

Mailing Date: JUL 9 2007

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 06-2531
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-334217
v.	:	
	:	LID - 53294
6643 GERMANTOWN INC	:	
6643-45 GERMANTOWN AVE	:	
PHILADELPHIA PA 19119-2253	:	
	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. E-SS-211	:	BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: Erik Shmukler, Esq.  
For Licensee: John J. McCreesh, III, Esq.

**ADJUDICATION**

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on October 31, 2006. The citation alleges that Licensee violated §442(a) of the Liquor Code, 47 P.S. §4-442(a), on September 27, 2006, by selling malt or brewed beverages for consumption off premises.

A hearing was held on April 19, 2007, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation, and to a summary of facts, although they did not agree that this summary supported a finding of liability.

FINDINGS OF FACT:

1. Pursuant to Act 39 of 2005, Licensee applied to the City Council of Philadelphia for an Off-Premises Sales (OPS) permit. The application was denied, and Licensee then appealed to the Court of Common Pleas of Philadelphia County at 6643 Germantown, Inc. v. City of Phila., October Term, 2005, No. 4536, Phila. Ct. Com. Pl. LEXIS 298.

2. By order dated June 28, 2006, Judge Glazer of the Court of Common Pleas of Philadelphia County reversed the decision of City Council and remanded the matter to them,

incorporating by reference the court's opinion in *USA Deli, Inc., et al., v. City of Philadelphia*, Nos. 04677 and 00277, 2006 Phila. Ct. Com. Pl. LEXIS 297.

3. On September 27, 2006, a liquor enforcement officer purchased a can of beer from a counter person in the licensed premises and left the premises with it.

#### CONCLUSIONS OF LAW:

This citation must be dismissed because of the controlling legal authority of *USA Deli, Inc., et al., v. City of Philadelphia*, Nos. 04677 and 00277, 2006 Phila. Ct. Com. Pl. LEXIS 297.

#### DISCUSSION:

Prior to September 4, 2005, §442(a) of the Liquor Code read as follows:

(a) No retail dispenser shall purchase or receive any malt or brewed beverages except in original containers as prepared for the market by the manufacturer at the place of manufacture. The retail dispenser may thereafter break the bulk upon the licensed premises and sell or dispense the same for consumption on or off the premises so licensed: Provided, however, That no retail dispenser may sell malt or brewed beverages for consumption off the premises in quantities in excess of one hundred ninety-two fluid ounces: Provided, further, That no club licensee may sell any malt or brewed beverages for consumption off the premises where sold or to persons not members of the club.

Act 39 of 2005 amended 442(a) by designating the existing text as subsection (a)(1) and adding new subsections (a)(2) through (6), which read as follows:

(a) (2) Notwithstanding paragraph (1), after October 31, 2005, a retail dispenser licensee, located in a city of the first class who is otherwise permitted to sell malt or brewed beverages for consumption off the premises may not do so unless it acquires a permit from the board.

(3) The application for a permit to sell malt or brewed beverages for consumption off the premises shall be on forms designated by the board and contain such information as the board may require. The application and renewal fee shall be as prescribed in section 614-A(28) of the act of April 9, 1929 (P.L. 177, No. 175), known as "The Administrative Code of 1929."

(4) The application for a permit to sell malt or brewed beverages for consumption off the premises must be accompanied by a copy of the approval of such request by the governing body of the city of the first class in which the licensed premises is located.

(5) The governing body of a city of the first class must render a decision by ordinance or resolution within forty-five days of receipt of a request for approval of a permit to sell malt or brewed beverages for consumption off the premises. The governing body must approve the request unless it finds that doing so would

adversely affect the welfare, health, peace and morals of the city or its residents. A decision by the city to deny a request may be appealed to the court of common pleas in the county in which the city is located. The failure to render a decision by the governing body of a city of the first class within the forty-five-day period shall be deemed approval of the permit.

(6) Upon being satisfied that the applicant has fulfilled all the requirements of this act and the board's regulations, the board shall approve the application.

In *USA Deli, Inc., et al., v. City of Philadelphia*, Nos. 04677 and 00277, 2006 Phila. Ct. Com. Pl. LEXIS 297, the Common Pleas Court of Philadelphia County held that “Act 39 adjudications violate due process of law under the Pennsylvania Constitution and the Fourteenth Amendment of the U.S. Constitution by allowing the Philadelphia City Council to commingle legislative, prosecutorial, and adjudicative functions.” The decisions of the Philadelphia City Council refusing the applications of two licensees for off-premises sales permits were reversed and the cases were remanded to City Council for proceedings consistent with the opinion.

The City of Philadelphia appealed this decision to Commonwealth Court, but the appeal was discontinued on December 20, 2006.

In fifteen citation cases involving ten licensees, I have held that the discontinuance of the appeal and the absence of further legal proceedings in a higher court necessarily meant that the procedure required by Act 39 had been finally determined to be unconstitutional. In those decisions I stated that “a finding of unconstitutionality dates from the time of enactment, and not merely from the date of the decision holding it so. *Fornwalt v. Follmer*, 616 A.2d 1040 (Pa. Super. 1992). Therefore [the subsection involved] was never a valid part of the Liquor Code, and the prosecution of any citation case which depends upon it must fail.” The Bureau has appealed these adjudications to the Pennsylvania Liquor Control Board. In eight cases, the Board has reversed my decision and remanded the cases to me for imposition of an appropriate penalty. The remaining appeals are still pending at this writing.

