Mailing Date: FEB 27 2015

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

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| PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT | : | IN RE Citation No.: 14-1366 |
| | : | BLCE Incident No.: W04-479908 |
| v. | : | |
| | : | PLCB LID No.: 58029 |
| NWASH, INC. 610 MERCHANT ST. AMBRIDGE, PA 15003-2465 | : | PLCB License No.: R-AP-SS-16667 |
| BEAVER COUNTY | : | |

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

APPEARANCES:

**BLCE COUNSEL:** NADIA VARGO, ESQUIRE
**LICENSEE:** AARON WASHINGTON, MANAGER

## ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 23, 2014, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against NWash, Inc., License Number R-AP-SS-16667, (hereinafter Licensee).

The citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-404, alleging that during the period June 13, 2013 through June 11, 2014, Licensee, by its servants, agents or employees, failed to adhere to the conditions of the agreement entered into the Board placing additional restrictions upon the subject license.

An administrative hearing was conducted on Thursday, December 18, 2014, at Two Parkway Center, Suite G-8, in Pittsburgh, Pennsylvania. The Bureau was represented by Nadia Vargo, Esquire. Licensee was represented by Aaron Washington, manager/steward, whom the Board has recognized as possessing corporate authority to speak on behalf of Licensee.

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

FINDINGS OF FACT:

1. Licensee entered into a Conditional Licensing Agreement (CLA), (Exhibit B-1) signed by Corporate President Novella Washington on January 30, 2008, and Board Chief Counsel, Faith Diehl, Esquire, on April 2, 2008. (N.T. 5, 8) The CLA provides, in pertinent part, as follows:

   6(b) states:

   > NWash shall install, maintain, and utilize security/surveillance cameras to cover the area immediately outside the entrance of the property and the interior of the premises. These cameras shall be operational whenever the premises is operating, shall be in sufficient number to monitor the entire licensed premises and shall permit recording. The input of all cameras will be recorded during all operating hours. Recordings shall be retained for not less than three (3) months, and shall be made available upon request to law enforcement officials, as well as Board employees and employees of the Bureau of Liquor Control Enforcement[.]

   6(d) states:

   > NWash shall maintain regular monthly contact with the Ambridge Police Department in order to address any problems, and shall maintain records indicating the date and substance of said contact, for a period of two (2) years from the date of said contact[.]

   6(h) states:

   > NWash shall have its employees monitor the exterior of the premises by routinely patrolling (at least once per hour) the entrance to the property. As part of the patrol, NWash shall clear away any litter or trash, ensure that there is no loitering, and notify the Ambridge Police Department of any unlawful or criminal activity. NWash shall maintain records indicating the date and time of such patrols as part of its business records for two (2) years from the date of the patrol[.]

2. The Bureau commenced its investigation of Licensee's premises on June 2, 2014, and completed its investigation on June 11, 2014. (Exhibit B-3) The Bureau notified Licensee of the nature of the alleged violation observed during its investigation in a letter dated July 10, 2014. (Id.)

¶6(b): Video records

3. On May 23, 2014, the Ambridge Police Department notified the Bureau that a shooting occurred at Licensee's premises. (N.T. 10-13) Licensee stipulated that there was a shooting at its premises on that date. (N.T. 16)

4. On June 2 and 11, 2014, Liquor Enforcement Officer Santo Bonadio spoke with Licensee. (N.T. 13, 14) Officer Bonadio requested Licensee's videotape records, but Licensee said it did not have those records and did not produce them. (N.T. 13, 15)

5. Licensee has stipulated that there is no video record from May 20-23, 2014. (N.T. 65-66, 158-159)

¶6(d): Records of monthly contact with police

6. Ambridge Police Department Chief, James Mann, testified that since June 13, 2013, Licensee has not initiated monthly contact with him. (N.T. 47-48, 67-68)

7. On June 11, 2014, Officer Bonadio requested Licensee's records of contacts with the Ambridge Police, but Licensee did not have records like that. (N.T. 18-19)

8. Licensee stipulated that there is no record of contact between Licensee and the Ambridge Police Department. (N.T. 83-84, 196-197)

9. Licensee has never requested Board clarification about its responsibilities under ¶6(d) of the CLA, or requested an amendment of the CLA terms. (N.T. 188, 191)

¶6(h): Records of hourly exterior patrols and conducting hourly exterior patrols

10. On June 11, 2014, Officer Bonadio requested any records that Licensee may keep of exterior patrols, but Licensee said it did not have those records and did not produce them. (N.T. 20)

11. On December 12, 2014, Licensee sent the Bureau documents purporting to show when Licensee conducted patrols. (N.T. 20) Those records include a date, the start of business operations, and the end of business operations.

