Mailing Date: JUL 30 2012

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT (BLCE)	: : : :	In Re Citation No.: 10-1508 BLCE Incident No.: W02-414330
v.	: : :	
PZF SOUTH MAIN STREET, W.B.-1, INC. T/A PIZZA FELLAS 395 S. MAIN ST. WILKES-BARRE, PA 18701-2202	: : : :	PLCB LID No.: 49052 PLCB License No.: R-SS-EHF-15423

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Craig A. Strong, Esquire

FOR LICENSEE: Sal Cognetti, Jr., Esquire

BACKGROUND:

This proceeding arises out of a citation, containing one count, that was issued on July 26, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against PZF South Main Street, W.B.-1, Inc. (Licensee).

The citation charges Licensee with violations of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that Licensee, by your servants, agents, or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, eighteen (18) years of age, on June 5 and 12, 2010.[1]

I presided at an evidentiary hearing on June 28, 2012 at 100 Lackawanna Avenue, Scranton, Pennsylvania.

Therefore, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

1. The Bureau began its investigation on June 9, 2010 and completed it on June 12, 2010. (N.T. 5)

2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested, on July 9, 2010. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 4)

3. On June 12, 2010, an eighteen year old (born August 15, 1991) entered the licensed premises. He ordered a beer from the sales clerk, who questioned him as to age. The minor presented a counterfeit photo driver's license purportedly issued by West Virginia (ID). (N.T. 8-9)

4. The minor purchased the ID in an illegal market. He supplied his photograph which was placed on the ID. (N.T. 17-19)

5. The sales clerk ran the ID through a transaction scan device, which did not register a reading for the ID. The sales clerk then inspected the ID under a black light after which she sold the minor beer. (N.T. 34-35)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

[1] The Bureau motioned to withdraw the June 5, 2010 date. I granted the motion. (N.T. 29)

2. I sustain the violation as charged.

DISCUSSION:

Introduction

After a lengthy colloquy between Licensee's counsel and me during the hearing, counsel promised he would submit a brief in support of the argument that Licensee acted in good faith thus requiring the citation be dismissed. Counsel fulfilled his commitment.

For the most part, counsel's argument is philosophical. Being disposed in that direction, I fully appreciate the value in counsel's, short, but incisive journey into the ethereal. However, as an Administrative Law Judge, I am not blessed with the luxury of lingering in that realm. My head may be in the clouds but my feet must be solidly touching the ground.

The Liquor Code provides licensees with three, alternative affirmative defenses to neutralize a proven charge of selling alcoholic beverages to a minor. All three include the requirement of good faith, a term the Liquor Code does not define.

Consequently, I set upon an effort to discover a universally accepted meaning for "good faith" in the law. Surely, I thought, a term so widely applied in any number of legal specialties must have been the subject of some description. I confirmed the expansive application of "good faith" in a variety of specialized jurisprudence. Surprisingly, I found virtually no guidance pointing to a general meaning. Intuition suggests this is so because of the assumption the meaning of commonly applied terminology is either widely understood or readily grasped.

Case Law

There are two decisions which directly inform this inquiry. The first is quite familiar to counsel. In **Skoritowski v. Pennsylvania State Police**, 742 A.2d 704 (Pa.Cmwlth. 1999), the Commonwealth Court engaged in statutory construction, specifically addressing Liquor Code Section 495(f) [47 P.S. §4-495(f)], relating to one affirmative defense for selling alcoholic beverages to a minor.

Senior Judge McCloskey emphasized the impact of three words in Liquor Code Section 495(f): "may be offered." He reasoned the intent of these words was to allow a finding of good faith absent the presentation of autoptic evidence. Put another way, the Commonwealth Court concluded a licensee is not burdened by having to produce the identification card, or a representation thereof, at the administrative hearing in order to establish good faith.

