Mailing Date: JUL 23 2007 Appeal

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : :	Citation Nos. 05-0992 05-2634
	:	Incident No. W02-303226
v.	: :	W02-310272
	:	LID - 10788
S & B RESTAURANT, INC. T/A THE WOODLANDS, AN INN 1073 RTE. 315 WILKES BARRE, PA 18702-6926	: : : :	
LUZERNE COUNTY LICENSE NO. R-AP-SS-3050	: :	

BEFORE: JUDGE FLAHERTY

APPEARANCES:

For Bureau of Enforcement
Craig Strong, Esquire

For Licensee
Steven M. Greenwald, Esquire

ADJUDICATION

BACKGROUND:

Citation No. 05-0992

This proceeding arises out of a citation that was issued on May 23, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against S & B RESTAURANT, INC., License Number R-AP-SS-3050 (hereinafter "Licensee").

The citation contains two counts.

The first count charges Licensee with violation of Section 13.102(a)(3) of the Liquor Control Board Regulations [40 Pa. Code §13.102(a)(3)] in that on December 31, 2004, Licensee, by its servants, agents or employes, sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price in that unlimited alcoholic drinks were served for the set price of $85.00.

The second count charges Licensee with violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)] in that Licensee, by its servants, agents or employes, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two years immediately preceding March 16, 2005.

The investigation which gave rise to the citation began on December 27, 2004 and was completed on April 19, 2005; and notice of the violation was sent to Licensee by Certified Mail on May 3, 2005. The notice of violation was received by Licensee.

Citation No. 05-2634

This proceeding arises out of a citation that was issued on December 28, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against S & B RESTAURANT, INC., License Number R-AP-SS-3050 (hereinafter "Licensee").

The citation contains three counts.

The first count charges Licensee with violation of Section 13.102(a)(3) of the Liquor Control Board Regulations [40 Pa. Code §13.102(a)(3)] in that on May 6 and June 17, 2005, Licensee, by its servants, agents or employes, sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited draft beers and unlimited mixed drinks were served for the set price of $10.00.

The second count charges Licensee with violation of Section 13.102(a) of the Liquor Control Board Regulations [40 Pa. Code §13.102(a)] in that on May 6 and June 17, 2005, Licensee, by its servants, agents or employes, discounted the price of alcoholic beverages for a period or periods other than a consecutive period of time not to exceed two hours in a business day.

The third count charges Licensee with violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)] in that on July 9, 2005, Licensee, by its servants, agents or employes, sold, furnished and/or

gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated male patron.

The investigation which gave rise to the citation began on April 26, 2005 and was completed on November 8, 2005; and notice of the violation was sent to Licensee by Certified Mail on November 17, 2005. The notice of violation was received by Licensee.

An evidentiary hearing was held on these matters on May 18, 2006 in the Scranton State Office Building, 100 Lackawanna Avenue, Scranton, Pennsylvania.

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

CITATION NO. 05-2634

NOTICE REQUIREMENTS:

1. This investigation was assigned on April 26, 2005 as the result of an internet website advertisement by Licensee of events taking place on the licensed premises during the month of May, 2005. The advertisement for each Friday in May featured a "5-day Happy Hour and College Karaoke" which was to last from 5:30 p.m. to 8:30 p.m., a period of three hours (N.T. 14-16 and Exhibit C-3).

2. The officer made his first visit to the licensed premises on May 6, 2005 (N.T. 1920).

3. The officer returned to the licensed premises on June 17, 2005 (N.T. 24).

4. The officer went to the licensed premises again on July 8, 2005, in response to a complaint made on July 5, 2005 concerning a specific minor being present on the licensed premises (N.T. 26-28 & 37).

5. On October 3, 2005, another officer made a request to personnel of Licensee to help determine whether the events in question (May 6 and June 17, 2005) were catered events (N.T. 36 & 39).

