

Mailing Date: May 23, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-0769
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

DEEP PUB, INC. : License No. R-6911
427 Rhawn Street :
Philadelphia, PA 19111-2226 :

Counsel for Licensee: Heather Hill, Pro Se
427 Rhawn Street
Philadelphia, PA 19111-2226

Counsel for Bureau: Erik S. Shmukler, Esquire
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OPINION

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 Deep Pub, Inc. (“Licensee”).

The citation in this case charged that, on January 18, 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 his discretion, or if his 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 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, the Bureau contends that the ALJ's findings of fact are not supported by substantial evidence. Further, the Bureau 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 stipulated to the fact scenario, contained in the Bureau's Pre-hearing Memorandum. (N.T. 6-7; Ex. B-3).

The record reveals that, on January 18, 2006, at 11:00 p.m., Bureau Officer Bernesky entered the licensed premises and observed one (1) male individual behind the counter rendering service to approximately twenty (20) patrons. (Ex. B-3). Officer Bernesky removed a six (6)-pack of twelve (12)-ounce bottles of Molson beer from a cooler and placed it on the bar. (Ex. B-3). The barmaid on duty stated that the cost would be eleven dollars (\$11.00). (Ex. B-3). Officer Bernesky handed the bartender a twenty dollar (\$20.00) bill and received nine dollars (\$9.00) in return. (Ex. B-3). Officer Bernesky then left the subject premises in possession of the beer. (Ex. B-3). Officer Bernesky verified with the Bureau's Philadelphia District file that the licensed premises did not possess an off-premises sales permit ("OPS permit"). (Ex. B-3).

Licensee's assistant manager, Heather Hill, noted at the hearing before the ALJ that Licensee's lack of an OPS permit on January 18, 2006 occurred due to a misunderstanding of the process of obtaining one. (N.T. 7).

Act 39 of 2005 (“Act”), as of November 1, 2005, required all restaurant and 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. § 4-407]. The Act further required that, before applying to the Board for the OPS permit, (1) the licensee must obtain written approval for such sales from the City 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.]

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). In order to comply with Liquor Code section 407, 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 consumption off its licensed premises on January 18, 2006. Although it is noted that Licensee had difficulty in understanding the process to obtain an OPS permit, there is nothing in the record demonstrating that Licensee made any effort to obtain a permit.

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 court's decision in USA Deli, Inc., supra, and because the City discontinued its appeal of that case to the Commonwealth Court. 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 for licensees to sell malt or brewed beverages for off-premises consumption. The Philadelphia Court of Common Pleas found that the City's determination process, not the General Assembly's requirement that licensees obtain off-premises permits from the Board in order to sell malt or brewed beverages to go, violated due process of law.

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 date in question, because its application for an OPS permit had not been submitted to the Board, and no authority existed for Licensee to sell beer for off-premises consumption.

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 decision of the ALJ is reversed.

ORDER

The decision of the ALJ is reversed.

The Bureau's appeal is granted.

It is hereby ordered that this matter is remanded to the ALJ in order to impose an appropriate penalty consistent with this Opinion.

Board Secretary