

Mailing Date: OCT 17 2008

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-0818
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-370648
	:	
v.	:	LID - 48330
	:	
KATHY J. WHITEMAN	:	
T/A THE BEAR'S DEN	:	
144-144 1/2 VALLEY ST.	:	
LEWISTOWN, PA 17044	:	
	:	
	:	
MIFFLIN COUNTY	:	
LICENSE NO. R-AP-SS-11776	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Nadia L. Vargo, Esquire
Pennsylvania State Police
313 Mt. Nebo Road
Pittsburgh, PA 15237-1305

For Licensee
Frank C. Sluzis, Esquire
2000 Linglestown Road
Suite 106
Harrisburg, PA 17110

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on April 18, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Kathy J. Whiteman, t/a The Bear's Den (Licensee), License Number R-AP-SS-11776.

This citation¹ contains two counts.

The first count charges Licensee with a violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that on March 5, 2008, Licensee, by servants, agents or employes, failed to keep records on the licensed premises.

The second count charges Licensee with a violation of Section 404 of the Liquor Code [47 P.S. §4-404]. The charge is that on March 5, 2008, Licensee, by servants, agents or employes, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license.

An evidentiary hearing was conducted on September 23, 2008 at the Hampton Inn, 180 Charlotte Drive, Altoona, 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 March 5, 2008 and completed it on March 22, 2008. (N.T. 10)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on April 1, 2008. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 9)

Count No. 1:

3. Licensee entered into a Conditional Licensing Agreement with the Pennsylvania Liquor Control Board.²

1. Commonwealth Exhibit No. C-2, N.T. 9.

2. The Conditional Licensing Agreement (CLA) is not paginated and was accompanied by a letter dated February 23, 2007, paragraph two of which appears to include conditions not within the four corners of the Conditional Licensing Agreement (Commonwealth Exhibit No. J-3, N.T. 15). The effective date of the CLA is a tad unclear. On its face, the CLA provides that the effective date is the date of Board approval (in this case, February 21, 2008). Licensee was not advised of that action until receipt of the CLA (a date unidentified in this record), with cover letter dated February 23, 2008.

4. On the date in question, at a time when the Conditional Licensing Agreement was in full force and effect, a Bureau Enforcement Officer entered the premises at approximately 1:46 p.m. There were patrons on the premises. Licensee was contacted by telephone and arrived at the premises at about 2:00 p.m. (N.T. 29-31)
5. Licensee did not engage in the use of a transaction scan device for any patron present that afternoon, all of whom unquestionably appear to be well over twenty-one. (N.T. 53-73)
6. The Conditional Licensing Agreement was prepared by the Pennsylvania Liquor Control Board (N.T. 22-23; Official Notice).

Count No. 2:

7. During the course of the inspection, Licensee was unable to show the Officer any income or expense ledgers for calendar 2007. (N.T. 43-44)
8. Licensee advised the Officer during the inspection that she could not find the necessary records. (N.T. 45)
9. The Officer allowed Licensee one hour to produce the records after which Licensee indicated she could not find the records. (N.T. 48)

CONCLUSIONS OF LAW:

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

Count No. 1:

2. **Sustained** as charged.

Count No. 2:

3. The Bureau has **failed** to prove that on March 5, 2008, Licensee, by servants, agents or employes, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the subject license.

DISCUSSION:

Statutory Basis

In pertinent part, Liquor Code Section 470(a) [47 P.S. §4-470(a)], relating to renewal of licenses, provides:

...The board may enter into an agreement with the applicant concerning additional restrictions on the license in question. If the board and the applicant enter into such an agreement, such agreement shall be binding on the applicant. Failure by the applicant to adhere to the agreement will be sufficient cause to form the basis for a citation under Section 471 and for the nonrenewal of the license under this Section.

