

Mailing Date: July 25, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1490C
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

PEM MANAGEMENT, INC. : License No. R-3920
27 South 21st Street :
Philadelphia, PA 19103-3307 :

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

Counsel for Bureau: Erik S. Shmukler, 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 David L. Shenkle (“ALJ”), wherein the ALJ sustained the first and second counts of the citation, imposed a fine in the amount of one thousand

four hundred dollars (\$1,400.00) and assessed five (5) points against the license. The ALJ also dismissed the third count of the citation.

The first count of the citation charged that, on March 23 and 24, 2006, Licensee, by its servants, agents or employees, violated section 5.32(a) of the Liquor Control Board Regulations, [40 Pa. Code § 5.32(a)] by permitting the use on the inside of the licensed premises of a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The second count of the citation charged that, on April 5, 2006, Licensee, by its servants, agents or employees, violated section 493(1) of the Liquor Code, [47 P.S. 4-493(1)] by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) male minor, nineteen (19) years of age.

The third count of the citation charged that, on April 5, 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 committed an error of law by dismissing the third count of the citation based on the erroneous finding that the underlying off-premises sales permit ("OPS") statute is unconstitutional.

A review of the record reveals that, on April 5, 2006, a minor whose birth date was January 31, 1987, entered the licensed premises as part of the Bureau's Age Compliance Program. He purchased a bottle of beer and departed the premises with the beer. His age was not questioned. (N.T. 30-33). In support of its contention that Licensee did not have an Off-Premises Sales Permit (OPS), the Bureau offered a faxed copy of a Board Attestation/Certification of Official Records (Ex. B-4), to show there was no

permit issued to Licensee for the period from April 5, 2006 through December 11, 2006.

In dismissing the third count of the citation, the ALJ found that even though the Bureau had proven the facts necessary to sustain the count, the Bureau was unable to prevail because of the holding in USA Deli, Inc., et al., v. City of Philadelphia, Nos. 04677 and 00277, 2006 Phila. Ct. Com. Pl. LEXIS 297.

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 April 5, 2006.

The ALJ dismissed the third count of 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 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 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 in dismissing the third count of the citation.

The decision of the ALJ relative to the third count of the citation is therefore, reversed.

ORDER

The decision of the ALJ in dismissing the third count of the citation is reversed.

The Bureau's appeal is granted.

Licensee has paid the fine in the amount of one thousand four hundred dollars (\$1,400.00).

It is hereby ordered that this matter is remanded to the ALJ in order to impose an appropriate penalty relative to the third count of the citation, consistent with this Opinion.

Licensee must adhere to all conditions set forth in the ALJ's Order in this matter.

Board Secretary