

Mailing Date: FEB 25 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-2203C
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-379239
v.	:	
	:	LID - 55716
NAPLES PIZZA, INC.	:	
T/A NAPLES PIZZA	:	
121 S. FRONT ST.	:	
STEELTON, PA 17113-2534	:	
	:	
	:	
DAUPHIN COUNTY	:	
LICENSE NO. R-SS-10212	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire
Pennsylvania State Police
3655 Vartan Way
Harrisburg, PA 17110

For Licensee
Pietro Congialos
President/Secretary
Treasurer/Manager
and Stockholder

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on October 2, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Naples Pizza, Inc., t/a Naples Pizza (Licensee), License Number R-SS-10212.

The citation¹ charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that on August 7, 2008, Licensee, by servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) male minor, nineteen (19) years of age.

An evidentiary hearing was conducted on January 27, 2009 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania. Licensee was represented by Mr. Pietro Congialos, Licensee's President/Secretary/Treasurer/Stockholder/Manager. I advised Mr. Congialos of Licensee's right to counsel, to cross-examine witnesses and to present testimony. Mr. Congialos acknowledged that he understood those rights and that he was prepared to go forward without an attorney. The matter was submitted by way of Stipulations of Fact.

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

STIPULATIONS OF FACT:

1. The Bureau began its investigation on August 7, 2008 and completed it on August 12, 2008. (N.T. 5)
2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on September 3, 2008. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. B-1, N.T. 5)
3. Pursuant to the Bureau's Age Compliance Check Program, a nineteen year old entered the premises on August 7, 2008. The nineteen year old showed his true and valid Pennsylvania Photo Driver's license to an employe. The employe returned the driver's license to the nineteen year old and then served the minor a twelve pack of beer to go. (N.T. 6-8)
4. The Bureau complied with all of the investigative and notice requirements of the Age Compliance Check Program.
5. Licensee sells beer for off premises consumption only. Since the second violation, Licensee has engaged in monthly meetings. Mr. C., Licensee's President/Secretary/Treasurer/Manager and Stockholder, reinforced with employes that he is not interested in "making a buck." He stresses with employes to take time to review the identification cards carefully. Licensee has changed some of the staff and is training new staff. (N.T. 13-14)

1. Commonwealth Exhibit No. B-2, N.T. 5.

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.
2. The citation is **sustained** as charged.

DISCUSSION:

Introduction

“Where you find the laws most numerous, there you will find also the greatest injustice.” These words, I am told, are authored by the Greek philosopher, Arcesilaus. For my purposes, the accuracy of the attribute is less important than the keen depth and insight the statement embodies. It is a declaration which has guided me in thinking about the novel and innovative approach presented by the Bureau.

Restrictive Operating Conditions (ROC)

For the first time, the Bureau presents for my consideration a document aptly identified as one listing restrictive operating conditions (ROC). The Bureau advises Licensee has agreed to accept the eight conditions listed in the ROC in addition to a penalty of \$2,500.00 and a thirty-five days suspension.

I applaud the Bureau’s willingness to entertain creative approaches to problem solving. After all, this entire administrative process is an exercise in achieving results that improve the manner in which licensees and the government operate. I also recognize that novelty, solely for the sake of novelty, is not a meritorious goal.

In principle, I fully agree that an Administrative Law Judge has the implied authority to fashion a remedy such as an ROC. Not all of my colleagues are with me. In actuality and in a very subtle manner, I have already applied rudimentary ROC’s any number of times.

By way of example, where a licensee has been adjudicated as having violated the regulation prohibiting amplified sound from escaping the premises multiple times, a licensee may assert the practice of having live bands has ceased. The licensee takes that action to mitigate the penalty. Invariably, I accept the licensee’s promise when fashioning a penalty.

The result is an informal contract in which the licensee commits to no more live music and I condition a lower penalty based on that commitment. There is no formal document evidencing the mutual promises but they are present nonetheless.

ROCs As They Relate To Conditional Licensing Agreements² (CLA)

Were I to strip this ROC of its formal trappings and do the same for a Conditional Licensing Agreement, the two might appear to be virtually the same. My ancient Greek mentor, Arcesilaus, now reminds me of his most remarkable insight. The more conditions are included in an ROC, the more onerous and oppressive the document becomes. Furthermore, no matter how careful the drafter may be in an effort for precision, the greater the verbiage, the more likely there will be interpretive issues.

