

Mailing Date: NOV 21 2011

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-2012
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-408077
	:	
v.	:	
	:	LID - 20771
	:	
PARDNERS, LTD.	:	
T/A WESTGATE RESTAURANT &	:	
LOUNGE	:	
WESTGATE SHPG CTR	:	
1550M KENNETH RD.	:	
YORK, PA 17404-2275	:	
	:	
YORK COUNTY	:	
LICENSE NO. R-AP-SS-20092	:	

BEFORE JUDGE THAU BUREAU COUNSEL PIETRZAK LICENSEE: L.C. HEIM, ESQUIRE

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on September 23, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against PARDNERS, LTD., License Number R-AP-SS-20092 (Licensee).

The citation contains two counts.

The first count charges Licensee with violation of Sections 104(a) and 401 of the Liquor Code [47 P.S. §§ 1-104(a) and 4-401] and Section 13.102 of the Liquor Control Board Regulations [40 Pa. Code §13.102]. The charge is that on February 20, 2010, Licensee, by its servants, agents or employes, furnished more than one free drink per patron.

The second count charges Licensee with violation of Section 13.102(a) of the Liquor

Control Board Regulations [40 Pa. Code §13.102(a)]. The charge is that on February 20, 2010, Licensee, by its servants, agents or employes, discounted the price of alcoholic beverages for a period or periods other than a consecutive period of time not to exceed two hours in a business day.

An evidentiary hearing was conducted on September 7, 2011 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on February 12, 2010 and completed it on August 16, 2010 (N.T. 6).
2. The Bureau sent a notice of alleged violation to Licensee at the licensed premises by certified mail, return receipt requested on September 14, 2010. The notice alleged violations as charged in the citation (Commonwealth Exhibit No. C-1).
3. On February 20, 2010, a Bureau Enforcement Officer arrived at the premises at about 6:00 pm, in an undercover capacity (N.T. 51-53).

Count No. 1

4. Shortly after 7:00 pm, a bartender filled 12 ounce plastic cups, which were arranged on the bar counter, with Miller Lite draft. The Officer accepted one of the 12 ounce containers of Miller Lite draft. At 7:35 pm, the Officer received a second 12 ounce container of beer. However, the brand of beer in this service was Coors Light. He received a third 12 ounce container of beer, without paying for it, as he left the premises (N.T. 55, 57 and 81).
5. On May 13, 2010, the Officer completed an administrative inspection of the premises. He spoke to Ms. S., Licensee's President, who explained that Licensee provided beer samples, on February 20, 2010, which were paid for by two importing distributor representatives (N.T. 59-62).
6. During the evening and time in question, one representative each, from two different importing distributors, was at the premises. Both were purchasing beer for customers. The bar staff kept a tally of the number of beers provided to customers. At the end of the business day, each of the importing distributor representatives paid for the purchases attributable to him (N.T. 113-122).

7. The instructions from the beer representatives were that they wished to purchase only one beer per customer. The rule applied separately to each of the two importing distributor representatives. In addition to the importing distributors paying for customers' beers, other patrons were also purchasing rounds (N.T. 113-114, 122-123).
8. One of the importing distributors paid for the beer provided customers for that particular product line from 1:00 to 4:00 pm, while the second importing distributor did the same from 4:00 to 7:00 pm (N.T. 142-144).
9. All products provided to customers were paid for by the two importing distributor representatives (N.T. 153-158).

Count No. 2

10. At 6:05 pm, on February 20, 2010, the Officer purchased a 12 ounce bottle of a Yuengling manufactured beer for which he paid \$2.25. At 7:10 p.m., the Officer ordered the same item, paying \$2.75 (N.T. 53-54).
11. At 6:35 p.m., the Officer ordered a draft of a Coors manufactured product, paying \$2.75. At 7:40 p.m., the Officer ordered the same Coors item, paying \$2.25 (N.T. 53-54).
12. Licensee's regular price for the Coors product purchased by the officer is \$2.75. During a happy hour promotion, the price is reduced to \$1.75 (N.T. 122-124). Licensee's happy hour promotion is always from 5:00 to 7:00 pm. At 7:00 pm, all prices returned to their normal amount (N.T. 125).

