Mailing Date: JAN 8 2009

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 07-3136
	:	Incident No. W03-365065
v.	:	
	:	LID - 34233
KALDES, INC. T/A AL'S CAFE 268 VERBEKE ST. HARRISBURG, PA 17102-2738	:	
DAUPHIN COUNTY LICENSE NO. R-AP-167	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire
Pennsylvania State Police
3655 Vartan Way
Harrisburg, PA 17102-2738

For Licensee
Steve C. Nicholas, Esquire
2215 Forest Hills Drive
Suite 37
Harrisburg, PA 17110

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on January 24, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Kaldes, Inc., t/a Al's Cafe (Licensee), License Number R-AP-167.

The citation[1] charges Licensee with a violation of Section 5.51(a) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.51(a)]. The charge is that on December 6, 2007, Licensee, by servants, agents or employes, failed to clean coils, tap rods and connections at least once every seven (7) days.

An evidentiary hearing was conducted on December 4, 2008 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on November 19, 2007 and completed it on December 6, 2007. (N.T. 10)

2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on December 26, 2007. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 6)

3. On December 6, 2007, a Bureau Enforcement Officer entered the licensed premises at 3:20 p.m. Licensee was open and operating selling alcoholic beverages. The Officer conducted an administrative inspection. Licensee's coil cleaning records indicated the beer dispensing system was cleaned at least once every seven days. The Officer took a swizzle stick and placed it inside the openings of all taps. He found the swizzle stick came out with black "slime" on it. (N.T. 10-13)

4. The Officer discussed the condition of the beer dispensing system with Licensee's Sole Corporate Officer who responded the system was cleaned once every seven days. (N.T. 18-20)

5. After the Officer displayed the swizzle stick to Licensee's Sole Corporate Officer, the Officer disposed of them in the trash. He did not ask Licensee's Sole Corporate Officer to draw any beer for visual or olfactory inspection. (N.T. 23-24)

6. No chemical analysis was made of the deposits on the swizzle stick. It could not be determined whether any substances harmful to human beings was a part of that which was removed from the beer taps. (N.T. 22)

1. Commonwealth Exhibit No. C-2, N.T. 8.

7. The material on the swizzle sticks had no noticeable smell. (N.T. 35)

8. Mr. W. is qualified as an expert in servicing and maintaining the cleanliness of beer dispensing systems. His business is to clean beer dispensing systems and to install and maintain those systems. He has been in that business for 27 years. Mr. W. services approximately 100 beer dispensing systems a week. Each of those systems has on average approximately six taps. (N.T. 38-43)

9. Mr. W. also went to a training program to learn how to clean all drafting equipment in April, 2003. (N.T. 44-45)

10. Beer by its nature contains bacteria. Some may be harmful and some not. The main reason beer is kept in a chilled condition is to retard the growth of bacteria. (N.T. 47-48)

11. At the end where the beer is tapped, because of the higher air temperature and the possibility of contaminants, the opening becomes an attractive entrance way for bacteria. (N.T. 49-50)

12. Bacteria naturally accumulate on the rim of the tap. There have been no studies that have found bacteria on the tap to be harmful. (N.T. 53)

13. If taps are not cleaned properly or insanitary, the contamination will cause a bad smell in the beer. The beer will have a very sour smell to it. (N.T. 53)

14. Bacteria begins to form on the edge of the tap within three hours after cleaning. The level of oxygen, the age of the faucet, the relative humidity, the method of pouring may accelerate bacterial growth. (N.T. 54-56)

15. Mr. W. cleaned the coils on December 3, 2007, three days prior to the Officer's visit. (N.T. 57)

16. Mr. W. returned to the premises on December 10, 2007 for the weekly cleaning. Licensee's Sole Corporate Officer advised Mr. W. that an Officer was in and asserted the beer dispensing system was insanitary. Mr. W. took the faucets totally apart, as he normally does. He used a brush to clean the system and found no black "sludge." He did find bacteria growth as is expected. What Mr. W. discovered was not out of the ordinary. (N.T. 62-66)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

2. The Bureau has **failed** to prove that on December 6, 2007, Licensee, by servants, agents or employes, failed to clean coils, tap rods and connections at least once every seven (7) days.

DISCUSSION:

As many years as I have been in this business, I have never been challenged to think about the charge at issue with such precision and depth. I can unequivocally say, henceforward, I will always apply the same vigor to such a charge as I was challenged to do in this matter.

At question is the family of regulations dealing with beer dispensing systems found in 40 Pa. Code, Subchapter D. Therein one finds the mandate for licensees to clean beer dispensing systems **at least** once every seven days which ties into the requirement, at no time may a beer dispensing system be insanitary.

Licensee's counsel would have me apply a definition to "insanitary"as: endangering health. Depending upon what dictionary one selects, one will find multiple definitions for "insanitary." A word as common as "face" has more then ten distinct meanings.
One cannot determine which meaning of a word applies without the context in which that word is employed.

Some guidance is provided in Title 40, Pa Code Section 5.54 which, in pertinent part, provides that it is the sole responsibility of a licensee to maintain equipment used in dispensing malt or brewed beverages in a "clean" and "sanitary" condition. The conjunctive use of both words suggests that "insanitary," which is found later in the referenced regulation and the antonym for "sanitary," must mean something more than simply unclean.

The definition of "insanitary" as propounded by counsel may not be as restrictive as I first suggested at the hearing when I deferred to the statutory imperative of interpreting these regulations broadly in favor of the public interest. In applying that principle, I did not consider the regulation mandates that beer dispensing systems be maintained in both a sanitary and clean condition.

The inquiry does not end here. Because the pertinent regulations provide for minimal cleaning of beer dispensing systems at least once every seven days, it is not unreasonable to conclude a licensee who complies with that minimum requirement has a presumptively clean and sanitary system especially when we know beer, by its nature, invites and carries bacteria.

Accordingly, when a licensee has a presumptively clean system, the swizzle stick analysis is simply insufficient to establish that a system is insanitary. There must be more evidence. Licensee's expert suggests any number of steps that could have been taken to establish that a system is insanitary.[2]

Interestingly, the bulk of this discussion at the hearing was about the cleanliness or lack thereof Licensee's beer dispensing system. All parties tacitly recognized the real issue supporting the Bureau's case. Nonetheless, there is a technical problem with the charge. It is one which I would not have chosen as a basis to dismiss but needs to be addressed.

The charge does not match the Bureau's proof. Licensee was not charged with maintaining an insanitary system but rather with failing to clean the beer dispensing system at least once every seven days. By the precise wording of the charge, the Bureau has missed the mark, as the record is abundantly clear Licensee did comply with the letter of the pertinent regulation.

ORDER:

NOW THEREFORE, it is ordered that Citation No. 07-3136, issued against Kaldes, Inc., t/a Al's Café, is DISMISSED.

2. Obviously, the longer the time of the last known cleaning, the easier it becomes for the Bureau to establish a system is insanitary.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 31st day of December, 2008.

Felix Thau, A.L.J.

pm

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.