

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

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| PENNSYLVANIA STATE | : | |
| POLICE, BUREAU OF | : | Citation No. 05-0860 |
| LIQUOR CONTROL ENFORCEMENT | : | |
| | : | Incident No. W01-304669 |
| v. | : | |
| | : | LID - 11973 |
| NEW DECK TAVERN CORPORATION | : | |
| 3408-12 SANSOM STREET | : | |
| PHILADELPHIA PA 19104 | : | |
| | : | |
| | : | |
| PHILADELPHIA COUNTY | : | |
| LICENSE NO. R-AP-SS-5727 | : | BEFORE: JUDGE SHENKLE |

APPEARANCES:

For Bureau of Enforcement: James E. Dailey, Esq.
For Licensee: Edward B. McHugh, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on May, 10, 2005. The citation alleges that Licensee violated §§104(c), 401(a) and 406(a)(1) of the Liquor Code, 47 P.S. §§1-104(c), 4-401(a) and 4-406(a)(1), on March 28, 2005, by offering and/or giving liquor and/or malt or brewed beverages as a prize.

A hearing was held on November 10, 2005, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and the citation. They also stipulated that the facts set forth in the Bureau’s prehearing memorandum may be taken as correct for the purpose of preparing this adjudication. Counsel for Licensee argued that the law does not prohibit the conduct alleged in the citation or, if it does, that the facts do not support a finding of liability. Based entirely on the Bureau’s prehearing memorandum, I make the following:

FINDINGS OF FACT:

1. On March 28, 2005, Liquor Enforcement Officer J. Kohler entered the licensed premises at about 9:15 p.m. and saw two bartenders serving approximately forty-five patrons. The officer asked one of the bartenders if the premises would be offering “Quizzo” that evening (Quizzo is a patron-interactive trivia game). The bartender said that they were.

2. Officer Kohler asked if the premises was still giving away a case of Guinness Draught beer as a prize for participating in Quizzo. The bartender stated that a case of Guinness beer was that evening's third place prize, but added that sometimes the patron would get a "rain check" voucher because at times it takes a while to obtain the beer for the winning patron.

DISCUSSION:

None of the provisions of law referred to in the citation explicitly prohibits "offering and/or giving liquor and/or malt or brewed beverages as a prize." The statutes cited read in their entirety as follows:

(c) Except as otherwise expressly provided, the purpose of this act is to prohibit the manufacture of and transactions in liquor, alcohol and malt or brewed beverages which take place in this Commonwealth, except by and under the control of the board as herein specifically provided, and every section and provision of the act shall be construed accordingly; to provide a structure in this Commonwealth for a distribution system, including the establishment of Pennsylvania liquor stores and licensing of importing distributors and distributors; and to preserve manufacturers of liquor and alcohol and malt and brewed beverages selling those products within this Commonwealth. The provisions of this act dealing with the manufacture, importation, sale, distribution and disposition of liquor, alcohol and malt or brewed beverages within the Commonwealth through the instrumentality of the board, licensees and otherwise, provide the means by which such control shall be made effective. This act shall not be construed as forbidding, affecting or regulating any transaction which is not subject to the legislative authority of this Commonwealth.

--47 P.S. §104(c), relating to "interpretation of act"

(a) Subject to the provisions of this act and regulations promulgated under this act, the board shall have authority to issue a retail liquor license for any premises kept or operated by a hotel, restaurant or club and specified in the license entitling the hotel, restaurant or club to purchase liquor from a Pennsylvania Liquor Store and to keep on the premises such liquor and, subject to the provisions of this act and the regulations made thereunder, to sell the same and also malt or brewed beverages to guests, patrons or members for consumption on the hotel, restaurant or club premises. Such licensees, other than clubs, shall be permitted to sell malt or brewed beverages for consumption off the premises where sold in quantities of not more than one hundred ninety-two fluid ounces in a single sale to one person. Such licenses shall be known as hotel liquor licenses, restaurant liquor licenses and club liquor licenses, respectively. No person who holds, either by appointment or election, any public office which involves the duty to enforce any of the penal laws of the United States of America or the penal laws of the Commonwealth of Pennsylvania or any penal ordinance or resolution of any political subdivision of this Commonwealth shall be issued any hotel or restaurant liquor license, nor shall such a person have any interest, directly or indirectly, in any such license.

