

Mailing Date: MAY 14 2014

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

PENNSYLVANIA STATE POLICE,	:	In Re Citation No.: 13-1917
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W05-464334
v.	:	
	:	
THE SHERI-DEN, INC.	:	PLCB LID No.: 15117
T/A THE SHERI-DEN	:	
534 SHERIDAN ST.	:	
JOHNSTOWN, PA 15906-1308	:	PLCB License No.: R-AP-SS-11717

**ADJUDICATION**

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Emily L. Gustave, Esquire

FOR LICENSEE: David J. Weaver, Esquire

**BACKGROUND:**

This proceeding arises out of a citation, containing five counts, that was issued on September 23, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against The Sheri-Den, Inc. (Licensee).

The first count charges Licensee with violations of Section 493(2) of the Liquor Code [47 P.S. §4-493(2)]. The charge is that Licensee, by your servants, agents, or employees, paid for purchases of malt or brewed beverages with other than licensee's checks, cashier's checks or money orders, during the period January 1 through August 6, 2013.

The second count charges Licensee with a violation of Section 493(2) of the Liquor Code [47 P.S. §4-493(2)]. The charge is that Licensee, by your servants, agents, or employees purchased malt or brewed beverages on credit, on August 6, 2013.

The third count charges Licensee with a violation of Section 5.23(a) of the Liquor Control Board Regulations [40 Pa. Code §5.23(a)]. The charge is that Licensee, by your servants, agents, or employees, failed to appoint a full-time manager for the licensed premises, during the period August 6, 2012 through August 6, 2013.

The fourth count charges Licensee with a violation of Section 102 of the Liquor Code [47 P.S. §1-102]. The charge is that, Licensee's licensed premises was not a bona fide restaurant in that Licensee, by your servants, agents, or employees, maintained insufficient food items, on July 31, 2013.

The fifth count charges Licensee with violations of Section 471 of the Liquor Code [47 P.S. §4-471]. The charge is that Licensee, by your servants, agents, or employees, failed to adhere to the terms of the court order, governing the operation of the licensed premises, issued by the Court of Common Pleas of Cambria County, on March 28, 2013, at Docket No. 2013-0813, on July 31 and August 6, 2013.

I presided at an evidentiary hearing on March 27, 2014 at 180 Charlotte Drive, Altoona, Pennsylvania. The matter was submitted by way of agreement of facts.

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

**FINDINGS OF FACT:**

1. The Bureau began its investigation on July 11, 2013 and completed it on August 7, 2013. (Commonwealth Exhibit No. C-1)
2. The Bureau sent a notice of the alleged violations to Licensee at the licensed premises by certified mail, return receipt requested, on August 20, 2013. The notice alleged the violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 5)

**Count No. 1**

3. During the period January 1 through August 6, 2013, Mr. Gawel, Licensee's President, went to one of Licensee's beer suppliers. While there, he paid for beer purchases in cash prior the delivery. (N.T. 14-15)

Count No. 2

4. On August 6, 2013, Licensee received a beer delivery when a Bureau Enforcement Officer was present conducting an administrative inspection. Within minutes after the Officer left, Licensee went to the beer distributor, which is located about a mile away, and paid for the delivery. (N.T. 20-29)

Count No. 3

5. During the period charged, Licensee did not submit a change of manager form to the Pennsylvania Liquor Control Board reflecting that the former manager quit. Mr. Gawel took over as the manager. (N.T. 29-30)

Count No. 4

6. On July 31, 2013, Licensee maintained no food items on the licensed premises as discovered by a Bureau Enforcement Officer who conducted an administrative inspection. (N.T. 30-49)

Count No. 5

7. Licensee entered into a Consent Order dated March 28, 2013 (Judge's Exhibit No. 1) in which, among other requirements, Licensee was required to use a transaction scan device for all patrons entering the premises and maintain such information for a minimum of thirty days. Licensee did comply with that provision but Mr. Gawel did not know how to retrieve the information. (N.T. 50-52)

8. Licensee recovered the information stored in the transaction scan device after the investigation in this matter was completed. (N.T. 63-66)

**CONCLUSION(S) OF LAW:**

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

Count Nos. 1, 3, and 4

2. I sustain the violations as charged.

Count Nos. 2 and 5

3. I dismiss the violations.

**DISCUSSION:**

Submission of Admission, Waiver, and Authorization (Waiver)

Very late in the process but before the hearing commenced, Licensee filed a Waiver. I was surprised by this submission because Licensee's Pre-Hearing Memorandum (PHM) indicated there would be a vigorous defense to the charges. Having some concern that the Bureau's case lacked a *prima facie* foundation, I determined the better course was to conduct the already scheduled hearing.

