

RULES AND REGULATIONS

Title 40—LIQUOR

LIQUOR CONTROL BOARD

[40 PA. CODE CH. 3]

Point System for Certain Licensees

The Liquor Control Board (Board), under the authority of section 207(i) of the Pennsylvania Liquor Code (47 P. S. § 2-207(i)), adds Chapter 3, Subchapter L (relating to point system for certain licensees).

Purpose

The act of December 8, 2004 (P. L. 1810, No. 239) (Act 239) created a point system for violations by licensees in cities of the first class. Upon accumulation of certain numbers of points, licensees will be subject to various consequences including receiving education in responsible alcohol management. If higher point totals are accumulated, ultimately, the license may be revoked. This point system expires on December 31, 2006, unless extended by statute.

Act 239 established a system of points to be assessed for enumerated violations of the Liquor Code (Code) (47 P. S. §§ 1-101—10-1001). Act 239 required that the Liquor Control Board (Board) adopt regulations setting the assessment of points for a category of violations described as “nonenhanced violations.” This final-omitted rulemaking enumerates what these nonenhanced violations are and also provides for a range of points for nonenhanced violations that may be assessed by an administrative law judge upon adjudication of a citation.

The act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201—1208), known as the Commonwealth Documents Law (CDL), establishes three circumstances under which an agency is permitted to promulgate a final-omitted rulemaking. These are when: (1) comments from the public are not appropriate, necessary or beneficial; (2) persons subject to the regulation are named or given personal notice; or (3) notice is impracticable, unnecessary or contrary to the public interest.

Licensees are already aware that even a single adjudicated citation for a violation of the Liquor Code may result in the revocation of, or decision by the Board not to renew their license. *Slovak-American Citizens Club v. Pennsylvania Liquor Control Board*, 549 A.2d 251 (Pa. Cmwlth. 1988). The point system creates a system for implementing the Board’s existing plenary discretion in licensing.

The Board considers that under section 479 of the Code (47 P. S. § 4-479), the regulated community is already on notice that at least one point will be assessed for any violations not enumerated in section 479(b) and (d) of the Code. Additionally, when a licensee in Philadelphia receives a citation, the cover letter from the Office of Administrative Law Judge (OALJ) now explains that points may be assessed if the citation is adjudicated against the licensee. In these ways, the Board believes that persons subject to the regulations are given actual notice of it in accordance with law. See section 204(2) of the CDL (45 P. S. § 1204(2)).

Because the statute became effective on February 6, 2005, and will expire on December 31, 2006, unless extended, the Board believes that expedited adoption of these implementing regulations is in the public interest.

Delaying implementation to follow the notice of proposed rulemaking system is impracticable and contrary to the public interest under these circumstances. See 201 of the CDL (45 P. S. § 1201).

For these reasons, the final-omitted rulemaking process serves both the public interest in prompt effectuation of the purpose of Act 239, and the regulated community’s receipt of fair notice of the potential consequences of an adjudicated citation

Summary of Rulemaking

The following are summaries of the regulatory changes:

- The rulemaking enumerates “nonenhanced violations.”
- It establishes a range of 3 to 5 points for 31 enumerated violations of the Code or 40 Pa. Code (relating to liquor).
- It establishes a range of 1 to 3 points for all other violations of the Code or 40 Pa. Code that have not been enumerated in Act 239 or this section.
- It directs removal of 3 points from the record for each 12 months a licensee operates without assessment of additional points.

Affected Parties

This final-omitted rulemaking will affect licensees in Philadelphia.

Paperwork Requirements

This final-form rulemaking requires the Board and the OALJ to keep records of the points assessed to and removed from license records. Additional correspondence between the Board and licensees will be required when several action levels are reached. Additional legal proceedings may be necessary when licenses are placed in safekeeping or revoked.

Fiscal Impact

Because this final-omitted rulemaking implements a procedure that has not previously existed in this Commonwealth, anticipated fiscal impact cannot be estimated with any confidence. If this final-omitted rulemaking and the statutory provisions it parallels, cause an increase in appeals of the OALJ decisions to the Board, this will increase costs to the Board and licensees. In 2003, there were 19 appeals to the Board filed by licensees in Philadelphia. In 2004, there were seven appeals filed by licensees in Philadelphia. The number of appeals is likely to increase.

