

Mailing Date: NOV 05 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-3060
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-384642
	:	
LARK'S BLUE BIRD BAR	:	
INCORPORATED	:	LID - 16863
5527 BALTIMORE AVE.	:	
PHILADELPHIA PA 19143-2841	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-14645	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

ERIK S. SHMUKLER, ESQ.

FOR THE LICENSEE:

EX PARTE

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on January 6, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Lark's Blue Bird Bar, Incorporated, License Number R-AP-SS-14645 (hereinafter "Licensee").

An Administrative hearing was held on Thursday, May 7, 2009, pursuant to requisite and appropriate hearing notice. Despite notice of the hearing having been sent to the Licensee, the Licensee failed to appear. Therefore, the hearing proceeded *ex parte*.

The citation contains two counts.

The first count charges Licensee with violation of Sections 491(1), 492(2), 492(3) and 493(16) of the Liquor Code, 47 P.S. Sections 4-491(1), 4-492(2) 4-492(3) and 4-493(16), in that on November 26, 2008, Licensee, by its servants, agents or employes, sold alcoholic beverages after the Restaurant Liquor License expired on October 31, 2008 and had not been renewed and/or validated.

The second count charges Licensee with violation of Sections 407(b)(1) of the Liquor Code, 47 P.S. Section 4-407(b)(1), in that on November 26, 2008, Licensee, by its servants, agents or employes, sold malt or brewed beverages for consumption off premises.

COUNT NOS. 1 AND 2

FINDINGS OF FACT:

1. The Bureau of Enforcement conducted an investigation of the licensed premises which began on November 18, 2008 and ended on December 8, 2008. A notice of violation letter was sent to the licensed premises by certified mail, return receipt requested on December 10, 2008. On December 19, 2008, an amended notice of violation letter was sent to the licensed premises by certified mail, return receipt requested. That mailing added an additional charge. The mailing was signed as received on December 20, 2008. A citation was sent to the licensed premises by certified mail, return receipt requested on January 6, 2009. That mailing was stamped "returned to sender" as unclaimed. The Office of Administrative Law Judge sent a citation hearing notice to the licensed premises on March 19, 2009 by certified mail, return receipt requested, and by first class mail. That mailing was returned unclaimed (N.T. 8-15).

2. An officer from the Bureau of Enforcement was assigned as investigation of the licensed premises on November 18, 2008. Before visiting the licensed premises, he checked the Pennsylvania Liquor Control Board database on Wednesday, November 26, 2008 and found that the license status was "inactive." On November 26, 2008 at approximately 7:55 p.m., he and another Enforcement officer entered the licensed premises. He noted that there was a female bartender on duty (N.T. 5-6).

3. The officer approached the bar and ordered a twelve ounce can of Coors Light beer. The bartender asked if it was for there or to go. The officer told her it was "to go" and she put it in a brown paper bag. The officer paid the bartender \$1.50 for the alcoholic beverages. The officer observed her place the money into a working cash register behind the bar. The officer observed no further violations, therefore, he departed the premises at 8:00 p.m. (N.T. 6).

4. On Monday, December 1, 2008, the officer contacted the Pennsylvania Liquor Control Board to confirm that the Restaurant Liquor License was inactive and requested certification of the same. Certified records from the Pennsylvania Liquor Control Board indicate the license expired October 31, 2008 and that they had no valid license or temporary authority to operate on November 26, 2008 (N.T. 7 and Exhibit B-3).

5. Certification from the Pennsylvania Liquor Control Board indicates that the licensee did not possess a valid off premises sales premises on November 26, 2008 (Exhibit B-4).

CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

Count No. 1 - On November 26, 2008, Licensee, by its servants, agents or employes, sold alcoholic beverages after the Restaurant Liquor License expired on October 31, 2008 and had not been renewed and/or validated, in violation of Sections 491(1), 492(2), 492(3) and 493(16) of the Liquor Code, 47 P.S. Sections 4-491(1), 4-492(2) 4-492(3) and 4-493(16).

Count No. 2 - On November 26, 2008, Licensee, by its servants, agents or employes, sold malt or brewed beverages for consumption off premises, in violation of Sections 407(b)(1) of the Liquor Code, 47 P.S. Section 4-407(b)(1).

PRIOR RECORD:

Licensee has been licensed since October 21, 1974, and since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, has a record of prior violations as follows:

Citation No. 06-0582. \$400.00 fine.

1. Possessed or operated gambling devices or permitted gambling on the licensed premises.
January 30, 2006.

Citation No. 08-2249. \$500.00 fine.

1. Operated the licensed establishment without a valid health permit or license.
August 27, 2008.
2. Not a bona fide restaurant in that food items, eating utensils, dishes and seating were insufficient.
August 27, 2008.

DISCUSSION:

Certified records from the Pennsylvania Liquor Control Board indicate that the license expired on October 31, 2008 and Licensee did not possess a valid liquor license or temporary authority to operate on November 26, 2008 when the officer made a purchase of beer. In addition, certified records from the Pennsylvania Liquor Control Board indicate that the Licensee did not possess a valid off premises sales permit on November 26, 2008.

Section 4-407(b)(1) (2006) requires that a restaurant licensee located in the city of a first class who is otherwise permitted to sell malt or brewed beverages for consumption off premises may not do so after October 31, 2007 unless it acquires a permit from the Board. In the case of *5708 K & T, Inc. v. Pa. Liquor Control Board*, 951 A.2d 1232 (Pa. Cmwlth. 2008), the trial Court reversed the decision of the Pennsylvania Liquor Control Board which sustained citations issued to an applicant for violation of Section 407 (2005) because the citations were based upon the unconstitutional process in Section 4-407 (2005).

At the time of this offense, that is to say November 26, 2008, Section 4-407 (2006) was the controlling law. The prescribed hearing procedure is different from the prior procedure, and seems to answer the problems identified by the court in *USA Deli*. There has been no appellate decision regarding the new procedure. Therefore, it appears that the provision is valid and enforceable and requires licensees in the city of the first class to acquire a permit for sales of brewed beverages for consumption off premises after October 31, 2007.

Here, the greater issue is that Licensee had no authority to sell beer on or off the premises because their license was inactive.

Under the circumstances, a monetary penalty shall be imposed.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$50.00 or more than \$1,000.00, or both, for violations of the type found in Count No. 2 of this case.

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$1,000.00 or more than \$5,000.00, or both, for violations of the type found in Count No. 1 of this case.

Therefore, penalties shall be assessed as follows:

Count No. 1 - \$1,000.00.
Count No. 2 - \$250.00.

Accordingly, we issue the following

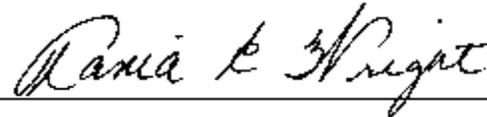
Lark's Blue Bird Bar, Incorporated
Citation No. 08-3060

ORDER:

THEREFORE, it is hereby Ordered that Licensee, Lark's Blue Bird Bar, Incorporated, License Number R-AP-SS-14645, pay a fine of One Thousand Two Hundred Fifty Dollars (\$1,250.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

In order to insure compliance with this Order, jurisdiction of this matter is retained.

Dated this 27TH day of October, 2009.



Tania E. Wright, J.

NOTE: 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.

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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, along with any required documentation, to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

Citation No. 08-3060
Lark's Blue Bird Bar, Incorporated