

Mailing Date: FEB 04 2015

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

PENNSYLVANIA STATE	:	In re Citation No.	BLCE Incident No.
POLICE, BUREAU OF	:	14-0310C	W09-472276
LIQUOR CONTROL ENFORCEMENT	:	14-1082C	W09-477716
	:	Consolidated for Adjudication Only	
v.	:		
	:	PLCB LID No. 50746	
VRAHOS, INCORPORATED	:		
T/A NICK'S PIZZA RESTAURANT	:	PLCB License No. R-AP-SS-EHF-11618	
822-824 MAIN ST.	:		
BETHLEHEM, PA 18018-3866	:	Northampton County	

JUDGE SHENKLE
BLCE COUNSEL: Roy Harkavy, Esq.
LICENSEE COUNSEL: Theodore J. Zeller, III, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued two citations, each of which alleges that Licensee violated the Liquor Code, 47 P.S. §4-493(1), by selling, furnishing, and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one minor, nineteen years of age. The details are as follows:

Citation No.	Date Citation Issued	Date of Violation Alleged
14-0310C	February 28, 2014	December 31, 2013
14-1082C	June 2, 2014	April 17, 2014

A hearing was held on November 13, 2014, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On December 31, 2013, a man whose birth date was September 27, 1994, who was participating in the Bureau's age compliance check program, entered the licensed premises at 6:40 p.m. He went to a cooler and selected a six-pack of beer, which he took to the cash register. When his age was questioned he presented his valid Pennsylvania Junior Driver's License. Licensee's clerk then completed the sale. The man left the premises with the beer. A liquor enforcement officer then entered and informed Licensee's employee of the violation (N.T. 16-17, 8-9, Ex. C-4).

2. On April 17, 2014, a man whose birth date was February 4, 1995, who was participating in the Bureau's age compliance check program, entered the licensed premises at 10:01 p.m. He

went to a cooler and selected a 24 ounce bottle of beer, which he took to the cash register. His age was not questioned. The man left the premises with the beer. A liquor enforcement officer then entered and informed Licensee's employee of the violation (N.T. 52-53, 45-46).

CONCLUSIONS OF LAW:

Both citations are sustained as charged.

DISCUSSION:

Counsel for Licensee argued, with particular attention to the facts in the second case, that the government's behavior constituted entrapment. There is considerable appeal to this argument, on a visceral level at least. I believe I communicated this feeling with an observation I made at the conclusion of the evidence:

Let me say for the record that the appearance of the last witness, the underage buyer who testified, is --- he does, indeed, appear to be an adult well over 21. And I could have been in the same position myself if I were a bartender.

I would have looked at him and said, there's an adult, but I know what risky business this is and I know what the police do. And so I would, if I were a bartender, card everybody just because that's the only way to not get caught. So I just have to say for the record that this is my sense impression from having seen this witness, that this is an unusually, mature looking individual... (N.T. 66).

This hearing was conducted in the Board Room of the Lehigh County Bar Association, and throughout the hearing on both cases there were a number of liquor enforcement officers present. I noticed a young woman, the underage buyer in the first case, and concluded that this was her role, because compared with the other people in the room she was obviously a minor. I wondered at the time if Mr. Harkavy had kept his second underage buyer elsewhere, because all of the other people, whom I presumed to be liquor enforcement officers, were clearly adults in my eyes.

But then the second case commenced and one of the presumed officers took his oath as the underage buyer. Counsel for Licensee and I both discussed his appearance at length on the record, because there was nothing about him which suggested that he was a minor.

I know that the Bureau does not agree to accept a minor into the age compliance check program until they have met the candidate personally, so they have an opportunity to judge his or her appearance, to determine whether the candidate will suit the Bureau's goals in the operation. One assumes that people with a more mature appearance will have an edge in this competition, because their work will be more productive in terms of citations filed.

Apart from my sense impressions, however, I must turn my attention to the legal framework in which the age compliance program operates. The defense of entrapment must be understood in this context, and cannot be sustained simply because I believe it would be just to do so.

Act 141 of 2002, §1, added a new subsection to 18 Pa. C.S. §6308, which relates to purchase, consumption, possession or transportation of liquor or malt or brewed beverages:

(e) Exception for compliance checks.--

- (1) An individual who is under 21 years of age may purchase, attempt to purchase, possess or transport liquor or malt or brewed beverages if all of the following apply:
 - (i) The individual is at least 18 years of age.
 - (ii) The individual is an officer, employee or intern of the Bureau of Liquor Control Enforcement of the Pennsylvania State Police.
 - (iii) The individual has completed training specified by the bureau.
 - (iv) The individual is acting within the scope of prescribed duties.
 - (v) The individual is acting under the direct control or supervision of a bureau officer who is an adult.
- (2) Under no circumstances may individuals under 21 years of age consume liquor or malt or brewed beverages.
- (3) The Pennsylvania State Police shall promulgate regulations prescribing the manner in which compliance checks are to be performed. Compliance checks under this subsection shall be conducted in a manner consistent with the regulations. Regulations shall require, at a minimum, all of the following:
 - (i) Prior to participation in the compliance check, the officer, employee or intern shall undergo training approved by the Bureau of Liquor Control Enforcement.
 - (ii) A person licensed to sell liquor or malt or brewed beverages that is found to be in compliance with this section during a compliance check shall be notified in writing of the compliance check and the determination of compliance.
 - (iii) A person licensed to sell liquor or malt or brewed beverages that is found to be noncompliant with this section during a compliance check shall be immediately verbally advised by the supervising bureau officer and shall be notified in writing of the failure to comply within ten working days of the date of the compliance check.

