

Mailing Date: OCT 31 2007

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation Nos. 06-0721C
LIQUOR CONTROL ENFORCEMENT	:	& 06-1715
	:	(Consolidated for Hearing
	:	Purposes Only)
	:	
v.	:	Incident Nos. W01-325223
	:	& W01-334769
	:	
HARPER'S INC.	:	
2101-03 S. 20 <sup>TH</sup> ST.	:	LID - 9748
PHILADELPHIA PA 19145-3602	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-1032	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

**ERIK S. SHMUKLER, ESQ.**

FOR THE LICENSEE:

**EX PARTE**

**BEFORE: JUDGE WRIGHT**

ADJUDICATION

BACKGROUND:

This proceeding arises out of citations that were issued on April 4, 2006 and July 21, 2006, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Harper's, Inc., License Number R-AP-SS-1032 (hereinafter "Licensee").

An Administrative hearing was held on Thursday, March 15, 2007, pursuant to requisite and appropriate hearing notice. Despite notice of the hearing having been sent to the Licensee, the Licensee failed to appear. Therefore, the hearing proceeded *ex parte*.

The citations are as follows:

Citation No. 06-0721C

This citation contains two counts.

The first count charges Licensee with violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1), in that on January 26, 2006, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) male minor, eighteen (18) years of age.

The second count charges Licensee with violation of Section 407 of the Liquor Code, 47 P.S. Section 4-407, in that on January 26, 2006, Licensee, by its servants, agents or employes, sold malt or brewed beverages for consumption off premises.

Citation No. 06-1715

The citation charges Licensee with violation of Section 437 of the Liquor Code, 47 P.S. Section 4-437, and Section 5.41 of the Liquor Control Board Regulations, 40 Pa. Code Section 5.41, in that on June 17, 2006, Licensee, by its servants, agents or employes, operated the licensed establishment without a valid health permit or license, which expired on April 30, 2006.

CITATION NO. 06-0721C  
COUNT NOS. 1 AND 2

FINDINGS OF FACT:

1. The Bureau of Enforcement conducted an investigation of the licensed premises which began on January 13, 2006 and ended February 2, 2006. A notice of violation letter was sent to the licensed premises on February 28, 2006 by certified mail, return receipt requested. A citation hearing notice dated April 4, 2006 was sent to the licensed premises by certified mail, return receipt requested. The mailing was signed as received on April 6, 2006 (N.T. 8-12 and Exhibits B-1 and B-2).

2. Officer Kareem Davis and Officer Seth Graham, from the Bureau of Enforcement, entered the licensed premises on January 26, 2006 for an age compliance check (N.T. 5-6).

3. The officers visited the premises at approximately 9:15 p.m. on January 26, 2006. During that time, the officers entered the premises to make sure that everything was safe and secure prior to an underage buyer being permitted onto the premises (N.T. 6-7).

4. Underage Buyer No. 81 proceeded to the counter and asked for a Colt 45. The bartender retrieved it from a cooler, brought it back to him and placed it in a bag. He gave the female bartender five dollars and she returned two dollars and fifty cents in change. She placed the Colt 45 into a brown paper bag (N.T. 7).

5. Underage Buyer No. 81 departed the premises in possession of the bag containing the Colt 45 (N.T. 8).

6. There were approximately seven patrons on the premises at the time (N.T. 8).

7. According to the records of the Pennsylvania Liquor Control Board, Licensee did not possess and off premises sales permit on January 26, 2006 (N.T. 11-12 and Exhibit B-3).

8. Underage Buyer No. 81 was born January 31, 1987 and was a part of the age compliance program with the Bureau of Enforcement. He was eighteen years of age on January 26, 2006 when he visited the licensed premises. Underage Buyer No. 81 entered the premises at approximately 9:20 p.m. on January 26, 2006. He asked the black female bartender for a Colt 45. She gave him five dollars and returned two dollars and fifty cents in change. He left the bar with the Colt 45 in a brown paper bag. He handed it over to the officers (N.T. 14).

9. Underage Buyer No. 81 was never asked for identification while on the premises (N.T. 14).

10. Officer Frank Spera was employed with the Bureau of Enforcement, at the time of hearing, for approximately eight and a half years. He is a supervisor and part of the age compliance detail which went to the licensed premises on January 26, 2006. Immediately after Underage Buyer No. 81 departed the premises, he handed over the Colt 45 malt beverage that he had purchased. He gave a description of the bartender and Officers Spera, Harris, Mullen and Gall then entered the premises. The premises was open and operating and they identified themselves to the female bartender. The bartender said that she had served an underage buyer who was working for the Bureau (N.T. 15-17).

11. In addition to verbally notifying the bartender, a notice of non compliance letter was sent to the licensed premises regarding the January 26, 2006 sale to an underage buyer (N.T. 17-18 and Exhibit B-3).

#### CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

Count No. 1 - On January 26, 2006, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) male minor, eighteen (18) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1).

Count No. 2 - On January 26, 2006, Licensee, by its servants, agents or employes, sold malt or brewed beverages for consumption off premises, in violation of Section 407 of the Liquor Code, 47 P.S. Section 4-407.

CITATION NO. 06-1715

FINDINGS OF FACT:

1. The Bureau of Enforcement conducted an investigation of the licensed premises which began on June 17, 2006 and ended June 26, 2006. A notice of violation letter dated July 3, 2006 was sent to the licensed premises by certified mail, return receipt requested. The mailing was signed as received. A citation hearing notice dated July 21, 2006 was sent to the licensed premises by certified mail, return receipt requested. The mailing was signed as received on July 24, 2006 (N.T. 20-21 and Exhibits B-1 and B-2).