6. Review of the records was complete on November 8, 2005 (N.T. 36).

7. The Notice of Violation letter was sent on November 17, 2005 (N.T. Exhibit C-1).

FINDINGS OF FACT:

COUNTS 1 AND 2

8. On May 6, 2005 an officer of the Bureau entered the licensed premises at 5:45 p.m. (N.T. 19-20).

9. The officer encountered a female individual who informed him that to attend the happy hour, he had to obtain a membership card for $1.00. The officer paid the dollar and received a membership card (N.T. 21 and Exhibit C-4).

10. After receiving the membership card, the officer proceeded to where the happy hour was being held. He was charged an entrance fee of $10.00 by a doorman, and proceeded into the area where the happy hour was being held. His hand was stamped when he paid the $10.00 (N.T. 21-22).

11. The officer observed upon entering the happy hour area that there was a buffet set up serving food (N.T. 22).

12. The officer proceeded to the bar area where he ordered a Coors Light draft beer, which was served to him in a twelve ounce plastic cup (N.T. 22).

13. The officer was served three additional Coors Light beers on that evening, and no money was charged each time he was served (N.T. 22).

14. The officer departed the licensed premises at 6:40 p.m. and returned at 7:30 p.m. At that time, he was allowed entrance because his hand had been stamped when he had previously paid the $10.00 fee. At that time he observed that the happy hour was continuing, and he obtained another beer at no charge (N.T. 23).

15. The happy hour was over at 8:30 p.m. The officer proceeded to another part of the licensed premises where another happy hour was being held where no admission was charged and drinks were being sold for one dollar. This happy hour was being sponsored by a radio station (N.T. 24).

16. On June 17, 2005 at 5:30 p.m., the officer returned to the licensed premises for another Five Day Getaway Club Celebration. He purchased another membership card for $1.00, and then proceeded down the hall to where the celebration was held (N.T. 24 and Exhibit C-5).

17. He paid a $10.00 cover charge and had his hand stamped. He then entered the bar area where the Five Day Getaway Club Celebration was being held (N.T. 24-25).

18. The sequence of events was the same as at the previous Five Day Getaway Club Celebration on May 6, 2005 (N.T. 24).

19. On June 16, 2005, at the Five Day Getaway Club Celebration, the officer had three alcoholic drinks, and after paying $10.00, he was not charged for any of them (N.T. 25).

20. The Happy Hour ended at 8:30 p.m., and the officer departed (N.T. 25-26).

21. The events which the officer attended on May 6, 2005 and June 17, 2005 were held pursuant to a written contract entered into between Licensee and the Getaway Club, also known as the Five Day Getaway Club (N.T. 84, 89 and Exhibit L-1).

22. The aforementioned contract provides that Licensee will provide a catered event every Friday in 2005. These events were contracted to begin at 5:30 p.m., with departure at 8:30 p.m. Licensee contracted to provide a "Cocktail Buffet (Chef's Choice)" and an open bar serving liquor, assorted wines, draft beer, soft drinks and juices (N.T. Exhibit L-2).

23. The contract describes the event as a cocktail reception with the number of guests being approximately 300 (N.T. Exhibit L-2).

24. The contract also provides: "Ten dollar door charge goes toward payment of food and beverage. Membership fee is sent to Getaway Club. Price subject to change based on increased entertainment or food package." (N.T. Exhibit L-2).

25. The contract is signed by Judy Broody, president of the Five Day Getaway Club, Incorporated (N.T. 55 and Exhibit L-2).

26. The Five Day Getaway Club is a Pennsylvania for profit corporation that was incorporated in 1985. Judy Broody is the sole stockholder and sole corporate officer. The address for the corporation is the home address of Judy Broody (N.T. 55, 58-59 & 81).

27. In order to attend a Five Day Getaway Club event, an individual must purchase a "membership" card. The cost of this card is $1.00. The card may be used every Friday during the calendar year in which it is purchased. The one dollar fee is collected by an individual who collects the dollar and dispenses the membership cards. This money is set aside and paid to the Five Day Getaway Club, Inc. less approximately $10.00 which is paid to the person who collects the $1.00 payments and dispenses the membership cards. The Five Day Getaway Club receives approximately $15,000.00 per year from the sales of the tickets (N.T. 30-31, 60-62, 65, 67, 98, 100-101 and 105).

