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4-16-2012

DEPARTMENT OF HEALTH, Petitioner, vs. SSP AMERICA d/b/a The Blue Note, Respondent

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**BEFORE THE COMMISSIONER OF
THE TENNESSEE DEPARTMENT OF HEALTH**

IN THE MATTER OF:)	
)	
)	
DEPARTMENT OF HEALTH,)	
Petitioner)	
)	
)	DOCKET No. 17.55-103250J
V.)	
)	
)	
SSP AMERICA d/b/a The Blue Note,)	
Respondent)	

INITIAL ORDER

This matter came before Administrative Law Judge Lynn England upon the Tennessee Department of Health's ("Petitioner") Notice of Charges, Petitioner's Memorandum of Law, SSP America d/b/a The Blue Note Café ("Respondent") Memorandum of Law in Opposition to Petitioner's Notice of Charges, Reply Brief of the Department of Health, Respondent's Reply to Petitioner's Memorandum of Law, Stipulation of Facts, all supporting documents filed by the parties, arguments of counsel, and all pleadings in this case. Judge England on behalf of the Commissioner of the Tennessee Department of Health finds that the Petitioner's Notice of Charges is not well-taken, Respondent is not guilty of violating the provisions of the Tennessee Non-Smoker Protection Act, and the Petitioner's enforcement action should be dismissed based on the Findings of Fact and Conclusions of law set forth below:

FINDINGS OF FACT

1. The Tennessee Non-Smoker Protection Act (the "Act"), codified at Tennessee Code Annotated Sections 39-17-1801 through 39-17-1812, became effective on June 11, 2007, and was in effect at all times relevant hereto.
2. The Blue Note Café is a restaurant located and operating beyond the passenger screening security checkpoints in the "Secured Area" in the passenger terminal of the Memphis International Airport ("Airport"). It offers seating and food service both adjacent to the concourse ("Exterior Service Area") and in an adjacent enclosed interior dining room and bar area ("Enclosed Interior Dining Room") that is accessible from the concourse in the passenger terminal.
3. Access to the Secured Area is controlled by the federal government. United States Transportation Security Administration ("TSA") agents guard the entry and exit points of this space and alarmed security doors prevent entry except through manned security checkpoints. TSA agents restrict and limit access within the Secured Area to only same-day ticketed passengers and/or properly identified employees (who have undergone background checks and have been tested on security rules and regulations) or individuals personally escorted by such employees.
4. The Blue Note Café is owned and operated by SSP America Memphis, LLC, of which SSP America, Inc., formerly known as Creative Host Services, Inc. is a principal Member.
5. On December 8, 2008, Petitioner sent an advisory letter to Creative Host Services, Inc.

6. On January 7, 2009, an inspector from the Tennessee Department of Health visited The Blue Note Café.
7. During the January 7, 2009 inspection, the Tennessee Department of Health inspector observed the following:
 - a. Neither a “no smoking” sign nor the international “no smoking” symbol was posted at any entrance to the Enclosed Interior Dining Room;
 - b. Patrons smoking in the Enclosed Interior Dining Room; and
 - c. A sign posted on the premises advising the clientele that smoking was permitted in the age-restricted Enclosed Interior Dining Room.
8. On January 26, 2009, Petitioner sent a warning letter to Creative Host Services, Inc.
9. On February 6, 2009, Respondent timely requested a hearing regarding Petitioner’s January 26, 2009 warning letter.
10. On April 15, 2009, Petitioner issued a proposed order for resolution of the matter prior to hearing.
11. On May 13, 2009, Burton E. Greenspon, counsel for Respondent, responded to the Petitioner’s April 15 transmittal. Mr. Greenspon included with his response the affidavit of Tim Hudson, the general manager of The Blue Note Café and photographs of Respondent’s premises as seen from the concourse of the passenger terminal.
12. On July 28, 2009, Petitioner sent Notice of Charges to counsel for Respondent.
13. In an effort to comply with the Act’s requirements with respect to “age-restricted venues,” The Blue Note Café maintains a host or hostess on duty and restricts access to its Enclosed Interior Dining Room at all times to persons who are twenty-one (21)

years of age or older by requiring an "acceptable form of identification" as that term is defined in the Act.

14. All employees of The Blue Note Café are at least twenty-one (21) years of age.

15. Smoking is not permitted in the Exterior Service Area.

16. At least since December 8, 2008, a sign has been posted at the entrance to The Blue Note Café, which reads:

Smoking Allowed Inside

Age-Restricted Venue

No One Under 21 Allowed

CONCLUSIONS OF LAW

1. The Department of Health bears the burden of proof in this case. The standard of proof is a preponderance of the evidence. *TN. Department of State, Administrative Procedures Division, Rule 1360-4-1-.02(3)(7)*.

2. Preponderance of the evidence simply means "the greater weight of the evidence or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion." Id.

