

Office of Administrative Law Judge  
Testimony of Office of Administrative Law Judge  
Before the House Liquor Committee  
March 21, 2012

Good afternoon Mr. Chairman and Members of the Committee. My name is Eileen Maunus and I am Chief Administrative Law Judge for the PLCB. Thank you for the opportunity to address the Committee; this being the first time in my sixteen years in this position that I have been asked to provide information on the Office of Administrative Law Judge's function as well as address issues of concern to my Office.

By way of background, I have been employed as Chief ALJ since 1996, having been appointed by Governor Ridge after testing and pursuant to Civil Service Rules. Prior to my appointment I held various positions with the PLCB, including Assistant Counsel, Deputy Chief Counsel and Acting Chief Counsel. This is my 29<sup>th</sup> year of service to the Commonwealth. The other 6 Judges, some of whom have been employed since 1987, were also subject to rigorous testing prior to receiving their gubernatorial commission.

I have been asked to address the Committee on the Office of Administrative Law Judge's procedures as well as issues of concern affecting the process.

With respect to the procedure, the processing of cases against Licensees is found in the Liquor Code and Title 40 of the Pa Code. The Bureau of Liquor Control Enforcement of the Pa State Police issues a citation alleging violations to the Licensee and also submits a copy of the citation to my Office. My Office operates in a manner similar to that of a Prothonotary by docketing and creating a processing file.

Generally, discovery is not permitted in an administrative proceeding, however our procedure, as found in our Regulations does permit limited discovery through the Pre-Hearing Memorandum. A Memorandum, which is to be filed by both the Bureau of Liquor Control Enforcement and the Licensee or Licensee's attorney, provides some information to the parties and my Office as to the general nature of the case. The information contained in the Memorandum also assists in the hearing scheduling process. With the Pre-Hearing Memorandum in hand, the Judge is better equipped to conduct and prepare for a hearing.

Whether or not the licensee has filed a Pre-Hearing Memorandum the case is either scheduled for hearing or the Licensee may file a waiver of the hearing essentially admitting to the violations. We estimate between 75% - 80% of our approximately 3000 cases per year are processed through a waiver. Hearings are formal, similar to what you would see in a Common Pleas Court proceeding. They can be as short as 15 minutes or may last the entire day.

After receiving the waiver or after hearing, the Administrative Law Judge prepares an Adjudication. If a violation is found, the Judge considers the circumstances of the case, the prior citation history, as well as the penalty parameters set forth in the Liquor Code when imposing a penalty. The Adjudication is sent to the parties as the law requires. We estimate our average yearly fines collected to be between \$1.8 million and \$2.2 million. In addition to monetary fines, in 2011 we imposed 2,662 days of license suspension and revoked 94 licenses.

Either party may appeal the Adjudication to the PLCB. The PLCB's review is based on the record made before the Administrative Law Judge. The standard of review is substantial evidence and/or error of law. Approximately 1-2% of our cases are appealed to the PLCB. Of the cases that are appealed, less than 10% are reversed. The PLCB's determination may be appealed by either the Licensee or the Bureau of Liquor Control Enforcement to the Common Pleas Court in the county in which the licensed premises is located. That review is statutorily described as de novo, which in common terms means "anew" or "all over again." The de novo review may be followed by either party appealing to the Commonwealth Court and the Pa Supreme Court.

There are numerous issues of concern to the Office of Administrative Law Judge (OALJ); however, due to the time constraints of this proceeding, I selected only a few for today's meeting. We are hopeful there will be future opportunities to assist in the legislative process.

We recognize it is not our job to formulate legislative policy. However, given our special expertise, we can assist in that process by suggesting or evaluating statutory language to determine if the underlying policy is best served. We also can raise alerts when statutory changes have consequences beyond those initially intended.

With your permission, we present several general, overriding concerns which frustrate our mandate in an all-encompassing way. They are: Command Pressure; Comingling; Stalled Cost Saving Initiatives and Safety/Security Concerns.

### **Command Pressure**

Command Pressure is a term familiar to most hearing officers. It is a topic always discussed at annual conferences held by various judicial organizations and addressed in many legal papers. In our system, Command Pressure is intertwined with Comingling.

Command Pressure may be defined as attempts by government officials to influence or direct government employees, who are charged with the duty to determine facts, and/or interpret law, and/or render binding decisions or recommendations with impartiality. Command Pressure may be as palpable as a Supervisor directing an employee to prepare a document precisely as commanded or as subtle as hinting of reward for a favorable outcome.

Whatever the method, Command Pressure is illegal, subjecting those who participate to punitive repercussions that may include criminal law sanctions. Less obvious, but even more destructive is the loss of public trust in governmental integrity that results from Command Pressure.

Our system has been crafted to ensure through civil service protection, that judges are organizationally insulated from Command Pressure sources, allowing us to render decisions with great deference to fairness.

The present system was made law by Act 14, 1987, which was a total re-enactment of the Liquor Code, but with an entirely re-tooled adjudicatory process.

Formerly, the PLCB investigated violations, brought charges, (heard by hearing officers employed at-will and who could only recommend), and issued Adjudications. It may be said that Act 14 predicted the Pennsylvania Supreme Court conclusion in the case of Lyness (*Lyness v. State Board of Medicine*, 605 A2d 1201 (1992)), that a procedure in which an agency is both prosecutor and judge is fundamentally unfair, as it plunders a citizen's right to an impartial decision maker.

Act 14 installed a number of measures resulting in a new enforcement/adjudicatory process which ensures high quality decision making, free of impartiality. The Act transferred the enforcement function to a new agency, the Bureau of Liquor Control Enforcement (BLCE) (47 P.S. §2.211). The adjudicatory function was also transferred from the PLCB to a new agency, the Office of Administrative Law Judge (OALJ) (47 P.S. §2-212).

Administrative Law Judges (ALJs) must be learned in the law and members in good standing of the bar of the Supreme Court of Pennsylvania. ALJs are appointed by the Governor who must comply with the Civil Service Act. Consequently, ALJs are insulated from Command Pressure by virtue of the job security afforded them in the Civil Service Act. The OALJ is defined as an autonomous office within the PLCB. Together, these features unequivocally speak to the General Assembly's intention to design an adjudicatory process free from any unlawful incursions.

However, it almost goes without saying, no matter how clear or carefully the Legislature enacts law, success can only be measured by the fidelity and resolve of those entrusted to fulfill the Legislature's goals. Ultimately, restructuring agencies and shifting responsibilities will never successfully defeat dishonesty or corruption.

I and my predecessor, the late Chief Administrative law Judge Gerald Ruth, who built the OALJ from the ground up, have worked tirelessly to merit the credentials of an effective and constitutionally firm system where, whatever the result of a particular case, both parties know they have been heard and that Adjudications are issued within the law by experienced, unbiased judicial officers.

Quite frankly, in the past four years or so, we are disheartened to report there has been what we perceive as attempts to assert Command Pressure, not in any one case, but rather in the broad perspective of operational control.

Our legislatively mandated organizational relationship with the PLCB offers opportunity for subtle Command Pressure. While we are defined as autonomous, we nevertheless rely on the PLCB for serving our administrative needs, such as office location and filling vacancies. Should a PLCB official be dissatisfied with an OALJ decision because the decision contradicts PLCB policy or position, it is relatively easy to seek retribution by deliberately undermining the support process.

**Another issue of concern is the concept of Comingling**

Comingling is a word which we understand to be an unconstitutional convergence of roles in the adjudicatory process as expressed in the case of Lyness. Almost the very day that Act 14 became law, phraseology was coined to the effect that the Bureau of Liquor Control Enforcement (BLCE) and the OALJ are exclusively responsible for enforcing the Liquor Code while the PLCB functions as a licensing authority. The slogan has been and continues to be an inaccurate over-simplification.

In practice, the BLCE engages in licensing and the PLCB also enforces. The BLCE regularly issues citations heavily flavored with licensing parameters. A citation charging a licensee with failing to qualify as a bona fide restaurant is a licensing matter clothed in citation garb. When the PLCB refuses to renew a license because of Liquor Code violations, the PLCB considers an enforcement matter in a licensing context.