28. The individual who collects $1.00 fee for the "membership card" is not working for the licensee while collecting this fee or dispensing the membership cards (N.T. 55, 100-101).

29. Before entering the actual Five Day Getaway Club event an individual would have to show the aforementioned "membership card", purchased for $1.00 and pay a $10.00 fee to an employe of Licensee. This fee is kept by the Licensee to cover the costs of the event, including food and drink and other expenses (N.T. 61, 78, 94-95, 97-98, 104-105).

30. The $10.00 fee paid by card holders to enter the catered event is collected by personnel working for Licensee, and is retained by Licensee to cover the costs of the event, including food, alcoholic beverages, service personnel and space rental (N.T. 78, 80, 94-95, 97 and 105).

31. The Five Day Getaway Club leaves the choice of food and drink to be provided at the events to the personnel of Licensee who have the appropriate expertise. However, the Five Day Getaway Club retains the right to change the menu and drink offering, with any change in the cost of food or drink to be reflected by an increase or decrease in the $10.00 fee charged at the door (N.T. 66-67, 72-73, 93-94 and 102-103).

32. Judy Broody, the sole stockholder and sole corporate officer of the Five Day Getaway Club is not, nor has she ever been an employe of Licensee. She has done business with Licensee over the years through a corporation known as Tron, Inc., which put on special events, and through the Five Day Getaway Club, Inc. (N.T. 55).

COUNT 3

33. On July 8, 2005, between 10:30 and 10:45 p.m. two officers of the Bureau entered the licensed premises in an undercover capacity in response to a complaint regarding a specific minor being present on the licensed premises (N.T. 26 and 50).

34. At approximately 1:10 a.m., now July 9, 2005, a male patron bumped into the officer on his way to the bar. He staggered into the officers, although he had a clear path to the bar (N.T. 26-27 and 50).

35. The aforementioned male patron ordered four Jeiger Bombs, an alcoholic drink consisting of Jeigermeister liquor and Red Bull energy drink. In attempting to pay for the drinks the patron fumbled in his pockets, but could not come up with the money. A female patron then paid for the drinks with a credit card (N.T. 27 and 51).

36. The male patron spilled one of the drinks on the bar counter. He then staggered into the officers again. He handed two drinks to his friends, and had to hold onto the bar to prop himself

up. He then took his shirt off and spilled two thirds of his drink on the dance floor (N.T. 27 and 51).

CONCLUSIONS OF LAW:

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

2. Count 1 of the citation is **dismissed**.

3. Count 2 of the citation is **dismissed.**

4. Count 3 of the citation is **sustained** as charged.

CITATION NO. 05-0992

NOTICE REQUIREMENTS:

37. The investigation involved in this case was assigned to the investigating officer of the Bureau on December 27, 2004 (N.T. 117).

38. The investigation was prompted by an advertisement placed by Licensee which promoted a New Year's Eve celebration on the licensed premises sponsored by the "Getaway Club." (N.T. 117-118 and Exhibit C-9).

39. On December 31, 2004 the officer entered the licensed premises and conducted undercover investigations (N.T. 118).

40. On February 5, 2005 the officer returned to the licensed premises and left a request for records (N.T. 120).

41. The officer returned to the licensed premises and retrieved the requested records on February 7, 2005 (N.T. 121).

42. On March 9, 2005 the officer made an additional records request.

43. The officer received a letter from Gary Kornfeld, Chief Executive Officer of Licensee dated March 16, 2005 explaining the business with the Getaway Club and the contract with Tron Enterprises (N.T. C-11).

44. The investigation was completed on April 19, 2005 and the Notice of Violation letter was sent on May 3, 2005 (N.T. 117 and Exhibit C-7).

