

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of All Licenses Held by
Metro Bar & Grill, Inc., d/b/a Arnellia's, for
the Premises at 1183 University Avenue,
Saint Paul, License I.D. No. 54523.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha, acting as a hearing officer for the Saint Paul City Council, commencing at 9:30 a.m. on Wednesday, January 26, 2000, at the Saint Paul City Hall/Ramsey County Courthouse, Room 41, 15 West Kellogg Boulevard, St. Paul, Minnesota. The hearing was held pursuant to a Notice of Hearing dated December 15, 1999.

Virginia D. Palmer, Assistant St. Paul City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, appeared on behalf of the City's Office of License, Inspections and Environmental Protection (LIEP). S. Mark Vaught, Attorney at Law, Six West Fifth Street, Suite 700, Saint Paul, Minnesota 55102-1412, appeared on behalf of the Licensee (hereinafter "Arnellia's" or "Licensee"). The record closed on March 7, 2000, with the receipt of the last post-hearing submission.

NOTICE

This Report contains a recommendation and not a final decision. The final decision will be made by the Saint Paul City Council, which may affirm, reject, or modify the Findings and Conclusions contained herein. The Council will consider the evidence in this case and the Administrative Law Judge's recommended Findings of Fact and Conclusions, but will not consider any factual testimony not previously submitted to and considered by the Administrative Law Judge. The Licensee will have an opportunity to present oral or written arguments regarding its position on the recommendation of the Administrative Law Judge in the application of the law or interpretation of the facts and may present argument related to its position. The Council's decision as to what, if any, adverse action shall be taken will be by resolution under § 310.05 of the St. Paul Legislative Code. To ascertain when the Council will consider this matter, the parties should contact the Saint Paul City Council, Room 310, St. Paul City Hall/Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102.

STATEMENT OF ISSUES

The issues in this matter are whether Licensee violated conditions on its license by failing to maintain video surveillance of the exterior of the licensed premises and failing to record that imagery, and, if so, what penalty is appropriate.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge (ALJ) makes the following:

FINDINGS OF FACT

1. Metro Bar & Grill, Inc. is a corporation doing business as Arnellia's at 1183 University Avenue, Saint Paul, Minnesota 55104. The corporation is owned by Arnellia Allen. Arnellia's has an Entertainment (B) license, a Gambling Location (B) license, a Cigarette/Tobacco license, and two Liquor On-Sale licenses. Arnellia's licenses remain valid pending the outcome of this proceeding. The business is owned by Arnellia Allen. The manager is her son, Jerry Allen. Jerry Allen's brother, Larry Allen, is employed by Arnellia's to provide security.

2. Arnellia's is located directly on University Avenue. To the west on that block is Antiques Minnesota. To the east side of Arnellia's is a parking lot and the Midway Car Wash. To the north side is an alley, with some parking and a dumpster. Four external video cameras have been in place on the building for approximately six years. One camera provides a view of the front door on the south side of the building, one camera observes the north side around the back door of Arnellia's (near the dumpster), and the other two cameras provide different angles of the parking lot on the east side of the building. Signs posted on the building state that video surveillance is being conducted. The video cameras send images to a monitor, which displays a picture for each camera together on the same screen.

3. The area in the vicinity of Arnellia's is subject to frequent police calls and significant levels of crime. To address these neighborhood problems and prevent any exacerbation of those problems, Arnellia's operates its business under a number of restrictions that have been in place for years.^[1] These restrictions include imposing a dress code on customers, requiring picture identification, banning individuals from the premises, screening music played on the premises for inappropriate content, using a metal detector to exclude weapons from the premises, and providing security to ensure orderly behavior on the premises.

4. In May, 1999, a man was shot and killed while in a car parked in front of the Midway Car Wash.^[2] In response to that killing, management at Arnellia's met with the Saint Paul Police, LIEP, and community representatives to determine what additional efforts could be made to address violent acts in the vicinity of Arnellia's. The Licensee agreed to add taping equipment to its existing video surveillance system. This additional condition became effective on July 8, 1999 and states:

Licensee holder will maintain in good working order at least 4 video surveillance cameras on the exterior of the building to constantly monitor the exterior of the premises. Tapes must be maintained for 7 days.^[3]

5. After agreeing to the conditions regarding the video surveillance system, a manager at Arnellia's developed a system to be followed for taping. The first tape of the day would be started when the establishment was opened for business, around noon each day. When that tape ran out, another employee inserted the second tape. That tape would record until after closing. Tapes were kept for a week and then reused for taping.

