

**Hearing – Liquor Control Enforcement Process  
House Liquor Control Committee  
March 21, 2012**

**Testimony of the Pennsylvania Liquor Control Board:**

**Joe Conti  
Chief Executive Officer**

Chairman Taylor, Chairman Santoni, Members of the House Liquor Control Committee, good afternoon.

On behalf of the Pennsylvania Liquor Control Board, thank you for the opportunity to provide testimony today in conjunction with the testimony of the Pennsylvania State Police, Bureau of Liquor Control Enforcement, and the Office of Administrative Law Judge. Sitting with me is Jerry Waters, Director of the Office of Regulatory Affairs, and Rodrigo Diaz, Executive Deputy Chief Counsel, who will briefly give you an overview of the Board's role in the enforcement process, which relates mainly to the Board's process of not renewing the licenses of establishments considered to be "nuisance bars." At the conclusion of our testimony, we will be happy to answer any questions you may have.

As you have heard in earlier testimony, it is the Pennsylvania State Police, Bureau of Liquor Control Enforcement (the "Bureau") and not the Board, that is charged with the day-to-day enforcement of the Liquor Code. The Bureau issues citations against licensees for violations of the laws of the Commonwealth of Pennsylvania, including the Liquor Code and the Board's Regulations. A citation requires a licensee to appear before the Office of Administrative Law Judge ("OALJ") to show cause why it should not be penalized. If the OALJ sustains the citation based

upon the evidence presented at the hearing, he or she has the authority to impose a fine and/or to suspend or revoke the license. A citation history follows a licensee, and can be considered when imposing later penalties, or upon renewal of the subject license.

Restaurant liquor licenses, which are the most common type of retail liquor license, are renewed every two (2) years, and they are validated in the year between renewals. To facilitate a timely review of all such license renewal applications, the Board has geographically divided the state into eleven (11) licensing districts, allowing the Board to conduct a review of licenses located within a each district by a given date once every two (2) years.

The Board administers a "Nuisance Bar" program under the provisions of section 470 of the Liquor Code [47 P.S. § 4-470] to review, at the time of license renewal, the operational history of any licensed establishment which, by its actions, may have abused the licensing privilege. When a particular licensing district is scheduled for renewal, the Board's Bureau of Licensing ("Licensing") may identify establishments within that district as a nuisance bar and base an objection to renewal of a license upon numerous factors, including violations of the Liquor Code and Board's Regulations and the citation history of the licensee. Licensing also considers any substantial neighborhood complaints, as well as any state and local police reports which may indicate that the licensed premises has not been operated in an appropriate manner. The Board may also take into consideration whether any substantial steps were taken to address the activity occurring on or about the premises.

A pamphlet on the Board's Nuisance Bar Program has been provided with copies of our testimony, for the Committee members' review.

Upon notification from Licensing that an objection has been lodged, an administrative hearing is scheduled and subsequently held before a Board hearing examiner. As is the case in other Licensing hearings, the hearing examiner makes a recommendation to the three (3)-member Board, and the Board renders its decision. The Board may, after considering all of the evidence presented, refuse to renew the license, renew the license, or, under the authority of section 470(a) of the Liquor Code, renew the license subject to conditions. A conditional licensing agreement (or "CLA") permits the Board to place additional conditions/restrictions upon a license and a licensed location that may serve to address those activities that led to Licensing's objection. A licensee agreeing to enter into such a CLA with the Board is bound by the terms of the CLA, and the license is renewed subject to those restrictions.

If the renewal application is refused, the licensee no longer has the authority to sell and serve alcoholic beverages unless until it files an appeal, which acts as a *supersedeas*, allowing the licensee to continue to operate until the appeal has been decided. [47 P.S. § 4-464]. Licensees may appeal the decision of the Board to their county's court of common pleas and ultimately, to the Commonwealth Court and the Supreme Court.

Section 464 of the Liquor Code allows a court of common pleas to hear an appeal of the Board's licensing decisions, based on a *de novo* standard of review, on questions of fact and administrative discretion, and to issue its own findings and conclusions with no deference whatsoever given to the Board's decision. [Id.].

This is true even though a complete evidentiary hearing is held before the Board and the Board is required to make detailed findings of fact and conclusions of law to support its decision. Simply put, the court of common pleas can overlook any licensee activity it wishes to, and its decision to renew the license will be upheld by the Commonwealth Court, unless there is an error of law, an abuse of discretion, or unless the court's findings of fact are not based on substantial evidence.

