

Mailing Date: OCT 22 2015

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

PENNSYLVANIA STATE POLICE,	:	In Re Citation No.: 15-1044C
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT (BLCE)	:	
	:	BLCE Incident No.: W05-495900
v.	:	
	:	
JOHNSTOWN PHOENIX BAR &	:	PLCB LID No.: 24166
RESTAURANT, INC.	:	
T/A PHOENIX	:	
200-202 BROAD ST.	:	PLCB License No.: R-13846
JOHNSTOWN, PA 15906-2714	:	
	:	
CAMBRIA COUNTY	:	

ADJUDICATION

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Michael C. Nickles, Esquire

LICENSEE COUNSEL: Myron I. Markovitz, Esquire

BACKGROUND:

This proceeding arises out of a citation, containing one count that was issued on June 15, 2015, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Johnstown Phoenix Bar & Restaurant, Inc. (Licensee).

The citation charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that Licensee, by your servants, agents, or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, twenty (20) years of age, on May 11, 2015.

The matter was submitted by way of Stipulations of Fact and Proposed Conclusions of Law.

1. The investigation began on May 11, 2015 and was completed on May 12, 2015. (Stipulations of Fact No. 2)

2. The Bureau issued a Notice of Violation letter on May 18, 2015. Said violation letter was timely received by Licensee. (Stipulations of Fact No. 3)

3. On the date charged, the Bureau conducted an Age Compliance Check (ACC) at the licensed premises. The Bureau Enforcement Officers conducting the ACC completed training and acted within the scope of their prescribed duties. The underage buyer (UB) completed training and passed an examination. At all relevant times, the UB was under the direct supervision of Bureau personnel. (Stipulations of Fact No. 5.a.)

4. A Bureau Enforcement Officer entered the premises at 8:33 p.m., in an undercover capacity. The Officer determined it was safe for the UB to enter. (Stipulations of Fact No. 5.b.)

5. The UB entered at 8:49 p.m. At all relevant times, the UB remained under the Officer's direct observation. The UB requested a bottle of beer. The bartender opened a bottle of beer and asked the UB for proof of age. The UB searched her belongings for her true and valid Pennsylvania Photo Driver's License showing her to be underage (Immediately prior to this visit, the UB participated in an ACC at another licensed premises. As the UB displayed her true and valid identification at the prior location, the UB could not locate her identification). The bartender asked the UB for her age. The UB became flustered and replied: "Twenty something." The bartender said: "No one looks that long, I trust you." The UB continued to search for her identification while the bartender served the UB the bottle of beer. (Stipulations of Fact No. 5.c.)

6. After the UB departed the premises and without having consumed any beer, a second Officer entered the licensed premises to provide verbal notification of the ACC failure. The verbal notice was followed up by written notification. (Stipulations of Fact No. 5.d., and e.)

CONCLUSION(S) OF LAW:

1. The notice requirements of the Liquor Code have been satisfied.
2. Licensee sold, furnished and/or gave alcoholic beverages to a minor.
3. The ACC proceeded in such a manner as to raise Common Law Entrapment thus requiring the Citation's dismissal.

4. Alternatively, as the Bureau has failed to comply completely with the legal requirements of the ACC Program, the citation must be dismissed.

DISCUSSION:¹

Common Law Entrapment

In BLCE v. James F. Edelblute, In Re Citation No.: 94-0947, I dismissed a charge of selling after hours based on Common Law Entrapment. Citing BLCE v. The Legion Home Association of Lock Haven, PA, In Re Citation No.: 91-0868 for the elements of Common Law Entrapment, I agreed with Administrative Law Judge Flaherty that Common Law Entrapment applies to this administrative process [also see: Smith v. State Horse Racing Com'n, 535 A2.d 596 (Pa. 1988)]. Common Law Entrapment mandates proof of two components: one not disposed to commit an unlawful act and government conduct likely to entrap one so innocently disposed.²

This record establishes both elements. Asking for proof of age and subsequently commenting that the bartender trusted the UB, is a demonstration of the bartender's disposition to obey law. When verbally deceptive as to age, the UB's intention was to entrap the bartender.³

Several questions arise. What happened to strict liability requiring me to sustain a sales to a minor violation whatever the circumstances? What makes an ACC case any different from the hundreds of other cases in which a minor intentionally deceives a server as to age? Having seemingly gone against a plethora of precedent, I am obligated to respond.