(N.T. 135) Licensee contends it maintains a "continuous" patrol which includes walking the exterior and viewing the exterior from inside. (N.T. 134)

12. Licensee did not have records that indicate when it conducted hourly exterior patrols of the premises. (N.T. 131-133, 135)

13. There is no evidence that the Bureau conducted surveillance of the licensed premises in the period June 13, 2013 through June 11, 2014.

14. Licensee conducted patrols of the exterior of the premises on one or more dates in the period charged. (N.T. 49-50, 57-58, 71-75)

15. There is no direct evidence in the record to establish that Licensee failed to conduct any exterior patrols as required under ¶6(h) of the CLA.

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).

At the hearing, Licensee stipulated that it did not keep a video record during operational hours on May 23, 2014. (Finding 5) Licensee also stipulated that it did not possess any records of monthly contact with the Ambridge Police. (Finding 8) Therefore, the Bureau has established by a preponderance of substantial evidence that Licensee violated the requirements of ¶¶6(b) and 6(d) of its CLA.

However, Licensee contends it was not obligated to have monthly contact with the police under ¶6(d) because it had an understanding with the Board that the requirements of ¶6(d) were excused by circumstances. In particular, Licensee testified that the Ambridge Police Chief in 2008 (not Chief Mann) informed Licensee and a Board employee that the police do not entertain monthly contacts with licensees. (N.T. 101, 106) Because the Board's "representative" nonetheless found that Licensee had satisfied the conditions necessary to begin operations, Licensee contends it believed the Board would not require it to engage in monthly police contacts. (N.T. 105-107)

I cannot agree. The terms of the CLA cannot be modified without a written agreement. The CLA specifically provides that the "terms will remain in effect...unless and until a subsequent agreement is reached with the Board." CLA ¶7. Therefore, Licensee had reason to know the CLA is not self-modifying, but Licensee never sought clarification or amendment of the CLA. (Finding 9) Because the CLA requires records

of monthly police contact, I cannot find any basis in the record to excuse Licensee from honoring its explicit obligations now.[1]

Next, Licensee argues that it did not violate the requirement to record its hourly exterior patrols pursuant to ¶6(h). Licensee contends its door personnel are required to conduct "continuous" patrols, which include hourly exterior patrols. Licensee suggests it is possible to "patrol" the exterior of the premises both by going outside and by standing inside and looking through its large front windows. (N.T. 129-130) Because its security personnel are most often positioned by the front windows, Licensee believes that even when staff are inside they are regularly in a position to assess conditions outside of its premises. (N.T. 131) Thus, it argues that by looking at the records of Licensee's operation one can infer that in each hour of its operation someone conducted an exterior patrol. (N.T. 134)

To be clear, looking out the window is not "patrolling" within the meaning of the CLA. The CLA envisions a physical presence outside the premises because "[a]s part of the patrol, NWash shall clear away any litter or trash, [and] ensure that there is no loitering[.]" (CLA ¶6(h)) These requirements can only be met when Licensee is outside. Thus, Licensee must go outside to patrol (which, as we shall see, below, the Chief of police confirmed Licensee's staff does).

In any event, Licensee's continuous patrol argument cannot excuse it from keeping records of exterior patrols. The CLA specifies that Licensee "shall maintain records indicating the date and time of such patrols." (Id.) Instead, Licensee testified its records merely indicated the hours its staff are on duty, which is inadequate under ¶6(h).[2] (Finding 11) Therefore, because Licensee acknowledges its records do not reflect hourly exterior patrols (Finding 12), the Bureau has established Licensee violated ¶6(h) by a preponderance of substantial evidence.[3]

Next, the Bureau urges me to conclude that the reason there are no records of patrols is because there were no patrols. I note that the Bureau did not offer any other evidence that Licensee failed to patrol or that it patrolled less frequently than required.

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[1] I also note that Licensee previously violated ¶6(d) for its failure to possess records of monthly police contact. BLCE v. NWash, Inc., 13-2260 (ALJ 6/11/14). Therefore, whatever obligations Licensee believed ¶6(d) imposed on it after it opened in 2008, once Licensee was found in violation at Citation No. 13-2260 it had good reason to know the Bureau expected strict compliance with the terms of the CLA. That should have been adequate justification for Licensee to contact the Board to clarify its obligations.

[2] I note that while Licensee's records were offered in evidence, they were admitted only for purposes of review to permit me to understand the parties' many disagreements over the quality and substance of Licensee's records. (N.T. 120) The records were never marked as exhibits.

[3] There was some confusion at the hearing regarding who was responsible for providing legible copies of Licensee's records. The Bureau objected that Licensee's records were illegible, to which Licensee offered to provide cleaner copies after the hearing. (N.T. 111-113) Licensee felt prejudiced by the Bureau's failure to alert it sooner that Licensee's records were illegible. (Id.) However, the Bureau does not have any obligation to make sure Licensee puts on a good defense. In any event, the contents of the documents proved to be unimportant to my determination because of Licensee's acknowledgement of the limitations of its records. (Finding 11) Therefore, there was no benefit in permitting Licensee to submit clearer, but still inadequate, records post-hearing.