COUNT 1

45. On December 31, 2004, an officer of the Bureau arrived at the licensed premises between 9:50 p.m. and 10:00 p.m. She was working in an undercover capacity (N.T. 118).

46. Upon entering the foyer area of the licensed premises the officer paid $85.00 to a woman seated at a table. Upon payment, she was given a ticket. She took the ticket to a ballroom area, where she gave it to a gentleman at the door. The gentleman at the door put a green wristband on her wrist (N.T. 118-119).

47. The officer ordered a Coors Light beer from a female employe. She received a plastic cup of Coors Light beer and was not charged anything for the drink (N.T. 119).

48. The officer then wandered around and enjoyed the food, and then went back to the same employe and was served a glass of white zinfandel wine (N.T. 119).

49. The officer then proceeded from the ballroom area to the area of the licensed premises known as Club Evolutions where she entered without challenge. She approached another female bartender and ordered another white zinfandel wine (N.T. 119).

50. While in Club Evolution, the officer ordered two or three glasses of wine (N.T. 119).

51. The officer left the licensed premises at around 11:30 p.m.

52. The event which the officer attended on December 31, 2004 was held pursuant to a written contract entered into between Licensee and the Getaway Club also known as the Five Day Getaway Club (N.T. 122 and Exhibit C-10).

53. The aforementioned written document specifies that Licensee will provide a catered event on the licensed premises on Friday, December 31, 2004 to begin at 8:00 p.m. and end at 2:00 a.m. The document specifies that Licensee was to provide a menu of food items including: prime rib carved to order with assorted sauces and rolls; Coquill St. Jacques with rice; buttered shrimp cocktail; chicken quesadillas with sour cream and salsa station; pistachio encrusted chicken tenderloin; cheese tortellini with vodka sauce; coconut fried shrimp with pineapple sauce; boneless buffalo style chicken with bleu cheese and celery; beef teriyaki with stir fry vegetables and lo mein; miniature kosher hot dogs wrapped with puff pastry; imported cheese display with assorted mustards; fresh vegetable tray with white godess and cucumber dill dips; assorted brownie bar with assorted miniature pastries; homemade Danish; coffee, tea and decaf (N.T. Exhibit C-15).

54. The document describes the event as a "celebration" with the number of guests being between 1000 and 1500 (N.T. Exhibit C-10).

55. The document specifies that there will be an open bar with premium brands of liquor, beer and wine. It also specifies that room set up will be a dinner set up with cocktail style seating, a stage, dance floor, a bar with barmen, and décor will be provided (N.T. Exhibit C-10).

56. The contract is signed by Judy Broody, president of the Five Day Getaway Club, Incorporated (N.T. 55 and Exhibit C-10).

57. Finding No. 26 is incorporated here by reference.

58. Finding No. 27 is incorporated here by reference.

59. Finding No. 28 is incorporated here by reference.

60. For this special event, an attendee paid a single charge of $85.00 and would receive a numbered ticket. One dollar of that amount was set aside as a membership fee to the Five Day Getaway Club. The rest of the amount paid was used to defray the cost of the New Year's Eve Celebration. The amount of the membership fees set aside for the Five Day Getaway Club was determined by the numbering on the tickets. No membership card was issued since this was last day of the calendar year and new membership cards would be issued for events in the new calendar year. Some membership fees were duplicated (N.T. 90, 137-141).

61. Finding No. 32 is incorporated here by reference.

COUNT 2

62. On February 5, 2005, the officer returned to the licensed premises, and left a request for records which included: a list of corporate officers of Licensee; the manager of record; a list of catered events; bar and liquor invoices; payroll records of all employes; income and expense records and bank statements. The records were to be produced on February 7, 2005 (N.T. 121).

63. The officer returned to the licensed premises on February 7, 2005, and all of the records she had requested were produced (N.T. 121).

64. On February 7, 2005 the officer made a verbal request for contracts, income and disbursement records and any other records dealing with the Five Day Getaway Club (N.T. 121).