CONCLUSIONS OF LAW:

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

Count No. 1

2. The Bureau has failed to prove that Licensee furnished more than one free drink per person.

Count No. 2

3. The Bureau has failed to prove that Licensee discounted the price of alcoholic beverages for a period or periods other than a consecutive period of time not to exceed two hours in a business day.

DISCUSSION:

Count No. 1 - Overview

This is the first time I have seen such a charge. As one of first impression, it has taken me on an intriguing legal journey having fascinating twists and turns. In navigating through them, I was lead to a series of Adjudications, the majority of which are no longer in the forefront of memory as they were rendered many years ago. As I removed the dust from them, I also cast off cobwebs which could have blurred thought.

In the process, I was reminded of the principle that the age of a decision rarely diminishes its value. That point was reinforced by the completeness and clarity of thought manifested in those Adjudications. With their guidance, I address the issues in this matter in no particular order.

Count No. 1 – Due Process, Notice

Before taking testimony, I engaged Bureau counsel in a colloquy regarding the charge’s legal foundation. The citation alleges that Licensee’s conduct violates Liquor Code Section 104 and 401 as well as the discount pricing policy regulation. I asked counsel how Liquor Code Section 104, a provision expressing a preference for the manner of statutory construction rather than defining conduct, can be violated. Counsel remarked that Liquor Code Section 104 must be read in conjunction with Liquor Code Section 401 (N.T. 36-38).

Seeing nothing substantive in Liquor Code Section 104, I shifted the discussion to Liquor Code Section 401, which addresses the authority conferred upon the Liquor Control Board to issue licenses. I pressed counsel to direct me to the specific language in that Section which Licensee is alleged to have violated. Counsel recalled reading Adjudications in which I drew the conclusion that the Liquor Code prohibits licensees from providing free alcoholic beverages (N.T. 37-39).

In *Bureau of Liquor Control Enforcement v. Jersey Central Railroad, Inc.*, Adjudication No. 02-1068, with substantial reference to case law I reasoned that licensees may not provide free alcoholic beverages. I based that analysis on a reading of Liquor Code Section 406(a)(1) [47 P.S. §4-406(a)(1)], which limits the extent of authority licensees are entrusted with when providing alcoholic beverages. Were I now writing that Adjudication, I would have added the realization its title, although not controlling, further guides the analysis. By employing the word “restrictions,” the Legislature, has directed us to interpret the scope of granted authority from a confinement perspective.¹

¹ After reading the above referenced Adjudication, I readily see how I contributed to the confusion herein presented. It is with regret and embarrassment that I recognize I incorrectly refer to Liquor Code Section 401 throughout the Adjudication’s Discussion. While committing that mistake, I went on to paraphrase pertinent portions of Liquor Code Section 406(a)(1) which, although correct, surely must have compounded the error.

Bureau counsel and I ended our exchange by examining whether Licensee's alleged conduct implicates the charge's third reference, i.e. the discount pricing policy regulation. Counsel saw no violation, a contention with which I agreed (N.T. 40-42).

In one of those long-ago Adjudications, I addressed the level of importance of references to law in citations, as they relate to the notice requirements by Due Process *All American Rathskeller, Inc.*, Adjudication No. 89-1082, 3 Sel. Ops. ALJ 236. There, I explained that a reference to law, whether accurate or not, does not trigger Due Process concerns as it is the wording of the charge which is the true measuring device.¹

Although the references to law in Count No. 1 are not pertinent, the matter may proceed on another theory. The wording of the charge closely tracks 40 Pa. Code §13.53. That is the law which is called into question. This result leads us in the direction of evaluating the legal bases for Regulations, Advisory Notices, and Advisory Opinions.

Regulations, Advisory Notices, Advisory Opinions – Their Legal Bases

Regulations, Advisory Notices, and Advisory Opinions represent formal methods employed by the Pennsylvania Liquor Control Board to disseminate information and standards. The inquiry is hardly new.