6. In August, 1999, Arnellia Allen discovered that one of the four surveillance cameras was not working properly. The camera operated properly in daylight, but did not return a clear image at night.^[4] The contractor who initially installed the system, Earl Allen,^[5] was contacted in early August, and he examined the system approximately one week later. The contractor concluded that a new camera was required and it was ordered from the manufacturer in California. Jerry Allen paid the contractor to order the camera on August 13, 1999. The date that the camera was ordered by the contractor is unknown.

7. The camera was delivered to Arnellia's in early September. The contractor was notified that the camera had arrived.

8. On September 23, 1999, a shooting incident occurred in the alley behind Arnellia's. Sergeant Munoz of the Saint Paul Police Department went to Arnellia's to obtain the videotape of the imagery captured by the video surveillance camera. Sergeant Munoz was informed that there was no tape available for that evening. Larry Allen had forgotten to put in the second tape on that day.

9. Arnellia's responded to the failure to tape by modifying its system of taping. Longer duration videotape was purchased, the employees responsible for the system were instructed to make certain that a tape was in the machine, and the system of retaining videotapes was modified.

10. On September 30, 1999, the Saint Paul City Attorney's Office issued a Notice of Violation to Arnellia's. The Notice indicated that on September 23, 1999, the Licensee failed to have its video cameras on and taping and that constitutes a violation of the video surveillance condition on Arnellia's license.^[6] No citation was made in the Notice of Violation to what provision of the Saint Paul Legislative Code was alleged to have been violated and no suggested penalty was indicated.

11. On October 7, 1999, Larry Allen was working the evening shift at Arnellia's. At about 8:00 p.m., Larry Allen switched the videotape for the tape that had been recording since Arnellia's opened that morning. When he activated the video recorder, he inadvertently pressed the "play" button rather than the "record" button.

12. Near midnight on October 7, 1999, an altercation began between patrons in Arnellia's. Those participating in the altercation were removed from the premises. The dispute continued outside and someone fired shots. A car struck and killed a pedestrian in the middle of University Avenue at that time. A large number of officers of the Saint Paul Police Department responded to the scene.

13. Larry Allen had been observing the incident outside Arnellia's. He went in to check on the videotape system and noticed for the first time that evening that the recorder had been set to play, rather than record. He immediately stopped the tape and began recording. An officer of the Saint Paul Police Department entered a few minutes later and requested the videotape. Larry Allen gave the officer the videotape.

14. In mid-October, the contractor returned to Arnellia's and installed the new camera. The installation of the new camera allowed nighttime images from a second angle in the parking lot to be recorded on the VCR.

15. As a result of the October 7 error in operating the VCR, Arnellia's again modified how the videotaping system was to operate. A three-week rotation of videotape was instituted. Each staff member at Arnellia's was instructed to check the operation of the VCR throughout the work shift. Any staff member observing anything unusual about the monitor or VCR is instructed to report to the manager on duty.

16. On November 10, 1999, the Saint Paul City Attorney's Office issued a Notice of Second Violation to the Licensee. The Notice stated that on October 7, 1999, Arnellia's failed to have its video cameras on and taping and that constitutes a violation of the video surveillance condition on Arnellia's license.^[7] No citation was made in the Notice of Violation to what provision of the Saint Paul Legislative Code was alleged to have been violated and no suggested penalty was indicated.

17. On December 15, 1999, the Assistant City Attorney, Virginia D. Palmer, issued a Notice of Hearing in this matter. The Notice of Hearing identified the hearing date as January 26, 1999.^[8]

18. The misidentification of the date of the hearing in the notice of this matter did not cause any confusion for Licensee. Licensee was not prevented from fully participating in the hearing due to the erroneous date.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Saint Paul City Council have authority to consider the charges against the respondent and the penalty, if any, that should be paid the city pursuant to Sec. 310.05 of the St. Paul Legislative Code.

2. LIEP has substantially complied with all relevant substantive and procedural legal requirements.

3. The Licensee received adequate and timely notice of the hearing and of the charges against it.

4. LIEP has the burden of proof to establish, by a preponderance of the evidence, that the respondent violated the conditions of its licensure.

5. The Licensee is in substantial compliance with the conditions of its license through the installation and operation of a videotaping system attached to its video surveillance cameras. The failure to record the images captured by the video surveillance cameras outside the licensed premises on September 23 and October 7, 1999, was inadvertent by the Licensee.

6. The efforts made by the Licensee to repair the malfunctioning camera complied with the condition that four video cameras be "maintained in good working order" outside the business premises.