65. On February 7, 2005 the officer also made a specific request for the contract dealing with the New year's Eve event and any information relating to costs and who was employed by whom during that event (N.T. 122).

66. Personnel of Licensee provided the officer with the contract for the New Year's Eve event (N.T. 122 and Exhibit C-10).

67. Licensee, through its Chief Executive Officer, Gary Kornfeld provided the officer with a letter which stated the following:

> "…The procedures for accounting for the Getaway Club transactions are as follows:
>
> Getaway Club membership tickets area sold to the public for $1.00 each. Members are entitled to gain entrance to Getaway Club events for a set additional fee. Anyone without a membership card will not be admitted. Membership cards can be purchased at the

> Woodlands Restaurant. The Getaway Club uses our security guards to sell membership tickets and to collect admittance fees for Getaway Club events. The Getaway Club pays the security guard $50.00 for their service.
>
> The food and beverages served at the events are standard fare and other items that the Woodlands may add at their discretion. The Getaway Club charges the public the same amount per person as the Woodlands charges them for the event. For example if the Woodlands charges the Getaway Club $10.00 per person for the event, the admittance for the Getaway Club event is $10.00. Because the dollar amount is the same, no money actually changes hands between the Woodlands and the Getaway Club for admittance fees. However, the revenue generated from the membership ticket sales does go to the Getaway Club less the amount that is paid to the security guard for collecting the admittance and membership fees.
>
> The Woodlands does not have contracts with any vendors, therefore we do not have a contract with Tron Enterprises…" (N.T. 123-124, 136 and Exhibit C-11).

68. This count was brought because the officer requested information for the Getaway Club, and the only thing provided was Mr. Kornfeld's letter which was entered into evidence as Exhibit C-11 (N.T. 123).

CONCLUSIONS OF LAW:

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

6. Count 1 of the citation is **dismissed**.

7. Count 2 of the citation is **dismissed**.

DISCUSSION:

CITATION NO. 05-2634

COUNTS 1 AND 2

The events attended by the officer on the licensed premises on May 6, 2005 and June 17,

2005 were legitimate catered events falling within the exception provided by Section 13.102(b)(1) of the Liquor Control Board Regulations [40 Pa. Code §13.102(b)(1)]. Counts 1 and 2 of this citation are, therefore, dismissed.

Section 13.102(a)(3) of the Liquor Control Board Regulations [40 Pa. Code §13.102(a)(3)] prohibits:

> (3) The sale or serving, or both of an unlimited or indefinite amount of liquor, wine or malt or brewed beverages for a set price.

Further, Section 13.102(a) of the Liquor Control Board Regulations [40 Pa. Code §13.102(a)] provides as pertinent:

> (a) General. Retail licensees may discount the price of alcoholic beverages for a consecutive period of time not to exceed 2 hours in a business day…

However, Section 13.102(b) of the Liquor Control Board Regulations (supra) provides, in pertinent part the following:

> (b) Exceptions Nothing in subsection (a) prohibits:
> (1) The sale or serving, or both of an unlimited or indefinite amount of liquor, wine or malt or brewed beverages for a fixed price for catered events which have been arranged at least 24 hours in advance.

It is clear that neither of the prohibitions found in the sections cited above apply to "catered events which have been arranged 24 hours in advance" as provided by the exception quoted above from Section 13.102(b)(1) (supra).

Although the term "catered event" is not defined in the Liquor Control Board Regulations [40 Pa. Code §1.1 et seq], the term "catering" is defined in Section 5.83(a) of the Liquor Control Board Regulations [40 Pa. Code §5.83(a)] as follows:

> (a) Catering, for the purpose of this section means the furnishing of liquor or malt or brewed beverages, or both, to be served with food prepared on the premises or brought onto the premises already prepared, for the accommodation of groups of nonmembers, who are using the facilities of the club by prior arrangement made at least 24 hours in advance of the time for private meetings or functions such

> as dances, cad parties, banquets and the like; and which is paid for by the nonmembers.

