

Mailing Date: FEB 21 2007

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 06-1183
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W02-326866
v.	:	
	:	LID - 50682
TWO CITY BROTHERS, INC.	:	
T/A CHERRY'S	:	
368 HAZLE ST.	:	
WILKES-BARRE, PA 18701-4834	:	
	:	
	:	
LUZERNE COUNTY	:	
LICENSE NO. R-AP-SS-6281	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Craig A. Strong, Esquire
Pennsylvania State Police
8320 Schantz Road, Second Floor
Breinigsville, PA 18031

For Licensee
Keith H. McDougal
Sole Corporate Officer

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on May 8, 2006, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Two City Brothers, Inc., t/a Cherry's (Licensee), License Number R-AP-SS-6281.

This citation¹ contains six counts.

The first count charges Licensee with violations of Section 404 of the Liquor Code [47 P.S. §4-404]. The charge is that during the period August 24, 2005 through April 6, 2006, Licensee's licensed corporation was not the only one pecuniarily interested in the operation of the licensed business.

The second count charges Licensee with violations of Section 473 of the Liquor Code [47 P.S. §4-473]. The charge is that Licensee, by servants, agents or employes, refused and/or failed to provide the Board with information regarding the involvement of Frank Desiderio, Mark Desiderio and Tricia Desiderio in the operation of its licensed premises from August 1, 2005 through April 19, 2006.

The third count charges Licensee with a violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that Licensee, by servants, agents or employes, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding April 19, 2006.

The fourth count charges Licensee with violations of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that on February 28, March 15 and 22, 2006, Licensee, by servants, agents or employes, refused an authorized employe of the Enforcement Bureau access to records covering the operation of the licensed business when the request was made during business hours.

The fifth count charges Licensee with a violation of Section 5.16 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.16]. The charge is that Licensee, by servants, agents or employes, failed to notify the Board within fifteen (15) days of a change of manager which occurred on June 1, 2005.

The sixth count charges Licensee with violations of Section 11.7(a)(1) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §11.7(a)(1)]. The charge is that during the period August 3 through December 31, 2005, Licensee, by servants, agents or employes, designated as authorized agent on Wholesale Liquor Purchase Permit Card and/or permitted to act as an agent a person who is who is neither an employe nor an officer of its licensed corporation.

1. Judge's Exhibit No. J-2, N.T. 8.

An evidentiary hearing was conducted on December 15, 2006 at the Scranton State Office Building, PUC Hearing Room 318, 100 Lackawanna Avenue, Scranton, Pennsylvania. Licensee was represented by its Sole Corporate Officer Keith H. McDougal.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on February 2, 2006 and completed it on April 19, 2006. (N.T. 16)

2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested. The notice alleged violations as charged in the citation.²

Count Nos. 3 and 4:

3. A Bureau Enforcement Officer visited the premises on February 28, 2006 at about 4:05 p.m. The Officer identified herself to the person in charge and conducted a routine inspection. The individual in charge advised the Officer that she was not a paid employe. The Officer left a request for records for the audit period of August 1, 2005 through March 9, 2006.

4. On March 7, 2006, the Officer received a telephone call from Mr. McDougal, Licensee's Sole Corporate Officer. He advised the Officer that there were no payroll records for employes and that he would call back to set up another appointment to look at records. (N.T. 18-19)

5. The Officer returned on March 15, 2006 to the licensed premises as previously arranged. She met with an individual in charge, Mr. G. She left a second request for records for the audit period beginning August 1, 2005. There were no records present on the licensed premises. The Officer advised Mr. G. that she would return on March 22, 2006 at 2:00 p.m., to look at the records. (N.T. 26-28)

2. The notice of alleged violations was not introduced into the record as Licensee resubmitted the Admission, Waiver and Authorization (Waiver). Although, I withdrew the Waiver's application later in the proceedings, I accept the Waiver with respect to the Bureau's compliance with all notice requirements. (N.T. 16)

6. The Officer returned on that date at the designated time. Mr. McDougal was present. The Officer was able to review facsimile transmission copies of bank statements for the audit period. Mr. McDougal did not provide any corporate minutes, deposit slips, cancelled checks, utility bills, insurance policies or any other document the Officer previously requested. (N.T. 28-30)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

Count No. 1:

2. The Bureau **failed** to prove that during the period August 24, 2005 through April 6, 2006, Licensee's licensed corporation was not the only one pecuniary interested in the operation of the licensed business.

Count No. 2:

3. The Bureau **failed** to prove that Licensee, by servants, agents or employes, refused and/or failed to provide the Board with information regarding the involvement of Frank Desiderio, Mark Desiderio and Tricia Desiderio in the operation of its licensed premises from August 1, 2005 through April 19, 2006.

Count No. 3:

4. Licensee, by servants, agents or employes, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding March 22, 2006.

Count No. 4:

5. **Sustained** as charged.

Count No. 5:

6. The Bureau **failed** to prove that Licensee, by servants, agents or employes, failed to notify the Board within fifteen (15) days of a change of manager which occurred on June 1, 2005.