--47 P.S. §4-401(a), relating to

“authority to issue liquor licenses to hotels, restaurants and clubs”

(a)(1) Every hotel, restaurant or club liquor licensee may sell liquor and malt or brewed beverages by the glass, open bottle or other container, and in any mixture, for consumption only in that part of the hotel or restaurant habitually used for the serving of food to guests or patrons, or in a bowling alley that is immediately adjacent to and under the same roof as a restaurant when no minors are present, unless minors who are present are under proper supervision as defined in section 493, in the bowling alley, and in the case of hotels, to guests, and in the case of clubs, to members, in their private rooms in the hotel or club. No club licensee nor its officers, servants, agents or employes, other than one holding a catering license, shall sell any liquor or malt or brewed beverages to any person except a member of the club. In the case of a restaurant located in a hotel which is not operated by the owner of the hotel and which is licensed to sell liquor under this act, liquor and malt or brewed beverages may be sold for consumption in that part of the restaurant habitually used for the serving of meals to patrons and also to guests in private guest rooms in the hotel. For the purpose of this paragraph, any person who is an active member of another club which is chartered by the same state or national organization shall have the same rights and privileges as members of the particular club. For the purpose of this paragraph, any person who is an active member of any volunteer firefighting company, association or group of this Commonwealth, whether incorporated or unincorporated, shall upon the approval of any club composed of volunteer firemen licensed under this act, have the same social rights and privileges as members of such licensed club. For the purposes of this paragraph, the term “active member” shall not include a social member.

--47 P.S. §4-406(a)(1), relating to “sales by liquor licensees; restrictions”

However, in *Irem Temple A.A.O.N.M.S., t/a Irem Temple Country Club*, Citation No. 891407, 4 Sel. Op. ALJ 5 (1990), the Honorable Robert F. Skwaryk found the licensee liable for offering and giving liquor as a prize on the basis that it constituted a violation of §§401(b) and 406(a)(1) of the Liquor Code. Judge Skwaryk reasoned that “the Liquor Code sets forth the mechanism by which liquor may be dispensed on a licensed premises. Offering or giving liquor without consideration or as a prize is a violation of the Liquor Code.” 4 Sel Op. ALJ at 10.

It may be seen that the provisions cited by the Bureau in the present case also apply to the dispensing of malt or brewed beverages, so, following Judge Skwaryk’s reasoning results in the conclusion that the offering or giving of a case of beer is also a violation of the Liquor Code.

One could wish for a more specific statute or regulation, but it seems clear that the Board has also interpreted the law to reach the same result. See, Advisory Notice No. 14, (<http://www.lcb.state.pa.us/plcb/cwp/view.asp?a=1334&Q=546395>) relating to events, tournaments or contests. To the same effect is the Board’s Advisory Opinion No. 01-404, (http://www.lcb.state.pa.us/webapp/legal/PublicAdvOpnDisplay.asp?opinion_year=2001&opinion_sequence=404).

The secondary question presented by Licensee’s counsel is, given that the award of a case of beer as a prize is against the law, did the Bureau’s evidence establish a violation? Here again,

one could wish for a more thorough and explicit demonstration. We know only that a bartender informed an undercover liquor enforcement officer that there *would be* Quizzo that evening, and that a case of Guinness would be the third prize.

It is common practice for enforcement officers to learn of intended unlawful behavior through the words of an employee of a licensee, and then to return at the time the behavior is scheduled to commence so as to actually witness it. If it is sufficient to merely learn of a licensee's stated *intention* to do the unlawful thing, one wonders why the Bureau bothers, in most cases, to continue the investigation any further.

In this case, however, I am constrained to find that a violation has been proven. The statement of the bartender to the officer constitutes an offer. The person receiving that offer is entitled to return to the premises in reliance upon it and, if that person's knowledge of relevant trivia is the third best among the participants in that evening's game, that person would be justified in expecting a case of Guinness (or a voucher for the same).

CONCLUSIONS OF LAW:

Sustained as charged.

PRIOR RECORD:

Licensee has been licensed since April 12, 1971, and has had no prior violations.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$50.00 to \$1,000.00 range, or both, for violations of the type found in this case.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, New Deck Tavern Corporation, License No. R-AP-SS-5727, pay a fine of one hundred dollars (\$100.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

The fine must be paid by treasurer's check, cashier's check, certified check or money order. **Personal checks, which include business-use personal checks, are not acceptable.** 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

Dated this 10th day of March, 2006.

_____jb David L. Shenkle, J.

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.