7. There is no basis for taking adverse action against the Licensee under Sections 310.06(b)(5) and 409.10 of the Saint Paul Legislative Code for the operation of its video surveillance system.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Saint Paul City Council DISMISS the action against the licenses held by Metro Bar & Grill, Inc.

Dated this ____ day of April, 2000

PHYLLIS A. REHA
Administrative Law Judge

Reported: Taped, three tapes

MEMORANDUM

Three incidents of violence are the motivation for bringing this action against the Licensee. A killing in May, occurring in front of the business next door; a shooting in September, occurring in the alley behind the business; and a shooting in October, resulting in a pedestrian being struck by a car and killed. There is no evidence in the record of this matter that any of these incidents took place on the licensed premises.^[9]

In response to the May killing, the conditions under which Arnellia's operates were reconsidered. Conditions regarding video surveillance were added. The language of the new condition itself is ambiguous, since that language does not expressly require that the imagery captured by the exterior video surveillance cameras be recorded. There is no dispute, however, that both LIEP and Arnellia's understood the condition to require the addition of a VCR and recording the imagery from those cameras.

The record in this matter is clear that Arnellia's implemented the new requirement consistent with its agreement. At first, tapes of six and eight hours in duration were used to cover the fourteen hours per day that Arnellia's is open.^[10] After a period of trial and error, Arnellia's discovered that additional time was needed to ensure that the videotaping covered the entire time the establishment was open. Arnellia's then switched to two eight-hour tapes per day. During this period staff discovered, also by trial and error, that the extended play option must be selected to ensure that the eight-

hour tape covers all eight hours.^[11] No one at Arnellia's was able to set the date and time feature on the VCR.

The second act of violence near Arnellia's was a shooting that took place in the alley behind the building on September 23, 1999. The victim in that incident was struck in the foot. The Saint Paul Police sought the videotape from that evening to assist in their investigation of the incident. There was no tape from that evening, since Larry Allen had forgotten to put a tape in the VCR. Arnellia's responded to the error by reviewing the system that had been established for videotaping, adjusting that system to ensure that the VCR was being activated at the appropriate times, and reminding the responsible employees that the taping was a requirement.

The third act of violence occurred on October 7, 1999. At approximately 8:00 p.m. on that date, Larry Allen changed the videotape in the VCR for the evening. He inadvertently pressed the wrong button on the VCR after inserting the new tape. Around midnight, an altercation started in Arnellia's. In accordance with the establishment's policy, the participants were ejected from Arnellia's. Those persons continued their dispute outside and shots were fired. A car then struck a pedestrian in University Avenue and that pedestrian was killed.

After seeing the events outside, Larry Allen went to check on the VCR. At that time he discovered that it was in "play" mode, rather than "record" mode. He immediately began recording. At the hearing in this matter, Larry Allen acknowledged his mistake.

LIEP maintains that violation of any condition is sufficient to take adverse action against Arnellia's license. The serious consequences on September 23 and October 7 are asserted to be justification for a penalty of sixty days suspension. Arnellia's points out that there is no evidence that any videotape from either evening would have prevented the incidents or materially aided the Saint Paul Police in their subsequent investigations.

Section 310.06(b)(5) authorizes adverse action be taken against a licensee when the licensee fails to comply with any condition of the license. Section 409.10 sets out the standards to apply in adding conditions to licenses as follows:

Sec. 409.10. Restrictions on licenses.

When a reasonable basis is found by the council to impose reasonable restrictions upon a license held under this chapter, the council, upon issuing a new license or renewing a license or approving a transfer of a license, may impose reasonable conditions and restrictions pertaining to the manner and circumstances in which the business shall be conducted to preserve the public peace and protect and promote good order and security. These reasonable conditions or restrictions may pertain to:

- (1) A limitation as to the hours when intoxicating liquor may be sold and/or consumed on the licensed premises;
- (2) A limitation and restriction as to the exact location within a building where intoxicating liquor will be served and/or sold and/or consumed;

- (3) A limitation and restriction as to the means of ingress to or egress from the licensed establishment;
- (4) A requirement that certain off-street parking facilities be provided;
- (5) A condition that the license will be in effect only so long as the establishment remains a drugstore, restaurant or hotel as defined by the state liquor act or regulations adopted pursuant thereto;
- (6) A limitation and restriction as to the means and methods of advertising the sale of intoxicating liquor on the building and/or on the premises adjacent thereto;
- (7) Reasonable conditions limiting the operation of the licensed premises so as to ensure that the licensed business will comport with the character of the district in which it is located and/or to the end that nuisances will be prevented; and
- (8) Additional conditions upon hotels and restaurants which may in the discretion of the council tend to insure that the sale of liquor will take place only in conjunction with the sale and service of food.