3. **T.C.A. § 39-17-1802(2)** defines:

"Age-restricted venue" means a legal establishment that affirmatively restricts access to its buildings or facilities at all times to persons who are twenty-one (21) years of age or older by requiring each person who attempts to gain entry to those buildings or facilities to submit for inspection an acceptable form of identification for the express purpose of determining if the person is twenty-one (21) years of age or older;

4. **T.C.A. § 39-17-1803. Places where smoking is prohibited.**

(a) Smoking is prohibited in all enclosed public places within this state, including,

but not limited to, the following places:

- (1)** Aquariums, galleries, libraries, and museums;
- (2)** Areas available to and customarily used by the general public in businesses and nonprofit entities patronized by the public, including, but not limited to, banks, laundromats, factories, professional offices, and retail service establishments;
- (3)** Child care and adult day care facilities;
- (4)** Convention facilities;
- (5)** Educational facilities, both public and private;
- (6)** Elevators;
- (7)** Health care facilities;
- (8)** Hotels and motels;
- (9)** Lobbies, hallways, and other common areas in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities;
- (10)** Polling places;
- (11)** Public and private transportation facilities, including trains, buses, taxicabs and airports under the authority of state or local governments, and ticket, boarding, and waiting areas of public transit depots;
- (12)** Restaurants;
- (13)** Restrooms, lobbies, reception areas, hallways, and other common-use areas;
- (14)** Retail stores;
- (15)** Rooms, chambers, places of meeting or public assembly, including school buildings, under the control of an agency, board, commission, committee or council of this state or a political subdivision of the state, to the extent the place is subject to the jurisdiction of the state;
- (16)** Service lines;
- (17)** Shopping malls;
- (18)** Sports arenas, including enclosed public places in outdoor arenas; and
- (19)** Theaters and other facilities primarily used for exhibiting motion pictures, stage dramas, lectures, musical recitals, or other similar performances.

(b) This prohibition on smoking shall be communicated to all existing employees and to all prospective employees upon their application of employment.

5. T.C.A. § 39-17-1804. Exempted areas.

Notwithstanding any other provision of this part to the contrary, the following areas shall be exempt from § 39-17-1803:

(1) Age-restricted venues;

(2) Hotel and motel rooms that are rented to guests and are designated as smoking rooms; provided, that no more than twenty-five percent (25%) of rooms rented to guests in a hotel or motel may be so designated. All smoking rooms on the same floor shall be contiguous and smoke from these rooms shall not infiltrate into areas where smoking is prohibited pursuant to this part;

(3) All premises of any manufacturer, importer, or wholesaler of tobacco products, all premises of any tobacco leaf dealer or processor, and all tobacco storage facilities;

(4) (A) Non-enclosed areas of public places, including:

(i) Open air patios, porches or decks;

(ii) Any area enclosed by garage type doors on one (1) or more sides when all those doors are completely open; and

(iii) Any area enclosed by tents or awnings with removable sides or vents when all those sides or vents are completely removed or open;

(B) Smoke from those non-enclosed areas shall not infiltrate into areas where smoking is prohibited pursuant to this part;

(5) Nursing homes and long-term care facilities licensed pursuant to title 68, chapter 11; provided, that this exemption shall only apply to residents of those facilities and that resident smoking practices shall be governed by the policies and procedures established by those facilities. Smoke from such areas shall not infiltrate into areas where smoking is prohibited pursuant to this part;

(6) Private businesses with three (3) or fewer employees where, in the discretion of the business owner, smoking may be allowed in an enclosed room not accessible to the general public. Smoke from that room shall not infiltrate into areas where smoking is prohibited pursuant to this part;

(7) Private clubs; provided, that this exemption shall not apply to any entity that is established solely for the purpose of avoiding compliance with this part;

(8) Private homes, private residences and private motor vehicles, unless those homes, residences and motor vehicles are being used for child care or day care or unless the private vehicle is being used for the public transportation of children or as part of health care or day care transportation;

(9) Retail tobacco stores that prohibit minors on their premises; and

(10) Commercial vehicles when the vehicle is occupied solely by the operator.

6. T.C.A. § 39-17-1805. Posting of nonsmoking areas.

(a) "No Smoking" signs or the international "No Smoking" symbol, consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it, shall be clearly and conspicuously posted at every entrance to every public place and place of employment where smoking is prohibited by this part by the owner, operator, manager, or other person in control of that place.

7. T.C.A. §39-17-1806. Enforcement -- Notice -- Complaints -- Inspections -- Informing violators.

(a) This part shall be enforced by the department of health in those enclosed public places otherwise regulated by the department. This part shall be enforced by the department of labor and workforce development in those enclosed public places otherwise regulated by the department. If neither department otherwise regulates an enclosed public place where smoking is prohibited pursuant to this part, the department of labor and workforce development shall enforce this part. The commissioner of health or the commissioner of labor and workforce development may apply for injunctive relief to enforce this part in any court of competent jurisdiction.

