Mailing Date: NOV 20 2013

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

PENNSYLVANIA STATE POLICE,	:	In Re Citation No.: 13-0937
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W02-458177
v.	:	
	:	
JIL BEVERAGE, INC.	:	PLCB LID No.: 44820
T/A FOREST CITY BEVERAGE	:	
332 MAIN ST.	:	
FOREST CITY, PA 18421-1418	:	PLCB License No.: D-SS-1197

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Craig A. Strong, Esquire

LICENSEE: Jeffrey I. Loomis, Sole Corporate Officer, Stockholder, and Manager

BACKGROUND:

This proceeding arises out of a citation, containing one count, that was issued on May 8, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against JIL Beverage, Inc. (Licensee).

The citation charges Licensee with a violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that Licensee, by your servants, agents, or employees, failed to keep records on the licensed premises, on March 20, 2013.

I presided at an evidentiary hearing on October 17, 2013 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 March 5, 2013 and completed it on March 20, 2013. (N.T. 9)

2. The Bureau sent a notice of the alleged violation to Licensee at the licensed premises by certified mail, return receipt requested, on March 26, 2013. The notice alleged the violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 9)

3. On March 20, 2013, a Bureau Enforcement Officer visited the premises at 6:20 p.m. to conduct an unannounced administrative inspection. The Officer spoke to a sales clerk, the only person on duty. (N.T. 10-12)

4. Licensee's license was located in the office rather than being posted for which the Bureau issued a warning letter to Licensee. The letter included two additional warnings. (N.T. 13-18)[1]

5. The Officer spoke to Mr. Loomis by telephone. The Officer asked him for the records of January, February, and March 2013. Mr. Loomis told the Officer the January and February 2013 records were at his home to be processed. (N.T. 29-30)

6. The Officer explained that he needed to see the March 2013 records immediately. There was never any clear discussion concerning where the March 2013 records were. They were on the licensed premises. (N.T. 68-72)

CONCLUSION(S) OF LAW:

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

2. The Bureau failed to prove that Licensee failed to keep records on the licensed premises.

[1] The warning letter was not officially included in the record as an Exhibit but was discussed and presented.

DISCUSSION:

Warning Letters

Although not directly relevant, the Bureau's general practice of issuing warning letters, more particularly the instant warning letter, offends fairness in several ways. When we speak of "fairness," the legal equivalent is framed in notions of Due Process.

In every case where a Bureau warning letter becomes a matter of record, I have asked, begged, pleaded for Bureau counsel to share the criteria the Bureau applies to determine when such a letter is appropriate. I have yet to be informed of any. I recall having been told the decision to release a warning letter is an Officer's prerogative. Moreover, I have adjudicated matters where a warning letter was prepared for what I considered to be a more serious breach of law than that alleged in the citation then before me. Absent any meaningful standard, the warning letter process is fundamentally unfair.

Additionally, when a licensee receives a warning letter, the licensee is not afforded an opportunity to defend or mitigate. There is no one looking over the Bureau's shoulder to determine whether a violation has occurred as alleged in the warning letter, whether in fact or in law. I cannot think of any judicial process in which there is no second-guessing of the decision, directly or collaterally.

Our legal system invariably provides a number of safeguards to ensure fairness. Some do so by multiple appeal levels, others by ***de novo*** process, which may also be combined with multiple appeal tiers. Other processes may be challenged by collateral attack, which is also likely to include several levels of appeal. The written warning is uniquely unfettered of any review.[2]

When I learn a warning letter was issued with charges other than those in the citation, I am generally told the fact a warning issued is being introduced for the sole purpose of letting me know the Bureau is being fair. I am not one to brush that response aside. However, I also am aware the fact of a warning includes the amorphous element of coloring a case; there is unadulterated fact and there is tint.

When a fact is embellished, albeit truthfully, the proponent is attempting to score points. Unless these warnings are absolutely ignored, they become the subject matter of fact gathering. Having no notice, the licensee must scramble to defend conduct outside the four corners of the citation, a responsibility Due Process unquestionably prohibits.

---

[2] In this regard, it is difficult to distinguish between a warning letter and the written opinion the Pennsylvania Liquor Control Board issues pursuant to Liquor Code Section 211 [47 P.S. §2-211].

