

Mailing Date: FEB 08 2010

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-2212
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W06-376219
v.	:	
	:	LID - 50379
ROBERT F. PESARCHICK	:	
ROBERT S. PANCHER	:	
T/A ROB'S SIX PACK SHACK	:	
257 S. MARKET ST.	:	
SHAMOKIN, PA 17872-5830	:	
	:	
NORTHUMBERLAND COUNTY	:	
LICENSE NO. R-SS-9992	:	

**BEFORE JUDGE FLAHERTY  
BUREAU COUNSEL BALLARON  
LICENSEE: DAVID B. MARATECK, ESQUIRE**

**ADJUDICATION**

**BACKGROUND:**

This proceeding arises out of a citation that was issued on September 25, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against ROBERT F. PESARCHICK & ROBERT S. PANCHER, License Number R-SS-9992 (hereinafter "Licensee").

The citation contains two counts.

The first count charges Licensees with violation of Sections 401(a) and 407(a) of the Liquor Code [47 P.S. §§4-401(a) and 4-407(a)] in that on June 29, 2008, Licensees, by their servants, agents or employes, sold malt or brewed beverages in excess of 192 fluid ounces in a single sale to one person for consumption off premises.

The second count charges Licensees with violation of Section 3.52(c) of the Liquor Control Board Regulations [40 Pa. Code §3.52(c)] in that on June 29, 2008, Licensees, by their servants, agents or employes, operated another business on the licensed premises without Board approval.

The investigation which gave rise to the citation began on June 13, 2008 and was completed on August 27, 2008; and notice of the violation was sent to Licensee by Certified Mail on September 4, 2008. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on April 28, 2009 in the PA Dept. of Agriculture, 2130 County Farms Road, Montoursville, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

COUNTS 1 AND 2

1. On June 29, 2008, an officer of the Bureau arrived at the licensed premises to conduct an undercover investigation. Upon entering the officer observed a female heard to be called Shannon behind the counter taking orders (N.T. 7).
2. The officer placed a food and beverage order (N.T. 7).
3. The officer observed a sign taped to the top of the bar counter which stated, "PA Fireworks for sale here." The officer asked Shannon what fireworks were being sold, and she pointed to boxes that were located above gambling machines on the far side of the bar (N.T. 7-8).
4. The officer observed two boxes of fireworks, smaller sizes that were \$20.00 each and larger boxes which were \$40.00 each, all containing different types of fireworks (N.T. 7-8).
5. The sign and fireworks were on the licensed premises to draw the attention of customers to a large tent which had been set up on the sidewalk outside the licensed premises where the fireworks were actually being sold. No fireworks were actually sold on the licensed premises (N.T. 32-33).
6. While on the licensed premises, the officer observed a male patron enter the licensed premises. He went to an upright cooler and retrieved two 12-packs of 12-ounce bottles of Yuengling Lager beer (N.T. 9). The patron took the two 12-packs to the counter and gave the counter person an undetermined amount of currency. The sale was rung up on the cash register (N.T. 9).

7. The officer heard Shannon say, "Only because it's you, but you still have to take one out at a time." (N.T. 9-10).

8. The customer picked up one case of beer, and took it outside. He then came back into the licensed premises, retrieved the second case of beer and left the establishment (N.T. 9).

CONCLUSIONS OF LAW:

1. The charge in Count No. 1 of the citation is **sustained**.
2. The charge in Count No. 2 of the citation is **dismissed**.

DISCUSSION:

COUNT 1

There was a factual dispute at the hearing as to whether or not the patron who purchased the two 12-packs of Yuengling Lager beer paid for each 12-pack separately. However, in either case, the actual intention of the parties was for the purchase of 288 fluid ounces of malt or brewed beverages for consumption off the premises. Count No. 1 of the citation is, therefore, sustained.

Section 442(a)(1) of the Liquor Code [47 P.S. §4-442(a)(1)] provides in part:

...No retail dispenser may sell malt or brewed beverages for consumption off premises in quantities in excess of 192 fluid ounces; ...

Licensee contends that the events in question amounted to two separate sales, each under 192 fluid ounces, and, therefore no violation occurred. I disagree.