Effective Date

This final-omitted rulemaking will become effective upon its publication in the *Pennsylvania Bulletin*.

Contact Person

Further information may be requested from James F. Maher, Assistant Counsel, Office of Chief Counsel, Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on May 24, 2005, the Board submitted a copy of this final-omitted rulemaking, with revisions, and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC), the Chair-

persons of the House and Senate Committees, and the Office of Attorney General. A copy of this material is available to the public upon request.

Under section 5.1(j.2) of the Regulatory Review Act, on June 8, 2005, this final-omitted rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 9, 2005, and approved this final-omitted rulemaking

Findings

The Board finds that:

(1) Public notice of the Board's intention to amend its regulations under the procedures in sections 201 and 202 of the CDL has been omitted under section 204 of the CDL because public comment is unnecessary in that the amendments adopted by this order merely implement an amendment to the act.

(2) The amendment of the Board's regulations in the manner provided in this order is necessary and appropriate for the administration of the act.

Order

The Board, acting under its authorizing statute, orders that:

(a) The regulations of the Board, 40 Pa. Code Chapter 3, are amended by adding §§ 3.121 and 3.122 to read as set forth in Annex A.

(b) The Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

JONATHAN H. NEWMAN,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 35 Pa.B. 3632 (June 25, 2005).)

Fiscal Note: 54-62. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 40. LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 3. LICENSE APPLICATIONS

Subchapter L. POINT SYSTEM FOR CERTAIN LICENSEES

Sec.
3.121. Statutory authority and applicability.
3.122. Points assessment.

§ 3.121. Statutory authority and applicability.

Section 479 of the Liquor Code (47 P. S. § 4-479) establishes a numerical system for assessment of points against the record of a license for licensees in cities of the first class. Every liquor and malt beverage license that has been cited for a violation under section 471 of the Liquor Code (47 P. S. § 4-471) shall have points assessed to the license record as of the date of final adjudication.

§ 3.122. Points assessment.

(a) The violations described in this section shall be known as "nonenhanced violations." If a licensee or the

licensee's agent is adjudicated to have violated two or more nonenhanced violations arising from the same core of operative facts, points shall be assessed only for the violation for which the greatest number of points may be assessed.

(b) Where a range of points is given, the administrative law judge shall assess any whole number of points for the violation within that range.

(c) The following violations will be assessed three to five points:

(1) Supplied false information on applications or notices (47 P. S. §§ 4-403, 4-436 and 4-471).

(2) Verification of an application by an unauthorized person (47 P. S. § 4-403).

(3) Offered, conferred or agreed to confer upon an enforcement officer of the Bureau of Liquor Control Enforcement or offered to pay or paid a commission, profit or remuneration to a member, or employee of the Board or other employee of the Commonwealth (47 P. S. §§ 4-471 and 4-491(14)).

(4) Cashed, received, handled or negotiated payroll and other checks (47 P. S. § 4-493(15)).

(5) Sales by a club of malt or brewed beverages for consumption off-premises (47 P. S. §§ 4-407 and 4-442(a)).

(6) Failure by a club to properly admit members; failed to conduct business through officers regularly elected; failed to hold regular meetings; failed to operate for the mutual benefit of the entire membership; or club officers and trustees not elected in accordance with the charter and bylaws (47 P. S. § 1-102).

(7) Sales by a club of liquor or malt or brewed beverages to nonmembers or as part of a catered event without providing the required service of food (47 P. S. §§ 4-401(b), 4-406(a)(1) and 4-442(a); 40 Pa. Code § 5.83(a) (relating to catering)).

(8) Held an event, contest or tournament on the licensed premises which involved the consumption of alcoholic beverages (40 Pa. Code § 5.32(e)(3) (relating to restrictions/exceptions)).

(9) Permitted malt or brewed beverages to be consumed on the licensed premises of a distributor or importing distributor, except as part of a lawful tasting (47 P. S. § 4-441(b)).

(10) Distributor or importing distributor licensee acquisition or maintenance of an interest in property used by another licensee (47 P. S. §§ 4-411 and 4-443).