2. Officer Justin Clarke visited the licensed premises on June 17, 2006 along with officers from the Philadelphia Police Department Citywide Vice Unit and the Philadelphia Department of Licensing and Inspections. The officers entered at approximately 12:55 a.m. As soon as Officer Clarke walked in, he identified himself to the female bartender, who was later identified as Karima Hudwell. He informed her that he was there to conduct a routine inspection of the premises (N.T. 20-21).

3. The officer was checking the licenses and he did not notice a health license on the premises. The employee in charge of the premises was Keith Pulian. He said he wasn't sure where the health license (N.T. 20-21).

4. On Friday, June 23, 2006, Officer Clarke contacted the Philadelphia Department of Licenses and Inspections. In talking with their representative, she confirmed that they do not have a food license. He then requested certification (N.T. 21-24 and Exhibit B-3).

5. Certification from the city of Philadelphia indicates the health license was revoked on September 23, 2004 (N.T. 24 and Exhibit B-3).

CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

On June 17, 2006, Licensee, by its servants, agents or employes, operated the licensed establishment without a valid health permit or license, which expired on April 30, 2006, in violation of Section 437 of the Liquor Code, 47 P.S. Section 4-437, and Section 5.41 of the Liquor Control Board Regulations, 40 Pa. Code Section 5.41.

PRIOR RECORD:

Licensee has been licensed since April 4, 1985, and since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, has a record of prior violations as follows:

Citation No. 92-0197. \$250.00 fine.

1. Sales after the Restaurant Liquor License expired on October 31, 1991 and had not been renewed and/or validated.

Citation No. 00-0598. \$300.00 fine.

1. Used loudspeakers or devices whereby music could be heard outside.  
March 11, 2000.

Citation No. 01-2111. \$2,550.00 fine and Verification conditions corrected.

1. Not a bona fide restaurant in that food items were insufficient.  
June 21 and August 30, 2001.
2. Failed to notify the Board within fifteen days of a Change of Officers.  
January 15, 2001.
3. The licensed corporation was not the only one pecuniarily interested in the operation of the licensed business.  
January 15 to August 30, 2001.
4. Failed to appoint a Board approved full-time manager for the licensed business.  
January 15 to August 30, 2001.
5. Used loudspeakers or devices whereby music could be heard outside.  
March 10 and April 7, 2001.
6. Operated the licensed establishment without a valid health permit or license.  
May 4, June 2 and 21, 2001.
7. Failed to clean coils, tap rods and connections at least once every 7 days.  
June 21, 2001.

8. Refused Enforcement officers the right to inspect completely the entire licensed premises during a time when the premises were open for the transaction of business.  
June 21 and July 20, 2001.
9. Failed to keep records on the licensed premises.  
June 21, 2001.

DISCUSSION:

With regard to Citation No. 06-0721C, Licensee sold liquor to an underage buyer on the premises without requesting identification or otherwise making assurances that the individual was of age. In addition, Licensee sold alcohol off premises without a permit.

This Court has concluded in a number of prior opinions that the law has returned to the state it was before the enactment and that retail dispenser licenses throughout the Commonwealth have a right as an incident of their license to sell malt or brewed beverages for off premises consumption without this special permit. The Court also found that any attempt to enforce the provisions of Act 39 of 2005, without first repairing the mechanism by which the applications must be approved in giving notice to the Licensees of that process, is a further violation of Licensee's constitutional right to due process. It is the opinion of this Court that the discontinuance of the appeal of *USA Deli, Inc. v. City of Philadelphia*, et al, 4677 October term (2005) was the definitive word and the end of the matter and would decide this matter consistent with the decision of the Commonwealth Court.

On appeal, the Liquor Board found contra to the Office of Administrative Law Judge. These matters are currently on appeal, therefore, until a decision is rendered by the Court of Common Pleas or higher authority, the Office of Administrative Law Judge finds Licensee in violation consistent with the opinion of the Liquor Board. Under the circumstances, a \$2,200.00 penalty shall be imposed.

With regard to Citation No. 06-1715, Licensee failed to have a valid health permit on the premises and had no authority to be operating the premises without a valid health permit. Under the circumstances, a \$500.00 penalty shall be imposed.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$50.00 or more than \$1,000.00, or both, for violations of the type found in Count No. 2 of Citation No. 06-0721 and Count No. 1 of Citation No. 06-1715.

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$1,000.00 or more than \$5,000.00, or both, for violations of the type found in Count No. 1 of Citation No. 06-0721C.

Harper's, Inc.  
Citation Nos. 06-0721C & 06-1715

Therefore, penalties shall be assessed as follows:

Citation No. 06-0721C  
Count No. 1 - \$2,000.00.  
Count No. 2 - \$200.00.

Citation No. 06-1715  
Count No. 1 - \$500.00.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, Harper's, Inc., License Number R-AP-SS-1032, pay a fine of Two Thousand Seven Hundred Dollars (\$2,700.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

**In order to insure compliance with this Order, jurisdiction of this matter is retained.**

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, along with any required documentation, to:

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

Dated this 24<sup>th</sup> day of October, 2007.

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Tania E. Wright, J.

**NOTE:** 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.

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