Mailing Date: AUG 31 2007 Appeal

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation Nos. 05-2756 & 06-0804 (consolidated for adjudication only)
v.	:	
MENG' MASTER DELI INC 567 N 63RD ST PHILADELPHIA PA 19151-4134	:	Incident Nos. W01-322404 W01-328340
	:	LID - 47297
PHILADELPHIA COUNTY LICENSE NO. E-SS-112	:	BEFORE: JUDGE SHENKLE

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

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued these citations on January 4 and April 11, 2006, respectively. The citations allege as follows:

CITATION NO. 05-2756

This citation alleges that Licensee violated §442(a)(2) of the Liquor Code, 47 P.S. §4442(a)(2), on November 6, 2005, by selling malt or brewed beverages for consumption off premises.

CITATION NO. 06-0804

This citation alleges that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on February 27, 2006, on the basis that the licensed premises was not a *bona fide* restaurant because there was insufficient seating accommodations.

A hearing was held on June 26, 2007, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letters and citations, and to a summary of facts regarding Citation No. 05-2756 (although they did not agree that these facts supported a finding of liability).

FINDINGS OF FACT:

CITATION NO. 05-2756

On November 6, 2005, a liquor enforcement officer purchased a can of beer from a counter person in the licensed premises and left the premises with it. Licensee did not have an Off Premises Sales Permit from the PLCB on that date.

CITATION NO. 06-0804

The Bureau found itself unable to present evidence in support of Citation No. 06-0804 because the investigating liquor enforcement officer did not appear and the Bureau had no expectation that his attendance could be procured at a future time.

CONCLUSIONS OF LAW:

Citation No. 05-2756 – The citation must be dismissed on the basis that the statute upon which it is based has been finally determined to be unconstitutional.

Citation No. 06-0804 – The citation must be dismissed because the Bureau was unable to present evidence in support of it.

DISCUSSION:

Prior to September 4, 2005, §442(a) of the Liquor Code read as follows:

> (a) No retail dispenser shall purchase or receive any malt or brewed beverages except in original containers as prepared for the market by the manufacturer at the place of manufacture. The retail dispenser may thereafter break the bulk upon the licensed premises and sell or dispense the same for consumption on or off the premises so licensed: Provided, however, That no retail dispenser may sell malt or brewed beverages for consumption off the premises in quantities in excess of one hundred ninety-two fluid ounces: Provided, further, That no club licensee may sell

> any malt or brewed beverages for consumption off the premises where sold or to persons not members of the club.

Act 39 of 2005 amended 442(a) by designating the existing text as subsection (a)(1) and adding new subsections (a)(2) through (6), which read as follows:

> (a) (2) Notwithstanding paragraph (1), after October 31, 2005, a retail dispenser licensee, located in a city of the first class who is otherwise permitted to sell malt or brewed beverages for consumption off the premises may not do so unless it acquires a permit from the board.
>
> (3) The application for a permit to sell malt or brewed beverages for consumption off the premises shall be on forms designated by the board and contain such information as the board may require. The application and renewal fee shall be as prescribed in section 614-A(28) of the act of April 9, 1929 (P.L. 177, No. 175), known as "The Administrative Code of 1929."
>
> (4) The application for a permit to sell malt or brewed beverages for consumption off the premises must be accompanied by a copy of the approval of such request by the governing body of the city of the first class in which the licensed premises is located.
>
> (5) The governing body of a city of the first class must render a decision by ordinance or resolution within forty-five days of receipt of a request for approval of a permit to sell malt or brewed beverages for consumption off the premises. The governing body must approve the request unless it finds that doing so would adversely affect the welfare, health, peace and morals of the city or its residents. A decision by the city to deny a request may be appealed to the court of common pleas in the county in which the city is located. The failure to render a decision by the governing body of a city of the first class within the forty-five-day period shall be deemed approval of the permit.
>
> (6) Upon being satisfied that the applicant has fulfilled all the requirements of this act and the board's regulations, the board shall approve the application.

In *USA Deli, Inc., et al., v. City of Philadelphia*, Nos. 04677 and 00277, 2006 Phila. Ct. Com. Pl. LEXIS 297, the Common Pleas Court of Philadelphia County held that "Act 39 adjudications violate due process of law under the Pennsylvania Constitution and the Fourteenth Amendment of the U.S. Constitution by allowing the Philadelphia City Council to commingle legislative, prosecutorial, and adjudicative functions." The decisions of the Philadelphia City Council refusing the applications of two licensees for off-premises sales permits were reversed and the cases were remanded to City Council for proceedings consistent with the opinion.

The City of Philadelphia appealed this decision to Commonwealth Court, but the appeal was discontinued on December 20, 2006.

The discontinuance of the appeal and the absence of further legal proceedings in a higher court necessarily means that the procedure required by Act 39 has been finally determined to be unconstitutional.

A finding of unconstitutionality dates from the time of enactment, and not merely from the date of the decision holding it so. *Fornwalt v. Follmer,* 616 A.2d 1040 (Pa. Super. 1992).

Therefore subsections (a)(2) through (6) were never a valid part of the Liquor Code, and the prosecution of any citation case which depends upon them must fail.

ORDER

THEREFORE, it is hereby ORDERED that Citation Nos. 05-2756 and 06-0804 are DISMISSED.

Dated this __24th__ day of __August__, 2007.

David L. Shenkle, J.

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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.