Count No. 6:

7. The Bureau **failed** to prove that Licensee, by servants, agents or employes, designated as authorized agent on Wholesale Liquor Purchase Permit Card and/or permitted to act as an agent a person who is neither an employe nor an officer of its licensed corporation, during the period August 3 through December 31, 2005.

DISCUSSION:

Waiver

Initially, Licensee submitted an Admission, Waiver and Authorization (Waiver). When reviewing the documents to prepare an Adjudication based on Licensee's Waiver, I became confused. I could not follow how the information presented related to the charges. Further, reading the charges themselves, I concluded they could represent such a serious breach of Licensee's obligation to operate within the law, that license revocation was a possible result. Consequently, I thought it better to convene a hearing to afford the Bureau the opportunity to explain its case and supporting evidence and to afford Licensee's Sole Corporate Officer the opportunity to challenge the charges or offer mitigation.

Licensee's Sole Corporate Officer, Mr. McDougal, came to the hearing without counsel. He initially expressed his intention to resubmit the Waiver (N.T. 1) based on a jointly recommended penalty of an eight days suspension for all six charges (N.T. 5-6). I accepted the Waiver subject to the understanding that Licensee did not waive its right to appeal as I would not be bound by the joint recommendation (N.T. 7).

Because Licensee's Waiver acknowledged the Bureau's facts as being true, I questioned the Officer without swearing her in (N.T. 9). As the factual basis for this citation was explained to me, Mr. McDougal denied the facts to support Count Nos. 1 and 2 (N.T. 13). Based on that denial, I could not, in good conscious, accept Licensee's Waiver. I withdrew the Waiver from consideration as it related to the substance of the charge thus requiring the Bureau to prove its case (N.T. 14).

The Investigation

I have entered no findings of Fact with respect to Counts 1, 2, 5 and 6, because the evidence supporting these charges constitutes inadmissible hearsay. When the evidence was produced at the hearing, as if by way of excuse, I was told the case was a difficult one to prove because of a dearth of records.

The difficulty of a case does not excuse the application of fundamental rules of evidence, rules which have been forged through centuries of experience, rules which are embodied in our concept of Due Process. The case the Bureau presented was not the end of an investigation; it was not the beginning of the end; it was not even the end of the beginning; it was, in fact, just the beginning. This case was an opportunity for investigative imagination. Who knows where the trail may have ended. Perhaps a thorough investigation would have concluded by finding no evidence of illegal conduct.

I expressed my judicial displeasure quite vehemently at the hearing each time a document, that was clearly inadmissible, was presented to me for consideration. I took no pleasure in doing so. I did not wake up the morning of the hearing with the goal to embarrass anyone. I did not whimsically decide to be critical of the Bureau's case. As a judicial officer, my frustration was fueled by charges that ought not to have been alleged given the inadmissibility of the evidence supporting them. It is not enough for the investigator to believe a violation has occurred. The investigation and judicial presentation must include legally admissible evidence.

What Is Hearsay

We are taught in Law School that hearsay is an out-of-court declaration, whether written or verbal, that is offered into evidence for the truth of its contents. Certainly, hearsay evidence has some value. Nevertheless, our legal system has formulated the general rule that hearsay ought not to be considered by our judicial officers because it is inherently unreliable. Indeed, our legal system's bias against hearsay is embodied in the concept of Due Process.

We also mistrust hearsay because the declarant is not under oath, is not subject to cross-examination and may not be evaluated by the fact finder for credibility. Over time, we have developed any number of exceptions that allow for the admissibility of hearsay based on well reasoned principles that generally speak to the declaration's inherent reliability. None of the documentary evidence presented by the Bureau falls into any exception.

Woe unto each of us if judges and juries are permitted to consider innuendo, rumor, gossip or conjecture. It may very well be our neck next in line for the governmental chopping block. From the time we are accused until seconds before the axe is lowered, no doubt each of us would have railed against a system that has so wrongly treated us.

Admissibility and Weight

The point may be made that Licensee did not object to the admissibility of the documents. Why then did I not consider them? Admissibility is only a threshold issue. All admissibility accomplishes is to enter evidence into the record for consideration. The more critical question is the weight and sufficiency the fact finder attributes to evidence.

I accord no weight to the hearsay as a matter of my discretion. I do so primarily because of the unreliability of the documents. I also have placed in the balance the fact that Licensee is unrepresented as well as the goal to avoid supporting or rewarding work that ends in a case lacking completeness.

Legal Residuum Rule

There is one additional principle which is embodied in a rule of evidence that precludes me from entering findings of fact. It is a rule which I find to be problematic. Applicable to administrative hearings, the Legal Residuum rule enjoins me from entering a finding of fact based on inadmissible hearsay, even if unobjected to, unless that hearsay is corroborated by other competent and admissible evidence.