I am not aware of any decision where the question of Common Law Entrapment, in an ACC setting and with the specific facts of this case, has been ruled upon.⁴ In this context, this matter is one of first impression. Moreover, in the narrow facts herein presented, it is a government agent, the UB, whose behavior was deceptive, with obvious intent to urge the bartender to violate the law.

¹ Although the parties provided suggested Conclusions of Law differing from those above, an Administrative Law Judge is never bound by the parties' legal conclusions.

² Administrative Law Judge Flaherty determined the licensee could not establish Common Law Entrapment.

³ I believe the UB did not act out of any malicious intent, but the UB's in-the-moment response was nevertheless purposefully designed.

⁴ In BLCE v. Vrahos, Incorporated, In Re Citation No.: 14-1082C, Administrative Law Judge Shenkle recognized that Common Law Entrapment is applicable to administrative law proceedings, finding the defense inapplicable although the UB's appearance was that of an adult. In BLCE v. TRTT, Inc., In Re Citation No.: 13-0946C, Administrative Law Judge Shenkle dismissed a sales to a minor charge as the Bureau failed to prove it followed all mandated procedural requirements.

I well recognize that government does have latitude to engage in artifice and deception to ensnare those inclined to break the law. We hold government to a higher standard, most generally grounded in our society's sense of fairness. When government intrudes into unfairness, we excuse otherwise culpable conduct. Our concept of fairness derives from our commitment to Due Process.⁵

Failing to Comply With ACC Program Requirements

1. Law

There exists only one appellate decision on point. In *Erie Sports Bar v. State Police*, 6 A.3d 663 (Pa.Cmwlth. 2010), the Commonwealth Court dismissed a charge of sales to a minor occurring within ACC confines. Writing for the Court, Senior Judge Kelley applied statutory construction principles. He reasoned that the Crimes Code [18 Pa.C.S.A. §§6308(e) and 6310(c)], each containing identical language, are quite clear. The Legislative directives in those Sections, instruct the Bureau to conduct ACCs within the framework of the law and regulations promulgated pursuant thereto. An absence of full compliance mandates citation dismissal.

The Bureau has acted upon legislative permission, adopting regulations found in 37 Pa. Code, Chapter 23. Both legislation and regulation are silent on whether the Bureau may permit a UB to provide verbally false information. Accordingly, the authority for verbal misrepresentation, exclusive of Common Law Entrapment, is not on solid ground.

The UB Training Manual,⁶ an entire copy of which I was not provided, leaving me to evaluate the Stipulation's summary without full context, goes further than law and regulation. The Manual allows for verbal deception. Looking at the levels of authority, the Manual cannot exceed regulation which cannot exceed law. Consequently, the Manual's instruction allowing for verbal deception may be *ultra vires*.

⁵ Administrative Law Judge Shenkle's ruling in *Vrahos, Incorporated* (supra), was appealed to the Pennsylvania Liquor Control Board (PLCB). The licensee relied upon Criminal Law Entrapment exclusively. The PLCB determined that Criminal Law Entrapment applies solely to criminal law matters. In *BLCE v. J & D's The Broadway, LLC*, In Re Citation No.: 12-1735C, the PLCB dismissed the licensee's appeal. The Licensee relied on Common Law Entrapment as the UB appeared to be mature. The instant facts are quite distinct. Interestingly, a purchaser's appearance is comprised largely of subjective opinion rather than fact.

⁶ Based upon the dealings in this matter between me and Bureau counsel, I understand the Manual's contents are closely guarded. As the Manual was not made available to me, there is no doubt a citizen requesting a copy will be met with resistance. The Manual is not subject to the safeguards of public evaluation as law and regulation are.

2. History

In every ACC case assigned me, when a UB is asked to provide proof of age, the UB invariably produces true and valid identification. My colleagues have expressed similar experiences. So entrenched in the ACC Program is this procedure that one might presume it was a statutory requirement. It is surprising that displaying true and valid identification is not embedded in law or regulation. The ACC's procedure, solidified through practice, while not absolutely controlling and without notice of change, nevertheless creates an expectation that future ACCs will model past.

ORDER:

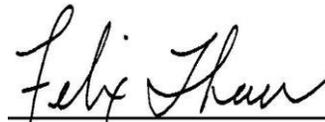
Dismissal

I dismiss the citation.

Retaining Jurisdiction

I retain Jurisdiction to ensure compliance with this Adjudication.

Dated this 20TH day of October, 2015.



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. The full requirements for an appeal can be found in 47 P.S. §4-471.