Normally, the absence of records of patrols might support the conclusion a licensee failed to conduct patrols. However, in this case there is uncontradicted, credible evidence from Chief Mann that he has seen Licensee's staff outside the premises. (Finding 14) For example, Chief Mann initially testified that he saw Licensee's staff outside the premises sometime in the range of November 2012 to May 2013.[4] (N.T. 57-58) Chief Mann further testified he had "seen security personnel out front in the middle of 30 people on many occasions." (N.T. 72) Thus, the Chief's testimony bolsters Licensee's assertion that it conducted exterior patrols. (N.T. 131)[5]

It has the further effect of preventing me from treating the absence of records as reliable evidence to support the Bureau's theory that Licensee never patrolled. Therefore, in light of the Chief's testimony, I conclude that Licensee's lack of records is not credible evidence sufficient to allow the inference that Licensee failed to patrol on any days or times required under the CLA. Instead, in this case the Bureau must prove at least one actual failure to patrol.

What the Bureau is left with, though, is too little to sustain a violation on this facet of its case. The Bureau has not presented any other evidence that Licensee failed to patrol on any day it operated in the period of June 2013 to July 2014. Any lingering question about the sufficiency of patrols is the Bureau's question (burden) to settle with evidence. Omicron. Put another way, the fact that there is a lingering question at all demonstrates that the Bureau did not prove its case by a clear preponderance of the evidence.

Accordingly, because there is no substantial evidence in the record that Licensee failed to patrol on any day it operated in the period of June 2013 to July 2014, the Bureau cannot meet its burden of proof under Omicron by a clear preponderance. However, because the Bureau has already satisfied its burden of proof for the other breaches of the CLA, I cannot dismiss the charge. Thus, the Bureau's charge is sustained.

CONCLUSIONS OF LAW:

Notice provisions of the Liquor Code at 47 P.S. §4-471 have been satisfied.

Count one: Licensee violated the Liquor Code at 47 P.S. §4-404, in that during the period June 13, 2013 through June 11, 2014, Licensee, by its servants, agents or employees, failed to adhere to the conditions of the agreement entered into the Board placing additional restrictions upon the subject license.

PRIOR RECORD:

Licensee has been licensed since April 4, 2008, and has four prior violations:

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[4] For example, Chief Mann testified that approximately one year to a year and a half before the May 23, 2014, shooting, he took Mr. Washington to view other licensed establishments (N.T. 49-50) and that he saw Licensee's staff outside. (N.T. 57-58)

[5] Chief Mann suggested that what he witnessed was not patrolling, but I am not bound by his conclusions.

IN RE:

Citation No. 13-1239. One day suspension.

1. Failed to have your Board-approved manager complete RAMP training within 180 days.
   December 9, 2012 through January 7, 2013.

Citation No. 13-1351. Three days suspension.

1. Smoked and/or permitted smoking in a public place where smoking was prohibited.
   April 18, 20, May 16 and 17, 2013.
2. Engaged in unlawful discrimination in that alcoholic beverages were provided to female patrons at a reduced price while male patrons were charged full price.
   April 18 and May 16, 2013.
3. Furnished more than one free drink per patron.
   May 16, 2013.

Citation No. 13-1596. One day suspension.

1. Sold and/or served an unlimited or indefinite amount of alcoholic beverages.
   June 14, 2013.

Citation No. 13-2260. Fine $1,150.00.

1. Failed to constantly and conspicuously expose license under a transparent substance.
   June 11, 2013.
2. Smoked and/or permitted smoking in a public place where smoking was prohibited.
   June 11, 2013.
3. Failed to post signage as required by the Clean Indoor Air Act.
   June 11, 2013.
4. Failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions on the license.
   June 11, 14 and 15, 2013.
5. Used loudspeakers or devices whereby the sound of music could be heard beyond the Licensee's property line.
   May 15, 16, 28 and 29, 2013.
6. Noisy and/or disorderly operation.
   May 15, 26, 28 and 29, 2013.

NWASH, INC.
IN RE CITATION NO. 14-1366H

PENALTY:

For violations of the type found in count one 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)

For the foregoing reasons, a penalty shall be imposed in the amount of $700.00.

ORDER:

THEREFORE, it is hereby ordered NWash, Inc., License No. R-AP-SS-16667, pay a fine of $700.00 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 18TH day of February, 2015.

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Richard O'Neill Earley, J.

**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**

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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

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In Re Citation No. 14-1366H
NWash, Inc.