The issued presented here was addressed by Administrative Law Judge Thau in *Thomas E. D'Andrea*, Citation No. 88-1218, V Sel. Op. 169. In that case Judge Thau, citing the Statutory Construction Act [1 Pa. C.S. §1922(1)] and the interpretational directives of Liquor Code Section 104 [47 P.S. §1-104], indicated that a statute is not to be interpreted in a manner which renders it meaningless. In support of this position, Judge Thau cited *Commonwealth Liquor Control Board v. Starr*, 318 A.2d 763 (Pa. Cmwlth 1974), affirmed *Commonwealth Liquor Control Board v. Starr*, 337 A.2d 914 (Pa. Cmwlth 1975); and *In re: School District of Pittsburgh*, 244 A.2d 42 (Pa. 1968).

Judge Thau further indicated that to accept licensee's position in that case, which is the same as Licensee's position in this case, would allow a person to purchase a large quantity of beer so long as the transaction was broken down into separate segments, each less than 192 fluid ounces. Such an interpretation renders the statutory provision in question meaningless.

I agree with Judge Thau that only those separate transactions which are entered into in good faith and not in an attempt to circumvent the statute should be considered legitimate.

In this case, the patron placed two 12-packs of 12-ounce cans of beer on the counter simultaneously. At this point the customer tendered money to the counter person in payment for the beer. It is only at this point that a feeble attempt is made to portray the sale of beer as two transactions when the counter person asks the customer to carry out the parcels separately.

Even if two separate payments were made for each of the 12-packs, it is clear that the parties intended one sale and purchase of 288 fluid ounces of beer at one time. Based upon the foregoing, I conclude that the charge in the citation is sustained.

COUNT 2

As Licensee was not actually conducting another business on the licensed premises, the charge in Count 2 of the citation must be dismissed.

Section 3.52(c) of the Liquor Control Board Regulation [40 Pa. Code §3.52(c)] states:

A licensee may not conduct another business on the licensed premises without Board approval.

In this case no separate business was being conducted on the licensed premises. While Licensee had fireworks displayed on the licensed premises, together with a sign indicating that they were for sale, the fireworks were actually being sold in a tent outside the licensed premises. No sales of fireworks actually took place within the licensed premises.

It is, therefore, clear that Licensee was not conducting another business on the licensed premises, and, therefore, did not need Board approval.

Based on the foregoing, I conclude that Count 2 of the citation must be dismissed.

PRIOR RECORD:

Licensee has been licensed since August 20, 2003, and has had five prior violations:

Citation No. 05-1576. Fine \$550.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises (machines). June 22, 2005.

Citation No. 06-0619. Fine \$1,250.00.

1. Sales to a minor. February 15, 2006.

Citation No. 06-0664. Fine \$200.00.

1. Sold malt or brewed beverages in excess of 192 fluid ounces in a single sale to one person for consumption off premises. February 15, 2006.

Citation No. 06-2354. Fine \$600.00.

1. Sold malt or brewed beverages in excess of 192 fluid ounces for consumption off premises. August 15, 2006.

Citation No. 08-0962. Fine \$750.00.

1. Sold malt or brewed beverages in excess of 192 fluid ounces for consumption off premises. March 14, 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 \$50.00 or more than \$1,000.00 or both for violations of the type found in this case.

Under the circumstances of this case, the penalty imposed shall be as follows:

Count 1 - \$900.00 fine  
Count 2 – Dismissed

ORDER

THEREFORE, it is hereby ordered that Licensee ROBERT F. PESARCHICK & ROBERT S. PANCHER, pay a fine of \$900.00 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.

IT IS FURTHER ORDERED that Count No. 2 of the citation be **DISMISSED**.

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 19<sup>TH</sup> day of January, 2010.



Daniel T. Flaherty, Jr., J.

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**MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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 submit stub with payment**

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The fine must be paid by Treasurer's Check, Cashier's Check or Certified Check. **Personal checks, which includes business-use personal checks, are not acceptable.** Make 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. 08-2212  
Robert F. Pesarchick &  
Robert S. Pancher