In the meantime, however, the present case and a number of others involving the same issue have come before me. In these cases the Bureau has argued that I must sustain the charge on the basis of five related factors:

1. The averment of the citation, and the evidence in support of it.
2. Whether the licensee has obtained a stay of enforcement.
3. The decision in *USA Deli, Inc., et al., v. City of Philadelphia, supra*.
4. The decision of the PLCB in *5708 K&T, Inc.*, Nos. 06-0745 & 06-1106, which relied on *PLCB v. TLK, Inc.*, 518 Pa. 500, 544 A.2d 931 (1988).
5. Acts 84 and 155 of 2006.

As to the first point, it is axiomatic that the Bureau must allege a violation of law and present substantial evidence to support the allegation. Putting aside for one moment the holding in *USA Deli, Inc.*, the Bureau has done so in this case.

As to the second point, I construe the Bureau's argument to create two classes of licensees among those who have unsuccessfully applied to Philadelphia City Council for an OPS permit: those who have appealed to the Court of Common Pleas from the denial and obtained a stay pending hearing on the appeal, and those who have not obtained such a stay.

In this case, Licensee applied for an OPS permit, was denied, appealed, and received the benefit of the court's reversal of the denial, all prior to the violation date, September 27, 2006. Licensee was entitled to regard the court's decision as the law of the case, and a sufficient warrant to exercise fully its license privilege.

The Bureau argues in its third point that the holding of *USA Deli, Inc.*, relates only to the process by which a licensee must request approval from the city. It argues that the decision leaves intact the underlying requirement for an OPS permit, since the "deemed approval" result mandated by the last sentence of §442(a)(5) remains as a method by which a license may obtain an OPS permit from the PLCB.

It is true that the court in *USA Deli, Inc.*, remanded the cases before it to City Council for proceedings consistent with the opinion, but it would have to be a matter of speculation as to what those proceedings could have been. The opinion contains no mention of, or reliance upon, the "deemed approval" provision as some sort of a safety valve ensuring the continued viability of the OPS permit requirement.

I construe the "deemed approval" requirement as a procedural trigger intended to require governmental action within the time allowed, and not as an alternative method for a licensee to obtain an OPS permit from the Board. By the logic of the Bureau's argument, every retail licensee in Philadelphia can now obtain an OPS permit, since City Council has refused to participate further in the process by which the legislature intended such permits to be obtained. This cannot be what the legislature had in mind.

I do not regard the distinction between licensees who have obtained a court stay and those who have not as meaningful, because I think the effect of *USA Deli, Inc.*, was to invalidate all of the provisions of Act 39 pertaining to City Council's input into the permitting process. This means, in my view, that the law has returned to the state it was in before the enactment: retail dispenser licensees throughout the Commonwealth have a right, as an incident of their licenses, to sell malt or brewed beverages for off-premises consumption in limited quantities.

As to the Bureau's fourth point, I confess that I am at a loss to understand how the Supreme Court's decision in *PLCB v. TLK, Inc.*, 518 Pa. 500, 544 A.2d 931 (1988), has any application to this issue. In that case, the Pennsylvania Supreme Court held that licensees may be held strictly liable for violations of the Liquor Code whether or not they knew or should have known of the misconduct; but they may be held liable for violation of criminal laws other than the Liquor Code only upon a showing that they had the requisite *scienter*. The principle established by *TLK* has no relevance to the case before us: licensees would be strictly liable for off-premises sales without a

permit if it were not for the fact that a higher authority than the PLCB has finally determined that the process required to obtain such a permit is constitutionally defective.

The Bureau's last point relates to the passage of Acts 84 and 155 of 2006, both of which were approved by the governor after the date of the alleged violation in this case. I agree with the Bureau that these statutes have no application to the present case.

The Board's opinion in the cases of this nature which it has decided so far states that my reliance upon *USA Deli, Inc.*, 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 that 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 on February 24, 2006.

– Board Opinion mailed May 23, 2007, regarding  
Citation No. 06-0808, 1102 Lam, Inc., pp. 4-5.

As this discussion indicates, I do not read the court's opinion in *USA Deli, Inc.*, in the same way as the Board. As I understand the opinion and the statute, the flaw which mandated reversal of the City's adjudication did not arise from the City's implementation of Act 39, but was an integral part of the statute itself.

In other words, the problem was not that the City Council behaved unconstitutionally of their own volition. Rather, the behavior of City Council was mandated by the statute. The invalidity, therefore, is a property of the statute, not the acts of City Council.

I do not think that we who comprise the administrative process are empowered to countermand the instructions of a court, or to re-write legislation so as to eliminate a problematic provision. My understanding of the law may be wrong, but until a court tells me that this is so I believe I am obliged to remain consistent with the decisions made in other cases.

#### ORDER

THEREFORE, it is hereby ORDERED that Citation No. 06-2531 is DISMISSED.

Dated this 13th day of June, 2007.

David L. Shenkle, J.

jb

**NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.**