Pursuant to that provision³, Licensee and the Board entered into what is called in the jargon of the trade, but not in the statute, a Conditional Licensing Agreement (CLA). The provision in controversy is Paragraph 6, e, which states:

Whiteman shall install and shall utilize a transaction scan device to scan the identification of all patrons entering the licensed premises.⁴

3. *Identical language appears in Liquor Code Section 404 [47 P.S. §4-404], relating to issuance, transfer or extension of certain licenses.*

4. *At the conclusion of taking testimony, I volunteered my thoughts regarding the Legislature's recent amendments to the Liquor Code which, in my opinion, have caused more legal issues than they have resolved. I do so well recognizing my responsibility as a judicial officer to avoid tipping the scales of justice to one side or the other. I further am keenly aware, when the scales of justice are otherwise tipped, I have an obligation to speak up, even though the parties do not. The remarks which follow are made in the spirit of these principles. I would be shirking my duty were I not to speak up when the legal issues introduced by the recent amendments to the Liquor Code, specifically the so-called Conditional Licensing Agreement, are palpable.*

*First, the significant cases dealing with the blending of the enforcement and application processes, such as **Ball Park's v. Liquor Control Bd.**, 641 A.2d 713 (Pa.Cmwlth. 1994), **Atiyeh v. Liquor Control Bd.**, 629 A.2d 182 (Pa.Cmwlth. 1993) and **Pa Liquor Control Bd. v. Bartosh**, 730 A.2d 1029 (Pa.Cmwlth. 1999), predate the amendment to Liquor Code Section 470(a), relating to the CLA. The vitality of these cases, in this new environment, is seriously compromised to the point where they can be largely ignored.*

Footnote No. 4, continued

As a consequence, some of the constitutional issues that were or could have been addressed prior to the introduction of the CLA, are in full play. The Legislature has created a system where an agency is so infused in the enforcement and application arenas to the point where any meaningful distinction has been blurred.

The intertwining is of such proportion that piecemeal, statutory adjustments are likely to serve no meaningful purpose; the Legislature has created a system involving three distinct governmental agencies (Pennsylvania Liquor Control Board, Office of Administrative Law Judge, Bureau of Liquor Control Enforcement), the functions of which, though defined, are so intertwined that applicants and licensees may be subjected to the same behaviors being sanctioned in both an enforcement and licensing setting.

In this system, the licensing authority also has the power to review Adjudications, the review being essentially plenary. In this case, assuming an appeal follows, the licensing authority has the power to decide the meaning of the CLA; a document which it drafted. This process should offend any reasonable person's understanding of unlawful co-mingling, an element of Due Process.

I am also of the mind the constitutional precept prohibiting unlawful delegation of legislative authority may have been breached. The authority to license has been delegated to the licensing agency within specified statutory and regulatory provisions. The statutes and regulations governing licensing have standards which have been promulgated, via legally established methods, with public notice and comment available.

The pertinent statutory text which birthed the CLA is standardless. Couched in the permissive

“may,” the law provides for unfettered use of CLAs. Our Legislature has given the licensing authority unbridled power to employ these CLAs without any requirement to promulgate regulations, to provide for standards, without public notice or public comment.

Footnote No. 4 continued

By way of a few examples, why is it that one licensee may be required to use a transaction scan device and another not? Or is it the case such a requirement is a part of all CLAs? What standards are employed to distinguish one situation from another? Why aren't the standards, such as they may be, subject to public scrutiny or input as a regulation would be?

*My colleagues and I have engaged in some dialogue as to how we are to address these CLAs. There is not a true consensus among us on this point. No doubt, these CLAs are curious legal creatures, having aspects of both governmental licensing authority and Contract Law. In wrestling with this question, I cannot conceive of any body of law other than Contract Law that makes sense when applied to these CLAs. **So Young, Inc. II**, Adjudication No. 03-1573, www.lcb.state.pa.us.*

*One element of contract law is that of unconscionability, in both its procedural and substantive aspects. Under common law, a contract or term is unconscionable, and consequently avoidable, when the asserting party can prove there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it. **Salley v. Option One Mortg. Corp.**, 925 A.2d 115 (Pa. 2007).*

In the enforcement arena, through this Adjudicatory process, the stakes are unquestionably high but it is not an all-or-nothing game. In a licensing renewal setting, the consequences are always terminal, i.e. loss of license, the equivalent of economic capital punishment.