The one repeated standard throughout the section is that any condition imposed on a licensee must be "reasonable". The condition at issue in this matter falls under item 7, which is the imposition of "reasonable conditions limiting the operation of the licensed premises ... to the end that nuisances will be prevented."^[12] Adverse action can certainly be taken against a licensee for any unreasonable failure to meet a condition requiring videotaping. Conversely, where a licensee has a reasonable excuse for that failure, adverse action is inappropriate.^[13]

In each instance where the videotaping system was found to be faulty, action was taken by Arnellia's to improve the system. VCRs are not "fool-proof" technology, and gaps in recording are inevitable. The Licensee has demonstrated substantial compliance with the license condition and the two instances of noncompliance were inadvertent. The degree of ongoing compliance is demonstrated by the other material on the tape provided to the Saint Paul Police Department on October 7, 1999.^[14]

LIEP asserts that violations of the license condition are established by the failure of Arnellia's to ensure that the correct date and time are imprinted on the recording. There is no such requirement in the conditions established for Arnellia's. Adverse action cannot be taken against the Licensee for failing to properly set the date and time of the VCR, absent some understanding that such conduct is required.^[15]

Having one video camera malfunction is also cited by LIEP as a violation of the license condition. The obligation in the license condition to "maintain in good working order" four video surveillance cameras assumes that the technology will periodically malfunction and need to be fixed. The measure of compliance is not whether any of the cameras are broken, but whether prompt action is taken to repair them. In this matter, the Licensee was prompt and a contractor was dilatory. The Licensee met the requirement that the video surveillance system be maintained.

Robert Kessler, Director of LIEP, testified that the purpose of the video surveillance license condition was:

This establishment attracts people that (*sic*) are prone to violence. And that we have a responsibility to do everything we can to prevent that from happening. And the conditions were designed, especially with the conditions in regard to the cameras, to send a message to those people that practice violence that they will be watched and that we will have records that will protect the public. Because of the lack of good management practices at that establishment, those records are not available and I think as a result, the message is that they can get by with these kinds of acts at that establishment without having to pay the price.^[16]

There is no way for anyone outside the establishment to know whether videotapes are being recorded at any particular moment. The video cameras and signs warning about surveillance are prominently displayed. Each of the three incidents that prompted action concerning the Licensee occurred off of the licensed premises. Possession of a business license does not grant police power to control the actions of persons outside of the licensed premises. The purpose of "sending a message" to persons outside the control of the licensee is accomplished by the visible indicia of video surveillance.

The efforts made by Arnellia's to prevent a nuisance condition in the vicinity of its business are reasonable. Maintaining videotape generated by surveillance cameras does not relate to the ongoing business of the Licensee, but merely aids in the subsequent investigations by police. The inadvertent failure, on two occasions, to record the video camera imagery from outside the premises does not rise to a failure to comply with the conditions on Arnellia's license. The actions taken to replace a malfunctioning camera were reasonable. Arnellia's has demonstrated by a preponderance of the evidence that it was in substantial compliance with its license conditions. LIEP failed to demonstrate that Arnellia's has failed to comply with the conditions on its license. Therefore, the Administrative Law Judge recommends that this matter be DISMISSED.

P.A.R.

Appendix A

EFFECTIVE 07/08/99:

