

Mailing Date: February 27, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation Nos. 06-0745  
BUREAU OF LIQUOR CONTROL : and 06-1106  
ENFORCEMENT : (As Consolidated)

vs.

5708 K & T, INC. : License No. R-1492  
5708 Germantown Avenue :  
Philadelphia, PA 19144-2137 :

Counsel for Licensee: Stephen R. Murphy, Esquire (before ALJ)  
239 South Camac Street  
Philadelphia, PA 19107

John J. McCreesh, Esquire (on appeal)  
MCCREESH, MCCREESH, MCCREESH &  
CANNON  
7053 Terminal Square  
Upper Darby, PA 19082

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

**OPINION**

5708 K & T, Inc. (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright (“ALJ”), wherein the

ALJ sustained the consolidated citations,<sup>1</sup> imposed a four hundred dollar (\$400.00) fine (\$200.00 assessed against each citation), and assessed one (1) point against Licensee's record.

Citation No. 06-0745 charged that, on February 4, 2006, Licensee, by its servants, agents or employees, violated section 407 of the Liquor Code [47 P.S. § 4-407] by selling malt or brewed beverages for consumption off premises.

Citation No. 06-1106 charged that, on March 27, 2006, Licensee, by its servants, agents or employees, violated section 407 of the Liquor Code [47 P.S. § 4-407] 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 her discretion, or if her decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as

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<sup>1</sup> The ALJ granted a Motion To Consolidate presented by Licensee's counsel on the basis that both citation matters dealt with the same alleged violation and the same controlling issue. Counsel for the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") had no objection to the consolidation.

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 that the ALJ's findings of fact are not supported by substantial evidence. Further, Licensee avers that the ALJ erred as a matter of law in finding a violation in light of the decision set forth in USA Deli, Inc. v. City of Philadelphia, 2006 Phila. Ct. Com. Pl. LEXIS 297 (May 16, 2006).

At the hearing before the ALJ, Licensee's counsel stipulated to the facts provided in the Pennsylvania State Police, Bureau of Liquor Control Enforcement's ("Bureau") Pre-Hearing Memoranda. (N.T. 6, 16, Ex. B-3 of Citation No. 06-0745; N.T. 6, 17, Ex. B-3 of Citation No. 06-1106).

The record in this consolidated citation matter reveals that, on Saturday, February 4, 2006, at 5:10 p.m., Bureau Officer L. Hess entered the licensed premises and observed one (1) male individual behind the counter rendering service to approximately eleven (11) patrons. A sign posted on the counter stated, "We cannot sell beer to go – sorry for the inconvenient [sic]." (N.T. 6, 16; Ex. B-3 of Citation No. 06-0745).

Officer Hess asked the employee for a forty (40)-ounce bottle of Budweiser beer to go. [Id.]. The officer observed that the employee removed the beer from a cooler behind the counter, put it in a small paper bag and placed it in a plastic grocery sack. [Id.]. Officer Hess paid the employee three dollars and fifty cents (\$3.50) for the beer and departed from the licensed premises with it. [Id.].

On or about March 27, 2006, Bureau Officer Gall verified with the Philadelphia District file that the licensed premises did not possess an off-premises sales permit (“OPS permit”). (N.T. 6, 16; Ex. B-3 of Citation No. 06-1106). On the same date, at approximately 2:05 p.m., Officer Gall, accompanied by Bureau Officer Ford, arrived at the premises. [Id.]. Officer Gall proceeded to a small opening in a glass plate window where he observed a sign which read, “We do not sell beer to go.” [Id.]. The officer asked a female saleswoman, identified as Soy Ky, for a sixteen (16)-ounce can of Steel Reserve beer to go. [Id.]. Ms. Ky retrieved a sixteen (16)-ounce can of Steel Reserve beer from a cooler, placed the beer and a straw in a bag, then placed the packaged beer in front of the officer. [Id.]. The officer paid Ms. Ky ten dollars (\$10.00) and received eight dollars and seventy-five cents (\$8.75) in change. [Id.]. The officer left the premises with the beer in full

