

Mailing Date: JUL 11 2006

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

PENNSYLVANIA STATE :
POLICE, BUREAU OF : Citation No. 05-0957
LIQUOR CONTROL ENFORCEMENT :
 : Incident No. W01-309875
 :
 v. :
 : LID - 50322
 :
 H & M BEER INC :
 1344 E LUZERNE ST :
 PHILADELPHIA PA 19124-5360 :
 :
 :
 :
 :
 PHILADELPHIA COUNTY :
 LICENSE NO. E-SS-342 : BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: James E. Dailey, Esq.
For Licensee: John J. McCreesh, III, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on May 20, 2005. The citation alleges that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on April 20, 2005, on the basis that the licensed premises was not a *bona fide* restaurant because there was insufficient seating.

A hearing was held on Tuesday, May 9, 2006, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and the citation.

FINDINGS OF FACT:

1. On March 18, 2003, when the Board approved the transfer of this license from the previous owner to the current licensee, the Board-approved areas were as follows:

First Floor:		Second Floor	
Beer Cooler	- 16' x 8'	Serving	- 16' x 11'
Serving	- 16' x 4'	Office	- 14' x 10'
		Office	- 14' x 12'
		Serving	- 16' x 16'
Basement:			
Storage	- 16' x 46'		

(Exhibit B-3)

2. These were also the licensed areas on April 20, 2005 (Ibid).

3. Liquor Enforcement Officer Brian Hendrzak inspected the licensed premises at 3:40 p.m. on April 20, 2005. After entering through the front door he saw to his left a 10 to 15-foot box with a cashier behind it. From the waist down the box appears to be made of wood; above the waist it is made of bulletproof glass (N.T. 4-5).

4. In the middle of the premises were grocery aisles, and to the right were coolers. Patrons were frequenting the premises, purchasing alcoholic beverages. There was no seating in the first floor (N.T. 6).

5. Officer Hendrzak identified himself to Hank Lai, Licensee's president. He asked Mr. Lai where his seating arrangements were, and Mr. Lai took him to the right portion of the premises, towards the back. They went through a door and up a flight of stairs. There was no lighting for the stairs, and there were boxes and stuff on them. At the top of the stairs they went left and down a hallway, which was really dark (N.T. 7).

6. In one of the licensed areas on the second floor of the premises there were a sufficient number of tables and chairs to qualify the premises as a *bona fide* Eating Place, but the chairs were stored in stacks of three or four, and there was a large quantity of paper towels in boxes stored on the tables. The area did not have lights (N.T. 9).

CONCLUSIONS OF LAW:

Sustained as charged.

DISCUSSION:

The result in this case may seem to be in conflict with the result in *5934 Lee, Inc.*, Citation No. 05-1316, in which I dismissed a citation initiated by the same liquor enforcement officer, whose investigation revealed many of the same facts present in this case. The significant difference is that, in *5934 Lee, Inc.*, the tables and chairs were set up and available for use; in the present case the tables and chairs were unusable because they were stacked.

I do not doubt that Licensee's counsel, who also represented the licensee in *5934 Lee, Inc.*, had that case in his mind when this case was heard. Mr. McCreesh's cross-examination of Officer Hendrzak and examination of his client in the present case were clearly aimed toward the similarities in the two cases.

Section 102 of the Liquor Code, 47 P.S. §1-102, contains this definition:

“Eating place” shall mean a premise where food is regularly and customarily prepared and sold, having a total area of not less than three hundred square feet available to the public in one or more rooms, other than living quarters, and equipped with tables and chairs, including bar seats, accommodating thirty persons at one time. The board shall, by regulation, set forth what constitutes tables and chairs sufficient to accommodate thirty persons at one time.

Licensee's premises has sufficient area and sufficient equipment to maintain the establishment as a *bona fide* Eating Place. Even though it is true that the bulk of Licensee's business is in groceries, continuation of this license requires that the establishment be maintained with adequate seating, available immediately to any patrons who may request it.

NOTICE OF ASSESSMENT OF POINTS PURSUANT TO ACT 239 OF 2004

Section 479 of the Liquor Code, 47 P.S. §4-479, establishes a numerical system for use in cities of the first class. Every restaurant and eating place licensee in cities of the first class who has been cited for a violation of §471 of the Liquor Code, 47 P.S. §4-471, on or after February 6, 2005, must have points assessed as of the date of the final adjudication. Points are in addition to other provisions of the Liquor Code regarding license transfer and renewal. Points are required to be assigned in addition to a monetary penalty and/or suspension and/or revocation of the license by the administrative law judge.

An enhanced penalty violation requires that the administrative law judge assign five to ten points, depending upon the circumstances surrounding the violation, to a license record, for each and every enhanced penalty violation. The Board has by regulation established a point system ranging from one to five points for other violations of the Liquor Code and Regulations not specifically set forth in §479.

Section 481(a), 47 P.S. §4-481(a) provides that when any license accumulates ten points or more, the administrative law judge must require the license holder to become compliant with and remain compliant with the provisions of §471.1, 47 P.S. §4-471.1, relating to the Responsible Alcohol Management Program (R.A.M.P.). Failure to comply with such an order within ninety days will result in two additional points being assessed against the license record.

Section 481(b), 47 P.S. §4-481(b) provides that when any license accumulates fifteen points or more, the administrative law judge must place the license in safekeeping. The license can only be removed from safekeeping upon approval by the board of a transfer to a disinterested third party. Upon completion of the transfer, the points assigned to it will be reduced to ten. If, within ninety days of the transfer the new owner voluntarily becomes compliant with and remains compliant with the responsible alcohol management provisions of §471.1, two additional points will be removed from the license record.

Notwithstanding other provisions of the Act, §481(c), 47 P.S. §4-481(c), provides that when any license accumulates twenty or more points in more than one citation, the administrative law judge must revoke the license.

PRIOR RECORD:

Licensee has been licensed since March 18, 2003, and has had one prior violation:

Citation No. 03-0964. \$1,000.00 fine.

1. Sales to a minor. May 3, 2003.
2. Minor frequenting. May 3, 2003.

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, H & M Beer, Inc., License No. E-SS-342, pay a fine of two hundred dollars (\$200.00) 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.

IT IS FURTHER ORDERED that two (2) points are hereby assessed against the record of Licensee, H & M Beer, Inc., License No. E-SS-342, as required by 47 P.S. §479(d)(9).

IT IS FURTHER ORDERED that Licensee shall, within 20 days of the mailing date of this order, submit verification in the form attached hereto that the premises now maintains sufficient available seating to qualify as a *bona fide* Eating Place. If Licensee fails to submit the verification within the time allowed, the penalty in this case will be modified to include a suspension of license, and for that purpose 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 6th day of July, 2006.

David L. Shenkle, J.

jb

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.

VERIFICATION

Subject to the penalties contained in 18 Pa. C. S. §4904, relating to unsworn falsification to authorities, the undersigned officer verifies that the licensed premises now has seating available to accommodate at least thirty persons.

Licensee acknowledges that sufficient seating to be maintained and available at all times this license is in operation.

Corporate Officer's Signature

Date

Submit this verification to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661