I find Section 5.83(a) (supra) to be instructive, and I am of the opinion that the Liquor Control Board meant the elements of "catering" as set forth in Section 5.83(a) to apply to the term "catered event" as that term is used in Section 13.102(b)(1) (supra).

Following the reasoning indicated above the elements of a catered event are:

1. The furnishing of liquor and/or malt or brewed beverages together with food;

2. for the accommodation of a person or entity other that the licensee;

3. in accordance prior arrangements made at least twenty four hours in advance;

4. for a private function;

5. which is paid for by the person or entity other than the licensee.

In addition, the Commonwealth Court has held that the party for whom a catered event is held may sell tickets to the event to members of the general public at the door of the event. ***Pennsylvania State Police v. American Serbian Club***, 750 A.2d 405 (Pa. Cmwlth 2000).

The events attended by the officer in this case meet the necessary criteria to be considered "catered events" as that term is used in Section 13. 102(b)(1) of the Regulations (supra). Liquor and/or malt or brewed beverages were served together with food. This was done for the accommodation of a Pennsylvania "for profit" corporation whose sole corporate officer and stockholder was neither officer, employe or stockholder of Licensee corporation. The arrangement for these two events was made on December 27, 2004, clearly more than twenty four hours ahead of the event. The functions were private functions for card holders of the Five Day Getaway Club, and were paid for by those card holders through entrance fees paid at the door.

The Bureau argues the Five Day Getaway Club is a façade with no other functions or purpose other than the weekly parties at S & B and is simply an attempt by S &B to evade the prohibitions of Section 13.102(a) (supra).

As previously pointed out, The Five Day Getaway Club is a legitimate Pennsylvania business corporation which was incorporated in 1985. It's sole stockholder and sole corporate officer is Judy Broody (See Finding No. 26). Judy Broody is not, nor has she ever been an employe of

Licensee (See Finding No. 32). The Five Day Getaway Club receives approximately $15,000.00 per year from the sale of tickets which must be purchased to gain entrance to the weekly events (See Finding No. 28). There are no common stockholders, officers or employes of Licensee and the Five Day Getaway Club. The two corporations stand alone.

The Bureau cites no section of the Liquor Code (supra) nor Regulations (supra), nor case law precedent which would prohibit a licensee from contracting with a third party to provide weekly catered events funded by entrance charges at the door in the same manner found in ***American Serbian Club*** (supra).

The lack of any such citations by the Bureau makes its assertions against this arrangement nothing more than empty rhetoric.

The Bureau can cite no dire consequences arising from this activity. If illegal activities such as sales to visibly intoxicated patrons or furnishing of alcohol to minors occur, the Bureua may still investigate and cite the Licensee for such violations where appropriate.

Based upon the foregoing, I conclude that events of May 6, 2005 and June 17, 2005 were catered events falling within the exception provided by Section 13.102(b). Counts 1 and 2 of the Citation (05-2634) are, therefore, dismissed.

COUNT 3

The record establishes that officers of the Bureau observed a patron who staggered into them on his way to the bar, although he had a clear path. When this patron attempted to pay for his drinks he fumbled through his pockets but could not come up with the money. He was served the drinks after a female patron paid for them with a credit card (See Findings 34 and 35).

Employes of Licensee served alcohol to a patron who exhibited clear signs of intoxication. The charge in Count 3 of the Citation is, therefore, sustained.

CITATION NO. 05-0992

COUNT 1

The Bureau has failed to establish the elements of the offense charged in this count and has, therefore, failed to meet its burden. The charge in Count 1 of the Citation is, therefore, dismissed.

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. ***In re Omicron Enterprises***, 449 A.2d 857 (Pa.Cmwlth 1982).

The phrase "preponderance of evidence" has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. ***Black's Law Dictionary, Fifth Edition***, West Publishing Company, Copyright 1979, Page 1064.

