

Mailing Date: May 23, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1299  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

1102 LAM, INC. : License No. R-8230  
1102-06 South 47<sup>th</sup> Street :  
Philadelphia, PA 19143-3615 :

Counsel for Licensee: John J. McCreesh, III, Esquire  
McCreesh, McCreesh, McCreesh & Cannon  
7053 Terminal Square  
Upper Darby, PA 19082

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 Opinion and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ dismissed the charges against 1102 Lam, Inc. (“Licensee”).

The citation in this case charged that, on March 30, April 1, April 12, and April 14, 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 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; Ex. B-3 of Citation No. 06-1299). On March 30, 2006 Bureau Officer S. Graham entered the premises and ordered a twenty-four (24)-ounce can of Budweiser beer from the male counterperson. (Ex. B-3 of Citation No. 06-1299). The counterperson placed the Budweiser in a bag, and Officer Graham paid for it. (Ex. B-3 of Citation No. 06-1299). Officer Graham then left the premises with the beer in hand. (Ex. B-3 of Citation No. 06-1299).

On April 1, 2006 Officer Graham entered the licensed premises, ordered and paid for a twenty-four (24)-ounce can of Coors Light beer. (Ex. B-3 of Citation No. 06-1299). The beer was placed in a paper bag, at which point, Officer Graham exited the premises with the beer in hand. (Ex. B-3 of Citation No. 06-1299).

On April 12, 2006, Bureau Officers Gall and Kohler entered the subject premises and observed Geoffrey Lam, sole corporate officer of Licensee, rendering service to patrons. (Ex. B-3 of Citation No. 06-1299). Officer Gall ordered and paid for a sixteen (16)-ounce can of Colt 45 beer to go. (Ex. B-3 of Citation No. 06-1299). Mr. Lam retrieved the Colt 45 and placed it in a bag for Officer Gall. (Ex. B-3 of Citation No. 06-1299).

Officer Gall then left the premises with the beer in hand. (Ex. B-3 of Citation No. 06-1299).

Also on April 12, 2006, Officer Kohler visited the subject premises to assist with a routine inspection. (Ex. B-3 of Citation No. 06-1299). Officer Kohler informed Mr. Lam that each time that beer was sold to go, Licensee would be cited, resulting in fines, points against the license and possible suspension or revocation of the license. (Ex. B-3 of Citation No. 06-1299). Mr. Lam responded to Officer Kohler's comment by stating, "too bad, beer equals money." (Ex. B-3 of Citation No. 06-1299).

On April 14, 2006, Officer Graham entered the premises and ordered a twenty-four (24)-ounce can of Coors Light beer. (Ex. B-3 of Citation No. 06-1299). After being questioned on his age, Officer Graham paid for and received the can of beer in a paper bag. (Ex. B-3 of Citation No. 06-1299). Officer Graham then departed the premises with the beer in hand. (Ex. B-3 of Citation No. 06-1299).

Licensee did not hold an off-premises sales permit ("OPS permit") issued by the Board on March 30, April 1, April 12, and April 14, 2006. (N.T. 4; Ex. B-3 of Citation No. 06-1299).

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 30, April 1, April 12, and April 14, 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 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 dates in question, because no authority existed for Licensee to sell beer for off-premises consumption on March 30, April 1, April 12, and April 14, 2006.

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.

This matter is hereby remanded to the ALJ for imposition of an appropriate penalty consistent with this Opinion.

---

Board Secretary