(b) Notice of the provisions of this part shall be given to all applicants for a business license pursuant to title 67, chapter 4, part 7.

(c) Any person who desires to register a complaint under this part may initiate the complaint with the department of health or the department of labor and workforce development, or both.

(d) The department of health and the department of labor and workforce development shall, while an establishment is undergoing otherwise mandated inspections, inspect for compliance with this part.

(e) An owner, manager, operator, or employee of an establishment regulated by this part shall inform persons violating this part of the appropriate provisions of this part.

8. T.C.A. § 39-17-1807. Penalties.

(b) A person who owns, manages, operates or otherwise controls any public place where smoking is prohibited pursuant to the provisions of this part and who knowingly fails to comply with any provision of this part shall be subject to the following:

(1) For a first violation in any twelve-month period, a written warning from the department of health or department of labor and workforce development, as appropriate;

**9. TN DEPARTMENT OF HEALTH Rules and Regulations
NON SMOKER PROTECTION ACT CHAPTER 1200-32-1**

1200-32-1-.01 PURPOSE.

The Non-Smoker Protection Act ("Act") requires that on and after October 1, 2007, smoking be prohibited in all enclosed public places within the State of Tennessee. It is the purpose of these rules to supplement the provisions of that Act and provide the mechanisms by which the Department of Health ("Department") shall implement the enforcement duties placed upon it by T.C.A. § 39-17-1801 et seq.

10. 1200-32-1-.02 PUBLIC PLACES REGULATED.

- (1) The Department shall be responsible for the enforcement activities required by the Act in the following enclosed public places:
- (a) All health care facilities licensed, permitted or certified pursuant to Tennessee Code Annotated, Title 68, Chapter 11; and
 - (b) All enclosed public places for which a license, permit or certification must be obtained from any health related board assigned to the Department's Division of Health Related Boards pursuant to Tennessee Code Annotated, 68-1-101 before a health related profession may be practiced therein; and
 - (c) All enclosed public places for which a license, permit or certification must be obtained from the Department's Division of Emergency Medical Services; and
 - (d) All other enclosed public places over which the Department has regulatory authority pursuant to Tennessee Code Annotated, Title 62, Title 68 or otherwise, including, but not limited, to the following:
 - 1. Restaurants
 - 2. Indoor swimming pools
 - 3. Food Service Establishments
 - 4. Hotels
 - 5. Bed and Breakfasts
 - 6. Fast Food Establishments
 - 7. Primary Health Care Centers
 - 8. County and District Health Departments
 - 9. Tattoo and Body Piercing Parlors
 - 10. Organized Camps
- (2) For enforcement purposes as to the establishments listed above that choose to be an "age-restricted venue," and consistent with the liberal construction required pursuant to T.C.A. § 39-17-1812, the age requirement contained in the definition of "age-restricted venue," set forth in T.C.A. § 39-17-1802(2), is intended to apply also to employees of such venues.

11. 1200-32-1-.03 SIGNAGE.

- (1) The "No Smoking" signs or the international "No Smoking" symbol required by T.C.A. § 39-17-1805 to be posted at every entrance to every public place and place of employment where smoking is prohibited shall be clearly and conspicuously placed

at a height, location and in such a size as to be easily seen by a person with normal vision entering the establishment and shall not be obscured in any way.

ANALYSIS

The Department of Health has failed to meet its burden of proof in this matter that the Blue Note Café is subject to the Non-Smoker Protection Act.

The Department alleges the Enclosed Interior Dining Room and Bar area of the Blue Note Café is in violation of the Non Smoker Protection Act. The Blue Note Café alleges this area of the restaurant meets the statutory requirement of an age restricted venue and is therefore exempt.

While the Blue Note Café offers both an exterior service area adjacent to the concourse of the airport and an enclosed interior dining room and bar area, the statute does not identify that an age-restricted venue cannot be "inside" another building (such as the airport) as argued by the Department. "Age-restricted venue" is defined as a "legal establishment that affirmatively restricts access to its buildings or **facilities** at all times to persons who are twenty-one (21) years of age or older by requiring each person who attempts to gain entry to those buildings or **facilities** to submit for inspection an acceptable form of identification for the express purpose of determining if the person is twenty-one (21) years of age or older." *T.C.A. § 39-17-1802(2)*. There is no requirement that a facility to be a "free standing" or "stand alone" building.

The Blue Note Café also maintains a host or hostess on duty who restricts access to the Enclosed Interior Dining Room and Bar Area at all times to persons

who are twenty-one (21) years of age or older by requiring an "acceptable form of identification" as that term defined in the Act.

It is therefore determined that the Blue Note Café meets all statutory criteria of an age restricted venue under the Non-Smoker Protection Act. Therefore, it is exempt from any prohibitions under the Non-Smoker Protection Act.

It is so ORDERED.

This Order entered and effective this 16 day of April, 2012

Lynn M. England
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this
16 day of April, 2012



Thomas G. Stovall, Director
Administrative Procedures Division