

Mailing Date: DEC 31 2015

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	IN RE: CITATION NO. 14-2149
LIQUOR CONTROL ENFORCEMENT	:	BLCE INCIDENT NO. W06-481511
	:	
v.	:	
	:	
	:	PLCB LID - 53788
THE COPPERHEAD, L.L.C.	:	
296 MAIN ST.	:	PLCB LICENSE NO. E-AM-SS-3272
PO BOX 481	:	
BEECH CREEK, PA 16822	:	
	:	
CLINTON COUNTY	:	

ADJUDICATION

BEFORE: DANIEL T. FLAHERTY, JR., ALJ
BUREAU COUNSEL: JOHN H. PIETRZAK
LICENSEE COUNSEL: FRANK S. MICELI

BACKGROUND:

This proceeding arises out of a citation that was issued on October 23, 2014, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against THE COPPERHEAD, L.L.C., (hereinafter "Licensee").

The citation contains two counts.

The first count charges Licensee with violation of Section 442(a)(1) of the Liquor Code [47 P.S. §4-442(a)(1)] in that on July 26, 2014, Licensee, by its servants, agents or employees, sold malt or brewed beverages in excess of 192 fluid ounces in a single sale to one person for consumption off premises.

The second count charges Licensee with violation of Sections 406(a)(3) and 493(16) of the Liquor Code [47 P.S. §§4-406(a)(3) and 4-493(16)] in that on August 10, 2014, Licensee, by its servants, agents or employees, sold, furnished and/or gave alcoholic beverages on Sunday between 2:00 a.m. and 11:00 a.m.

The investigation which gave rise to the citation began on July 7, 2014 and was completed on September 10, 2014; and notice of the violation was sent to Licensee by Certified Mail on October 2, 2014. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on June 16, 2015 at The Lysox Complex, 524 County Farms Road, Suite 2, Montoursville, Pennsylvania 17784-9865.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

COUNT 1

1. On July 26, 2014, an officer of the Bureau entered the licensed premises in an undercover capacity (N.T. 7).

2. The officer entered the carryout store portion of the premises where he retrieved a 12-pack of Natural Light beer in 12-ounce cans (144 ounces) and a six-pack of Busch beer in 16 ounce cans (96 ounces), for a total of 240 ounces (N.T. 9-10).

3. The officer placed both of the items on the checkout counter in the carryout area. He handed the female clerk a \$20.00 bill. The clerk walked around the counter and through a doorway into the bar area and returned with \$4.25 which she handed to the officer (N.T. 10).

4. At this point, the female employee told the officer that she could not let him carry the six-pack and the 12-pack both at once. The officer then took the six-pack and set it outside the door. He then returned and picked up the 12-pack and took it outside where he picked up the six pack and went to his vehicle (N.T. 10-11).

COUNT 2

5. On Sunday, August 10, 2014 at 8:30 a.m., the officer made a visit to the licensed premises in an undercover capacity (N.T. 12).

6. At the time of his arrival, the officer observed that the licensed premises was closed (N.T. 12).

7. At approximately 9:30 a.m., the officer observed a vehicle pull in and park alongside the licensed premises. A male individual whom the officer recognized as Jason Clymer, principal of Copperhead, LLC, exited the vehicle, entered the licensed premises and opened the premises for business (N.T. 12-13).

8. The officer entered the licensed premises at 9:42 a.m. He selected a six pack of Twisted Tea Strawberry Lemonade from the cooler and placed it on the counter. He was waited on by Mr. Clymer (N.T. 13-14).

9. The only food items that the licensed operation serves constantly are two types of chili dogs. These items are advertised throughout the establishment. Licensee has these items prepared the night before and in the refrigerator so that they can be microwaved and served quickly upon request. Licensee occasionally has other food items which would be cooked and ready for service around 11:00 a.m. (N.T. 30-39 and Exhibits L-1, L-2, L-3 and L-4).

10. If the officer or anyone else had ordered chili dogs at 9:00 a.m. when the establishment first opened, the Licensee could have quickly warmed up chili dogs and served them (N.T. 45-48).

11. The officer asked Mr. Clymer if there was anything cooking and whether he had any chicken wings. Mr. Clymer replied that he didn't have a fryer, and therefore he didn't have chicken wings. He told the officer, "We have chili dogs, and I might be making other foods around lunchtime." (N.T. 14 and 49).

12. The officer did not order any food items other than chicken wings (N.T. 22, 39-40).

CONCLUSIONS OF LAW:

1. Count No. 1 of the citation is **sustained**.
2. Count No. 2 of the citation is **dismissed**.

DISCUSSION:

COUNT 1

There was a factual dispute at the hearing as to whether or not the patron who purchased the two 12-packs of Yuengling Lager beer paid for each 12-pack separately. However, in either case, the actual intention of the parties was for the purchase of 288 fluid ounces of malt or brewed beverages for consumption off the premises. Count No. 1 of the citation is, therefore, sustained.

