

Mailing Date: May 6, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-1028
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

ALTLAND HOUSE CATERING, INC. : License No. R- 11720
t/a The Valencia Ballroom :
142 N. George Street :
York, PA 17401-1117 :

Counsel for Licensee: Andrew M. Paxton, Esquire
135 N. George Street
York, PA 17401

Counsel for Bureau: Thomas M. Ballaron, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17110

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from the Opinion and Order Upon Remand From the Pennsylvania Liquor Control Board of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ ordered that the January 15, 2008 Adjudication dismissing the citation, remained in full force and effect.

The citation charged that, from March 21, 2006 through March 21, 2007, Licensee, by its servants, agents or employees, violated section 3.52(c) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code § 3.52(c)] by operating another business on its licensed premises without Board approval.

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 in dismissing the citation. Further, the Bureau contends that Licensee's practice of providing institutional food services under contract cannot be considered within the scope of the core business actions of an "R" license and therefore, Licensee was required to obtain Board approval before conducting such a business on its licensed premises.

A review of the record reveals the following procedural history of this citation matter:

On January 15, 2008 (mailing date of January 22, 2008), the ALJ entered an Adjudication dismissing the citation, finding that the Bureau failed to prove the charge set forth in the citation.

On February 21, 2008, the Bureau filed an appeal to the Board.

On April 23, 2008, the Board issued an Order which affirmed the ALJ, although on different grounds, and dismissed the Bureau's appeal.

On May 8, 2008, the Bureau filed an Application for Reconsideration with the Board.

On May 29, 2008, the Board granted Bureau's Application for Reconsideration and remanded the matter to the ALJ in order to conduct a hearing relative to the merits of the charges underlying the citation.

A hearing was then scheduled for July 22, 2008 at 9:30 a.m.

On July 17, 2008, the ALJ accepted Stipulation of Facts from the Bureau and Licensee's counsel and the hearing scheduled for July 22, 2008 was cancelled.

On July 23, 2008, (mailing date July 30, 2008), the ALJ issued an Opinion and Order Upon Remand From the Pennsylvania Liquor Control Board wherein

the ALJ ordered that the Conclusions of Law, Discussion and Order in the January 15, 2008 Adjudication remain in full force and effect.

On August 28, 2008, the Bureau filed a timely appeal from the July 30, 2008 Order of the ALJ.

As to the merits of the appeal, a further review of the record reveals the Bureau and Licensee's counsel agreed to the following stipulations of facts, in lieu of hearing before the ALJ:

During the period in question, Licensee had "Meals-On-Wheels" contracts with Adams, York and Lebanon Counties to provide meals for qualifying seniors. (FF#7)

All food preparation for the Meals-On-Wheels contracts occurred on the licensed premises; ingredients were delivered and stored at the licensed premises; the meals were prepared by Licensee's employees using Licensee's facilities; and the meals were packaged there awaiting delivery. (FF#8)

Between January and October 2006, Licensee grossed \$971,312.00 from the Meals-On-Wheels contracts. (FF #9)

For the period charged in the Citation (March 21, 2006 through March 21, 2007), Licensee did not have Board approval to engage in another business to operate on the licensed premises.

The ALJ further incorporated into his findings that Licensee contacted the Board and requested a legal opinion under the authority of § 2-211.1 [47 P.S. § 2-211.1] as to whether preparing food for a Meals-On-Wheels program constituted the “operation of another business” requiring Board approval; and if so, Licensee requested Board approval. (FF #11)¹

The Board now recognizes and takes administrative notice of Advisory Opinion No. 07-502 which was issued on January 7, 2008 in response to an inquiry dated November 12, 2007 from Licensee’s counsel, Andrew M. Paxton, in which the Board stated, as it states now, that Licensee’s activities constitute another business requiring the Board’s approval.

Section 3.52 of the Board’s Regulations prohibits a licensee from having an inside passage or communication to or with any business conducted by that licensee unless it receives approval by the Board. [40 Pa. Code § 3.2(b)]. Section 3.52(c) also prohibits a licensee from conducting any other business on the licensed premises without Board approval. [40 Pa. Code § 3.52(c)]. While what constitutes another business is not defined in the Liquor Code, it

¹While there appears to be no specific reference to the basis for finding of fact No. 11, the record reveals that during the November 14, 2007 hearing before the ALJ, Licensee’s counsel informed the ALJ that although a request for a legal opinion had been requested from the Board prior to the hearing, no response had been forthcoming by the hearing date. (N.T. 4, 6).

generally means the engaging in a business other than the providing of food for on-premises consumption, when the licensee is a restaurant.

Similarly, even where the licensee operates a catering business as part of its restaurant services, it is still presumed that the catered functions are to include on-premises consumption. While licensees may choose to offer take-out services as a convenience to its customers, such services may be deemed to constitute the operation of another business when those services extend beyond the core activity of a restaurant liquor license, which is defined in part as a “reputable place operated by persons of good reputation and habitually and principally used for the purpose of providing food for the public...” [47 P.S 1-102].

The relevant issue underlying this appeal is whether or not providing institutional food service under contract is directly related to or a direct corollary of the core business for which Licensee is licensed. The Board finds that Licensee’s practice of providing institutional food services under its “Meals-On-Wheels” contracts does not fall within the scope of the core business activities of a restaurant liquor licensee. Accordingly, Licensee was

required to obtain Board permission to conduct institutional food services for the Meals-On-Wheels contracts before engaging in such business.²

Based upon the foregoing, the Board must conclude that the ALJ's dismissal of the citation was an error of law and must be reversed.

² It should be noted that at the Board session on October 22, 2008, the Board approved Licensee's request to provide meals for the Meals-On-Wheels Program.

ORDER

The decision of the ALJ is reversed.

The appeal of the Bureau is sustained.

The matter is remanded to the ALJ for purposes of determining a penalty that is consistent with this Opinion.

Board Secretary