The present system has three government agencies (PLCB, OALJ, BLCE) to which a licensee must respond. Each interprets the same body of law but from a different

perspective. This arrangement is a recipe for confusing, unrealistic demands. It is an unimaginably encumbered process, requiring both licensees and the government to expend duplicative resources. In this arena, Commingling includes elements of Command Pressure as well as inordinate resource depletion as agencies compete for authority and work at cross purposes.

The General Assembly has attempted to address this unusually complex inter-agency operation. A prime example is the addition of Liquor Code Section 2-211.1 (47 P.S. §2.211.1) which authorizes the PLCB to issue opinions to licensees, upon request, which opinions restrict BLCE authority. Regrettably, that provision created more problems than it solved. Other Liquor Code amendments, unquestionably intended to improve the process, actually compounded comingling.

The PLCB's licensing authority, through the refusal to renew process, and the authority granted the PLCB to enter into Conditional Licensing Agreements (CLAs) have enlarged Comingling and further eroded the enforcement function assigned to the BLCE and OALJ. With respect to the Condition Licensing Agreements, if a licensee is cited for having violated a provision in the CLA, the ALJ is charged with determining if the CLA has been violated. Either the BLCE or the licensee may appeal the decision to the PLCB. In essence, the PLCB will be reviewing its own contract to determine if the ALJ's decision was correct. One way to resolve some of the more egregious Commingling issues is to remove the PLCB from the appeal process; allowing appeals to go directly to either the Common Pleas Court or the Commonwealth Court.

The three agency structure is expensive, some may even say wasteful. Certainly, for the alcoholic beverage industry, the lines of authority are exceedingly blurred and cumbersome. In this environment, many licensees, who operate on a shoe string, find it cost-prohibitive to retain counsel when confronted with the possibility of a fine, suspension, revocation, refusal to renew, or agreeing to a CLA.

Licensees are placed in the arguably unlawful predicament of being fined for specified conduct through the adjudicatory process, only to have the unlawful conduct resurrected as a basis for refusal to renew, or perhaps pressure to agree to a CLA.

For licensees, the adjudicatory process, offers a wider variety of outcomes, such as a fine or suspension. However, in a refusal to renew posture, licenses are faced with an all-or-nothing choice, that being revocation of the license.

**Another concern is Stalled Cost Savings Initiatives**

We have not forgotten our obligation to expend public funds with care while maintaining our mission. We have several cost saving initiatives which require information technology assistance. Without assessing fault or blame, we have been unable to see some of these ideas to fruition.

We have sought to transmit court documents via e-mail as is common in other courts. With respect to mailing citations (BLCE function), hearing notices, Adjudication, and etc., the law mandates specified approaches. Some documents must be sent by certified-mail, return receipt requested. The current postal cost for each such mailing exceeds \$5.00. No doubt, the requirement was designed to insure, as best we can, that notices implicating substantial rights are more likely to have been received and that the government has taken reasonable steps to accomplish that goal.

We cannot ignore this obligation, but we can offer licensees the alternative of transmitting documents via email, if the licensee agrees and waives statutory notice requirements. We attempted a pilot program to allow for email filing; however, no more than a week after implementation, we discovered that many emails were either not received or delivered. We intended to retain an email delivery receipt as proof of mailing. It seems the difficulty was that differing email systems do not necessarily "speak to each other." So, we ended the pilot program.

We asked for help from the PLCB through its Information Technology staff. We have not been successful in moving this program forward. The same can be said for the technology changes needed to implement credit card fine payment.

We are frustrated by the lack of progress particularly when we see other Commonwealth agencies with websites and systems allowing for the varying process we endeavor to employ.

**My last issue for discussion is Safety/Security**

Ever since the events of September 11, 2001, were forever burned into our collective memory, safety and security have become top governmental priorities. More recently, gunshots have been heard in several court houses, places where extreme security measures have failed us. Regretfully, there has been less attention devoted to safety and security for the public and personnel involved in this adjudicatory process.

Many agencies convene hearings in government buildings where accessibility is rigidly controlled. That is not the case for us. In several locations, we hold hearings in a hotel conference room. Thankfully, we have not had a problem, although we have had written threats directed at one ALJ.

Perhaps, the one element which promotes security at our hearings is the presence of BLCE Officers.

Safety and Security present an enormously complex issue for the Commonwealth when considering the number and variety of administrative hearings held by Commonwealth agencies. None of us wants to discuss how we could have averted a tragedy after the fact.

Again, thank you for permitting me to address the Committee. I hope to have the opportunity to have a more in depth discussion with Committee staff on proposed legislation as well as the impact of any policy change on our adjudicatory function.

# **OALJ POSITION PAPERS**

Office of Administrative Law Judge

How Citations Are Processed

Presented To House Liquor Committee

March 21, 2012

The description which follows applies to citations issued pursuant to Liquor Code, Article IV as they represent the overwhelming majority of citations. The relevant procedural provisions of law are: Liquor Code Section 471 (47 P.S. 4-471); regulations applying to matters before the Office of Administrative Law Judge (40 Pa. Code, Chapter 15).

The process for Article V licensees is governed by Liquor Code Sections 514, 515, and 516 (47 P.S. §§§5-514, 5-515, 5-516) which, in combination, generally track the process for Article IV licensees. The general rules of practice and procedure applicable to all agencies also apply (1 Pa. Code, Chapters 31 & 35).

It is the Bureau of Liquor Control Enforcement (Bureau) which initiates this administrative, adjudicatory process by way of a formal charging document, a citation (sample appended as Exhibit A). The Bureau mails the citation to the charged licensee and files the citation with the Office of Administrative Law Judge's (OALJ's) Central Office (CO). The CO operates in a manner identical to that of a Prothonotary. The CO is responsible for processing and docketing a citation. When a citation is filed, the CO places the citation on the docket and creates a processing file.

Generally, administrative procedure prohibits discovery. However, and as codified in 40 Pa. Code §15.43, our procedure does permit limited discovery through the Pre-Hearing Memorandum (PHM, sample appended as Exhibit B). The PHM provides some information for the Bureau, the Licensee, and the OALJ as to the general nature of the case. The PHM also assists in the hearing scheduling process.

The PHM procedure is a response to the competing administrative law needs of low cost, speedy resolution, and allowing both parties some discovery. PHMs also facilitates OALJ responsibilities. With PHM in hand, the presiding Administrative Law Judge (ALJ) is better equipped to conduct and prepare for a hearing. The presiding OALJ may also employ the information within a PHM to consider Pre-Hearing Motions such as a continuance request or to initiate a pre-hearing conference.

Office of Administrative Law Judge,  
How Citations Are Processed  
Presented to House Liquor Committee  
March 21, 2012

The Bureau is first to file a PHM. When filed with the OALJ, CO transmits the Bureau's PHM to the licensee, includes a blank PHM to be completed by the licensee, along with a cover letter (sample appended as Exhibit C). If an attorney has entered an appearance for licensee, at whatever point that occurs, all documents that would ordinarily be sent to the licensee are directed to licensee's attorney.

When one of the parties finds inadequacies in the opposing side's PHM, a Motion may be filed specifically requesting additional information. The presiding ALJ may also seek additional pre-hearing information.

A failure to complete a PHM, may result in negative consequences for the defaulting party. For example, a licensee who requests a continuance but has not filed a PHM is less likely to have that continuance granted as the licensee has not obeyed process and has not provided the OALJ with hearing availability dates.

Whether the licensee has filed a PHM or not, pursuant to established time frames, (procedure/time frames appended as Exhibit E) the case is sent to the Hearing Clerk (HC) who schedules the matter for hearing. The HC, in consultation with the presiding ALJ, schedules as many cases as can be placed on a day's calendar so that the entire day is devoted to hearings. The HC provides a block of time for each hearing based on the party's PHMs which list: hearing time estimates, number of witnesses, and legal issues. The HC may also consult with the presiding ALJ for guidance. The scheduling system allows the HC to assign hearing times in one-quarter hour increments. Some hearings are allotted fifteen minutes, others may require an entire day.

The purpose of scheduling a full day of hearings is to minimize cost for both transcription services and travel. Because the OALJ conducts hearings in locations requiring the presiding ALJ to travel, the more hearings scheduled in a day, the more likely it is that the OALJ can reduce traveling costs because the need to travel will be reduced.