The exercise of the *de novo* standard of review by courts of common pleas in the sixty-seven (67) counties of the Commonwealth has resulted in widely disparate outcomes, due to the lack of any consensus among common pleas courts as to the degree of deference given the Board's determination following an evidentiary hearing. Instead of one administrative agency with specific expertise applying one standard, resulting in consistent outcomes, the numerous individual trial court judges within each county apply their own standards. This is particularly true in nuisance bar cases.

In 2011, twenty-six (26) appeals of Board decisions relative to Licensing matters were filed with the courts of common pleas. Of the twenty-six (26) appeals, the courts reversed the Board's decisions in nine (9) cases (or thirty-five percent (35%) of all appeals). Of note, the reversals all involved nuisance bars, which represented seventeen (17) of the twenty-six (26) appeals. Accordingly, the various Courts of Common Pleas reversed the Board in more than half of all nuisance bar cases (fifty-three percent (53%) of the time). Accordingly, even when the Board has ultimately decided not to renew a nuisance bar establishment after a careful evaluation of the facts, the courts of common pleas may arbitrarily require the Board to renew the license. It is therefore recommended that the

standard of review be modified so that the Board's decisions would only be reversed if it is determined that the Board committed an error of law, abused its discretion, or if its decision was not based on substantial evidence. This would hopefully lead to more consistent decisions and deter licensees from filing meritless appeals in the hopes of obtaining a sympathetic judge in the courts of common pleas. It would also afford the Board's decisions the same deference as those of other administrative agencies.

With regard to the fines imposed for violations of the Liquor Code and the Board's Regulations, it should be noted that the current fine structure in the Liquor Code, with the exception of slots licensees, has not been changed since 1987, twenty-five (25) years ago. While the OALJ does have the power to suspend or revoke licenses based upon an egregious citation history, its power to punish or deter Liquor Code violations based upon the monetary fines contained in section 471(b) is minimal. The Board recently conducted a survey of the penalties imposed by the various fifty (50) states for violations of the more serious offense of selling or furnishing alcohol to a minor. When compared with the actual penalties imposed by the OALJ for such serious infractions of the Liquor Code, licensees in Pennsylvania face relatively light monetary penalties and minimal suspensions, especially in the case of repeat offenders.

The Board has consistently recommended increasing the ranges of monetary penalties to become more of a deterrent against unlawful licensee conduct, especially for more serious violations of the Liquor Code, including sales to minors and visibly intoxicated persons. Increasing the fine structure will provide a greater disincentive for licensees to risk violating the law in order to generate additional profit. Further, it should be noted that as a result of inflation, a one thousand dollar

(\$1,000.00) penalty issued in 2012 is worth only about one-half of what the penalty was worth in 1987, when the current penalty system was put into place.

Finally, it should be noted that the amount of fines collected fall significantly short of covering the costs of enforcement, which are paid by the Board through a transfer to the Bureau every year, a trend which continues to worsen each year. For example, in Fiscal Year 2008-09, the total funds collected through enforcement efforts covered approximately 11.2% of the overall costs of enforcement, while in Fiscal Year 2010-11, the funds collected covered less than 8.2% of the overall costs of enforcement.

It may also interest you that another tool which may be utilized to address nuisance bar establishments is the filing of an action under section 611 of the Liquor Code. [47 P.S. 6-611]. The following entities and persons may bring a 611 action to enjoin a licensee from operating the premises in a manner that constitutes a nuisance: the Pennsylvania State Police, Bureau of Liquor Control Enforcement, the municipality in which the premises is located, the office of the Attorney General, neighbors and businesses within five hundred (500) feet of the premises, or the District Attorney. Actions to enjoin the continued operation of the premises may result in the padlocking of the premises for one (1) year.

In closing, a few recent inquiries have been made regarding off-premise beer sales in Philadelphia that I would like to address. Prior to the Commonwealth Court decision in the case of Asian American Licensed Beverage Association of Philadelphia v. Commonwealth of Pennsylvania, 475 M.D. 2007 (Pa. Cmwlth., July 11, 2011), sections 407(b) and 442(a)(2) of the Liquor Code required retail licensees in Philadelphia to obtain an off-premises sales permit from the city

before it could lawfully sell beer for off-premises consumption. [47 P.S. §§ 4-407(b), 4-442(a)(2)]. As a result of the aforementioned decision, sections 407(b) and 442(a)(2) are no longer enforceable. Accordingly, holders of retail liquor licenses are now authorized to sell beer for off-premises consumption in quantities not exceeding one hundred ninety-two (192) fluid ounces in a single sale without obtaining any other permit or license from the Board.

Thank you and we would be happy to answer any questions you may have at this time.