

Mailing Date: July 25, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1551
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

RAMON A. GONZALEZ : License No. E-4589
ENTERPRISES, INC. :
1400 North 7th Street :
Philadelphia, PA 19122-3603 :

Counsel for Licensee: John J. McCreesh, III, Esquire
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PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue, 3rd 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 two hundred dollars (\$200.00) and assessed two (2) points against the license. The ALJ also dismissed the third count of the citation.

The first count of the citation charged that, on April 26 and May 23, 2006, Licensee, by its servants, agents or employees, violated section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] by failing to keep records on the licensed premises.

The second count of the citation charged that, on April 26 and May 23, 2006, Licensee, by its servants, agents or employees, violated section 5.41 of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 5.41] by failing to display on the licensed premises documentary evidence that it meet all sanitary requirements for a public eating place.

The third count of the citation charged that, on May 23, 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 committed an error of law by dismissing the third count of the citation based upon an erroneous finding that the Off-Premises Sales Permit ("OPS") statute is unconstitutional.

At the hearing before the ALJ, Licensee stipulated to a summary of facts as set forth in the Bureau's Pre-Hearing Memorandum. (N.T. 4-5, Ex. B-3). The record reveals that, on May 23, 2006, at approximately 11:30 a.m., a Bureau officer observed a patron in the licensed premises purchase a sixteen (16)-ounce container of malt liquor and then leave with it. (Ex. B-3). Licensee did not have an OPS from the Board on that date.¹ (Ex.B-3).

Act 39 of 2005 ("Act"), as of November 1, 2005, required all restaurant liquor and eating place retail dispenser licensees located in the City

¹ The Board takes administrative notice that Licensee has been able to obtain an OPS since the date listed in the third count of the citation.

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 May 23, 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 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. As a result, the Bureau's appeal is granted, and the decision of the ALJ dismissing the third count of the citation is reversed.

ORDER

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

The Bureau's appeal is granted.

Licensee has paid the fine in the amount of two hundred dollars (\$200.00).

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

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of ~ (\$ ~ ~) dollars.

It is further ordered that one (1) point is hereby assessed against the record of the Licensee pursuant to 40 Pa. Code § 3.122(d).

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

Board Secretary