

Mailing Date: May 5, 2004

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 03-0384
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :
 :
v. :
 :
PRICE KING SOUTH, INC. :
t/a Rhythm House Café :
3029 Washington Pike : License No. R-4280
Bridgeville, PA 15107-1403 :

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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appeals from the Adjudication and Order of Administrative Law Judge Robert F. Skwaryk (“ALJ”), wherein the ALJ dismissed the citation against Price King South, Inc. (“Licensee”).

The citation charged that Licensee violated section 3.52(a) of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 3.52(a)] in that, on February 4, 2003, Licensee, by its servants, agents or employees, permitted other persons to operate another business on the licensed premises.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the ALJ's decision if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. "Substantial evidence" has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Johnson v. Pennsylvania Bd. of Probation and Parole, 706 A.2d 903 (Pa. Cmwlth. 1998); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

The ALJ's dismissal of the citation was based upon his conclusion that the Bureau had failed to prove a key element of the charge: that the sales transactions had occurred within the area of the premises licensed by the Board.

On appeal, the Bureau asserts that the decision of the ALJ was not based on substantial evidence, was not supported by current appellate case law, and was contrary to the intent and purpose of the Liquor Code.

On February 4, 2003, at 8:55 p.m., Bureau Officer Susan Nist entered Licensee's premises and observed approximately two hundred (200), mostly male, patrons in the bar area. (N.T. 6-7, 16). She followed a female into a large room at the rear of the bar, where she observed approximately fifty (50) females watching a presentation by two (2) women pitching items including plastic dildos, body paints and vibrators. (N.T. 7-8, 15, 17). Each of the people watching the presentation had been given a booklet and price sheet. (N.T. 7-8, 10-11; Exs. C-5, C-6). When the presentation concluded, the patrons were told about a second room off the first one. (N.T. 8).

Officer Nist exited the large room and went through a door into the smaller room, where she observed two (2) tables that were lined with items similar to those that were on display in the first room. (N.T. 8-9, 16). Four (4) female salespersons behind the tables answered questions about the products, while another female sat at a table in the front of the room taking orders and using a credit card machine. (N.T. 9, 13-16). Officer Nist

observed a few sales transactions, and she estimated there were ten (10) people in line. (N.T. 9). She observed alcoholic beverages being sold in the large room. (N.T. 12, 14). Officer Nist made a purchase with cash of one (1) of the items presented and departed the premises at 10:00 p.m. (N.T. 13-15).

The company hosting the presentation, "Sassy Sensations," located in Pittsburgh, does mainly in-home sales. (N.T. 13-17). The salespeople were dressed in business attire. (N.T. 13). All sales were transacted in the second room. (N.T. 14, 16). Licensee's cash registers were not utilized in those transactions. (N.T. 14). Officer Nist did not follow up to determine whether Sassy Sensations returned to conduct business at Licensee's premises at another time. (N.T. 12-13, 17).

Darryl Price is Licensee's event consultant and holder of a liquor license in safekeeping. (N.T. 19, 21-22). He was approached by a representative of a local radio station, WAVE, who offered commercials to Licensee, on trade, in exchange for Licensee allowing Sassy Sensations to conduct a single, ninety (90)-minute presentation at its premises. (N.T. 19-20, 22-24). Mr. Price did not believe that there would be any sales of the products conducted on the premises. (N.T. 20, 22). He did not share, in any way, in any of the

alleged sales. (N.T. 21). Sassy Sensations did not have any direct business relationship with Licensee. (N.T. 21, 23).

Licensee was represented by counsel, and testimony was presented on its behalf. (N.T. 19 – 24). Licensee’s attorney acknowledged that the smaller room where the sales were made is part of the licensed premises. (N.T. 29). Mr. Price also admitted that Sassy Sensations was allowed to sell its products on Licensee’s premises. (N.T. 23).

Board records show that, on February 4, 2003, the entire first floor of the licensed premises was licensed, with the exception of three (3) unlicensed storage rooms off the kitchen, one (1) unlicensed storage room off the kitchen/serving room, an unlicensed office and an unlicensed coatroom. [Administrative Notice].

The Bureau’s appeal asserts that, because sales were made in part of the licensed premises, section 3.52(a) was violated. Section 3.52(a) of the Board’s Regulations [40 Pa. Code § 3.52(a)] provides that, “[a] licensee may not permit other persons to operate another business on the licensed premises.”

The Bureau’s officer testified that sales of products marketed by “Sassy Sensations” were observed occurring in Licensee’s premises. A presentation

about the products was made in a room where alcohol was being served, which room was separate from the main bar area of the licensed premises. The actual product sales took place in a small room separate from the room in which the presentation about the products was being made. There is no dispute on the record that Sassy Sensations conducted sales of its products at Licensee's premises on February 4, 2003, or that the room in which the sales took place was licensed by the Board.

What remains at issue is whether, on February 4, 2003, Licensee allowed Sassy Sensations to conduct another business on its licensed premises. The Bureau's officer observed the sales presentation and sale transactions on one (1) occasion and did not follow up at the licensed premises to determine whether another presentation and/or sales were ever made again.