At any time during the Pre-Hearing process, a licensee may submit a Waiver (sample appended as Exhibit D). By doing so, the licensee is essentially admitting to the violations and waiving any defenses. The presiding ALJ then prepares an Adjudication based on the pre-hearing information within the file as well as any submissions the parties wish the presiding ALJ to consider.

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How Citations Are Processed  
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In some situations, the ALJ may request a conference regarding the Waiver. It may be the ALJ finds the information supporting the charge insufficient or the penalty recommendation insufficient or too severe. We estimate that somewhere between 75-80% or our approximately 3,000 cases per year are processed through a Waiver.

Whether after hearing or Waiver filing, the presiding ALJ prepares an Adjudication which is sent to the parties as the law requires. We estimate our average yearly fines collected to be between \$1.8 and \$2.2 million. We also imposed 2,662 days of license suspension and revoked 94 licenses in 2011. The parties may appeal the Adjudication to the PLCB. That review is based on substantial evidence and/or error of law. Approximately 1-2% of our cases are appealed annually. Of the cases that are appealed less than 10% are reversed. Either party may appeal the PLCB's determination to the Court of Common Pleas in the county in which the licensed premises is located.

That review is statutorily described as *de novo*, which, in common terms, means: "anew" or "all over again." However, case law has refined *de novo* to a hybrid standard having elements of an appeal.

The *de novo* review may be followed by either party appealing to the Commonwealth Court, and the Pennsylvania Supreme Court.

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA STATE POLICE

BUREAU OF LIQUOR CONTROL  
ENFORCEMENT

v.

ANY LICENSEE, INC.  
123 MAIN STREET  
ANY TOWN, PA 00000  
ANY COUNTY

CITATION NO. 99-9999

Incident No. W12-654321

LID - 12345

License No. R-AP-00000

License First Issued: June 20, 2007

CITATION

WHEREAS, the Pennsylvania Liquor Control Board has issued to you the above-referenced license and related permit(s) for the licensed term ending February 28, 2011; and

WHEREAS, the Bureau of Liquor Control Enforcement is in possession of facts which leads it to believe that you have violated the Liquor Code, the Act of April 12, 1951, P.L. 90, as reenacted and amended, 47 P.S. §1-101, et seq, and the rules and regulations adopted pursuant thereto, in the following manner:

1. On October 21, November 6 and November 21, 2010, you, by your servants, agents or employees, used, or permitted to be used on the inside of your licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside, in violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a).

Any Licensee, Inc.  
Citation No. 99-9999  
Page 2

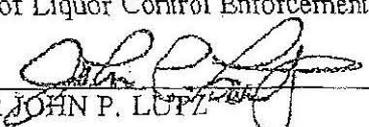
NOW THEREFORE, you are hereby cited to appear before an Administrative Law Judge, on a date to be scheduled by the Office of Administrative Law Judge, to show cause why such license should not be suspended or revoked or a fine imposed.

You have the right to retain legal counsel to represent you. If you do hire an attorney, he or she must file a Notice of Appearance with the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania 17110-9661, and forward a copy to the Assistant Counsel at the address listed below in accordance with 1 Pa. Code Subchapter C. Delay in obtaining counsel is not reason for any continuance.

You have the right to waive your hearing. Such action is an admission to the charges. Should you choose to waive, the proper form is enclosed for your convenience. Upon receipt, the Office of Administrative Law Judge will process the forms and issue an adjudication.

**BY ORDER**

Bureau of Liquor Control Enforcement

  
MAJOR JOHN P. LUTZ  
Director

Date: December 30, 2010

Ima Lawyer, Assistant Counsel  
Pennsylvania State Police  
Bureau of Liquor Control Enforcement  
3655 Vartan Way  
Harrisburg, PA 17110  
Telephone: (717) 540-7413

## TOP 10 AVERMENTS FOR 2011

AVER #	AVERMENT DESCRIPTION	NO. OF VIOLATIONS
17506	ISS. BAD CHECKS DATED _____ IN PAY. FOR PURCHS. OF M. OR BR. BEVS.	343
36503	PERMITTED SALE OF LIQUOR AND/OR MALT OR BREWED BEVERAGES TO A MINOR.	281
35501	USED A LOUDSPEAKER (IN/OUT) WHEREBY THE SOUND COULD BE HEARD OUTSIDE.	240
26001	POSSESSED OR OP. GAMBLING DEVICES OR ALLOW. GAMBLING OR LOT ON PREM.	204
50701	PERMITTED SMOKING IN A PUBLIC PLACE WHERE SMOKING IS PROHIBITED	164
26501	OPERATED THE LICENSED ESTB. WITHOUT A VALID HEALTH PERMIT OR LICENSE.	149
50505	SOLD ALC. BEV AFTER YOUR LIC. EXPR. AND HAD NOT BEEN RENEWED/VALIDATED	137
26007	FAIL TO MAIN COMP & TRUTH REC COV OP OF THE LIC BUS FOR PER 2 YR SGOCA	119
50702	FAILED TO POST SIGNAGE AS REQUIRED BY LAW.	93
42101	FAILED TO HAVE PATRONS VACATE PREMISES ½ HR AFTER CLOSING TIME	77

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

PENNSYLVANIA STATE POLICE,  
BUREAU OF LIQUOR CONTROL  
ENFORCEMENT

VS.

ANY LICENSEE, INC.  
123 MAIN STREET  
ANY TOWN, PA 00000  
ANY COUNTY

CITATION NO. 99-9999

LID No 12345  
License Nu R-AP-00000

LICENSE FIRST ISSUED: June 20, 2007

PRE-HEARING MEMORANDUM

Submitted By: Ima Lawyer, Esq.

Counsel For:  
Pennsylvania State Police,  
Bureau of Liquor Control  
Enforcement

- I. Issues of Complex Nature or Statewide Significance - None
- II. Witnesses:

A. Bureau of Enforcement will call:

1. Any Enforcement Officer *BLCE* - This witness will testify as to the dates the Bureau's investigation was opened and completed, and that the Bureau's investigation consisted, in pertinent part, of the following:

On October 9, 2010, this witness entered the licensed premises and conducted undercover surveillance.

On October 21, 2010, at 10:05 p.m., this witness entered the licensed premises in an undercover capacity. He observed two male bartenders rendering service to approximately 25 patrons.

This witness will testify that entertainment was being provided in the form of a DJ playing recorded music from a DJ booth. The DJ's music was being amplified through at least seven loudspeakers, each measuring about 6" x 12" in dimension, and an additional loudspeaker, which measured about 3' x 6' in dimension.

At 11:15 p.m., this witness departed the licensed premises. At that time he could hear amplified music emanating for the establishment at distances of 220 feet away in a northwestward direction and 240 feet away in a northeastward direction.

On November 6, 2010, at 1:00 a.m., this witness arrived in the vicinity of the licensed premises. At that time he could hear amplified music emanating

from the establishment at distances of approximately 280 feet away in a northeastward direction and 260 feet away in a northwestward direction.

At 1:08 a.m., this witness entered the licensed premises in an undercover capacity. He observed two female bartenders and a male bartender rendering service to approximately 35 patrons.

This witness will testify that entertainment was being provided in the form of a DJ playing recorded music from a DJ booth. The DJ's music was being amplified through at least fifteen loudspeakers, each measuring about 6" x 12" in dimension. The loudspeakers were located to the front and rear of the establishment.

On November 21, 2010, at 12:05 a.m., this witness arrived in the vicinity of the licensed premises. At that time he could hear amplified music emanating from the establishment at distances of approximately 275 feet away in a northeastward direction and 240 feet away in a northwestward direction.

At 12:10 a.m., this witness entered the licensed premises in an undercover capacity. He observed two female bartenders and two male bartenders rendering service to approximately 50 patrons.

This witness will testify that entertainment was being provided in the form of a DJ playing recorded music from a DJ booth. The DJ's music was being amplified through at least fifteen loudspeakers, each measuring about 6" x 12" in dimension. The loudspeakers were located to the front and rear of the establishment.

On November 24, 2010, this witness contacted the sole corporate officer and Board-approved manager, Ima Licensee. This concluded the investigation.

On December 14, 2010, this witness sent, or caused to be sent, a "Notice of Violation" letter, under the signature of Sergeant of BLCE \_\_\_\_\_, to the licensee.

