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PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 06-1134
vs.	:	
CHERIE TAVERN CORP. 4100 North Fifth Street Philadelphia, PA 19140-2614	:	License No. R-1079

Counsel for Licensee: Edward A. Taraskus, Esquire
1315 Walnut Street, Suite 1002
Philadelphia, PA 19107-4721

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 Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), wherein the ALJ sustained the first, second, third and fifth counts of the citation, imposing a fine of one thousand

($1,000.00) dollars, and dismissed the fourth count of the citation against Cherie Tavern Corp. ("Licensee").

The first count of the citation charged that, on March 15, 2006, Licensee, by its servants, agents or employees, violated section 471 of the Liquor Code [47 P.S. § 4-471] and section 5513 of the Crimes Code [18 Pa. Code § 5513] by possessing or operating gambling devices or paraphernalia or permitting gambling or lotteries, poolselling and/or bookmaking on the licensed premises.

The second count of the citation charged that, on March 15, 2006, Licensee, by its servants agents or employees, violated section 102 of the Liquor Code [47 P.S. § 1-102] in that Licensee maintained insufficient food items.

The third count of the citation charged that, on March 15, 2006, Licensee by its servants, agents or employees, violated section 437 of the Liquor Code [47 P.S. § 4-437] and section 5.41 of the Liquor Control Board's ("Board") Regulations [40 Pa. Code § 5.41] by operating the licensed establishment without a valid health permit or license, which expired on April 30, 2005.

The fourth count of the citation charged that, on March 15, 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.

The fifth count of the citation charged that, on March 15, 2006, Licensee by its servants, agents or employees, violated section 5.51(a) of the Board's Regulations [40 Pa. Code § 5.51(a)] by failing to clean coils, tap rods and connections at least once every seven (7) days.

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/her discretion, or if his/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 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 committed an error of law in dismissing the fourth count of the citation. In support of its argument, the Bureau avers[1] that the ALJ committed an error of law in finding that USA Deli, Inc. v. City of Philadelphia, et al., No. 4677 October Term (2005) and 5708 K&T, Inc. v. Pennsylvania Liquor Control Bd. (PSP/BLCE), No. 200 (March Term 2007)[2] compelled the dismissal of the subject citation. The Bureau also pointed out that Licensee failed to obtain a stay from the Philadelphia Court of Common Pleas enjoining enforcement of section 407 of the Liquor Code, and that there is no retroactive effect of Act 84 of 2006 and Act 155 of 2006.

At the hearing before the ALJ, Licensee stipulated to the facts contained in the Bureau's Pre-Hearing Memorandum. (N.T. 4-7; Ex. B-3). On March 15, 2006, at approximately 2:15 p.m., Bureau officers entered the licensed premises to conduct an open inspection. (Ex. B-3). During the

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[1] On December 10, 2007, the Board granted the Bureau's request for an extension of thirty (30) days in which to file its argument in support of its appeal. The Bureau's argument in support of its appeal was received by the Board on January 7, 2008. (Admin. Notice).

[2] 5708 K&T, Inc. involved two (2) consolidated citations, Citation No. 06-0745 and Citation No. 06-1106, involving the sale of malt or brewed beverages by a Philadelphia licensee that did not have an OPS issued by the Board. The City of Philadelphia had denied the licensee's request for an OPS, and its request for a stay of action on the City's denial, and the licensee failed to obtain an OPS issued by the Board. The ALJ sustained the charges and imposed fines and assessed points against the license. The Board affirmed the ALJ's decision. On October 3, 2007, the Court of Common Pleas of Philadelphia County reversed the Board without opinion. According to the Bureau, 5708 K&T, Inc. is presently on appeal before the Commonwealth Court. (Admin. Notice).

inspection, Officer Burns observed a patron enter the bar and request a six (6)-pack of Budweiser beer to go. (Ex. B-3). The sale was rung up on the cash register, and the six (6)-pack was placed into a bag. (Ex. B-3). The patron paid for the beer and departed the premises with the beer in hand. (Ex. B-3). Sergeant Davis asked Licensee's corporate president, James Aldebol, if the premises had an Off-Premises Sales ("OPS") permit, to which he responded that he was cleared by the City of Philadelphia, but not the Board. (Ex. B-3). Licensee was in possession of an OPS permit by the time of the hearing before the ALJ. (N.T. 8).

Act 39 of 2005 ("Act"), as of November 1, 2005, required all restaurant liquor and eating place 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 March 15, 2006.

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. v. City of Philadelphia, No. 4677 October Term (2005), 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 OPS permits from the Board in order to sell malt or brewed beverages to go, violated due process of law.[3]

In fact, as the Bureau pointed out, Act 84 of 2006, effective September 6, 2006, amended section Liquor Code section 407(b), but merely made OPS permits valid for two (2) years. Otherwise, the General Assembly restated the text of Act 39, thereby re-affirming the statutory requirement that licensees hold an OPS issued by the Board prior to selling beer for off-premises consumption. Act 155 of 2006 by the General Assembly, effective November 29, 2006, amended section 407(b) to require a hearing board to hear requests from Philadelphia licensees for OPS

[3] The Court of Common Pleas in USA Deli, Inc. only found the process by which a licensee must "request approval" to be unconstitutional. USA Deli, Inc. left intact that portion of Liquor Code section 407(b)(4) which stated that a failure of the City to act within forty-five (45) days would be viewed by the Board as an "approval," following which the Board would issue the requisite OPS. Had the City's hearing process been the only means by which to obtain an OPS, then and only then could it be argued that the requirement for an OPS was void. The action of the ALJ in leaping to the conclusion that USA Deli, Inc. effectively pulled the plug on all aspects of the OPS permit scheme is unnecessarily far-reaching, and ignores a basic principle that the purpose of the Liquor Code is to restrain the sale of alcohol, not to promote it. In Re: Tahiti Bar, 150 A.2d 112 (Pa. 1959). The finding that the effect of USA Deli, Inc. was to return the law to the state it was in before enactment is in total disregard of the fact that the Court of Common Pleas chose not to disturb the option of the Board to act, notwithstanding inaction on the part of the City Council.

permits. Since nothing in the text of Act 155 of 2006 made that amendment retroactive, and there is a presumption against retroactive effect in the rules of statutory construction [1 Pa. S.C.A § 1926], Act 155 of 2006 likewise re-affirmed the statutory requirement that licensees hold an OPS issued by the Board prior to selling beer for off-premises consumption.

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 no authority existed for Licensee to sell beer for off-premises consumption.

Based upon the foregoing, and the fact that Licensee has not obtained a stay of enforcement from the Philadelphia Court of Common Pleas, 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 as to the fourth count of the citation is reversed.

ORDER

The decision of the ALJ as to the fourth count of the citation 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 and Order.

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Board Secretary