This Rule has its origins in unemployment compensation jurisprudence. *Walker v. Unemployment Comp. Board of Review*, 367 A.2d 366 (Pa.Cmwlt. 1976); *M. Randall DuBois*, VI Sel.Op. ALJ 102. It presents a questionable application in this administrative process where an Administrative Law Judge, trained in the law, is bound by a rule originally designed to protect unemployment compensation applicants from misapplication of evidentiary rules by hearing officers. The Rule prohibits me from considering such evidence, yet a Common Pleas Judge, viewing the record on appeal pursuant to the Liquor Code, is free to place a value on the very same evidence.

Hearsay In This Case

I could draw out this discussion to dissertation length by reviewing every bit of inadmissible evidence. I believe I successfully did so at the hearing. I do find it helpful to address generally several points.

Some of the documents I was asked to consider were mailings addressed to the licensed premises but to an addressee other than Mr. McDougal. Virtually everyone must have experienced receiving mislabeled mail to an improper addressee. It is a common event that ought to do nothing more than raise suspicion followed by legally admissible verification, if such exists.

Presenting a newspaper article for the truth of its contents is perhaps the paradigm of inadmissible hearsay. The factual content of such articles may be based on multiple levels of hearsay. What is said in newspaper articles is not truth as we know it to be in our judicial system.

Licensee's bank statements are also inadmissible hearsay absent an authenticating witness. At the hearing I was given the argument these statements are admissible as an exception to the hearsay rule for admissions by a party opponent. The statements are Licensee's records, so the argument goes. In reality, the statements are records of the bank about Licensee's account.

The point regarding the need for authentication was clearly made when the Bureau's witness had to interpret an entry in one bank statement. When asked how the witness knew the import of a specific entry, the reply was the Officer obtained that information from her Supervisor who spoke to a bank official.

The documents which support the alleged failure by Licensee to report a change in manager (Count No. 5) are business records of other licensees which identify someone other than the Board approved Manager as the "manager." No authenticating witness was presented to explain the document.

Lastly, the statement made by the individual on duty during the Officer's first visit to the licensed premises, the basis for Count No. 6 (Finding of Fact No. 3), is inadmissible. The declaration was intended to prove the declarant was not an employe. If this is true, the declaration cannot be attributed to Licensee as a vicarious admission. The statement: "I am not a paid employe," even if considered, may actually form an admission that the declarant is an employe. At best, the declaration, even if admissible, is ambiguous.

Confusing Dates

As the matter was presented, I questioned why the specified dates in the same related charge and/or intervals did not coincide, particularly Count No. 1 and 2. In fact, I questioned where all the dates in the various charges were pertinent to the Bureau's case. The responses were hardly reassuring. What I concluded was the selection of specified dates and/or intervals had less to do with the violations than some connection to administrative needs.

PRIOR RECORD:

Licensee has been licensed since January 13, 2003, and has had three prior violations (Commonwealth Exhibit No. C-14):

Adjudication No. 04-0302. Fine \$400.00.

1. Sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price. January 31 and February 1, 2004.
2. Furnished an unlimited or indefinite amount of free alcoholic beverages for a period of three hours on January 31 and February 1, 2004.
3. You discounted the price of alcoholic beverages between 12:00 midnight and 2:00 a.m. February 1, 2004.

Adjudication No. 05-0673. Fine \$100.00. Fine not paid and license suspended 1 day and thereafter until fine paid.

Issued worthless checks in payment for malt or brewed beverages.
December 28, 2004.

Adjudication No. 05-2552. Fine \$150.00.

Issued worthless checks in payment for malt or brewed beverages.
August 25 and September 16, 2005.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$50.00 or more than \$1,000.00 or both for violations of the type found in Count Nos. 3 and 4, in this case.

This record establishes a pattern of behavior by Licensee intended to deny the Bureau access to Licensee's records for as long as possible. I impose a severe sanction in order to send a message to this and other licensees that such behavior will not be tolerated.

I impose:

Count No. 3 - \$500.00 fine.

Count No. 4 - \$1,000.00 fine and 14 days suspension.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$1,500.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

The fine must be paid by Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal checks, which include business-use personal checks, are not acceptable.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, Pennsylvania 17110-9661

Imposition of Suspension

THEREFORE, it is hereby ordered that the Restaurant liquor license (including all permits) of Two City Brothers, Inc., t/a Cherry's, License No. R-AP-SS-6281, be suspended for a period of fourteen days, **BEGINNING** at 7:00 a.m., on Monday, April 16, 2007, and **ENDING** at 7:00 a.m., on Monday, April 30, 2007.

Licensee is directed on Monday, April 16, 2007, at 7:00 a.m., to place a placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised, if replacement placards are needed for any reason, they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized on Monday, April 30, 2007, at 7:00 a.m., to remove the placard of suspension and return its license to its original wall location.

Dismissal of Counts

It is further ordered that Count Nos. 1, 2, 5 and 6 in Citation No. 06-1183, issued against Two City Brothers, Inc., are DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 12th day of February, 2007.

Felix Thau, A.L.J.

pm

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.