In **CSC Enterprises v. State Police**, 782 A.2d 57 (Pa.Cmwlth. 2001), the Commonwealth Court relied upon and extended the ruling in Skoritowski. Writing for the Court, Judge McGinley compared Liquor Code Section 495, regarding good faith, as it then existed to its previous structure. The comparison led Judge McGinley to conclude it was the Legislature's intent to eliminate the duty to produce the actual Declaration of Age Card, completed by a minor prior to a sale, at an administrative hearing in order to satisfy a licensee's burden of establishing an affirmative defense. In other words, an evaluation of good faith is not dependent upon presenting physical evidence.

Statutory Modifications

Subsequent to these rulings, the General Assembly again modified pertinent statutory provisions. In terms of legislative time, these modifications occurred rather swiftly after CSC was decided and in a manner that undeniably manifests an intent to place the rulings in Skoritowski and CSC in the no-longer-relevant category.

By Act 10 of 2002, the General Assembly modified Liquor Code Sections 495(e) and (f) [47 P.S. §4-495(e) and (f)] by removing the three words Senior Judge McCloskey relied upon in Skoritowski. The Act also added new subsections (g) and (h) to Liquor Code Section 495.

Liquor Code Section 495(e), in pertinent part, now provides:

> (e) No penalty shall be imposed on a licensee,… for serving alcohol to a minor if the licensee… can establish that the minor was required to produce an identification card as set forth in subsection (a), the minor completed and signed the form as set forth in subsection (c) **and** these documents were relied upon in good faith. (emphasis mine)

Liquor Code Section 495(f), in pertinent part, now provides:

> (f) In addition to the defense set forth in subsection (e), no penalty shall be imposed on a licensee,… for serving alcohol to a minor if the licensee… can establish that the minor was required to produce an identification card as set forth in subsection (a), a photograph, photocopy, or other visual or video **presentation of the identification card was made and** these documents were relied upon in good faith. (emphasis mine)

New Liquor Code Section 495(g) [47 P.S. §4-495(g)], in pertinent part, provides:

> (g) In addition to defenses set forth in subsections (e) and (f), no penalty shall be imposed on a licensee,… for serving alcohol to a minor if the licensee… can establish that the minor was required to produce an identification card as set forth in subsection (a), the identification card is identified as a valid card by a transaction scan device **and**[2] the identification card and transaction scan device results were relied upon in good faith. (emphasis mine)

Affirmative Defenses - Requirements

Good faith is not to be evaluated absent full compliance with all other affirmative defense elements. A licensee must now present the actual Declaration of Age Card or a photograph, photocopy, or other visual or video copy of the identification card at the administrative hearing.

In reciting relevant portions of Liquor Code Section 495 above, I emphasize the following: **presentation of the identification card was made**. A presentation is an act in the nature of a demonstration or display. In the context of Liquor Code Section 495(f), presenting an identification card by way of one of the alternative forms permitted must refer to the administrative hearing. The words, "was made," refer back to "presentation." In combination, these three words can only refer to a presentation at the administrative hearing. Otherwise, they make no sense.

If the legislative intent were no more than to require a licensee to copy an identification card in one of the forms required without having to produce that copy at an administrative hearing, a more appropriate choice would have been: a photograph, photocopy, or other visual or video representation of the identification card was made.

Application to Facts

Licensee provided testimony suggesting that Licensee complied with all three affirmative defenses. As to the first listed in the Liquor Code regarding completion of the Declaration of Age Card, I cannot accord Licensee's supporting testimony significant weight. Licensee's server testified that she "believed" she required the minor to complete a Declaration of Age Card. Consequently, I am unable to conclude a Declaration of Age Card was actually completed. Furthermore, Licensee did not produce a Declaration of Age Card, purportedly completed by the minor at this administrative hearing, a necessary element in the affirmative defense.

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[2] Some of the common and ordinary meanings of "and" are: in addition to, including, or also. Grammar and meaning, without comparing former statutory construction to the present, drive the conclusion that good faith is an additional requirement to those detailed in the Liquor Code.

