

Mailing Date: May 23, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1145  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

XIAO GUAN GARDEN, INC. : License No. E-4604  
915-17 Race Street :  
Philadelphia, PA 19107-1805 :

Counsel for Licensee: Marc S. Karpo, Esquire  
137 North 9<sup>th</sup> Street  
Philadelphia, PA 19107-1805

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PENNSYLVANIA STATE POLICE,  
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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 Xiao Guan Garden, Inc. (“Licensee”).

The citation in this case charged that, on March 24, 2006, Licensee, by its servants, agents or employees, violated section 442(a) of the Liquor Code [47 P.S. § 4-442(a)], 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 no 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 facts provided in the Bureau's Pre-hearing Memorandum. (N.T. 4-5; Ex. B-3). The record in this citation matter reveals that, on March 24, 2006, at approximately 9:50 p.m., Bureau Officer K. Davis entered the subject premises and asked if they had any beer to go. (Ex. B-3). The first male turned to another behind the counter, asked likewise, turned back to Officer Davis and asked what kind of beer Officer Davis wanted. (Ex. B-3). Officer Davis asked for two (2) Coors Light beers to go. (Ex. B-3). The male working the counter went to the back of the premises and returned with two (2) twelve (12)-ounce bottles of Coors Light in a paper bag. (Ex. B-3). The man working the counter asked for four dollars (\$4.00), which Officer Davis provided. (Ex. B-3). Upon receiving the beer, Officer Davis departed the premises at approximately 10:00 p.m. (Ex. B-3). Officer Davis verified with the Bureau's Philadelphia District file that the licensed premises did not possess an off-premises sales permit ("OPS permit"). (Exs. B-3, B-4).

It appears from the record before the ALJ that on March 24, 2006, not only did Licensee lack an OPS permit, it had not even applied for one.

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 special permit, (1) the licensees must obtain written approval for such sales from the City and, (2) the City must approve the applications 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 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 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 24, 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., *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.

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Board Secretary