1. Dress Code: Arnellia's agrees to continue to enforce a dress code for customers designed specifically to prevent patrons or customers from concealing weapons or contraband inside baggy clothing or wearing gang affiliated colors.
2. Adherence to Strict Identification Requirements: Arnellia's will require proper picture identification from anyone who appears to be younger than 30 years old. Those without proper identification shall be denied entrance.
3. Increase Communication with Police and Neighbors: Arnellia's shall initiate and maintain regular communication with the west sector team police commander or his designee, and licensing officials, Christine Rozek and Kristina Schweinler. Meetings shall include neighborhood organizations to the extent possible.
4. Control Music Type and Format: Arnellia's shall continue to be responsible for screening out music that promotes or glorifies violence and nefarious or anti-social behavior.
5. Arnellia's management and security personnel will insure that patrons do not leave enmasse, but rather, management and security will encourage patrons to leave in an orderly and controlled manner between 12:30 a.m. and 1:15 a.m.
6. The public telephones shall not allow incoming calls, nor any calls to or from electronic beepers or pagers.
7. Arnellia's shall maintain a list of all patrons who have been banned from the establishment, and this list shall be strictly enforced by Arnellia's. Such list shall include proper identification of that person, photograph and a notice of trespass. This notice should be in triplicate with one copy going to each of the following: 1) Maintained by the establishment; 2) LIEP; 3) the individual being banned. Once banned, a person will remain banned for a minimum of one year. Arnellias will cooperate with police in filling out trespass notice(s).
8. Arnellias shall continue to provide security personnel to promote the orderly behavior of patrons on and leaving the premises. The premises shall include the area immediately adjacent to the establishment. Special attention will be paid to encouraging patrons to leave the area.
9. All employees and security personnel information shall be provided to LIEP for background checks.
10. Arnellia's will employ the use of a metal detecting devices to ensure there are no weapons on the premises.
11. Licensee holder will maintain in good working order at least 4 video surveillance cameras on the exterior of the building to constantly monitor the exterior of the premises. Tapes must be maintained for 7 days.
12. A video surveillance camera shall be maintained in good working order in the interior of the establishment to monitor customers as they enter the establishment. Tapes must be maintained for 7 days.
13. Signage shall be posted on the exterior of the building to notify patrons that the area may be under video surveillance.
14. Security personnel will be on duty daily from 8:00 p.m. until closing.
15. Back door will remain locked after 5:30 p.m. to prevent entry.
16. The licensee will lock the door of the establishment at 12:30 a.m. No additional patrons will be allowed entry after that time.
17. Conditions reviewed at renewal.

^[1] The entire list of restrictions, identified as conditions on Arnellia's license, is attached as Appendix A. The list of conditions includes the subsequently agreed-to conditions regarding the video cameras.

^[2] Midway Car Wash is located at 1169 University Avenue.

^[3] Exhibit 2.

^[4] The image returned by that camera at night would only show objects with their own illumination, such as automobile headlights and taillights.

^[5] Earl Allen is no relation to Arnellia Allen, Jerry Allen, or Larry Allen.

^[6] Exhibit 5.

^[7] Exhibit 9.

^[8] Exhibit 10.

^[9] Several witnesses suggested that the automobile striking the pedestrian was exiting Arnellia's parking lot.

^[10] While Condition 11 states that the cameras must monitor the exterior continuously, both Arnellia's and LIEP understood the taping requirement to be only during business hours.

^[11] The other option, standard play, provides better video quality but much shorter duration.

^[12] Saint Paul Legislative Code Sec. 409.10.

^[13] This standard of conduct is reflected in other license actions involving entertainment establishments.

For example, in assessing whether adverse action was appropriate where female dancers "went topless" without a bar owner's knowledge, Administrative Law Judge Peter Erickson stated:

This case is not so much one where critical issues of fact must be determined, but rather one in which the penalty must be appropriate to the violation. **This case would be much different if, when Mr. Jensen had seen that the dancers were topless, he had immediately taken action, whether or not successful, to curb the topless activities.** However, Mr. Jensen decided that he could do nothing at that time and it was not until after Officer Nohr became involved that Mr. Jensen put an end to the topless behavior. Additionally, Mr. Jensen could have instructed his bouncers and other employees regarding the law on nudity and told them to enforce the prohibition if any of the dancers decided undress. **Although Mr. Jensen was not aware that the show would be topless, he is not blameless for the resulting nudity which continued until after Officer Nohr arrived. However, Mr. Jensen's good faith efforts to ensure that the show would not be topless before ever booking it should be given great weight.**

City of Coleraine v. Harley Jensen, d/b/a Harley's Hut II, OAH Docket No. 4-2101-5430-6

(Recommendation issued April 23, 1991)(emphasis added).

^[14] The time stamp on the tape provided is October 30, 1989, and that tape-records the entire evening's events outside of Arnellia's. With the rotation of tapes described by Arnellia's, the next time stamp that would be imprinted on that particular tape is November 7, 1989. At about the middle of the tape (approximately four hours at extended play), the scene changes to the events on October 7, 1999, and the time stamp changes to November 7, 1989. The new date and imagery lasts only a few minutes, which is consistent with the police officer receiving the tape that night. These facts support the testimony of Larry Allen that the tape was inserted according to the procedure, but that the "play" button was inadvertently pressed.

^[15] As discussed above, the language of the license condition fails to expressly require taping, much less requiring accurate time stamps. There was no understanding between Arnellia's and LIEP that the VCR must imprint an accurate time stamp to meet the license condition.

^[16] Hearing Testimony, Tape 1.