As recently as this year, I had occasion to touch upon the subject in *The Phyrst* (supra). To my reckoning, the earliest Adjudication on point is *Bureau of Liquor Control Enforcement v. Santini*, Adjudication No. 89-0611, VI, Sel Ops. ALJ 319. Other relevant and harmonious Adjudications are: *Bureau of Liquor Control Enforcement v. Gelco*, Adjudication No. 931373; *Brandt Distributors of Harrisburg, Inc.*, Adjudication No. 88-2612, 1 Sel Ops. ALJ 83, *Bureau of Liquor Control Enforcement v. Frank J. Zeiger, Jr.*, Adjudication No. 98-2064. In *Bureau of Liquor Control Enforcement v. Delawareco, Inc.*, Adjudication No. 95-2743.

With guidance by case law as more fully described within the above Adjudications, when distilled to their essence, several principles predominate. Agency pronouncements may be classified as either interpretive or legislative. Interpretive declarations are not binding on courts but courts may

¹ Also see *Skippack Creek Enterprises, Inc.*, Adjudication No. 91-0952, 9 Sel. Ops. ALJ 115; *Estate of Mary Lou Gregorakis, James Gregorakis, Executor*, Adjudication No. 91-1339, 10 Sel Ops. ALJ 90; *Bureau of Liquor Control Enforcement v. Sea Seas, Inc.*, Adjudication No. 94-1577, 21 Sel Ops. ALJ 75; *Bureau of Liquor Control Enforcement v. Pennino Enterprises, Inc.*, Adjudication No. 97-1291; *Bureau of Liquor Control Enforcement v. Fraternal Order of Eagles Aerie 1231*, Adjudication No. 97-1918; *Bureau of Liquor Control Enforcement v. Karagiannis, Inc.*, Adjudication No. 99-1024; *Bureau of Liquor Control Enforcement v. The Phyrst, Inc.*, Adjudication No. 11-0155.

accord them authoritative effect that approximates the force of law. Interpretive rules may be adopted by an agency without granted power.

A legislative declaration is one adopted by an agency pursuant to delegated power to make law through rules. Courts are bound by legislative rules as if they were statutes. Nevertheless, courts may still inquire into their validity. A legislative statement must comply with the grant of authority conferred upon an agency. A legislative rule must not conflict with the statute over which an agency has oversight. Such a rule must be promulgated in accordance with law. A legislative rule creates a binding norm.

Effective November 13, 2004 and codified in accordance with the Commonwealth Documents Law (34 Pa. B. 6139), 40 Pa. Code §13.53 was formerly embodied in Advisory Notice No. 10, relating to bar spending and giving free drinks. Particularly because Advisory Notices are adopted outside the Commonwealth Documents Law process, it is vital to determine whether their contents are legislative or interpretive.

If interpretive, an Administrative Law Judge is free to evaluate the appropriateness of the standard. If legislative, the statement has no legal effect precisely because it was not processed in accordance with the Commonwealth Documents Law. As the relevant portion of Advisory Notice No. 10 creates a binding norm, as it then existed, the rule was unenforceable.

Transforming the relevant portion of Advisory Notice No. 10 to a duly promulgated regulation renders it lawful but only to the extent the rule is congruent with the overriding statute.² Since Liquor Code Section 406(a)(1) grants licensees no authority to provide free alcoholic beverages, so much of Regulation 13.53 which contradicts that conclusion remains **ultra vires**.³

Added to the Liquor Code in 1993, Section 211.1 [47 P.S. §2-211.1] gave authority to the Pennsylvania Liquor Control Board to issue legal opinions (Advisory Opinions) “regarding any

² The legitimacy of any governmental announcement is always at issue. It represents a fundamental determination which ought to precede any substantive rule analysis. For example, see *Butera v. Commonwealth Office of Budget*, 370 A.2d 1248 (Pa. Cmwlth. 1977) and subsequent approving judicial determinations relating to the level of legality accorded Executive Orders.

³ The principle that an agency’s interpretation of the statute over which it has governance is entitled to great weight is complicated by the Liquor Code’s structure. As an autonomous office within the board (47 P.S. §2-212), created for the purpose of presiding at citation hearings by applying law, the question may be raised as to which body, Office of Administrative Law Judge or Pennsylvania Liquor Control Board, constitutes the agency. *Joyce Ann Lyon*, Adjudication No. 92-1881, 13 Sel Ops. ALJ 46.

subject matter relating” to the Liquor Code or “any regulation promulgated pursuant to it.” Such opinions, as the Section goes on to say, “shall be binding on the enforcement bureau.”