The manner in which these warnings are phrased provides almost no substance as to the behavior the Bureau alleges to be unlawful. The warnings are written in legal jargon without specific reference to actual behavior. The warning letter issued to Licensee in this matter demonstrates the point. This warning, with capital letters galore, containing numbers only relevant to the Bureau, and replete with conclusion, is hardly user friendly. The letter alleges:

1. FAILED TO CONSTANTLY AND CONSPIUOUSLY EXPOSE DISTRIBUTOR LICENSE UNDER A TRANSPARANT SUBSTANCE ON THE LICENSED PREMISES. (30001)
   March 20, 2013

2. YOU, BY YOUR SERVANTS, AGENTS OR EMPLOYEES, ENGAGED IN UNLAWFUL DISCRIMINATION IN THAT YOU PROVIDED ALCOHOLIC BEVERAGES TO SENIOR CITIZENS AT A REDUCED PRICE WHILE CHARGING FULL PRICE TO OTHER PATRONS. (62005)
   March 20, 2013

3. OFFERED AND/OR GAVE ALLOWANCES, REBATES OR CONCESSIONS. (28504)
   March 20, 2013

Looking at the third warning first, I see all conclusion. How is Licensee to know what behavior caused the warning to issue? Interestingly, at the hearing, I was told the warning was issued because of Licensee's pricing structure. Licensee charged wholesale customers lower prices than retail trade.

There are any number of interpretations finding that a variance in pricing based on wholesale versus retail trade is not considered a direct inducement. This warning was therefore improvidently issued.

Similarly, the second warning regarding disparate pricing for retail customers based upon age, does not violate the Human Relations Act. Factually, Licensee offered a lower price to retail customers who reached seniority. Licensee promoted the lower price as a Senior Citizen Discount. The relevant provision of the Human Relations Act, a body of law primarily targeting employment and housing discrimination, does not preclude a provider from charging disparate prices for a product based on age.[3]

[3] Defined as any person forty years of age or older [43 P.S. §954].

Prefaced by "It shall be unlawful," the statute at issue [43 P.S. §955(11)(i)(1)] provides:

> (i) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employe of any public accommodation, resort or amusement to:
>
> (1) Refuse, withhold from, or deny to any person because of his race, color, sex, religious creed, ancestry, national origin or handicap or disability, or to any person due to use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals, either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such public accommodation, resort or amusement.

Notably absent from the long list of classifications is age. This warning, as the other, was incorrectly issued.[4]

I well recognize I have no business in judging a Bureau administrative decision. However, when it enters the doors of the citation hearing and evaluation process, a Bureau administrative practice becomes fair game especially when the practice implicates Due Process.

I appreciate the policy supporting warnings. Warnings not only demonstrate government fairness when dealing with "trivial" matters but also offer a very beneficial educational component by guiding and teaching licensees. While these goals are commendable, the practice must be monitored, shepherded, and standardized to ensure it constantly and consistently bears a direct relationship to the goals for which it was intended to serve.

Maintaining Records

Liquor Code Section 493(12), the provision at issue, has been significantly modified. Licensees no longer must maintain records on the premises for at least two years. Licensees still must maintain at least two years of records but only the most recent six months are required to be on the licensed premises, subject to an additional exception. Those records may be removed for a "lawful business purpose," an intentionally vague term that begs for clarification through litigation. They must also be returned to the premises when that purpose is complete.

---

[4] I leave for another day the question of whether a Senior Discount somehow violates the Liquor Code.

With respect to business records beyond six months but less than two years old, the Bureau may require a licensee to return those records to the licensed premises within twenty-four hours of the request. As to records not on the licensed premises but less than six months old, there is no need for the Bureau to request their return. The return of those records must automatically occur when the need for their initial removal expires.

This controversy deals with records less than six months old. The Bureau conceded that the January 2013 and February 2013 records were permitted to be with Mr. Loomis as he was using them for a lawful business purpose. The Bureau's rub relates to the March 2013 records which, the Bureau claims, were not on the licensed premises and not absent therefrom for a lawful business purpose.

Mr. Loomis testified the March 2013 records were on the licensed premises but that their presence was not discussed during the telephone conversation he had with the Officer. I find Mr. Loomis and the Officer to be credible. This record demonstrates the discussion between the two became heated. I conclude the parties misunderstood each other. The March 2013 records were on the licensed premises as they were required to be.

PRIOR ADJUDICATION HISTORY:

Licensee has been licensed since August 26, 1999, and has no prior Adjudications.

ORDER:

Dismissal

I dismiss the citation.

Dated this 6TH day of November, 2013.

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.