III. Exhibits

A. Exhibits intended to be introduced and used at hearing

Bureau of Enforcement:

1. Notice of Violation letter dated December 14, 2010.
2. Certified Mail Return Receipt Card indicating that Licensee was served with Notice of Violation letter.
3. Citation No. 10-2699.
4. Certified Mail Return Receipt Card indicating that Licensee was served with Citation No. 10-2699.
5. Official Record of History of Prior Violations of Licensee (attached).

IV. Proposed Stipulations or Agreement of:

A. Facts:

1. The Bureau proposes that the Licensee stipulate that the Bureau's investigation was assigned on September 29, 2010, and was completed on November 24, 2010, as set forth in Bureau Exhibit No. 1.

2. The Bureau proposes that the Licensee stipulate to receipt of the Notice of Violation letter (Bureau Exhibit No. 1) and receipt of the Citation (Bureau Exhibit No. 3).

3. The Bureau proposes that the Licensee stipulate that it has a history of prior violations as specified in Bureau Exhibit No. 5.

B. Exhibits:

1. The Bureau proposes that Licensee stipulate to the admission into the record of the Notice of Violation letter (Bureau Exhibit No. 1), of Citation No. 10-2699 (Bureau Exhibit No. 3), and the Official Record of History of Prior Violations (Bureau Exhibit No. 5).

C. Issues - None

V. Special Requests:

1. If the Licensee fails to stipulate to the admissibility of Exhibit No. 5 (Prior History) for all purposes, then the Bureau respectfully requests that the Office of Administrative Law Judge take judicial notice of the Official Record of History of Prior Violations of Licensee, without the need to certify the history into the record at hearing, or to subpoena the records custodian for the purpose of authenticating the history.

VI. Your Estimated Time Needed To Present Your Case

Bureau of Enforcement: 1 Hour

VII. Days Within the Next Ninety Days Not Able to Attend Hearing

*NOTE: If a notice of hearing has not been received within 60 days of the filing of your pre-hearing memorandum, it is your responsibility to inform this office of your availability to attend a hearing for an additional 60 days beyond your last stated availability.*

March 16, 2011  
May 31 - June 2, 2011  
June 29 - 30, 2011  
July 5 - 13, 2011

PRE-HEARING MEMORANDUM  
CITATION NO. 99-9999  
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February 17, 2011

VIII. Counsel Representing Licensee: As of this date, our file shows no indication that the Licensee is represented by counsel.

Respectfully submitted,

*Ima Lawyer*

By: Ima Lawyer  
Assistant Counsel

Date

Pennsylvania State Police  
Bureau of Liquor Control  
Enforcement  
3655 Vartan Way  
Harrisburg, PA 17110  
(717) 540-7413

SPLE-9 (1-90)



PENNSYLVANIA STATE POLICE  
BUREAU OF LIQUOR CONTROL ENFORCEMENT  
PRIOR CITATION RECORD



TO: Office of Chief Counsel

FROM: Bureau of Liquor Control  
Enforcement

RE:

CITATION NO. 99-0000 FINE \$150.00. WAIVER OF HEARING. (JUDGE FLAHERTY)

1. PERMITTED SMOKING IN A PUBLIC PLACE WHERE SMOKING WAS PROHIBITED.  
(LL and Clean Indoor Air Act)

December 10, 2009, January 13, 22, 23, February 27, March 8, April 5 and 6, 2010.

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

PENNSYLVANIA STATE POLICE,	:	CITATION NO. 99-9999
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	INCIDENT NO. W12-654321
	:	
v.	:	LID 12345
	:	
ANY LICENSEE, INC.	:	LICENSE NO. R-AP-00000
123 MAIN STREET	:	
ANY TOWN, PA 00000	:	
ANY COUNTY	:	
	:	
	:	
	:	
	:	
	:	

PRE-HEARING MEMORANDUM

Submitted by: Attorney A. \_\_\_\_\_ Counsel for: Licensee

- I. Issues of Complex Nature or Statewide Significance: None.
- II. Witnesses:
  - (A) Licensee will call:
    - 1. Ima Licensee, Manager/Officer/Director/Shareholder  
This witness will testify that Licensee disputes the observations of BLCE's witness. This witness will further testify regarding the remedial measures taken by Licensee including but limited to requesting the Any Boro/ Township officials to petition PLCB pursuant to 47 P.S. § 4-493.1(B).
- III. Exhibits intended to be introduced and used at hearing: None.
- IV. List any Stipulations or Agreement of Facts to evidence provided in BLCE's Pre-Hearing Memorandum:  
Licensee will stipulate that BLCE met the notice requirements pursuant to 47 P.S. § 4-471(b). Licensee will further stipulate to the receipt of the Notice of Violation Letter and receipt of Citation No. 10-2699. Licensee will further stipulate to the history of prior violations.

- V. List any special needs/accommodations, i.e., television, DVD player, translator/interpreter, ADA accommodations, etc.: None.
- VI. Estimated Time Needed to Present Your Case: .5 hour
- VII. List all days within the next ninety (90) days that you will not be able to attend a hearing:

<u>Day of Week</u>	<u>Month and Date</u>
Monday	March 38, 2011 (morning)
Tuesday	March 29, 2011 (afternoon)
Thursday	April 7, 2011
Tuesday	April 12, 2011 (afternoon)
Friday	April 15, 2011
Monday	April 18, 2011
Friday	April 29, 2011 (morning)
Tuesday	May 3, 2011
Wednesday	May 4, 2011
Thursday	May 5, 2011
Friday	May 6, 2011
Monday	May 16, 2011
Tuesday	May 17, 2011
Wednesday	May 18, 2011
Thursday	May 19, 2011
Friday	May 20, 2011
Monday	May 23, 2011
Tuesday	May 24, 2011
Wednesday	May 25, 2011
Thursday	May 26, 2011
Friday	May 27, 2011
Thursday	June 16, 2011
Monday	June 20, 2011
Tuesday	June 21, 2011
Wednesday	June 22, 2011
Thursday	June 23, 2011
Friday	June 24, 2011

**AUTHORIZATION TO TRANSMIT DOCUMENTS BY E-MAIL:**

I authorize the Office of Administrative Law Judge to transmit documents electronically to the e-mail address listed below. I waive service documents by mail. I further recognize the Office of Administrative Law Judge will not necessarily be able to verify your receipt of the e-mail or electronically transmit certain documents

Under penalty of law (18 Pa.C.S. § 4904, relating to unsworn falsification to authorities), I verify that I am the attorney authorized to complete and sign this Pre-Hearing Memorandum on behalf of Licensee.

Respectfully Submitted,

Attorney A.

Attorney A.

**ADMISSION, WAIVER AND AUTHORIZATION  
ARTICLE IV. LICENSEES**

**PLEASE READ INFORMATION AND INSTRUCTIONS ON REVERSE SIDE BEFORE COMPLETING THIS FORM.**

1. NAME OF LICENSEE AS IT APPEARS ON THE LICENSE

2. LICENSE NUMBER

3. LID NUMBER

4. CITATION NUMBER

5. Has the license been returned to the Pennsylvania Liquor Control Board for safekeeping?  Yes  No

If yes, provide date: \_\_\_\_\_  
MONTH/DAY/YEAR

6. Has a transfer application been filed with the Pennsylvania Liquor Control Board?  Yes  No

If yes, provide date: \_\_\_\_\_  
MONTH/DAY/YEAR

7. If a suspension is imposed, do you wish to serve it as soon as possible?  Yes  No

8. Customary and Usual Days of Operation:

Sunday  Monday  Tuesday  Wednesday  Thursday  Friday  Saturday

9. STATEMENT OF ADMISSION, WAIVER AND AUTHORIZATION:

- Licensee admits to all violations charged in the referenced citation.
- Licensee admits the Bureau of Liquor Control Enforcement has complied with the applicable notice requirements of the Liquor Code.
- Licensee waives the right to a hearing.
- Licensee waives the right to appeal the Adjudication.
- Licensee authorizes the Administrative Law Judge to enter an Adjudication based on a summary of facts and prior Adjudication History.

