

Mailing Date: July 22, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 09-0391
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

TIMMY’S CORPORATION : License No. D-2069
5840 Harbison Avenue :
Philadelphia, PA 19135-4046 : LID 54892
:

Counsel for Licensee: Stewart J. Berger, Esquire
Law Offices of Stewart J. Berger, P.C.
7207 Rising Sun Avenue
Philadelphia, PA 19111

Counsel for Bureau: Erik S. Shmukler, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue, Third Avenue
Philadelphia, PA 19142

OPINION

Timmy’s Corporation (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ sustained Citation No. 09-0391 and imposed a suspension of the liquor license for a period of three (3) days.

The citation charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(a)] in that on January 31, 2009, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcohol beverages to one (1) male minor, twenty (20) years of age.

On appeal, Licensee contends that since the same minor came into the licensed premises on two (2) prior occasions and bought alcohol with false identification that made the minor appear to be twenty-two (22) years old, the same result would have occurred if the minor was asked for identification on January 31, 2009. Licensee argues that the law does not require a useless act, since if the minor was purportedly twenty-two (22) years of age on December 12, 2008 and again on December 20, 2008, it was impossible for him to be under twenty-two (22) years of age on January 31, 2009. Accordingly, Licensee opines that the appeal should be granted and the citation be vacated.

Pursuant to section 471 of the Pennsylvania Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Pennsylvania Liquor Control Board (“Board”) shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if

his/her decision was not based upon substantial evidence. The Commonwealth Court defined “substantial evidence” to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers’ Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

The Board has reviewed the record, including the ALJ’s Adjudication and Order, Licensee’s Appeal of ALJ’s Adjudication and the hearing transcript with Licensee’s contention in mind.

The record reveals the following relevant facts: On January 31, 2009, Liquor Enforcement Officer John Bernasky (“Officer”) visited the licensed premises at approximately 8:30 p.m. [N.T. 6]. On or about 9:45 p.m., the Officer observed Andrew Shaeffer (“minor”) enter the licensed premises. [N.T. 6]. The Officer then walked towards the licensed premises and saw the minor make a transaction. [N.T. 7]. The minor then exited the licensed premises with three (3) cases of beer. [N.T. 7]. The Officer approached the minor, introduced himself, and requested that the minor produce identification. [N.T. 7]. Upon questioning, the minor indicated that his date of birth was December 21, 1988,

and that he was twenty (20) years old. [N.T. 7, 13]. The minor indicated that he did not produce identification in the licensed premises because he was not asked to do so. [N.T. 7]. Upon further questioning by the Officer, the minor admitted that he has been in the licensed premises before and had used a false identification to purchase alcohol. [N.T. 7]. The Officer issued the minor a citation and then talked to the Licensee's manager, John Liu, at the licensed premises. [N.T. 7]. Mr. Liu explained to the Officer that he recognized the minor from being in the premises in the past, and the minor had used identification indicating he was twenty-two (22) years old, and accordingly, Mr. Liu did not feel it was necessary to ask for identification on this particular date. [N.T. 8, 21-24].

The record also indicates that the minor was in the licensed premises on December 12 and 20, 2008, and had used the Pennsylvania driver's license of his brother, Corey Shaeffer, whose date of birth is August 3, 1986.¹ [N.T. 16-17]. Mr. Liu stated that Corey Shaeffer and the minor look alike. [N.T. 24]. Furthermore, the minor admitted that on January 31, 2009, he purchased three (3) cases of beer without being asked for identification or to sign anything by Licensee.

¹ Copies of scanned receipts from Licensee's identification machine on the premises were admitted to support the dates and presence of Corey or Corey's identification card. [N.T. 18].

[N.T. 15]. The minor also did not recall having his false identification photocopied in the past. [N.T. 15]. The minor did not have his brother's driver's license on his person on January 31, 2009. [N.T. 15].

Licensee argues that since the minor used false identification in the past, regardless of whether Mr. Liu asked for identification on January 31, 2009, the same result would have occurred. Licensee contends that it is impossible for someone who was twenty-two (22) years old in the past to become a minor and that the law does not require useless acts. This argument is not a valid defense and in the instant case, if the minor were asked to produce identification, Licensee would have learned that he was underage since he did not have the false identification with him on January 31, 2009.

Section 493 of the Liquor Code makes it unlawful for a licensee to sell liquor, malt or brewed beverages to a minor. [47 P.S. § 4-493(1)]. There are four (4) forms of identification acceptable as proper proof of age under the Liquor Code: a valid photo driver's license or identification card issued by the Department of Transportation or by any other state, a valid armed forces of the United States identification card, or a valid photo passport or travel visa issued by the United States or a foreign country [47 P.S. § 4-495(a)]. A minor's

deception in presenting a false photo driver's license does not relieve a licensee from its obligation to require a minor to present identification and to fill in and sign a declaration of age card under subsection 495(e), or to photograph, photocopy, etc. the identification card under subsection 495(f), or use a transaction scan device under subsection 495(g). The courts have consistently held that the Code provides only one defense against prosecution for services to minors -- compliance with section 495. 146, Inc. v. Pennsylvania Liquor Control Board, 107 Pa. Cmwlt. 79, 527 A.2d 1083, 1085 (1987). To allow a licensee to escape the consequences of the illegal sale by claiming deception would render the Liquor Code a nullity. Id. citing GTRT, Inc. Liquor License Case, 78 Pa. Cmwlt. 584, 586-87, 467 A.2d 1233, 1234 (1983).

In the instant case, Licensee did not request any form of identification from the minor on January 31, 2009. Given that this is not Licensee's first incident of selling alcohol to a minor, it would seem prudent for Licensee to be taking extra precautions to prevent such citations.² Licensee did not adequately protect itself from fraud and/or present a valid defense to its actions and/or inactions. Applying the foregoing law to the facts of this case,

² Licensee was issued citations, and appropriate penalties, for selling to minors on October 15, 2005 and December 8, 2007.

the Board concludes that the ALJ did not commit an error of law or abuse his discretion, and his decision was based upon substantial evidence.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is denied.

The three (3) day suspension has been served.

Board Secretary