

Mailing Date: September 19, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-2531
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

6643 GERMANTOWN, INC. : License No. E-211
6643-45 GERMANTOWN AVENUE :
PHILADELPHIA, PA 19119-2253 :

Counsel for Licensee: John J. McCreesh, III, Esquire
7053 Terminal Square
Upper Darby, PA 19082

Counsel for Bureau: Erik 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 dismissed the citation.

The citation charged that, on September 27, 2006, Licensee 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 citation based upon an erroneous finding that the underlying 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 September 27, 2006, at approximately 1:20 p.m., Bureau officer Gall was permitted to purchase a sixteen (16)-

ounce can of Budweiser beer. (Ex. B-3). The officer departed the premises in possession of the beer. (Ex. B-3). Licensee did not have an OPS on September 27, 2006. (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 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 citation. As a result, the Bureau's appeal is granted, and the decision of the ALJ dismissing the citation is reversed.

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 Opinion.

Board Secretary