A lengthy and complicated ROC, also may place into question the voluntariness of a licensee's consent. It is true, whether by ROC or CLA, a licensee may be faced with a Hobson's choice, a take it or leave it governmental offer. That difficulty ordinarily will not vitiate the voluntary nature of a licensee's decision to agree to an ROC or CLA.

At some point, when the choice is between license revocation and agreeing to restrictions (ROC) or a refusal to renew (the licensing equivalent to revocation) unless restrictions apply (CLA), a cogent argument can be made the licensee's agreement could not be voluntary.

When restrictions are numerous, vague, oppressive, unrelated to the behavior requiring correction, or arbitrary, the line between coercion and free choice is blurred. We ought not to forget, when an ROC or CLA is approved, the restrictions have the full force and effect of law. It is as if the Legislature enacted special rules to apply to only one licensee.

2. An Agreement altering a licensee's operating authority and entered into by a licensee and the Pennsylvania Liquor Control Board pursuant to the authority granted the Pennsylvania Liquor Control Board via the Liquor Code.

As a guiding principle, I view any ROC with more than five conditions as suspect. The conditions must be few, concise, clear and readily enforceable. Careful thought must be given to construct conditions which bear some reasonable relationship to the rules a licensee has been violating. A ROC ought to be cobbled together with precision tools and the most careful planning. Otherwise, the ROC will resemble a chaotic jumble of unintelligible restrictions.

This ROC

It is with the above general background that I evaluate the ROC presented for my endorsement in this matter. Before doing so, I admit I am not one who supports ROC's for a matter such as this. Perhaps that is why none of the eight conditions impresses me as vital. Nevertheless, I owe the parties some explanation as to why each requirement is unnecessary.

The Unrepresented Licensee

I first recognize Licensee has not retained counsel. It is true, a person may choose to respond to any legal process without counsel; that individual ought not to be given any special treatment as a result of that choice. That principle is balanced by the responsibility a judicial officer has to ensure an unrepresented litigant is afforded full and fair treatment. There is a constant tension between these competing values. In this matter, the lack of legal representation in relationship to the issues warrants heightened judicial scrutiny.

Condition No. 1

The ROC mandates that Licensee use a transaction scan device to verify the majority of every customer upon every entry onto the premises. Simply put, that requirement is oppressive. Why require a licensee to verify the age of a customer more than once? Once confirmed, majority never changes. I see no rational governmental interest in imposing such a burden particularly when the breach thereof may result in further sanctions which theoretically includes license revocation.

Condition No. 2

The Bureau asks that I require Licensee use a transaction scan device to verify age and further demands the device record and maintain very specific data. The use of a transaction scan device represents an element of a statutory, affirmative defense. I see no benefit in elevating that defense to an affirmative duty. If Licensee chooses to serve customers of questionable age, without any affirmative defense procedures, I may very well see Licensee again for serving a minor. Licensee's choice to disregard establishing the age of a purchaser may serve to increase the penalty I impose.

Conditions No. 3 and 4

The Bureau wants Licensee to maintain transaction scan device records for two years and provide access to the Bureau to inspect those records. These provisions do nothing but repeat that which is already in the Liquor Code.

Conditions No. 5, 6, 7

For those who present identification other than a Pennsylvania Photo driver's license, the Bureau suggests I compel Licensee to scan the presented identification and require a secondary photo identification card which includes the customer's signature (Condition 5).

When viewed in conjunction with Conditions 6 and 7,³ this requirement is rather silly. If Licensee is complying with Conditions 6 and 7, then why impose Condition 5 at all?

Conditions 6 and 7 are unrelated to the behavior at issue. Adjudications of record have nothing to do with attempts by out of state individuals to purchase alcoholic beverages at the licensed premises. Additionally, my comments regarding raising an affirmative defense to an affirmative responsibility, under the heading Condition 2, apply here.

All three conditions do not assist Licensee in avoiding further violations and do nothing to further the government's interest in that regard.