10. THE PENALTIES AUTHORIZED BY LAW ARE:

License suspension and/or revocation; suspension and/or revocation of any ancillary permit, including but not limited to the Amusement Permit or Sunday Sales Permit; and/or fine of:

\$50 to \$1,000 as to Count(s) No. \_\_\_\_\_ and/or

\$1,000 to \$5,000 as to Count(s) No. \_\_\_\_\_

If a violation is the third or subsequent violation of any of the offenses referred to in subsection 471(b) of the Liquor Code or Crimes Code within a four (4) year period, the Administrative Law Judge must, as least, impose a suspension.

11. UNDER PENALTY OF LAW (18 PA. C.S. §4904, RELATING TO UNSWORN FALSIFICATION TO AUTHORITIES), I VERIFY THAT I AM THE LICENSEE, AN OFFICER/PARTNER, CLUB STEWARD OR ATTORNEY AUTHORIZED TO COMPLETE AND SIGN THIS FORM ON BEHALF OF THE LICENSEE. I HAVE READ THE INFORMATION AND INSTRUCTIONS ON THE REVERSE SIDE OF THIS FORM.

SIGNATURE

DATE

PRINT NAME AND TITLE

DAYTIME TELEPHONE NO.

EMAIL ADDRESS

**OFFICE OF ADMINISTRATIVE LAW JUDGE  
CITATION PROCEDURE/TIMEFRAMES**

**CITATIONS** - received, docketed, and files created same day or next day.

**PSP-PHM** - DUE 60 DAYS FROM CITATION ISSUANCE DATE.

**PHM NOTICE** - sent to Licensee within one (1) to three (3) days of receiving PSP-PHM.

**LICENSEE PHM** - due 20 days from notice date.

**LICENSEE PHM ALERT** - created 25 days from notice date if Licensee PHM is not received. Alert is printed on the 26<sup>th</sup> day. Cases are pulled from open files, hearings are requested, hearing cover sheet is created, and case is filed in hearing drawers for scheduling as soon as possible.

**HEARINGS SCHEDULED** - 50 days in advance of the date of hearing (cases may be scheduled no more than 60 days in advance nor less than 10 days in advance of hearing date). The 50 days incorporates 30 days to accommodate PSP-BLCE subpoena issuance requirement. Scheduling is done through the Citation Hearing Scheduling System when initiated by the Hearing Clerk. Each case is scheduled from the list of cases that are available on the date/location being scheduled; however, if BLCE Counsel or BLCE Enforcement Officers are not available, the cases will not appear on the list. After doing preliminary scheduling, Hearing Clerk checks Licensee's PHM, if submitted, to make sure the date is not listed on PHM as a day Licensee/Licensee's Counsel is not available. If either is unavailable that day, the Hearing Clerk removes the case from list and attempts to schedule another case for that time slot. Delays in hearing can occur due to continuance requests by either BLCE or Licensee/Licensee's Counsel, criminal proceedings, requests for consolidation of citations, if Enforcement Officer is scheduled to be "out" for a period of time, or a case is bifurcated at first hearing.

**HEARING TRANSCRIPT** - due 21 calendar days after hearing is held. Transcripts are processed and then mailed within one (1) to four (4) days to respective ALJs. \*

**ADJUDICATION** - due 30 days after transcript is received by presiding ALJ. Brief schedules and/or complexity of a case may extend the 30 days.

**ADJUDICATION INTERNAL REVIEW** - takes an average of three (3) days from the receipt in the ALJ Central Office.

**MAILING OF ADJUDICATION** - occurs within five (5) to ten (10) days of receipt by the Adjudication Clerk (depending on whether or not weekends/holidays are involved). If there is a transfer pending, the mailing is expedited to one (1) to two (2) days.

**PENALTY SATISFACTION** - Fines are due within 20 days of the mailing date of the Adjudication. Suspensions are served by Licensee as indicated by the effective and ending dates set by the ALJ in the Adjudication or Supplemental Order. Delay can occur with mailings due to returned mail; delays in suspension being served can be due to deferred suspensions when a license is inactive or in safekeeping. Supplemental Orders are issued for failure to pay the fine within 20 days of the mailing date of the Order imposing a suspension, which will continue thereafter until fine is paid and further Order is issued by the ALJ. Delays in payment or serving suspension may also occur if an appeal is filed by Licensee/Licensee's Attorney.

**CASE CLOSED** - When only a fine is imposed, case is closed immediately upon processing the payment. If a suspension is imposed, the case will be closed in the week after the suspension ended. If the License is revoked or case is dismissed and no appeal is filed, the case is closed the week following the 30 day period during which an appeal could be filed.

**\*NOTE: WAIVERS** may be submitted at any time from citation issuance up to and including the time of hearing.

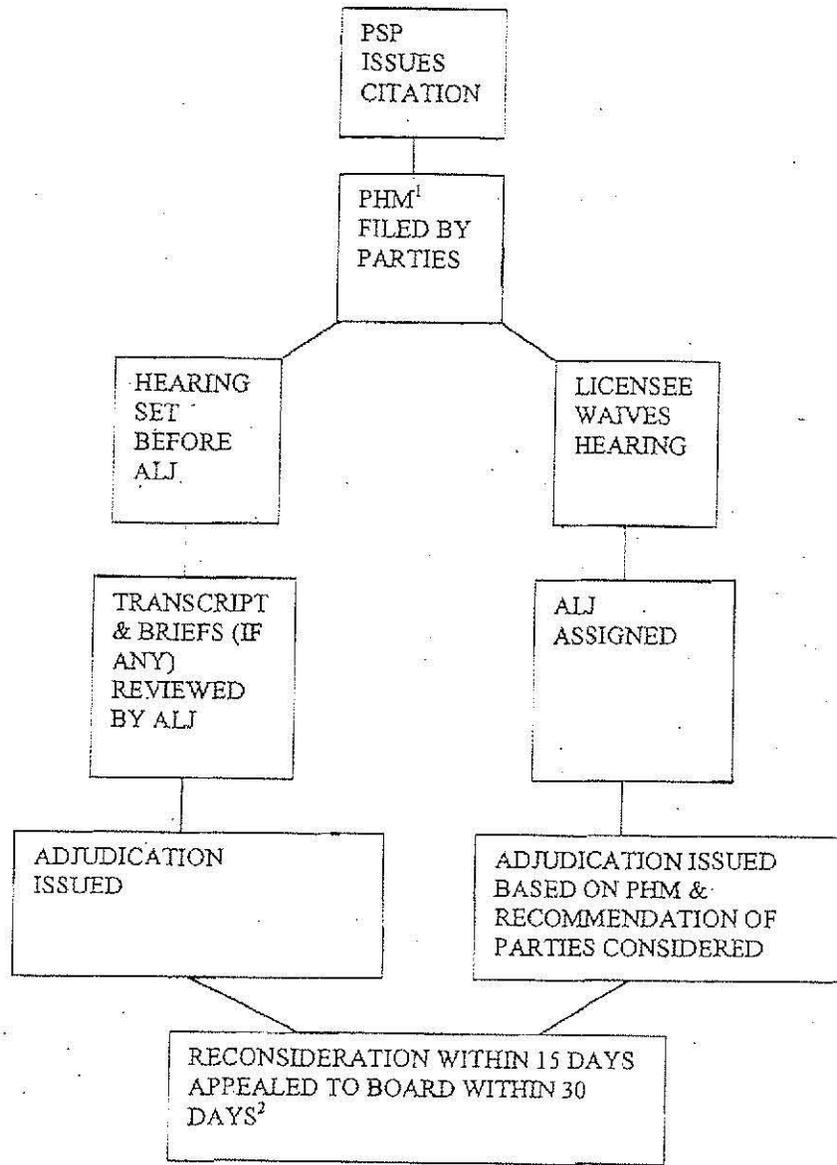
A waiver received prior to a hearing being scheduled is processed immediately, and a memorandum is sent within one (1) to four (4) days to PSP-BLCE Counsel (if a Pre-Hearing Memorandum or Explanation of Case has not already been submitted). The memorandum indicates a waiver has been filed and requests the case summary, prior history, and recommended penalty if there is one.

Waivers are assigned to ALJs within one (1) to three (3) days after the information is received from PSP-BLCE Counsel or immediately when we already have a copy of Pre-Hearing Memorandum or Explanation of Case.

Adjudications are due 30 days after a waiver is assigned, or immediately if a license transfer is pending.