All of the requirements listed in this statute were met in these cases. Each of the underage buyers completed the specified training, met the age requirement, acted within the scope of his or her duties, and remained under the direct supervision of a Bureau officer at all times. Neither minor consumed any alcoholic beverage. The Bureau gave the requisite verbal notification, followed by the written notification within ten working days.

All of this was proven in the testimony. I did not find any facts on the basis of this evidence, apart from the immediate verbal notification, because it is my view that these facts are not relevant in a case of this nature. The Bureau has, I am sure, its reasons for laying the groundwork, establishing compliance with the statute, but this evidence does not impact on the decision I must reach: did Licensee's agents, servants or employees serve an alcoholic beverage to a minor?

Since the evidence shows clearly that they did, the question turns to the issue of entrapment argued by counsel. The general rule is found in the Crimes Code, 18 Pa. C.S. §313:

§ 313 Entrapment

- (a) General rule.--A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

- (1) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
- (2) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

We must first determine what the “offense” is. The service by a licensee of alcoholic beverages to adults is not an offense; service to minors is. Under the first alternative, the government could be guilty of entrapment only if their agents made knowingly false representations that service to minors is lawful. The government did not do this. They made knowingly false representations designed to induce the belief that the person attempting to purchase was an adult, but they did not attempt to distort the target’s understanding of the law.

The Crimes Code’s codification of the defense of entrapment has been construed to apply only to criminal prosecutions. Although the Supreme Court of Pennsylvania has recognized the possibility that “a defense like ‘entrapment’ may be properly afforded in the administrative context,” the facts before the Court did not justify it. *Smith v. State Horse Racing Commission*, 535 A.2d 596, 599 (Pa., 1988).

The facts in this case do not support a finding of common law entrapment, either.

PRIOR RECORD:

Licensee has been licensed since March 31, 2003, and has had no prior violations.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$1,000.00 to \$5,000.00 range, or both, for violations of the type found in this case. Mandatory R.A.M.P. – certification is required by 47 P.S. §4-471(d) in these circumstances. Penalties are assessed as follows:

- Citation No. 14-0301C – a fine of \$1,000.00 plus mandatory R.A.M.P. – certification.
Citation No. 14-1082C – a fine of \$1,500.00 plus mandatory R.A.M.P. – certification.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Vrahos, Incorporated, t/a Nick’s Pizza Restaurant, License No. R-AP-SS-EHF-11618, shall pay a fine of two thousand five hundred dollars (\$2,500.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee’s license will be suspended or revoked. Jurisdiction is retained.

IT IS FURTHER ORDERED that Licensee shall comply with the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management in the following manner. The Licensee is directed to contact the Bureau of Alcohol Education, Pennsylvania Liquor Control Board (toll free telephone: 1-866-275-8237; www.lcb.state.pa.us) within thirty (30) days of the mailing date of this adjudication in order to receive assistance in the compliance process. Licensee must receive certification within ninety (90) days of the mailing date of this adjudication.

Licensee must remain in compliance for a period of one year from the date such certification is issued. The Bureau of Liquor Control Enforcement is further directed to monitor compliance with this adjudication.

Failure to comply with this order will be grounds for modification of penalty in this case. Failure to comply may also constitute grounds for issuance of a new citation as authorized by Section 471(d) of the Liquor Code, 47 P.S. Section 4-471(d).

Dated this 15TH day of January, 2015.



David L. Shenkle, J.

jb

NOTICE: 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.

WHETHER OR NOT RECONSIDERATION HAS BEEN REQUESTED, AGGRIEVED PERSONS MAY APPEAL TO THE PLCB, NORTHWEST OFFICE BUILDING, HARRISBURG, PA 17124 WITHIN 30 DAYS AFTER THE MAILING DATE OF THIS ORDER.

THE PLCB CHIEF COUNSEL'S TELEPHONE NUMBER IS 717-783-9454.

Detach Here and Return Stub with Payment – Note Citation Number on Check

The fine must be paid by cashier's check, money order, or a check drawn on the trust account of an attorney licensed in Pennsylvania. **Personal and business checks are NOT acceptable unless bank certified.** If you are paying by guaranteed check, please make it payable to the Commonwealth of Pennsylvania and mail it, along with any required documentation, to:

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

Credit/debit cards may be used: visit www.lcb.state.pa.us
and look under LEGAL/Office of ALJ for instructions.