(11) Sales by distributor or importing distributor in quantities of less than a case of 24 containers, each container holding 7 fluid ounces or more, or a case of 12 containers, each holding 24 fluid ounces or more (47 P. S. § 4-441(b)).

(12) Purchase of malt or brewed beverages by a distributor or an importing distributor after license expiration or failure to renew or validate the license (47 P. S. § 1-102).

(13) Failed to be a bona fide restaurant providing sufficient food items, eating utensils, dishes and seating in a location with a total area of 400 square feet available to the public in one or more rooms (47 P. S. §§ 1-102 and 4-491(6)).

(14) Failed to be a bona fide eating place providing sufficient food items, eating utensils, dishes, and seating

in a location with a total area of 300 square feet available to the public in one or more rooms (47 P. S. §§ 1-102, 4-442(b)).

(15) Failed to maintain a permanent partition at least 4 feet high between the licensed eating place and other business (40 Pa. Code § 3.54).

(16) Permitted entertainment outside of lawful service hours or on Sunday before 11:00 a.m. or after 2:00 a.m. on the following Monday (47 P. S. § 4-493(10)).

(17) Permitted entertainment to occur without an amusement permit (47 P. S. § 4-493(10)).

(18) Permitted entertainment while the license or amusement permit was suspended by order of an administrative law judge (47 P. S. § 4-493(10)).

(19) Furnished false information concerning sale of food and beverages when applying for a Sunday sales permit; or concealing the pecuniary interest of others; or concealing the source of funds when applying for a license (47 P. S. §§ 4-403(h), 4-404, 4-406(a)(3), 4-432(a) and (f), 4-436(j), 4-468(a) and 4-471; 40 Pa. Code § 11.172 (relating to application for Sunday sales permit)).

(20) Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling or bookmaking on the licensed premises (47 P. S. § 4-471).

(21) Failed to operate as a bona fide hotel (47 P. S. §§ 1-102 and 4-461(c)).

(22) Interfered with a liquor control enforcement officer, police officer or board employee in the administration of the law or other governmental function (47 P. S. § 4-471).

(23) Altered an expired liquor license to show it as current and valid (47 P. S. § 4-471(a)).

(24) Consumption of liquor or malt or brewed beverages by licensee or its agents while tending bar or otherwise serving liquor or malt or brewed beverages (47 P. S. § 4-493(28)).

(25) Sold alcoholic beverages during a period of license or special permit suspension (47 P. S. §§ 4-406(a)(3), 4-491(1), 4-492(2) and (3) and 4-493(16)).

(26) Permitted another person to operate a business on the licensed premises (40 Pa. Code § 3.52(a) (relating to connection with other business)).

(27) Permitted another person or entity to own or operate, or both, the licensed premises (47 P. S. §§ 4-404 and 4-436(f)).

(28) Sold alcoholic beverages after the license is submitted for safekeeping (47 P. S. §§ 4-467, 4-491(1), 4-492(2), 4-492(3) and 4-493(16); 40 Pa. Code § 7.31 (relating to surrender of licenses in certain cases)).

(29) Sold alcoholic beverages after the license has expired (47 P. S. §§ 4-491(1), 4-492(2) and (3) and 4-493(16)).

(30) Sold beer products for takeout in excess of 192 fluid ounces in a single sale (except for distributor) (47 P. S. §§ 4-401(a), 4-407 and 4-442(a)).

(31) Sold untaxed cigarettes (47 P. S. § 4-471).

(d) For any violation of the Liquor Code or this title that has not been specified in section 479 of the Liquor Code (47 P. S. § 4-479) or this section, the administrative law judge shall assess one to three points.

(e) Points will be assessed to the license record by the Board and the Office of Administrative Law Judge, effective on the date of final adjudication. Final adjudication means when the administrative law judge has rendered a decision on the citation notwithstanding any appeals of that decision. If the decision is reversed or modified on appeal, the assessment of points will be correspondingly adjusted.

(f) Points assigned to any license record shall be removed at the rate of three points for each 12 consecutive months of operation of the licensed premises in which the license has not been assessed points.

[Pa.B. Doc. No. 05-1209. Filed for public inspection June 24, 2005, 9:00 a.m.]