

Mailing Date: NOV 30 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1603X
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W04-394933
	:	
BRASS MONKEY INC	:	
428 N STATE ST	:	LID-57639
CLAIRTON PA 15025-2178	:	
	:	
	:	
ALLEGHENY COUNTY	:	
LICENSE NO. R-AP-SS-EHF-3855	:	

ADJUDICATION

JUDGE: ROBERT F. SKWARYK

APPEARANCES:

BUREAU COUNSEL: Nadia L. Vargo, Esq.
LICENSEE COUNSEL: Michael F. Fives, Esq.

BACKGROUND:

This proceeding arises out of a citation that was issued on July 10, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Brass Monkey, Inc., License Number R-AP-SS-EHF-3855 (hereinafter Licensee).

The citation charges Licensee with violation of Section 493(26) of the Liquor Code [47 P.S. §4-493(26)], in that Licensees, by their servants, agents or employees, issued checks or drafts dated May 13, 2009, in payment for purchases of malt or brewed beverages, when Licensee had insufficient funds in, or credit with, the institution upon which drawn for payment of such checks.

The investigation which gave rise to the citation began on May 29, 2009 and was completed on June 9, 2009. The notice of violation letter was mailed to Licensee on June 23, 2009.

An evidentiary hearing was held on this matter on October 27, 2009, in Pittsburgh, Pennsylvania.

Upon review of the transcript of the hearing and the Pre-Hearing Memorandum, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. Licensee is located in Allegheny County, Pennsylvania and holds Restaurant Liquor license number R-AP-SS-EHF-3855. (N.T. 4)
2. On May 13, 2009, Licensee issued check number 2682 in the amount of \$215.79 to wholesale distributor, Tony Savatt, Inc. in payment for purchases of malt or brewed beverages.
3. On May 15, 2009, Licensee's check number 2682 was dishonored by Licensee's bank due to insufficient funds in the account. (N.T. 8- 9, 12-14, 18, Exhibits C-6 & C-7).
4. On Tuesday, May 26, 2009, check number 2682 was satisfied by redeposit. (N.T. 9, 14)
5. On Thursday, June 11, 2009, the Bureau issued a warning letter to Licensee for insufficient fund check number 2627. (N.T. 14-15, 18, Exhibit C-5)
6. Licensee's online bank statement indicates that on May 15, 2009, there were sufficient funds to cover check number 2682. (N.T. 30, Exhibit L-1)

CONCLUSION OF LAW:

The Bureau did not show by a clear preponderance of the evidence that Licensee issued check number 2682 with insufficient funds in his account. Citation No. 09-1603X is DISMISSED.

DISCUSSION:

The burden of proof is on the Bureau to show by a clear preponderance of the evidence that a violation of the Liquor Code occurred. Pa. Liquor Control Board v. PPC Circus Bar, Inc., 506 A.2d 5211(Pa. Cmwlth. 1986); In Re: Omicron Enterprises, 449 A.2d 857(Pa. Cmwlth. 1982).

Section 493(26) of the Liquor Code provides as follows:

It shall be unlawful—

Worthless checks. For any retail liquor licensee or any retail dispenser, distributor or importing distributor, to make, draw, utter, issue or deliver, or cause to be made, drawn, uttered, issued or delivered, any check, draft or similar order, for the payment of money in payment for any purchase of malt or brewed beverages, when such retail liquor licensee, retail dispenser, distributor or importing

distributor, has not sufficient funds in, or credit with, such bank, banking institution, trust company or other depository, for the payment of such check. Any person who is a licensee under the provisions of this article, who shall receive in payment for malt or brewed beverages sold by him any check, draft or similar order for the payment of money, which is subsequently dishonored by the bank, banking institution, trust company or other depository, upon which drawn, for any reason whatsoever, shall, within five days of receipt of notice of such dishonor, notify by certified mail the person who presented the said worthless check, draft or similar order. If the violation of this clause is the first such violation by the licensee that calendar year involving a check, draft or similar order from the purchaser to the seller and if the check, draft or similar order is subsequently honored within ten (10) days from the day it was made, drawn, uttered, issued or delivered, then the enforcement bureau shall issue an administrative warning in lieu of citation.

At the hearing held on the matter, the enforcement officer testified as to his investigation. An officer from Tony Savatt, Inc., testified that on May 14, 2009 they delivered twenty cases of beer to the licensee and received check number 2682 in the amount of \$215.79, which was pre-dated May 13, 2009. (Exhibit L-6). The check was returned by Licensee's bank marked "Insufficient Funds." (Exhibit C-7). It was resubmitted and cleared on May 26, 2007. (Exhibit L-1).

Licensee's president testified that it was a bank error, and the bank refunded his \$34.00 overage fee. A copy of Licensee's online bank account was entered as Exhibit L-1. Neither the Bureau nor Licensee's counsel subpoenaed the Bank or its records.

I find the testimony of all witnesses to be credible. Also, I find that Licensee rebutted the Bureau's evidence and testimony and showed that he had sufficient money in his account to satisfy check number 2682 on May 15, 2009. The bank dishonored the check in error.

As such, the citation is DISMISSED.

JURISDICTION IS RETAINED UNTIL CASE IS CLOSED.

Dated this 20TH day of November, 2009.



Robert F. Skwaryk, J.