Occurrences that can cause delays in basic processing time are as follow:

- ❖ Late PSP-PHM's
- ❖ Availability of parties for hearings
- ❖ Availability of hearing facilities
- ❖ Number of cases pending for hearings
- ❖ Matters of law that create special circumstances, i.e., criminal procedures, etc.
- ❖ Late Hearing Transcripts
- ❖ Brief Schedules
- ❖ Bifurcated Hearings
- ❖ Computer Error
- ❖ Human Error



1. Pre-Hearing Memo. See 15.1 et. seq. of Title 40 (Board Regulations)  
 2. See 47 P.S. §4-471 (Liquor Code)

Office of Administrative Law Judge  
Core Topics For Legislative Consideration

Presented to House Liquor Committee

March 21, 2012

There is any number of legislative recommendations which the Office of Administrative Law Judge (OALJ) wishes to recommend. The list is entirely too long and complicated for this session. We are hopeful there will be future opportunities to assist the legislative process in this manner.

We recognize it is not our job to formulate legislative policy. However, given our special expertise, we can assist in that process by suggesting or evaluating statutory language to determine if the underlying policy is best served. We also can raise alerts when statutory changes have consequences beyond these initially intended. As one example, please find appended an Adjudication discussing how the Clean Indoor Air Act and the Liquor Code are difficult to reconcile (BLCE vs 3745 Enterprises, Inc., Exhibit A).

With your permission, we present several general, overriding concerns which frustrate our mandate in an all-encompassing way. They are: Command Pressure; Comingling; Stalled Cost Saving Recommendations, and Safety/Security.

**Command Pressure**

Command Pressure is a term familiar to most hearing officers. It is a topic always discussed at annual conferences held by organizations such as the National Association of Administrative Law Judges (NAALJ) and the National Association of Hearing Officials (NAHO). In our system, Command Pressure is intertwined with Comingling.

Command Pressure may be defined as attempts by government officials to influence or direct government employees, who are charged with the duty to determine facts, and/or interpret law, and/or render binding decisions or recommendations with impartiality. Command Pressure may be as palpable as a Supervisor directing an employee to prepare a document precisely as commanded. The supervisor may also apply Command Pressure subtly by providing the slightest hint of reward for a favorable outcome.

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Whatever the method, Command Pressure is illegal, subjecting those who participate to punitive repercussions that may include criminal law sanctions. Less obvious, but even more destructive is the loss of public trust in governmental integrity that results from Command Pressure.

In the varied jurisdictions and systems represented at NAALJ and NAHO conferences, legislative responses to Command Pressure vary widely, ranging from virtually none to high priority. Consider the plight of a hearing officer, having no job protection, who is ordered to decide a case in a specified manner. Next, imagine a hearing officer having job protection but who is told her performance rating will be adjusted downward if she does not decide a case in a requested manner. Lastly, think of the hearing officer having job protection and who is organizationally insulated from Command Pressure sources. Our system falls into the last category. It is about as carefully crafted as can be to ensure that decisions are rendered with great deference to fairness.

The present system was made law by Act 14, 1987, which was a total re-enactment of the Liquor Code, but with an entirely re-tooled adjudicatory process. The Act was the General Assembly's response to the seemingly unending barrage of allegations claiming rampant and widespread corruption within the Pennsylvania Liquor Control Board (PLCB). The then existing adjudicatory process did not escape censure. It was described as a system which could not but promote unfairness and corruption.

Formerly, the PLCB investigated violations, brought charges, (heard by hearing officers employed at-will and who could only recommend), and issued Adjudications. It may be said that Act 14 predicted the Pennsylvania Supreme Court conclusion that a procedure in which an agency is both prosecutor and judge is fundamentally unfair, as it plunders a citizen's right to an impartial decision maker (*Lyness v State Board of Medicine*, 605 A2d 1201 (1992)).

Act 14 installed a number of measures to design a new enforcement/adjudicatory process, to insure high quality decision making, free of impartiality. The Act transferred the enforcement function to a new agency, the Bureau of Liquor Control Enforcement (BLCE) (47 P.S. §2.211). The adjudicatory function was also transferred from the PLCB to a new agency, the Office of Administrative Law Judge (OALJ) (47 P.S. §2-212).

Administrative Law Judges (ALJs) must be learned in the law and members in good standing of the bar of the Supreme Court of Pennsylvania. ALJs are appointed by the Governor who must comply with the Civil Service Act. Consequently, ALJs are insulated from Command Pressure by virtue of the job security afforded them in the Civil

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Service Act. The OALJ is defined as an autonomous office within the PLCB. Together, these features unequivocally speak to the General Assembly's intention to design a adjudicatory process free from any unlawful incursions.

However, it almost goes without saying, no matter how clear or carefully the Legislature enacts law, success can only be measured by the fidelity and resolve of those entrusted to fulfill the Legislature's goals. Ultimately, restructuring agencies and shifting responsibilities will never successfully defeat dishonesty or corruption.

I and my predecessor, the late Chief Administrative law Judge Gerald Ruth, who built the OALJ from the ground up, have worked tirelessly to merit the credentials of an effective and constitutionally firm system where, whatever the result of a particular case, both parties know they have been heard and that Adjudications are issued within the law by experienced, unbiased judicial officers.

Quite frankly, in the past four years or so, we are disheartened to report there has been what we perceive as attempts to assert Command Pressure, not in any one case, but rather in the broad perspective of operational control.

Our legislatively mandated organizational relationship with the PLCB offers opportunity for subtle Command Pressure. While we are defined as autonomous, we nevertheless rely on the PLCB for serving our administrative needs, such as office location and filling vacancies. Should a PLCB official be dissatisfied with an OALJ decision because the decision contradicts PLCB policy or position, it is relatively easy to seek retribution by deliberately undermining the support process.

The paragraph immediately above portrays an intentional act. The present OALJ-PLCB relationship also contributes to benign relationship failures. As an agency which is not directly responsible or concerned with how the OALJ functions, and which, as are all Commonwealth agencies, tasked with doing more but with less resources, it is not a surprise that PLCB officials might place its needs and requirements ahead of the OALJ's.

### **Comingling**

Comingling is a word which we understand to be an unconstitutional convergence of roles in the adjudicatory process as expressed in Lyness, supra. Almost the very day that Act 14 became law, phraseogly was coined to the effect that the Bureau of Liquor Control Enforcement (BLCE) and the OALJ are exclusively responsible for enforcing the

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Liquor Code while the PLCB functions as no more than a licensing authority. The slogan has been and continues to be inaccurate over-simplification.

In practice, the BLCE engages in licensing, the PLCB also enforces. The BLCE regularly issues citations heavily flavored with licensing parameters. A citation charging a licensee with failing to qualify as a bona fide restaurant is a licensing matter clothed in citation garb. When the PLCB refuses to renew a license because of Liquor Code violations, the PLCB considers an enforcement matter in a licensing context.

The present system has three government agencies (PLCB, OALJ, BLCE) to which a licensee must respond. Each interprets the same body of law but from a different perspective. This arrangement is a recipe for confusing, unrealistic demands. It is an unimaginably encumbered process, requiring both licensees and the government to expend duplicative resources. In this arena, Commingling includes elements of Command Pressure as well as inordinate resource depletion as agencies compete for authority and work at cross purposes.

The General Assembly has attempted to address this unusually complex inter-agency operation. A prime example is the addition of Liquor Code Section 2-211.1 (47 P.S. §2.211.1) which authorizes the PLCB to issue opinions to licensees, upon request, which opinions restrict BLCE authority. Regrettably, that provision created more problems than it solved. Other Liquor Code amendments, unquestionably intended to improve the process, actually compounded comingling in the broad sense intended herein.

The PLCB's licensing authority, through the refusal to renew process, and the authority granted the PLCB to enter into Conditional Licensing Agreements (CLAs) have enlarged Comingling and further eroded the enforcement function assigned to the BLCE and OALJ.

The three agency structure is expensive, some may even say wasteful. Certainly, for the alcoholic beverage industry, the lines of authority are exceedingly blurred and cumbersome. In this environment, many licensees, who operate on a shoe string, find it cost-prohibitive to retain counsel when confronted with the possibility of a fine, suspension, revocation, refusal to renew, or agreeing to a CLA.