Licensee's witness admitted that Sassy Sensations, an entity unrelated to Licensee, sold its products on Licensee's premises. Further, it is clear that Sassy Sensations conducted its sales presentation on Licensee's premises. The Bureau did fail to adduce proof of the extent of the licensed premises. In this, it did not carry its entire burden of proof. Pennsylvania Liquor Control Board v. PPC Circus Bar, Inc., 506 A.2d 521 (Pa. Cmwlth. 1986).

However, the admission by Licensee's witness mooted this basis upon which dismissal of the citation would have been justified.

Appellate interpretations of section 3.52(a) are scant. The Commonwealth Court refused to consider independent contractor exotic dancers performing on a licensed premises to be a section 3.52(a) violation. It reasoned that, the dancers were "part and parcel" of the licensee's business of operating a "gentleman's club." Therefore, even if they were independent contractors, they would not be "other persons conducting another business." MAG Enterprises, Inc. v. Pennsylvania Liquor Control Board, 806 A.2d 521 (2002).

An earlier interpretation of section 3.52(a) is found in Pennsylvania Liquor Control Board v. Franzoni, 71 Pa. Cmwlth. 248, 454 A.2d 1170 (1983). There, a citation was dismissed where items were being sold in the licensed premises that had come from licensee's related business selling 'sporting goods generally related to hunting and fishing and incidental momentos [sic] and memorabilia." Franzoni, 454 A.2d at 1171. Because it was the licensee, and not "other persons," there was no violation of section 3.52(a).

Before 1997, the Board's Regulations did not clearly restrict licensees themselves from conducting another business on the licensed premises. This was remedied by adding section 3.52(c) that prohibits such other businesses without Board approval.

In Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Benny Enterprises, LLC, 669 A.2d 1018 (Pa. Cmwlth. 1995), the Commonwealth Court ruled that section 3.52(b) of the Board's Regulations did not prohibit a licensee from selling darts and accessories used in connection with an electronic darts game played in the same room where the bar was located. The Court reasoned:

If we were to adopt the board's interpretation of section 3.52(b) of the regulations, we would have to conclude that every bar and restaurant which sells cigarettes or candy, or which has a jukebox or pinball machine on its licensed premises, must obtain approval from the board for such income-generating activities. Clearly, this would be an absurd result and one not intended by the language of section 3.52(b).

[Id.].

This Board previously affirmed a citation similar to the one at bar. In Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Freddy's Restaurant and Lounge, Inc., Citation No. 95-0324, May 2, 1996, the licensee on one (1) occasion allowed an exotic dancer to promote sales of her

erotic videotapes on the licensed premises. The Board found that this action violated section 3.52(a). However, the “part and parcel” analysis of the Commonwealth Court in MAG Enterprises, supra, might have dictated that this Board reach a different result.

The Bureau’s appeal asserts that, because the sales presentation was made in part of the licensed premises, section 3.52(a) was violated. If the Board were to accept the position advocated by the Bureau, then every trade or merchandise show in every hotel in the Commonwealth would be in violation of the Board’s Regulations.

The Board, prior to the Freddy’s Restaurant and Lounge case, affirmed at least one (1) citation case wherein the citation was dismissed because the alleged business being conducted on the licensed premises was not of a permanent, fixed or continuous nature. Pennsylvania State Police, Bureau of Liquor Control Enforcement v. R.D.B. Rittenhouse Place, Inc., Citation No. 90-2130, January 15, 1992 (charity fashion show conducted on one occasion). A common thread found in the sparse appellate cases is that the businesses conducted were ongoing enterprises. See In re: Lakewood Company, 181 A.2d 918 (Pa. Super. 1962); Franzoni, 454 A.2d 1170; Benny Enterprises, 669 A.2d 1018; M.A.G. Enterprises, 806 A.2d 521.

In the instant case, Sassy Sensations conducted one (1) presentation on Licensee's premises. This does not rise to the level of permanent, fixed or continuous. Therefore, the Board hereby overrules its decision in Freddy's Restaurant and Lounge and holds that one (1) occasion of a sales presentation by an entity other than the Licensee does not constitute a violation of section 3.52(a).

When the Board issues a license for a premises that has larger rooms, it is safe to assume that those rooms may be used for meetings. It is not uncommon for meetings include sales of products or services, whether it be books, computer software or, as here, novelties. The Board expects its licensees to carry on "the highly dangerous business of selling intoxicating liquor" with the greatest degree of responsibility. Commonwealth v. Koczvara, 397 Pa. 575; 155 A. 2d 825 (1959).¹

Licensee is advised, however, that it is a licensed premises, and not a bazaar. Sales of products or services by others in the context of meetings cannot become the Licensee's principal concern.

¹ Allowing the occasional and incidental sale of products or services in such a context does not diminish the Board's expectations for its licensees. The Board has previously permitted retail licensees to sell, on their licensed premises, hunting and fishing licenses, jewelry, darts, sports memorabilia, small Styrofoam coolers, newspapers, lottery tickets, magazines and specialty coffees. Bands performing on licensed premises have been permitted to sell their "cassette tapes, tee-shirts, headbands, and posters depicting pictures and/or the name of the band." (Advisory Opinion 03-369, September 5, 2003).

The Board concludes that the Bureau failed to prove that another business was being conducted on the licensed premises on February 4, 2003. Accordingly, the appeal of the Bureau is dismissed and the decision of the ALJ to dismiss the citation against Licensee is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of the Bureau is dismissed.

Board Secretary