Where a CLA is in place, even the tiniest, most obscure breach subjects the licensee to the economic gallows. If that were not enough, the licensee may be subject to a second meeting with government, based on the same behavior, via this adjudicatory process.

Contract Law

In *So Young, Inc. II*, supra, I concluded contract law was applicable to these CLAs. Contracts are to be construed against the maker. When interpreting a contract, a court is to construe the terms in order to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement. A preferred contract interpretation always ascribes the most reasonable, probable, and material conduct to the parties. *Lane v. Com.*, 954 A.2d 615 (Pa.Super. 2008).

Contract Law Application

At issue is the meaning of Paragraph 6, e. The Bureau argues the word “all” means “all.” Consequently, Licensee must use a transaction scan device for every patron on every visit. In support, the Bureau cites *So Young, Inc. II*, supra.

That Adjudication involved the requirement that the licensee use a metal detector to screen “all” patrons. The obvious purpose for using a metal detector is to avoid customers entering the premises with deadly hardware. In this context, checking each patron upon every entrance makes complete sense. Moreover, Licensee raised no challenged to the CLA.⁵

I disagree with the Bureau’s conclusion that *So Young, Inc. II*, supra is applicable here. In the instant matter, the provision in controversy is designed to insure that only those of majority enter a licensed premises. Once a customer’s majority has been established, there is no need to mandate any further verification.

Requiring a licensee to use a transaction scan device for every patron, at every visit is an unreasonable burden. It is one which even the most prudent licensee would hardly require. Employing the interpretational imperative of reasonableness, I cannot imagine the CLA’s drafter intended Licensee use a transaction scan device on every patron’s visit. I am unwilling to believe the drafter intended to be unreasonable.

The final blow to the Bureau’s reliance on *So Young, Inc. II*, supra, rests on the absence of words. Were it the intention of the licensing authority to mandate the use of a transaction scan device for all patrons, at all times, surely additional words would have been present. Perhaps the pertinent provision would have read: “... for all patrons, **upon every visit**” or added words to that effect.

The Bureau would have me conclude the CLA’s drafter was imprecise or unskilled. That is an assessment I cannot and will not make.

5. I hasten to add, So Young, Inc. II, supra, was one of the very early CLA violation cases that crossed my desk. My reasoning regarding these CLAs, was then in its formative stages.

Burden of Proof

Based on the above, in order to prevail, the Bureau must establish Licensee did not use the transaction scan device on the very first visit of each of the customers present on March 5, 2008 and after the effective date of the CLA. The record is devoid of any evidence to satisfy this burden.

Continuance

At the conclusion of the hearing, I allowed Bureau counsel time to let me know if the Bureau required a continuance. Having heard nothing as of this date, I now close the record.

PRIOR RECORD:

Licensee has been licensed since October 5, 2001, and has had two prior violations:

Adjudication No. 05-1888. Fine \$1,200.00.

Sales to a minor.

August 14, 2005.

Adjudication No. 07-2329. Fine \$300.00.

1. Sold malt or brewed beverages in excess
of 192 fluid ounces for consumption off
premises.

July 6, 2007.

2. Failed to keep records on the licensed premises.

August 20, 2007.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$50.00 or more than \$1,000.00 or both for violations of the type found in Count Nos. 1 and 2 in this case.

I impose:

Count No. 1 – \$300.00 fine.

Count No. 2 – Dismissed.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$300.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

Dismissal of Count No. 2

IT IS FURTHER ORDERED that Count No. 2 of Citation No. 08-0818, issued against Kathy J. Whiteman, t/a The Bear's Den, is DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 16th day of October, 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.

Detach Here and Return Stub with Payment

The fine must be paid by treasurer's check, cashier's check, certified check or money order. Personal Checks, which include business-use personal checks, are not acceptable. Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road

Harrisburg, PA 17110-9661

Citation No. 08-0818
KATHY J. WHITEMAN