Although Advisory Opinions are applied only to the requesting licensee, this unique and, in my experience, unprecedented authority by which the Pennsylvania Liquor Control Board may utter a rule which shackles the Bureau of Liquor Control Enforcement, has troubled me.

Was it the Legislature’s intent to bypass the Commonwealth Document’s Law? Are there any limitations in Advisory Opinion content? Did the Legislature intend to confer sweeping legislative authority in derogation of every law to the contrary, subject only to the restrictions in this Commonwealth’s Constitution, Article II, Section 1, which vests legislative power in the General Assembly?

I fully understand Section 211.1 was well intended. It was designed to assist licensees who may be confronted with three differing interpretations, one each from the Bureau of Liquor Control Enforcement, Office of Administrative Law Judge, and Pennsylvania Liquor Control Board. Although theoretically applicable only to the requesting licensee, another licensee having no Advisory Opinion in hand, is cited for the same conduct the requesting licensee received immunity. If the Administrative Law Judge finds a violation, the first level of appeal is to the Pennsylvania Liquor Control Board, the agency which already has spoken to the issue.

With this possibility in mind, I cannot imagine the General Assembly intended to grant a level of authority so broad as to cause even a whisper of a possible constitutional incursion into an unlawful delegation of legislative power. I also cannot conceive of an intent to abrogate the procedures and safeguards installed in the Commonwealth Documents Law as a means of avoiding burdensome, inappropriate, unreasonable, or unlawful agency rules.

I am driven to conclude Section 211.1 was intended to permit interpretive opinions only. Furthermore, the Advisory Opinions may not interpret legislative rules other than duly promulgated regulations.⁴

⁴ I am not the first Administrative Law Judge to take this position. In *Delawareco, Inc.*, supra, Administrative Law Judge Shenkle challenged the legality of an Advisory Opinion in a manner identical to that I present herein. In *Bureau of Liquor Control Enforcement v. Freddie’s Restaurant and Lounge, Inc.*, Adjudication No. 95-0324, 24 Sel Ops. ALJ 21, former Administrative Law Judge Elbling chose not to apply an Advisory Opinion as he believed it to be a clearly erroneous interpretation of a regulation.

40 Pa. Code, §13.53

The pertinent regulation provides:

§13.53. Bar spending/free drinks.

Representatives of manufacturers and licensees may give or purchase an alcoholic beverage for consumers in retail licensed premises **provided** the giving of the alcoholic beverage is not contingent upon the purchase of any other alcoholic beverage and is limited to one standard-sized alcoholic beverage per patron in any offering. A standard sized alcoholic beverage is 12 fluid ounces of a malt or brewed beverage, 4 fluid ounces of wine (including fortified wine) and 1 ½ fluid ounces of liquor (emphasis mine).

Whatever my opinion regarding its legality, a discussion regarding its meaning has value. I preface my remarks noting how exceedingly difficult is the labor of composing regulations. The author must write clearly, with the constant reminder that whatever the final composition may be, it will be read by others whose understanding of words may not coincide with intended meanings. Furthermore, a proposed rule may be applied to a setting never envisioned by those constructing it. As a rule takes shape, there is a constant struggle between saying too much or not enough.

With those caveats in mind, I question whether the regulation, as applied to the facts herein, ought to have been applied to the two importing distributors as well. Did they not participate in the alleged unlawful promotion? Furthermore, one rule of statutory construction tells us that proviso's or exceptions are to be construed as affirmative defenses. *Bureau of Liquor Control Enforcement v. Behind the Moon, Inc.*, Adjudication No. 99-0813.

Does it necessarily follow that so much of the regulation introduced by "provided" was intended to constitute an affirmative defense? Was it the Pennsylvania Liquor Control Board's intention to place the burden upon a licensee to prove that an offering or giving of alcoholic beverages was accomplished without any contingency to purchase and that the amount given was limited to one standard sized drink? The applicability of this rule of statutory construction is further clouded because the regulation's proviso is partly couched in the negative.⁵

Foundations for Dismissals

⁵ This result presupposes the regulation admits of no affirmative defense. Since the regulation's application is to a hypothetical, there is no need to address that concern.

