

Mailing Date: DEC 12 2005

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-0982
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-308368
v.	:	
	:	LID - 3950
JAMES A. DANNER VETERANS	:	
OF FOREIGN WARS POST 537	:	
HOME ASSOCIATION	:	
1095 PINES RD.	:	
ETTERS, PA 17319-9661	:	
	:	
YORK COUNTY	:	
LICENSE NO. CC-5482	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Thomas M. Ballaron, Esquire
Pennsylvania State Police
3655 Vartan Way
Harrisburg, PA 17110

For Licensee
Fred Lehman
Commander

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on May 26, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against James A. Danner Veterans of Foreign Wars Post 537 Home Association (Licensee), License Number CC-5482.

This citation¹ contains four counts.

The first count charges Licensee with a violation of Section 13.102(a)(3) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §13.102(a)(3)]. The charge is that on March 26, 2005, Licensee, by servants, agents or employes, sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that club members were able to obtain draft beers at a beer truck for the set price of \$15.00.

The second count charges Licensee with a violation of Sections 401(b) and 406(a)(1) of the Liquor Code [47 P.S. §4-401(b) and §4-406(a)(1)]. The charge is that on March 26, 2005, Licensee, by servants, agents or employes, sold alcoholic beverages to nonmembers.

The third count charges Licensee with violations of Sections 471 and 493(12) of the Liquor Code [47 P.S. §4-471 and §4-493(12)], Section 311 of the Local Option Small Games of Chance Act [10 P.S. §311] and Section 901 of the Department of Revenue Regulations [61 Pa. Code §901]. The charge is that on divers occasions between October 1, 2004 and April 19, 2005, Licensee, by servants, agents or employes, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years concerning the Local Option Small Games of Chance Act.

The fourth count charges Licensee with a violation of Section 5.83(a) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.83(a)]. The charge is that on March 26, 2005, Licensee, by servants, agents or employes, failed to conduct a catered event in conformity with Title 40 of the Pennsylvania Code.

An evidentiary hearing was conducted on November 1, 2005 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania. Licensee was represented by its Commander, Mr. Fred Lehman.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

1. Commonwealth Exhibit No. C-2.

FINDINGS OF FACT:

1. The Bureau began its investigation on March 25, 2005 and completed it on April 19, 2005. (N.T. 17)

2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on May 3, 2005. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1)

Count Nos. 1 and 2:

3. A Bureau Enforcement Officer arrived at the licensed premises at about 4:40 p.m., on March 26, 2005, in an undercover capacity. The Officer purchased an alcoholic beverage after which the bartender asked the Officer if he was a member. He advised the bartender that he was not. The bartender presented a guest book for the Officer to sign. At 3:25 p.m., the Officer ordered another mixed drink from one of the bartenders. (N.T. 21-24)

4. At approximately 5:25 p.m., the Officer identified himself to Mr. Lehman, Licensee's Commander. He discussed Licensee's promotion with Mr. Lehman. The Officer went to a beer truck. There was a sign posted on the pavilion door that indicated the first drink of beer was free but that every drink after that \$0.05 for draft and \$0.25 per pitcher. Some of the participants did not pay for the beer. (N.T. 25-29)

Count No. 3:

5. A Bureau Enforcement Officer returned to the premises on April 19, 2005. The Officer reviewed Licensee's Small Games of Chance records. Licensee did not maintain any records concerning payouts or cash prizes or the value of merchandise. (N.T. 32-35)

CONCLUSIONS OF LAW:

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

Count No. 1:

2. **Sustained** as charged.

Count No. 2:

3. **Sustained** as charged.

Count No. 3:

4. **Sustained** as charged.

Count No. 4:

5. The charge does not describe unlawful behavior requiring that it be dismissed.

DISCUSSION:

It is time to dust off a relatively old Adjudication as a reminder that negating an affirmative defense does not constitute a distinct violation. *Behind the moon, Inc.*, Adjudication No. 99-0813, www.lcb.state.pa.us; *Jude's Last Nickel, Inc.*, Adjudication No. 02-0648, www.lcb.state.pa.us.

Club licensees are prohibited from selling to nonmembers. There is an exception for Catering Club licensees which may sell to nonmembers provided there is compliance with 40 Pa. Code §5.83(a) [40 Pa. Code §5.83(a)]. As the above referenced Adjudications indicate, exceptions or provisos are to be construed as affirmative defenses, i.e., the burden rests with the licensee to demonstrate the licensee has fallen within the exception.

It is not unlawful for a Catering Club licensee to conduct a catered event that fails to comply with the pertinent regulation. Such a failure renders sales to nonmembers unlawful, and that is precisely what Licensee has been charged with (Count No. 2).

PRIOR RECORD:

Licensee has been licensed since February 20, 1958, and has had four prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge (Commonwealth Exhibit No. C-3):

Adjudication No. 00-0420. Fine \$250.00.
Sales to nonmembers.
January 10, 2000.

Adjudication No. 00-1687. Fine \$350.00.
Sales to nonmembers.
August 4, 2000.

Adjudication No. 01-0987. Fine \$100.00.
Failed to adhere to by-laws.
February 14, 2001.

Adjudication No. 04-1975. Fine \$1,100.00.

1. Failed to adhere to by-laws.
October 13, 2004.
2. Failed to maintain complete and truthful records covering the operation of the licensed business for a period of 2 years concerning the Local Option Small Games of Chance Act.
October 13, 2004.
3. Offered and/or awarded more than \$5,000.00 in cash or merchandise in any 7 day period.
October 3 through 9, 2004.
4. Failed to maintain records in conformity with Title 40 of the Pennsylvania Code.
October 13, 2004.

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 Nos. 1, 2 and 3 in this case.

I find Licensee's operation to be exceedingly dangerous. Permitting patrons to pour their own alcoholic beverages without any monitoring whatsoever invites disaster. Accordingly, I impose:

Count No. 1 – \$1,000.00 fine and 7 days suspension.
Count No. 2 – \$1,000.00 fine and 7 days suspension.
Count No. 3 – \$500.00 fine.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$2,500.00 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.

The fine must be paid by Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal checks, which include business-use personal checks, are not acceptable.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

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

Imposition of Suspension

IT IS FURTHER ORDERED that the Catering Club liquor license of James A. Danner Veterans of Foreign Wars Post 537 Home Association, License No. CC-5482, be suspended for a period of fourteen days, **BEGINNING** at 7:00 a.m., on Monday, February 13, 2006, and **ENDING** at 7:00 a.m., on Monday, February 27, 2006.

Licensee is directed, on Monday, February 13, 2006, at 7:00 a.m., to place a placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised, if replacement placards are needed for any reason, they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized, on Monday, February 27, 2006, at 7:00 a.m., to remove the placard of suspension and return its license to its original wall location.

Dismissal of Count No. 4

IT IS FURTHER ORDERED THAT Count No. 4 in Citation No. 05-0982, issued against James A. Danner Veterans of Foreign Wars Post 537 Home Association is DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 5th day of December, 2005.

Felix Thau, A.L.J.

pm

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.