The remaining two affirmative defenses are also problematic for Licensee. There is no question the ID the minor presented is of excellent quality, without visible blemish to the untrained eye. Unfortunately for Licensee, the video recording of the sale does not "present" the identification card. In order for Licensee to prevail, it is essential for the identification card to be readily identified as such in whatever facsimile form permitted by the Liquor Code and presented at the administrative hearing.

If the affirmative defense were intended to allow a depiction of the sale, subsection 495(f) would have been worded in a different manner. Subsection (f) demands a presentation, "of the identification card." A video presentation of the transaction in which it is impossible to see the identification card fails to meet the required standard.

Licensee cannot avoid liability by way of the third listed affirmative defense because the Liquor Code mandates that the transaction scan device identify the identification card as valid. In this matter, the ID produced no transaction scan device reading.

Good Faith

Assuming for purposes of completeness, Licensee complied with all prerequisites of the three affirmative defenses, I remain unable to find good faith. Returning to the beginning of this discussion in which I described my efforts to discern the meaning of good faith, I pose the question once again. Counsel's brief suggests that good faith is equivalent to good intentions. It is a seller's heart which controls good faith. The heart moves us in all sorts of directions but, without the brain as bridle, obeying the heart's every call is destructive.

Black's Law Dictionary defines "good faith" as: honesty of intention and freedom from knowledge of circumstances which ought to put a person upon inquiry. That definition combines the heart and head into a meaningful, observable, and measurable posture. Instantly, however well-intentioned the sales clerk may have been, when the ID failed to scan, that should have been enough to place the sales clerk on high alert. At that point, the sales clerk had knowledge which ought to have put her upon inquiry. The sales clerk's failure to respond to the obvious warning that a fictitious identification card might be in play defeats good faith.

PRIOR RECORD:

Licensee has been licensed since October 2, 2002, and has the following Adjudication history:

In Re Citation No.: 03-0085. Fine $150.00.
Operated the licensed establishment without a valid health permit or license on December 16, 2002.

In Re Citation No.: 03-0196. Fine $200.00.
1. Distributed handbills, price lists or circulars by mail to the general public off the licensed premises as a means of advertising alcoholic beverages on January 23, 2003.
2. Offered and/or gave things of value as an inducement to purchase alcoholic beverages on January 23 and 24, 2003.

In Re Citation No.: 03-0530. Fine $1,500.00.
1. Sales to a minor on February 28, 2003.
2. Sold malt or brewed beverages in excess of 192 fluid ounces in a single sale to one person for consumption off premises on February 28, 2003.

In Re Citation No.: 03-1959. Fine $100.00.
Issued worthless checks in payment for malt or brewed beverages dated September 8 and 9, 2003.

In Re Citation No.: 05-0182. Fine $2,100.00.
1. Sold malt or brewed beverages in excess of 192 fluid ounces in a single sale for consumption off premises on January 6, 2005.
2. Failed to constantly and conspicuously expose Restaurant Liquor License under a transparent substance on the licensed premises on January 6, 2005.
3. Sales to a minor on January 6, 2005.

In Re Citation No.: 05-0455. Fine $2,300.00 and 1 day suspension.
1. Sales to minors on February 11 and 12, 2005.
2. Sales in excess of 192 fluid ounces in a single sale for consumption off premises on January 29 and February 11, 2005.

In Re Citation No.: 07-2594. Fine $2,500.00, 1 day suspension and R.A.M.P. training mandated.
Sales to a minor on October 5, 2007.

In Re Citation No.: 09-1148. Fine $3,000.00 and 1 day suspension.
Sales to a minor on April 24, 2009.

In Re Citation No.: 09-2222. Fine $3,000.00 and 1 day suspension.
1. Minor frequenting on July 3, 2009.
2. Sales to a minor on July 3, 2009.

In Re Citation No.: 09-2406. Fine $3,000.00 and 1 day suspension.
Sales to a minor on September 16, 2009.

In Re Citation No.: 09-2558. Fine $3,000.00 and 1 day suspension.
1. Minor frequenting on October 8, 2009.
2. Sales to a minor on October 8, 2009.