Even though I determine the pertinent regulation is inconsistent with the Liquor Code, I am not so naive as to imagine appellate review will result in disagreement. Consequently, in the interest of judicial economy, I have weighed the evidence and applied the appropriate law.

Count No. 1

Licensee provided no free beer that evening. All drinks were paid for. It was the two importing distributors that provided beer to Licensee's customers in order to promote their respective product lines. Standing alone, these facts are sufficient to dismiss the charge.

Even if Licensee did provide free beer, the Bureau's case must still fall. The Officer received three servings of beer without charge. The record is quite clear as to the brands of the first two services. There is nothing in the record to establish the brand of beer the Officer received at the third service. Without that information, the Bureau cannot establish that Licensee exceeded the permitted amount.

Lastly, if this record were clear that a patron received more than one free serving as provided by the importing distributors, the charge must still be dismissed. If we are to place Licensee's neck in the chopping block for the importing distributors conduct, the charge ought to have included the concept of permission. With the addition of "and/or permitted," the rules of the game are necessarily modified.

In several Adjudications, including that phrase was a determining factor for deciding if a violation occurred. *Bureau of Liquor Control Enforcement v. Skippack Creek Enterprises, Inc.*, supra; *Bureau of Liquor Control Enforcement v. Dennis J. Rallis*, Adjudication No. 890289, 2 Sel. Ops. ALJ 67; *Bureau of Liquor Control Enforcement v. Jerry Watt*, Adjudication No. 88-1448, VI Sel. Ops. ALJ 341; *Bureau of Liquor Control Enforcement v. LEYP, Inc. II*, Adjudication No. 89-1897, 3 Sel. Ops. ALJ 51.

Count No. 2

I am confident I can rely on the Officer's testimony regarding the price and timing of the drinks he purchased (N.T. 10-11). Since Licensee's Happy Hour promotion lasted from 5:00 pm to 7:00 pm, at which time prices were raised to their normal levels, the Officer's purchase of a drink after 7:00 pm, at a price lower than the purchase prior thereto, ordinarily would establish a violation. However, I find this lower price transaction was inadvertent and outside Licensee's intended promotional practice.

An unstudied application of strict liability, which ordinarily applies to Liquor Code violations [*Pa. Liquor Control Board v. TLK, Inc.*, 544 A2.d 932 (Pa. 1988)], would have demanded me to sustain the charge. Strict liability is not a panacea. *Bureau of Liquor Control Enforcement v. Northeast Concessions, L.P.*, Adjudication No. 08-1298.

In *All American Rathskeller*, supra, I discussed how intent may become a required element of proof. I revisited that rationale in *Bureau of Liquor Control Enforcement v. Fraternal Order of Eagles Aerie 1231*, Adjudication No. 97-1918 and in *Bureau of Liquor Control Enforcement v. Bally Hotel, Inc.*, Adjudication No. 97-0917. In the former, I analyzed Adjudications by other Administrative Law Judges and case law, the majority of which are in accord with the reasoning herein.

Looking at the framework of the discount pricing regulation, one readily sees that it addresses business practice. The word “practice” is included in the regulation’s title. The context of the entire regulation speaks to affirmative conduct which cannot occur without intent. It is impossible to engage in a discount pricing promotion without intending to do so. Therefore, the Bureau must establish that the service of beer at a reduced price was intended to be part of a discount pricing promotion.

As I find the service was no more than a one-time pricing error rather than a sale in furtherance of a discount pricing practice, I dismiss the charge.

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ORDER

IT IS HEREBY ORDERED that Citation No. 10-2012 be **DISMISSED**.

Dated this 7TH day of November, 2011.



Felix Thau, A.L.J.

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MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.

IF YOU WISH TO APPEAL THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER, THE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE MAILING DATE OF THE ORDER. PLEASE CONTACT CHIEF COUNSEL'S OFFICE AT 717-783-9454.