

Mailing Date: July 5, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-2279
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

5708 K & T, INC. : License No. R-1492
5708 Germantown Avenue :
Philadelphia, PA 19144-2137 :

Counsel for Licensee: John J. McCreesh, III, Esquire
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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 dismissed the citation issued to 5708 K & T, Inc. (“Licensee”).

The citation charged that, on August 25, 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 citation based on the erroneous finding that the underlying off-premises sales ("OPS") permit statutes are unconstitutional.

At the hearing before the ALJ, Licensee stipulated to the facts, contained in the Bureau's Pre-Hearing Memorandum. (N.T. 4-5; Ex. B-3).

The record reveals that, on August 25, 2006, at approximately 2:25 p.m., Bureau Officer E. Gall entered the licensed premises and observed an African-American male and an Asian female behind a counter and plate glass rendering service to six (6) patrons. (Ex. B-3). Officer Gall ordered and purchased a sixteen (16)-ounce can of Coors Light beer "to go" from the male cashier. (Ex. B-3). Officer Gall gave the cashier a five dollar (\$5.00) bill, after which the beer was placed in a small bag along with a straw. (Ex. B-3). The officer received change from the purchase, and then left the subject premises in possession of the beer. (Ex. B-3). Officer Gall thereafter returned to the subject premises accompanied by two (2) other enforcement officers and asked to speak to the owner of the establishment. (Ex. B-3). The officer was introduced to Chieng Ky and informed Mr. Ky that he had purchased beer "to go" in the premises. (Ex. B-3). Mr. Ky produced paperwork listing "various establishments and various attorneys' signatures," but no authority to sell malt or brewed beverages to-go. (Ex. B-3).

Officer Gall requested and did receive a certified verification from the Pennsylvania Liquor Control Board ("Board") that Licensee did not possess an OPS permit on August 25, 2006. (Exs. B-3, B-4).

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 August 25, 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.¹

¹ In reviewing the discussion set forth in the ALJ's Adjudication, it would seem that the ALJ has chosen to throw out the baby with the bath water. The Court of Common Pleas in USA Deli, Inc. only found the process by which a licensee must "request approval" to be unconstitutional. USA Deli, Inc. left intact that portion of Liquor Code section 407(b)(4) which stated that a failure of the City to act within forty-five (45) days would be viewed by the Board as an "approval," following which the Board would issue the requisite OPS. Had the City's hearing process been the only means by which to obtain an OPS, then and only then

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. As a result, the Bureau's appeal is granted, and the decision of the ALJ is reversed.

could it be argued that the requirement for an OPS was void. The action of the ALJ in leaping to the conclusion that USA Deli, Inc. effectively pulled the plug on all aspects of the OPS permit scheme is unnecessarily far-reaching, and ignores a basic principle that the purpose of the Liquor Code is to restrain the sale of alcohol, not to promote it. In Re: Tahiti Bar, 150 A.2d 112 (Pa. 1959). The finding that the effect of USA Deli, Inc. was to return the law to the state it was in before enactment is in total disregard of the fact that the Court of Common Pleas chose not to disturb the option of the Board to act, notwithstanding inaction on the part of the City Council.

ORDER

The decision of the ALJ is reversed.

The Bureau's appeal is granted.

It is hereby ordered that this matter is remanded to the ALJ in order to impose an appropriate penalty consistent with this Order and Opinion.

Board Secretary