Condition No. 8

The Bureau suggests I require Licensee have each server trained through the Responsible Alcohol Management Program (R.A.M.P.). I initially thought the proposal was acceptable. After more studied thought, I have concluded otherwise. I see any number of pitfalls in that condition which renders it difficult to monitor. What if, for example, a new employe becomes ill and cannot participate in the training program within the prescribed time limit. Is that a true violation of the Condition? There are too many variables that might legitimately impact on compliance with that condition. Once again, Arcesilaus, whispers in my ear that less is better.

3. Condition 6 commands Licensee to keep on its premises a Booklet, issued by the Pennsylvania Department of Transportation, which lists valid photo driver's licenses from all states and territories. Condition 7, requires Licensee to compare the foreign photo driver's license to these in the Booklet.

PRIOR RECORD:

Licensee has been licensed since December 14, 2005, and has had two prior violations (Commonwealth Exhibit No. B-3, N.T. 5):

Adjudication No. 07-3132C. Fine \$1,250.00 and
R.A.M.P. compliance for one year.
Sales to a minor.
November 24, 2007.

Adjudication No. 08-0686C. Fine \$1,250.00 and
R.A.M.P. compliance for one year.
Sales to a minor.
February 20, 2008.

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 \$1,000.00 or more than \$5,000.00 or both for violations of the type found in this case.

Further, Section 471(c) of the Liquor Code [47 P.S. §4-471(c)] requires that the penalty imposed include license revocation or suspension where the violation in question is the third or subsequent violation of any of the offenses referred to in subsection 471(b) of the Liquor Code [47 P.S. §4-471(b)] and/or the Crimes Code within a four year period. The following Adjudications (07-3132C and 08-0686C), in combination with the charge in this citation, requires that license revocation or suspension must be included as part of the penalty.

In addition to the ROC, the Bureau recommends a fine of \$2,500.00 and a 35 days suspension. When this matter crossed my desk, I was surprised by what I thought was a shockingly extreme sanction. Out of concern that my penalty assessment calibration system desperately needed adjustment, I discussed the recommended penalty with several colleagues. They too, could not endorse the recommendation.

At the hearing, I had an opportunity to talk to Mr. C. He impressed me as one who is endeavoring to obey the law but has not yet discovered a workable method to control Licensee's employes.

This matter is one which lends itself to the use of criminal law concept of probation. In this setting, I view probation as a way to reward Licensee for future compliance with the law.

Accordingly, I will impose a \$2,000.00 fine and a fifteen days suspension. However, I vacate and hold in abeyance fourteen days of that suspension. In the event Licensee successfully operates for one year from the mailing date of this Adjudication without violating Liquor Code Section 493(1) [47 P.S. §4-493(1)] as it relates to minors, I will then issue a further Order permanently vacating the fourteen days suspension.

I also order Licensee to comply with the requirements set forth in Liquor Code Section 471.1 [47 P.S. §4-471.1], pertaining to Responsible Alcohol Management, for a period of one year.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$2,000.00 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.

Imposition of Suspension

IT IS FURTHER ORDERED that the Restaurant liquor license (including all permits) of Naples Pizza, Inc., t/a Naples Pizza, License No. R-SS-10212, be suspended for a period of fifteen days. I temporarily vacate fourteen days of that suspension. In the event Licensee successfully operates for one year from the mailing date of this Adjudication without violating Liquor Code Section 493(1) [47 P.S. §4-493(1)], as it relates to minors, I will then issue a further Order permanently vacating those fourteen days suspension.

IT IS FURTHER ORDERED THAT at this time, Licensee serve a one day suspension beginning at 7:00 a.m., Monday, April 27, 2009 and ending at 7:00 a.m., Tuesday, April 28, 2008.

Licensee is directed, on Monday, April 27, 2009, at 7:00 a.m., to place a placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised, if replacement placards are needed for any reason, they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized, on Tuesday, April 28, 2009, at 7:00 a.m., to remove the placard of suspension and return its license to its original wall location.

R.A.M.P. Requirements

IT IS FURTHER ORDERED that Licensee shall comply with the requirements set forth in Liquor Code Section 471.1 pertaining to Responsible Alcohol Management in the following manner. Licensee must remain in compliance for a period of one year from the mailing date of this Adjudication.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 17TH day of February, 2009.



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, Pennsylvania 17110-9661