

Mailing Date: June 21, 2006

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-0860
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

NEW DECK TAVERN : License No. R-5727
CORPORATION :
3408-12 Sansom Street :
Philadelphia, PA 19104 :

Counsel for Licensee: Edward B. McHugh, Esquire
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6901 Woodland Avenue
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OPINION

New Deck Tavern Corporation ("Licensee") appealed from the
Adjudication and Order of Administrative Law Judge David L. Shenkle

("ALJ"), wherein the ALJ sustained the citation and imposed a one hundred dollar (\$100.00) fine.

The citation charged Licensee with violation of sections 104(c), 401(a) and 406(a)(1) of the Liquor Code [47 P.S. §§ 1-104(c), 4-401(a), 4-406(a)(1)], in that on March 28, 2005, Licensee, by its servants, agents or employees, offered and/or gave liquor and/or malt or brewed beverages as a prize.

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 decision of the ALJ if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. The Commonwealth Court has defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal, Licensee contends the ALJ abused his discretion, committed an error of law and/or made a decision not supported by substantial evidence.

Licensee first argues that the Liquor Code sections alleged to be violated do not expressly or implicitly prohibit the alleged unlawful conduct. In further support of its contention that the record is not supported by substantial evidence, Licensee argues that the ALJ relied on inadmissible hearsay evidence in that there was no demonstration by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) that Licensee actually offered malt or brewed beverages as a prize or that the enforcement officer witnessed the alleged conduct.

A review of the record reveals that Licensee stipulated to the facts presented in the Bureau Pre-hearing Memorandum. (N.T. 4-5). On March 28, 2005, Julie Kohler, an enforcement officer with the Bureau, visited the licensed premises at approximately 9:15 p.m. (Ex. B-3). During the visit, Officer Kohler observed two (2) bartenders serving approximately forty-five (45) patrons. (Ex. B-3). On the date in question, Officer Kohler asked one of the bartenders if the premises would be offering “Quizzo” (a patron-interactive trivia game) that evening. (Ex. B-3). The bartender confirmed that it would. (Ex. B-3).

Officer Kohler asked the bartender if the premises was still giving away a case of Guinness Draught beer as a prize for participating in Quizzo. (Ex. B-

3). The bartender indicated that a case of Guinness Beer was that evening's third place prize for Quizzo. (Ex. B-3). The bartender further informed Officer Kohler that sometimes a rain check voucher is given to the winner of the case of Guinness Draught beer because at times it takes the premises a while to obtain the case of beer offered as a prize. (Ex. B-3). Officer Kohler departed from the subject premises at approximately 10:30 p.m. (Ex. B-3).

The Board has reviewed this appeal matter with Licensee's objections in mind; however, the Board finds that it must reject Licensee's contentions.

The Legislature of Pennsylvania granted the Board broad police powers for the protection of the public welfare, health, peace and morals of the citizens of the Commonwealth. To achieve these purposes, the Liquor Code must be liberally construed pursuant to section 104(a). [47 P.S. § 1-104(a)]. As stated by the Pennsylvania Supreme Court:

There is perhaps no other area of permissible state action within which the exercise of the police powers of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages.

In re Tahiti Bar, Inc. Liquor License Case, 395 Pa. 355, 150 A.2d 112, 115 (1959).

While the Board agrees, in part, that 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 Board has historically interpreted the Liquor Code to prohibit the awarding of alcoholic beverages. [See Bd. Advisory Notice No. 14]. The Board, in this instance, makes no distinction between liquor and malt or brewed beverages, as further evidenced by the response issued in Board Advisory Opinion No. 01-404. Further, as the purpose of the Liquor Code is to regulate and restrain the sale of liquor, not to promote it, the offering of alcohol as a prize stands clearly in the fact of that purpose.

Licensee’s second issue on appeal was that the ALJ relied on hearsay evidence to support a finding that Licensee offered or gave alcohol as a prize, and that there was no demonstration that the Bureau officer actually witnessed the offering and/or giving of liquor and/or malt or brewed beverages as a prize.

Licensee is correct that hearsay evidence is generally inadmissible, and that inadmissible hearsay evidence cannot alone support an ALJ’s finding of fact. [Pa.R.E. 801(c), 802]. However, Commonwealth agencies are not generally bound by technical rules of evidence at agency hearings, and there

exists an exception to the hearsay rule that allows the court to consider as evidence admissions by party opponents. [2 Pa. C.S. § 505; Pa.R.E. 803(25)].

Notwithstanding the fact that Officer Kohler did not actually witness the beer being given as the third place prize, the evidence does support a violation. The bartender freely admitted that a case of Guinness Draught beer would be the third place prize for the Quizzo participants, and also gave details regarding the “rain check voucher.” Such a statement constitutes an admission of a party opponent, which is an exception to the hearsay objection. Clearly, the bartender’s statement can be interpreted as so far contrary to Licensee’s interest that a reasonable person in the bartender’s position would not have made the statement unless believing it to be true.

The Board is satisfied that a violation has occurred and that there is sufficient evidence to support the ALJ’s findings.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee pay the fine in the amount of one hundred dollars (\$100.00) within twenty (20) days of the mailing date of this Order. Failure to do so shall result in license suspension and/or revocation.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated March 10, 2006.

Board Secretary