view of Ms. Ky and a male salesclerk. [Id.]. Officers Gall and Ford then returned to the premises and identified themselves to Ms. Ky. [Id.]. A routine inspection was conducted, during which time Mr. Ky arrived. [Id.]. Officer Gall informed Mr. Ky that he had purchased a sixteen (16)-ounce can of beer and took it out of the premises. [Id.]. Ms. Ky was informed that the premises does not have an OPS permit and could not, therefore, sell beer to go. [Id.]. Mr. Ky stated that he had applied for the permit, but had not received it. [Id.].

On August 18, 2006, the Pennsylvania Liquor Control Board (“Board”) issued a certification verifying that, on March 27 and February 4, 2006, Licensee did not possess a valid OPS permit. (N.T. 16-18; Exs. B-4 of Citation Nos. 06-0745 and 06-1106 ).

Licensee’s counsel argued before the ALJ that Licensee should not be found in violation because the dates of violations listed in the citations occurred after Licensee had been wrongfully denied its OPS permit by the Philadelphia City Council on October 27, 2005. (N.T. 18; Ex. L-2). Licensee’s counsel further suggested that, since Licensee took a timely appeal to the Philadelphia County Court of Common Pleas and sought a stay on November 2, 2005, and the review process by City Counsel which resulted

in denial of the permit was subsequently found to constitute a constitutional due process violation against Licensee, then no violation should be found to exist. (N.T. 11-12, 118-19; Exs. L-3, L-4). The Board does not agree.

It is well settled that licensees are subject to strict liability for violations of the Liquor Code. Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988).

Act 39 of 2005 (“Act”), as of November 1, 2005, required all restaurant and retail dispenser licensees located in the City of Philadelphia to obtain OPS permits from the Board. [47 P.S. § 4-407]. The Act further required that, before applying to the Board for the special permit, (1) the licensee must obtain written approval for such sales from the City of Philadelphia and, (2) the City must approve the application within forty-five (45) 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. § 4-407(b)]. A denial of the application by the City may be appealed to the Court of Common Pleas. [47 P.S. § 4-407(b)(4)]. Failure of the City to act within the forty-five (45)-day period is deemed to be approval of the application. [Id.].

In the instant matter, Philadelphia City Council, in fact, denied Licensee's application for an OPS permit on October 27, 2005. (Admin. Notice). Licensee appealed that denial to the Philadelphia Court of Common Pleas on or about November 2, 2005. Licensee's counsel concedes that, although Licensee applied for a stay of the City Council action denying issuance of the permit, that request was denied by the Court of Common Pleas. Licensee's counsel further concedes that the action of City Council was not determined to be unconstitutional until on or after issuance of the USA Deli, Inc. opinion on May 15, 2006.

The circumstances outlined by Licensee's counsel clearly establish that Licensee had no authority from either the Board or Philadelphia City Council to engage in the sale of malt or brewed beverages for consumption off its licensed premises on February 4 or March 27, 2006. It is equally clear, by Licensee's counsel's admission, that Licensee was not acting under a court-ordered stay when it sold beer to go to Officer Hess on February 4, 2006, or to Officer Gall on March 27, 2006.

Licensee must be held strictly liable for a 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 Licensee should not have engaged in sales of beer to go on the dates in question, because its application for an OPS permit had been denied, and no authority existed for Licensee to sell beer for off-premises consumption.

Based upon the foregoing, there is sufficient evidence to support the decision of the ALJ and the ALJ committed no error of law. As a result, Licensee's appeal must be denied.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of four hundred (\$400.00) dollars.

It is further ordered that one (1) point is hereby assessed against the record of Licensee pursuant to 40 Pa. Code § 3.122(d).

Licensee must adhere to all conditions set forth in the ALJ's Order in this matter dated November 6, 2006.

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Board Secretary