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Licensees are placed in the arguably unlawful predicament of being fined for specified conduct through the adjudicatory process, only to have the unlawful conduct resurrected as a basis for refusal to renew, or perhaps pressure to agree to a CLA.

For licensees, the adjudicatory process, offers a wider variety of outcomes, such as a fine or suspension. However, in a refusal to renew posture, licenses are faced with an all-or-nothing choice, that being revocation of the license. If we add the complex appellate procedure to both processes, seeking appellate review for the government and the judicial system is taxing, and, as for licensees, approaching financially oppression.

#### **Stalled Cost Savings Recommendations**

We have not forgotten our obligation to expend public funds with care while maintaining our mission in the center of the radar screen. We have several cost saving initiatives which require information technology assistance. Without assessing fault or blame, we have been unable to see these ideas to fruition.

However, there is one recent suggestion which is well on its way to implementation but has yet to complete the regulatory review process. Currently, our regulations do not permit fine payments through credit card or other electronic methods such as electronic checking account withdrawal. If the proposal becomes a lawful regulation, we will then need information technology assistance to provide or purchase software to effect the new regulation.

The Liquor Code requires that fines be paid within twenty days. As time approaches for payment, as a courtesy, the OALJ reminds licensees by telephone. If payment is not forthcoming, the OALJ is required to issue a license suspension.

The presiding ALJ then issues a follow-up order suspending the license for at least one day. Our policy is to impose an open-ended suspension until the fine is paid. If a license has expired or is in safekeeping, we have no choice but to defer the suspension. When a fine is not timely paid, OALJ, the BLCE, and PLCB resources are diverted to evaluating license status, pushing more paperwork through the system, and verifying that a suspended licensee complies with the suspension.

We have no empirical data, but our common sense tells us that licensees are more likely to pay fines on time with a credit card option. Therefore, we anticipate savings for all three agencies because the need to impose a suspension for failure to pay a fine will diminish.

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Our second recommendation is to transmit documents as e-mail attachments. With respect to mailing citations (BLCE function), hearing notices, Adjudication, and etc., the law mandates specified approaches. Some documents must be sent by certified-mail, return receipt requested. The current postal cost for each such mailing exceeds \$5.00. No doubt, the requirement was designed to insure, as best we can, that notices implicating substantial rights are more likely to have been received and that the government has taken reasonable steps to accomplish that goal.

We cannot ignore this obligation, but we can offer licensees the alternative of transmitting documents via email, if the licensee agrees and waives statutory notice requirements. We began this process by modifying an Entry of Appearance form for lawyers to include an email option. We did the same for our "Waivers."

No more than a week after implementation, we discovered that many emails were either not received or delivered. We intended to retain an email delivery receipt as proof of mailing. It seems the difficulty was that differing email systems do not necessarily "speak to each other." Additionally, with the many blockers email systems employ to avoid corrupting or comprising the system, our emails could be subject to the safeguards of other email systems. We stopped the procedure.

We asked for help from the PLCB through its Information Technology staff. We have not been successful in moving this program forward. The same can be said for the technology changes needed to implement credit card fine payment. It was suggested that a web location must be developed to allow for licensees to sign on and enter their email addresses. It is through this approach, we are told, that we can effect email notification.

We are frustrated by the lack of progress particularly when we see other Commonwealth agencies with websites and systems allowing for the varying process we endeavor to employ.

### **Safety/Security**

Ever since the events of September 11, 2001, were forever burned into our collective memory, safety and security have become top governmental priorities. More recently, gunshots have been heard in several court houses, places where extreme security measures have failed us. Regretfully, there has been less attention devoted to safety and security for the public and personal involved in this adjudicatory process.

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Many agencies convene hearings in government buildings where accessibility is rigidly controlled. That is not the case for us. In several locations, we hold hearings in a hotel conference room. Thankfully, we have not had a problem, although we have had written threats directed at one ALJ.

Perhaps, the one element which promotes security at our hearings is the presence of BLCE Officers. The Officers attend as witnesses not directly for security. On one occasion, a BLCE District Office Commander deliberately attended a hearing in full State Police uniform because he thought the licensee might not behave properly. Appearing in uniform, the Sergeant suggested, was designed to interdict.

Safety and Security present an enormously complex issue for the Commonwealth when considering the number and variety of administrative hearings held by Commonwealth agencies. None of us wants to discuss how we could have averted a tragedy after the fact.

Mailing Date: FEB 13 2012

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

PENNSYLVANIA STATE POLICE,  
BUREAU OF LIQUOR CONTROL  
ENFORCEMENT (BLCE)

v.

3745 ENTERPRISES, INC.  
3745 N. 6<sup>TH</sup> ST.  
HARRISBURG, PA 17110-1519

DAUPHIN COUNTY

Docket No.: 11-0804

BLCE Incident No.: W03-427630

PLCB LID No.: 51633

PLCB License No.: R-AP-SS-7022

BEFORE: Administrative Law Judge Felix Thau

FOR BLCE: John H. Pietrzak, Esquire

LICENSEE: George Giannaris, Sole Corporate Officer and Stockholder

**ADJUDICATION**

BACKGROUND:

This proceeding arises out of a citation, containing one count, that was issued on May 12, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against 3745 Enterprises, Inc. (Licensee).

The citation charges Licensee with violations of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 637.6(a)(1) of the Clean Indoor Air Act [35 P.S. §637.6(a)(1)]. The charge is that Licensee, by your servants, agents, or employees, failed to post signage as required by the Clean Indoor Air Act, on March 4, 5, 17 and April 1, 2011.

I presided at an evidentiary hearing on October 5, 2011 at the Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

Therefore, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

1. The Bureau began its investigation on March 4, 2011 and completed it on April 5, 2011. (N.T. 45)
2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested on, April 28, 2011. The notice alleged violations as charged in the citation. (Commonwealth Exhibit Nos. C-1, C-2, N.T. 43).
3. On the four dates charged, a Bureau Enforcement Officer conducted an undercover surveillance of the licensed premises. Although Licensee acquired an exception to permit smoking on the licensed premises, there were no signs indicating that smoking was permitted. (N.T. 46)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. The violations are sustained as charged.

DISCUSSION:

I was particularly intrigued by the sign Licensee placed on a portion of the licensed premises where Licensee was permitted to allow patrons to smoke. The sign advised customers that one had to be at least eighteen years old to patronize the excepted area. The sign's message prompted an on-the-record discussion concerning the interplay between the Liquor Code (LC) and the Clean Indoor Air Act (CIAA).

I remarked, the CIAA can readily confuse licensees who may conclude they are now permitted to allow unsupervised minors, older than eighteen, on the licensed premises, or at least that portion where smoking is permitted. And so, as between the LC and the CIAA, it is much like two celestial bodies, the gravitational fields of which increasingly warp the space around the other as the two get closer.

The colloquy first addressed this general observation, yet neither the LC nor the CIAA have any directive suggesting one supersedes the other when they cross paths. Consequently, when interpreting provisions of one that implicate portions of the other, one must construe them together as if they are one statute, when possible<sup>1</sup>. I have discovered three instances where the LC and the CIAA demand they be read together but frustrate each other's purpose. I pray I find no more.

The CIAA prohibits smoking in a public place, as defined by the CIAA, subject to a host of exceptions. Two exceptions apply to what the CIAA defines as a drinking establishment (35 P.S. §637.2). In relevant part, a drinking establishment is a place which operates pursuant to an eating place retail dispenser's (sic) license, restaurant liquor license, or retail dispenser's (sic) license issued pursuant to the LC or an enclosed area within such a licensed premises.

These alternative definitions, i.e. either an entire licensed premises or a portion thereof, have two additional and identical components. A drinking establishment is prohibited from permitting anyone under eighteen years old on the premises and must have annual on-premises food sales no greater than twenty percent of combined gross sales attributed only to the area intended for exception<sup>2</sup>.

The CIAA's definition of drinking establishment frustrates Liquor Code policy. Additionally, the definition suggests there are three license types issued pursuant to the LC. In fact, there are just two. There is no "retail dispenser's" license as identified in the CIAA. The term, retail dispenser, is defined in Liquor Code Section 102 (47 P.S. §1-102). That definition delineates specific sales authority granted to an eating place licensee<sup>3</sup>. Eating place and restaurant are both defined in Liquor Code Section 102.