In Re Citation No.: 10-0396. Fine $500.00.
Failed to post in a conspicuous place on the outside of the licensed premises a notice of suspension on February 8, 2010.

PENALTY ASSESSMENT CRITERIA:

Mandatory Requirement(s)

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 the violation found herein.

Further, this violation, in combination with two prior Adjudications, In Re Citation Nos.: 09-2406, 09-2558, represents the third violation of Liquor Code Section 493(1), relating to sales to minors and Liquor Code Section 493(14), relating to permitting minors to frequent, within four years. Liquor Code Section 471(c) [47 P.S. §4-471(c)] requires the penalty herein imposed to include license revocation or suspension.

Discretionary Component(s)

From February 28, 2003, the date of Licensee's first violation of selling alcoholic beverages to a minor, to June 12, 2010, the date of the instant violation, Licensee will have been penalized for selling alcoholic beverages to a minor on nine occasions within approximately seven and one-half years. Needless to say, Licensee's prior Adjudication history is far from stellar. It betokens a business operation that is inadequate regardless of Licensee's assertion of good intention. Accordingly, I have no choice but to impose a severe sanction.

I impose a $2,000.00 fine and a seven days suspension. I further order Licensee to remain compliant with the Responsible Alcohol Management Program (RAMP).

ORDER:

In Re Citation No.: 10-1508; Licensee, PZF South Main Street, W.B.-1, Inc.;
PLCB LID No.: 49052; PLCB License No.: R-SS-EHF-15423

Imposition of Fine

Licensee must pay a $2,000.00 fine within twenty days of the mailing date of this Adjudication. The mailing date is located on this Adjudication's first page, upper left corner. If Licensee fails to comply, the Liquor Code requires that I suspend or revoke the license.

Imposition of Suspension

I suspend the license, as well as all other permits or licenses issued by the Pennsylvania Liquor Control Board attendant to the License, for seven days, beginning Monday, October 8, 2012, 7:00 a.m., and ending Monday, October 15, 2012, 7:00 a.m.

I order Licensee to post a Notice of Suspension Placard (PLCB Form 1925) in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from the outside of the licensed premises, on or before Monday, October 8, 2012, 7:00 a.m. The Suspension Placard may not be removed until the suspension ends.

In the event Licensee does not comply with all conditions herein, the Bureau may issue an additional citation claiming Licensee has violated this Order. Alternatively, the Bureau may assert the same claim by requesting this Adjudication be reopened.

RAMP Compliance

I order Licensee to maintain its compliance with Liquor Code Section 471.1, pertaining to responsible alcohol management, for one year from the mailing date of this order.

Retaining Jurisdiction

I retain Jurisdiction to ensure compliance with this Adjudication.

Dated this 27TH day of July, 2012.

Felix Thau, A.L.J.

bc

General Information

This Adjudication is a legal document. It affects your rights, privileges, and obligations. The information which follows is a general guide. Therefore, you may want to consult with an attorney.

Applying for Reconsideration

If you want the Administrative Law Judge to reconsider this Adjudication, you must submit a written application and a nonrefundable $25.00 filing fee. Both must be received by the Office of Administrative Law Judge, (PLCB - Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, PA 17110-9661) within fifteen days of this Adjudication's mailing date. Your application must describe the reasons for reconsideration. The full requirements for reconsideration can be found in Title 1 Pa. Code §35.241.

Appeal Rights

If you wish to appeal this Adjudication, you must file an appeal within thirty days of the mailing date of this Adjudication by contacting the Office of Chief Counsel of the Pennsylvania Liquor Control Board (717-783-9454). For further information, visit www.lcb.state.pa.us. The full requirements for an appeal can be found in 47 P.S. §4-471.

Detach Here and Return Stub with Payment

The fine must be paid by Cashier's Check, Certified Check or Money Order. **Personal and business checks are not acceptable unless bank certified**. Make guaranteed 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

PZF South Main Street, W.B.-1, Inc.
In Re Citation No.: 10-1508