Selective Enforcement

Although not articulated with the legalistic term of selective enforcement, Licensee's PHM presented the argument that the Bureau has been unfairly targeting Licensee. At the hearing, I explained that government does not violate the Constitution by scrutinizing one licensee more carefully than another so long as the basis for the special treatment does not involve a protected class such as race, for example. In fact, we encourage and expect a higher level of governmental observation for a number of reasons one of which is repetitive complaints.

Paying for Beer with Cash

I was told the reason the Liquor Code forbids a restaurant liquor licensee from purchasing beer for resale from a wholesaler (Importing Distributor or Distributor) with cash was to avoid having the wholesaler's delivery person from carrying large amounts of money. Because Licensee paid for beer in advance of delivery, the harm the Liquor Code intends to avoid cannot occur.

When interpreting a law, unless ambiguous, the letter of the law may not be disregarded in favor of the law's purpose. While I must find a violation, I am free to consider the law's purpose when imposing a penalty. Since the Liquor Code's intent was not breached, I impose the minimum allowable fine of \$50.00.

### Purchasing Beer on Credit

The single incident upon which the Bureau's evidence rests is no more than Licensee paying for beer with cash at the wholesaler's place of business (a violation encompassed in Count No. 1) within an hour of the beer delivery. The case is further compounded by the presence of a Bureau Enforcement Officer who was in the midst of an administrative inspection. One would hardly expect Mr. Gawel to depart the premises, leaving the Enforcement Officer without inspection assistance.

Interestingly, Mr. Gawel's subsequent payment for a beer delivery at the wholesaler's premises, in cash, represents faster payment had Licensee provided the wholesaler a check immediately upon beer delivery completion. Indeed, the wholesaler could have decided not to cash the check for weeks, yet we do not assert a credit transaction.

A sale on credit is defined by the parties' intent. Knowing that such a transaction is illegal, we do not anticipate that the parties would enter into such an agreement without obfuscation. That is why the Liquor Code prohibits a restaurant liquor licensee from paying for wholesale beer purchases when the licensee has insufficient funds to cover the check. In such a circumstance, we need not infer an intent to engage in a wholesale credit transaction for beer.<sup>1</sup>

### Failure to Appoint a Manager

This charge has vexed me for years. At first blush, it seems unrealistic because someone, somehow is operating the licensed business so that a managerial appointment must have occurred. This matter has finally clarified my thinking.

When the regulation in question mandates a managerial appointment, it is not an appointment in the more general dictionary definition. Recognizing that the regulation places a special position upon a manager, an appointment contemplated by the regulation is a formal act of announcement. In this sense, an appointment includes what may be characterized as a ritual, such as we recognize when our President "appoints" a Supreme Court Justice. The appointment requires notification for purposes of formal approval by another entity.<sup>2</sup>

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<sup>1</sup> This is yet another example where the concept of intent not being an element in Liquor Code violations makes no sense as the charge necessarily implicates contract intent. By way of further example, the requisite intent may be inferred if the wholesaler's general business practice is to deposit licensee checks once a week, but withholds a specific licensee's check for two months.

<sup>2</sup> For managerial appointments, the approving authority is the Pennsylvania Liquor Control Board.

### Maintaining No Food

In actuality, the assertion that a licensee maintains no food reflects one predicate identifying a legitimate restaurant within the meaning of the Liquor Code. If a restaurant liquor licensee maintains no food, how is it possible for that licensee to be *bona fide*? Currently, it is entirely legally conceivable that a restaurant liquor licensee operate within the law but without any food on the premises.

This results from what I believe to be an unreasonably strained but historically engraved statutory construction interpretation. Because a hotel licensee is defined as having a kitchen, while a restaurant's Liquor Code definition does not include "kitchen," long ago, someone determined that a restaurant need not have a kitchen. If there need be no kitchen than there also need be no food.