Section 442(a)(1) of the Liquor Code [47 P.S. §4-442(a)(1)] provides in part:

...No retail dispenser may sell malt or brewed beverages for consumption off premises in quantities in excess of 192 fluid ounces; ...

Licensee contends that the events in question amounted to two separate sales, each under 192 fluid ounces, and, therefore no violation occurred. I disagree.

The issued presented here was addressed by Administrative Law Judge Thau in *Thomas E. D'Andrea*, Citation No. 88-1218, V Sel. Op. 169. In that case Judge Thau, citing the Statutory Construction Act [1 Pa. C.S. §1922(1)] and the interpretational directives of Liquor Code Section 104 [47 P.S. §1-104], indicated that a statute is not to be interpreted in a manner which renders it meaningless. In support of this position, Judge Thau cited *Commonwealth Liquor Control Board v. Starr*, 318 A.2d 763 (Pa. Cmwlth 1974), affirmed *Commonwealth Liquor Control Board v. Starr*, 337 A.2d 914 (Pa. Cmwlth 1975); and *In re: School District of Pittsburgh*, 244 A.2d 42 (Pa. 1968).

Judge Thau further indicated that to accept licensee's position in that case, which is the same as Licensee's position in this case, would allow a person to purchase a large quantity of beer so long as the transaction was broken down into separate segments, each less than 192 fluid ounces. Such an interpretation renders the statutory provision in question meaningless.

I agree with Judge Thau that only those separate transactions which are entered into in good faith and not in an attempt to circumvent the statute should be considered legitimate.

In this case, the patron placed two 12-packs of 12-ounce cans of beer on the counter simultaneously. At this point the customer tendered money to the counter person in payment for the beer. It is only at this point that a feeble attempt is made to portray the sale of beer as two transactions when the counter person asks the customer to carry out the parcels separately.

Even if two separate payments were made for each of the 12-packs, it is clear that the parties intended one sale and purchase of 288 fluid ounces of beer at one time. Based upon the foregoing, I conclude that the charge in the citation is sustained.

COUNT 2

Licensee was in compliance with the applicable statutory section applying to eating place licensees, and this count must, therefore, be dismissed.

Licensee was charged with violation of Section 406(a)(3) of the Liquor Code [47 P.S. §4-406(a)(3)] which does not name eating place licensees. However, the identical language is also found in Section 432(f) of the Liquor Code [47 P.S. §4-432(f)]. This section reads as follows:

Hotel, eating places, or municipal golf course retail dispenser licensees may sell malt or brewed beverages between the hours of eleven o'clock antemeridian on Sunday and two o'clock antemeridian on Monday upon purchase of a special permit from the board at an annual fee as prescribed in section 614-A of the act of April 9, 1929 (P.L. 177, No. 175, known as "The Administrative Code of 1929,") which shall be in addition to any other license fees. Notwithstanding this provision, a licensee holding such a special permit may begin selling malt or brewed beverages on Sunday between the hours of nine o'clock antemeridian and eleven o'clock antemeridian provided that the licensee offers a meal, as

that term is defined in section 406 beginning at nine o'clock antemeridian.

The record establishes in this case that Licensee had available in the refrigerator cooked ingredients for chili dogs and could have served them very quickly had they been ordered. The officer, however, inquired about chicken wings but never ordered any food.

A "meal" is defined in Section 406 (supra) as:

...food prepared on the premises sufficient to constitute breakfast, lunch or dinner; it shall not mean a snack such as pretzels, popcorn, chips or similar food.

I am of the opinion that cooked chili dogs in the refrigerator and available to be heated and served within a minute or so constitutes a meal that was ready for service.

Based upon the foregoing, I conclude that Licensee was in compliance with Section 432(f) of the Liquor Code (supra) the appropriate Section of the Liquor Code and Count No. 2 of the citation is dismissed.

PRIOR RECORD:

Licensee has been licensed since November 8, 2004, and has had two prior violations:

IN RE:

Citation No. 05-2158. Fine \$250.00.

1. Sold malt or brewed beverages in excess of 192 fluid ounces for consumption off premises.

Citation No. 14-0781. Fine \$1,400.00.

1. Sales on Sunday between 2:00 a.m. and 11:00 a.m. March 30, 2014.

PENALTY:

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 \$50.00 or more than \$1,000.00 or both for violations of the type found in Count 1 of this case.

Under the circumstances of this case, the penalty imposed shall be as follows:

Count 1 - \$250.00 fine
Count 2 - Dismissed

ORDER

THEREFORE, it is hereby ordered that Licensee THE COPPERHEAD, L.L.C., pay a fine of \$250.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

Jurisdiction is retained.

Dated this 24TH day of December, 2015.



Daniel T. Flaherty, Jr., 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.

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 business or trust account of an attorney licensed in Pennsylvania. **Personal and business checks are NOT acceptable unless bank certified.** Please make your guaranteed check 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

IN RE: CITATION NO. 14-2149
THE COPPERHEAD, L.L.C.