Subject to slight differences, an eating place licensee may only sell malt or brewed beverages (beer). In addition to selling beer, a restaurant liquor licensee may also sell liquor, which, in LC parlance, includes wine.

The notion of a drinking establishment, that is a place dedicated to serving alcoholic beverages, is anathema to the LC. As similarly defined, a restaurant and an eating place are

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<sup>1</sup> See 1 Pa. C.S.A. §1932 relating to laws *in pari materia*.

<sup>2</sup> The Department of Health of the Commonwealth describes the two exceptions as a Type I (entire premises excepted) or a Type II (part of premises excepted) *Moonlite Café, Inc. v. Dept. of Health* 23 A.3d 1111 Pa. Cmwlth. 2011 and *House of Leung, Inc. v. Dept. of Health*, unreported opinion of the Commonwealth Court, Docket No. 2485 C.D. 2010, decided December 21, 2011. Although unreported opinions have no precedential value, they are still instructive.

<sup>3</sup> The CIAA employs the terminology: eating place retail dispenser's licensee, which also does not follow LC nomenclature.

principally eating establishments; alcoholic beverage sales are secondary. Now, if a licensee wishes to permit smoking on the premises, the licensee may actively discourage food sales in order to qualify for a smoking exception.

The second distortion between the LC and CIAA relates to what the CIAA phrases in the negative<sup>4</sup>. No one under eighteen is permitted in the area of a licensed premises excepted from the smoking ban. Reading the CIAA alone, one may reasonably infer that customers at least eighteen years of age may patronize an excepted licensed premises. Regrettably, that result offends Liquor Code Section 493(14) [47 P.S. §4-493(14)], which, among other things, renders it unlawful for a licensee to permit minors to frequent a licensed premises<sup>5</sup>.

There are those who still cling to the position that a licensee violates Clause (14) only when a minor visits the premises on three or more occasions. This conclusion is based on *Appeal of Speranza*, 206 A.2d 292 (Pa. 1965), hereafter *Speranza*, in which the Supreme Court of Pennsylvania engaged in statutory construction. The Court concluded that frequent, as used in Clause (14), means; to visit often, to resort to habitually, or to recur again and again.

*Speranza* is now nearly fifty years old. Ordinarily, a decision's age has no bearing on its continued validity. Nevertheless, it is easy to forget that *Speranza* and its progeny are determinations entirely grounded in statutory construction. When a statute is modified, cases interpreting the former provision have questionable application. The degree to which these cases maintain value is inversely proportional to the extent of statutory change. The greater the modification, the less reliance can be placed upon statutory construction decisions pre-dating it.

As presently constituted, Clause (14) is markedly different than that considered by the *Speranza* Court. Then, the pertinent text read:

It shall be unlawful –

(14) For any...licensee...to permit...persons of ill  
repute, known criminals, prostitutes or minors  
to frequent...

The current version no longer includes known criminals or minors as customer classifications a licensee may not permit to frequent a licensed premises.

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<sup>4</sup> I need not address the third discrepancy which may be found in 35 P.S. §637.6(b), relating to affirmative defenses.

<sup>5</sup> See 1 Pa. C.S.A. §1991 which defines minor as a person under twenty-one years old.

Instead, as applied to minors, the second paragraph of Clause (14) approaches the prohibition from another direction. The paragraph begins:

Minors may only frequent licensed premises if...

Clause (14) then goes on to list five situations, each of which independently responds to the "if," above:

- (a) they are accompanied by a parent;
- (b) they are accompanied by a legal guardian;
- (c) they are under proper supervision;
- (d) they are attending a social gathering; or
- (e) the hotel, restaurant or retail dispenser licensee has gross sales of food and nonalcoholic beverages equal to fifty per centum or more of its combined gross sales of both food and alcoholic beverages.

The second paragraph continues by defining some of the terms employed in the five conditions above, while also adding qualifiers to them for special circumstances.

The question needs to be asked: Since "frequent" remains an integral part of the current text, why is that *Speranza* no longer applies? In response, I direct the reader to the five "ifs." Each, plainly and clearly, refers to a single incident. This response provokes a follow-up question: What meaning are we then to apply to frequent?

I long ago concluded, the *Speranza* Court's chosen definition does not mesh with the policy considerations supporting prohibiting minors to frequent a licensed premises. We can readily agree, the underlying purpose is to protect minors from an environment in which alcoholic beverage sales and consumption may create unsafe or unhealthy conditions and where unsupervised, young adults may readily be enticed to experiment with alcoholic beverages

before they have achieved a minimum level of maturity<sup>6</sup>. The perceived deleterious impact begins to occur immediately upon a minor's entry into a licensed premises<sup>7</sup>.

We often say that we frequent a place when our intention is to convey the meaning that we attend or are present there. Other synonyms associated with this meaning are: to appear; to be a guest at; to be at; to be present. This is the sense of frequent that is in harmony with LC's principles.

ADJUDICATION HISTORY:

Licensee has been licensed since July 21, 2003, and has the following Adjudication history:

Docket No. 06-2284C. Fine \$1,250.00 and R.A.M.P. training mandated.  
Sales to a minor on August 11, 2006.

Docket No. 07-2988. Fine \$200.00  
Sold malt or brewed beverages in excess of 192 fluid ounces for  
consumption off premises on September 27, 2007.

PENALTY ASSESSMENT CRITERIA:

**Mandatory Requirement(s)**

Section 471 of the Liquor Code [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 the violations found herein.

**Discretionary Component(s)**

I impose a \$100.00 fine.

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<sup>6</sup> The Legislature has fixed that level at twenty-one. Whether one agrees or not, as a society, we must select some age applicable to all, even though we know the requisite maturity to consume alcoholic beverages responsibly does not coincide with the age we may select. Indeed, my Administrative Law Judge experience has led me to conclude there are some who never reach such a level.

I find it interesting to note that conditions (a) through (d) all permit minors to frequent a licensed premises with assurance there is a responsible adult controlling and monitoring a minor's conduct. However, as I understand the law, for all other legal purposes a minor achieves majority at age eighteen. Consequently, adults, who conditions (a) through (d) entrust with controlling and monitoring minors eighteen years old or older, have questionable legal authority to do so.

<sup>7</sup> Also see P.S.P v. Behind the Moon, Inc., Docket No. 99-0813; CIC Investors No. 850, LTD., Docket No. 90-0580, Selected Opinions, ALJ, Volume 5, Page 131; CIC Investors No. 580, LTD v. P.S.P. 612 A.2<sup>nd</sup> 1105.

ORDER:

**Fine Imposition**

Licensee must pay a \$100.00 fine within 20 days of the mailing date of this Adjudication. The mailing date is located on this Adjudication's first page, upper left corner. If Licensee fails to comply, the Liquor Code requires that I suspend or revoke the license.

**Retaining Jurisdiction**

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 10<sup>TH</sup> day of February, 2012.



Felix Thau, A.L.J.

bc

General Information

This Adjudication is a legal document. The information which follows is a general guide. Therefore, you may want to consult with an attorney.

Applying for Reconsideration

If you want the Administrative Law Judge to reconsider this Adjudication, you must submit a written application and a nonrefundable \$25.00 filing fee. Both must be received by the Office of Administrative Law Judge, (PLCB - Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, PA 17110-9661) within fifteen days of this Adjudication's mailing date. Your application must describe the reasons for reconsideration. The full requirements for reconsideration can be found in Title 1 Pa. Code §35.241.

### Appeal Rights

If you wish to appeal this Adjudication, you must file an appeal within thirty days of the mailing date of this Adjudication by contacting the Office of Chief Counsel of the Pennsylvania Liquor Control Board (717-783-9454). For further information, visit [www.lcb.state.pa.us](http://www.lcb.state.pa.us). The full requirements for an appeal can be found in 47 P.S. §4-471.

Detach Here and Return Stub with Payment

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The fine must be paid by cashier's check, certified check or money order. **Personal and business checks, are not acceptable unless bank certified.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge  
Brandywine Plaza  
2221 Paxton Church Road  
Harrisburg, PA 17110-9661

Docket No. 10-0125  
3745 Enterprises, Inc.