

Mailing Date: November 13, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-2756  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

MENG' MASTER DELI, INC. : License No. E-112  
567 North 63<sup>rd</sup> Street :  
Philadelphia, PA 19151-4134 :

Counsel for Licensee: John J. McCreesh, III, Esquire  
McCreesh, McCreesh, McCreesh & Cannon  
7053 Terminal Square  
Upper Darby, PA 19082

Counsel for Bureau: James E. Dailey, Esquire  
PENNSYLVANIA STATE POLICE,  
Bureau of Liquor Control Enforcement  
6901 Woodland Avenue, Third Floor  
Philadelphia, PA 19142

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") appealed from the Opinion and Order of Administrative Law Judge David L. Shenkle ("ALJ"), wherein the ALJ dismissed the charges against Meng' Master Deli, Inc. ("Licensee").

In the instant case, Citation No. 05-2756 charged that, on November 6, 2005, Licensee, by its servants, agents or employees, violated section 442 of the Liquor Code [47 P.S. § 4-442] by selling malt or brewed beverages for consumption off-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 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 (Pa. Cmwlth. 1984).

On appeal, the Bureau contends that the ALJ committed an error of law by dismissing Citation No. 05-2756. The ALJ dismissed the citation based on the premise that subsections 442(a)(2) and 442(a)(6) of the Liquor Code are unconstitutional and, therefore, prosecution of a citation case which depends upon those subsections must fail.

At the hearing before the ALJ, 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). (N.T. 4-5; Exs. B-1, B-2, and B-3 of Citation No. 05-2756). The record in this citation matter revealed that, on November 6, 2005, Bureau Officer R. R. Burns entered the subject premises at approximately 2:30 p.m. and observed a patron purchase a twelve (12)-ounce bottle of Hurricane malt liquor and leave the premises. (Ex. B-3 of Citation No. 05-2756). Officer Burns then purchased a twelve (12)-ounce bottle of Corona beer and immediately left the premises. (Ex. B-3 of Citation No. 05-2756). Licensee did not possess an Off-Premises Sales (“OPS”) permit. (Ex. B-3 of Citation No. 05-2756).

Act 39 of 2005 (“Act”), as of November 1, 2005, required all retail dispenser licensees located in the City of Philadelphia (“City”) to obtain OPS permits from the Board if they wished to sell malt or brewed beverages for off-premises consumption. [47 P.S. § 4-442(a)]. The Act further required that, before applying to the Board for the special permit: 1) licensees must obtain written approval for such sales from the City; and 2) the City must approve the applications within ninety (90) days of receipt, unless it finds

that doing so would adversely affect the welfare, health, peace and morals of the City or its residents. [47 P.S. § 4-442(a)(5)]. A denial of the application by the City may be appealed to the Court of Common Pleas. [47 P.S. § 4-442(a)(5)]. Failure of the City to act within the ninety (90)-day period is deemed approval of the application. [Id.].

It is well settled that licensees are strictly liable for violations of the Liquor Code. Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988). In order to comply with Liquor Code section 442, Licensee was required to have an OPS permit before selling malt or brewed beverages for off-premises consumption. The facts clearly establish that Licensee had no authority from the Board to engage in the sale of malt or brewed beverages for off-premises consumption on November 6, 2005.

The ALJ dismissed the citation against Licensee, despite the fact that Licensee did not possess an OPS permit, because Act 39 was determined to be unconstitutional by the Philadelphia County Court of Common Pleas decision in USA Deli, Inc. v. City of Philadelphia, 2006 Phila. Ct. Com. Pl. LEXIS 297 (May 16, 2006), and because the City discontinued its appeal of that case to the Commonwealth Court. However, the ALJ's reference to the

USA Deli, Inc. decision as a factor determining the outcome of this case is misplaced.

At issue in USA Deli, Inc. was the process by which the City commingled legislative, prosecutorial, and adjudicative functions when considering whether to grant applications for permits to sell malt or brewed beverages for off-premises consumption. The Philadelphia Court of Common Pleas found that the City's determination process violated due process of law. However, the General Assembly's requirement that licensees obtain OPS permits from the Board in order to sell malt or brewed beverages for off-premises consumption remains.

Licensee must be held strictly liable for its violation of the Liquor Code, notwithstanding that the issuance process set forth in the Act was later found to be unconstitutional as it pertains to the Philadelphia City Council's actions. The facts of record clearly establish that Licensee was not permitted to sell beer for off-premises consumption on the date in question, because Licensee had not obtained the requisite OPS permit from the Board.

Based upon the foregoing, there is sufficient evidence that the ALJ committed an error of law. As a result, the Bureau's appeal is granted and the ALJ's decision is reversed.

ORDER

The Bureau's appeal is granted.

The decision of the ALJ is reversed.

This matter is hereby remanded to the ALJ for imposition of an appropriate penalty consistent with this Opinion.

---

Board Secretary