that Lt. Zett examined the wrong glass. I decline to afford significant weight to her testimony because I do not find Lt. Zett's confidence that she checked the juvenile's glass credible. As a consequence, Lt. Zett's testimony cannot establish by a preponderance of the evidence that Licensee permitted a minor to possess alcohol.

However, I find the juvenile's testimony that she drank pineapple juice credible. (Finding 18) No one detected the smell of alcohol on her, or described her appearance or behavior as suggesting inebriation. (Finding 14) This lack of circumstantial evidence associated with consumption of alcohol tends to suggest the juvenile did not drink. This bolsters the reliability of her testimony that she only drank juice.

Additionally, I note there was confusing testimony regarding the manner in which fruit juice is normally served and the size of the juvenile's glass. (Findings 12-13, 17, 19-20) However, I do not find this evidence adequate to meet the Bureau's burden of proof. The conflicting evidence does not easily lead to inferences favorable or unfavorable to the Bureau. Thus, a reasonable person would not accept this evidence, alone, as adequate to support a conclusion that the juvenile possessed alcohol. Joy Global, Inc.

Therefore, under Omicron Enterprises and Agostino the Bureau failed to present substantial credible evidence to support sustaining a violation for Licensee permitting a juvenile to possess alcohol. Accordingly, count five must be dismissed.

PRIOR RECORD:

Licensee has been licensed since May 8, 2006, and has had two prior violations:

---

(Finding 15) and thus qualified as an adult capable of supervision under the Liquor Code. However, the juvenile's mistaken belief is obviously not a justification to lie to an officer.

R & G, INC.  
T/A LEFTYS IN THE STRIP  
IN RE CITATION NO. 14-0642

IN RE:

Citation No. 06-2583. Fine \$350.00.

1. Failed to require patrons to vacate the premises not later than one-half hour after the required time.
2. Permitted patrons to possess or remove alcoholic beverages after 2:30 a.m.

Citation No. 11-1172. Fine \$300.00. Fine not paid and license suspended 1 day and thereafter until fine paid.

1. Operated the licensed establishment without a valid health permit or license.  
September 1 through December 2, 2010.

PENALTY:

For violations of the type found in counts one through four of this case, the Liquor Code permits any of the following penalties: (1) a license revocation, (2) a fine in the range of \$50.00 to \$1,000.00 for each count, (3) a license suspension, or (4) any combination of a fine and suspension. (47 P.S. §4-471) Accordingly, I impose a penalty of \$200 for count one, \$200 for count two, \$200 for count three, and \$650 for count four.

For the foregoing reasons, a penalty shall be imposed in the amount of \$1,250.00.

ORDER:

THEREFORE, it is hereby ordered R & G, Inc., t/a Leftys in the Strip, License No. R-SS-19951, pay a fine of \$1,250.00 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 27<sup>TH</sup> day of MARCH, 2015.



Richard O'Neill Earley, J.

kes

R & G, INC.  
T/A LEFTYS IN THE STRIP  
IN RE CITATION NO. 14-0642

**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 – Note Citation Number on Check**

-----

The fine must be paid by cashier's check, money order, or a check drawn on the account of an attorney licensed in Pennsylvania. **Personal and business checks are NOT acceptable unless bank certified.** Please make your guaranteed check 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

In Re Citation No. 14-0642  
R & G, Inc.  
t/a Leftys in the Strip