Count No. 1 of this citation charges that Licensee "…sold or served an unlimited or indefinite amount of alcoholic beverages for a fixed price in that unlimited alcoholic drinks were served for the set price of $85.00 in violation of Section 13.102(a)(3) of the Liquor Control Board Regulations [40 Pa. Code §13.102(a)(3)].[1]

In this record establishes that the investigating officer acting in an undercover capacity, paid the $85.00 entrance fee at the entrance to the ballroom for which she received a ticket (See Finding No. 45 and 46). She took the ticket to the ballroom where she received a green wristband (See Finding No. 46).

After receiving the wristband the officer ordered a Coors Light beer. She was served this drink at no charge (See Finding No. 47).

During the course of the evening, the officer received several other alcoholic beverages (See Findings No. 48, 49 and 50). However, there is no indication in the record as to whether or not the officer was charged for these additional drinks.

In order to establish that an indefinite or unlimited amount of alcoholic beverages were sold or furnished for a set price more than one such beverage must be furnished after the set price is paid. If only one beverage is provided the amount is definite and limited for at set price. It is only additional beverages provided at no additional charge that establish an unlimited quantity for a fixed price.

Although it might be easy to assume the officer was not charged for the additional alcoholic beverages she received, such an assumption cannot replace the requirement for actual evidence. The Bureau must establish all of the elements of an alleged offense with actual evidence of record.

Based upon the foregoing, I conclude that the Bureau has failed to meet its burden and Count No. 1 of the Citation must be dismissed.

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[1] Section 13.102(a)(3) of the Liquor Control Board Regulations [40 Pa. Code §13.102(a)(3)] prohibits: "The sale or serving or both of an unlimited or indefinite amount of liquor, wine or malt or brewed beverages for a set price."

COUNT 2

Because the records sought by the officer in this case did not cover the operation of the licensed business, they were not part of records which Licensee was required to keep.

Section 493(12) of the Liquor Code [47 P.S. §4-493(12)] makes it unlawful for any license:

> …to fail to keep on the licensed premises for a period of at least two years complete and truthful records covering the operation of his licensed business…(emphasis supplied).

In this case the investigating officer made several requests for records dealing with the Five Day Getaway Club. In particular, on February 7 the officer made a verbal request for: "contracts, income and disbursement records and any other records dealing with the Five Day Getaway Club." In addition the officer also made a request for the contract dealing with the New Year's Eve event and any other information relating to costs and who was employed by whom during the event (See Findings No. 64 and 65).

Licensee provided the officer with the contract for the New Year's Eve event together with a letter explaining the way the event was handled and that Licensee did not keep records covering the revenue generating activities of the Five Day Getaway Club.

Since the revenue generating activities of the Five Day Getaway Club were not part of the "operation of the licensed business," Licensee was not required to keep records concerning them. Thus, failure of Licensee to keep and/or provide such records did not constitute a violation of Section 493(12) of the Liquor Code (supra).

Based on the foregoing, Count 2 of the citation will be dismissed.

PRIOR RECORD:

Licensee has been licensed since April 21, 1969, and has had four prior violation(s) since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

Citation No. 90-2567. Fine $75.00.

1. Failed to notify the Board within 15 days of a change of officers, directors and/or stockholders.

Citation No. 93-2535. Fine $3,000.00.

1. Sales to visibly intoxicated persons.

Citation No. 93-2637. $1,000.00 fine

1. Sales to a minor.

Citation No. 94-1496. $550.00 fine

1. Refilled liquor bottles.
2. Fortified, adulterated and/or contaminated liquor.
3. Failed to break empty liquor bottles within 24 hours.
4. Failed to have copies on the licensed premises of birth certificates for employes under 21 years of age.

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 this case.

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

Count 1 – Dismissed
Count 2 - $1,500.00 fine

ORDER

THEREFORE, it is hereby ordered that Licensee S & B RESTAURANT, INC., pay a fine of $1,500.00 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 or Certified Check. **Personal checks, which includes business-use personal checks, are not acceptable**. Make check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge

Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 12th day of July, 2007.

Daniel T. Flaherty, Jr., J. an

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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.