Over time, this construction morphed into what is now an integral Liquor Code principle. A restaurant liquor licensee must provide food to customers, but can have food presented to a customer prepared somewhere else and delivered to the licensed premises. Therefore, it is not enough to find that a restaurant liquor licensee maintains no food. A quick look at a licensee's records will reveal whether a licensee has food purchases and sales.<sup>3</sup>

### Conditional Licensing Agreement Violation

The Bureau's case rested entirely on Mr. Gawel's inability to retrieve information saved in the transaction scan device. Simply because information claimed to be stored was not readily retrievable does not satisfy the Bureau's burden of proof also because I find Mr. Gawel's assertion that the transaction scan device entries were stored, a fact which he subsequently verified, I dismiss the charge.

### **PRIOR ADJUDICATION HISTORY:**

Licensee has been licensed since August 25, 1973, and has had eleven prior Adjudications since July 1, 1987, the date the Office of Administrative Law Judge was established.

In Re Citation No.: 87-2886. 5 days suspension.  
Sales to a visibly intoxicated person.

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<sup>3</sup> It has long been my conclusion that a momentary or brief lack of food is insufficient to conclude a restaurant liquor licensee is illegitimate.

In Re Citation No.: 90-2100. Fine \$1,000.00 and 3 days suspension.

Sales between 2:00 a.m. and 7:00 a.m. on August 18, 1990.

In Re Citation No.: 93-0405. Fine \$1,400.00.

1. You, Edward Michael Gawel, Corporate President Director and Stockholder, consumed liquor or malt or brewed beverages while tending bar or otherwise serving liquor or malt or brewed beverages on February 6, 1993.
2. Failed to require patrons to vacate the premises not later than one-half hour after the required time on January 30 and February 6, 1993.
3. Sales between 2:00 a.m. and 7:00 a.m. on February 6, 1993.

In Re Citation No.: 94-0878. Fine \$300.00 and 1 day suspension.

1. Supplied false information on application for restaurant liquor license for the year expiring January 31, 1995 on November 29, 1993.
2. Manager failed to devote full time and attention to the operation of the licensed business.

In Re Citation No.: 00-1595. Fine \$600.00.

Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises (machines) on June 14, 15 and August 9, 2000.

In Re Citation No.: 01-1398. Fine \$1,000.00.

Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises (machines) on June 12, 2001.

In Re Citation No.: 03-0783. Fine \$500.00.

1. Not a bona fide restaurant in that food items were insufficient on March 21, 2003.
2. Failed to appoint a Board-approved full time Manager for the licensed premises during the period September 1, 2002 through April 19, 2003.

3. Failed to maintain complete and truthful records covering the operation of the licensed business for a period of 2 years immediately preceding April 19, 2003.

In Re Citation No.: 04-2188. Fine \$500.00.

1. Failed to appoint a Board-approved full-time Manager for the licensed premises during the period April 19, 2003 through November 19, 2004.
2. Failed to keep records on the licensed premises on November 19, 2004.

In Re Citation No.: 07-1314. Fine \$200.00.

Sold malt or brewed beverages in excess of 192 fluid ounces for consumption off premises on March 17, 2007.

In Re Citation No.: 08-2486. Fine \$1,300.00 and RAMP training mandated.

Sales to a visibly intoxicated person on September 19, 2008.

In Re Citation No.: 11-0467. Fine \$300.00.

1. Smoked and/or permitted smoking in a public place where smoking was prohibited on February 17, 2011.
2. Failed to post signage as required by the Clean Indoor Air Act on February 17, 2011.

**PENALTY ASSESSMENT CRITERIA:**

***Mandatory Requirement(s)***

Liquor Code Section 471 [47 P.S. §4-471] prescribes a penalty of license suspension, or revocation, or a fine of not less than \$50.00, or more than \$1,000.00, or both for the violations found herein.

***Discretionary Component(s)***

I impose:

Count No. 1 - \$50.00 fine.

Count No. 3 - \$200.00 fine.

Count No. 4 - \$200.00 fine.

**ORDER:**

***Imposition of Fine***

Licensee must pay a \$450.00 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.

***Retaining Jurisdiction***

I retain Jurisdiction to ensure compliance with this Adjudication.

Dated this 30<sup>TH</sup> day of April, 2014.



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. If you have not already done so, it may be prudent for you 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](http://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

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The fine must be paid by a check drawn on the business or trust account of your attorney, who must be licensed in this Commonwealth, a treasurer's check, cashier's check, or money order. **Personal and business checks are not acceptable unless they are certified by your bank.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail, along with any required documentation (please use the Return Stub when mailing payment or write your citation number on the check).

PLCB-Office of Administrative Law Judge  
Brandywine Plaza  
2221 Paxton Church Road  
Harrisburg, PA 17110-9661