

Mailing Date: November 13, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation Nos. 05-0992
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

S & B RESTAURANT, INC. : License No. R-3050
t/a The Woodlands, An Inn :
1073 Route 315 :
Wilkes-Barre, PA 18702-3050 :

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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from the Adjudication and Order of Administrative Law Judge Daniel T. Flaherty (“ALJ”), wherein the ALJ dismissed both counts of the citation against S & B Restaurant, Inc. t/a The Woodlands, An Inn (“Licensee”).

The first count of the citation charged that, on December 31, 2004, Licensee, by its servants, agents or employees, violated section 13.102(a)(3) of the Liquor Control Board's ("Board") Regulations [40 Pa. Code § 13.102(a)(3)] by selling and/or serving an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited alcoholic drinks were served for the set price of eighty-five dollars (\$85.00).

The second count of the citation charged that Licensee, by its servants, agents or employees, violated section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] by failing to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding March 16, 2005.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeals in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005);

Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

It is the Bureau's contention on appeal that the ALJ's finding about whether the event being held on the licensed premises was an exception to section 13.102(a)(3) for catered events was not supported by substantial evidence. The Bureau further contends that the ALJ committed an error of law in finding that the records requested were not required to be kept by Licensee.

While the Board has reviewed the record with the Bureau's objections in mind, we must nevertheless conclude that there is substantial evidence to support the decision of the ALJ to dismiss the first and second counts of the citation.

The record reveals that, on or about December 27, 2004, Bureau Officer Barbara Williams was assigned to investigate an event sponsored by the Five-Day Getaway Club, Inc. ("Getaway Club") at Licensee's premises on December 31, 2004. (N.T. 116-118, 126, 128-129, 138-139; Ex. C-9). She arrived at the licensed premises at approximately 9:50 p.m. on December 31, 2004 in an undercover capacity. (N.T. 118). She entered the foyer area, approached Cathy Kaminski, and asked how much it was to

get in. (N.T. 118, 122). In exchange for eighty-five dollars (\$85.00) which covered entertainment, drinks, and food, Officer Williams was given a ticket. (N.T. 118, 120, 129). When she presented the ticket at the door to a ballroom area, a doorman took the ticket and placed a green wristband on her wrist. (N.T. 118-119, 129-131, 134). Once inside, Officer Williams observed tables with liquor and pitchers of beer and things. (N.T. 119).

At approximately 10:05 p.m., Officer Williams ordered from an unidentified female dressed like Licensee's other employees and was served a Coors Light beer, for which she was not charged. (N.T. 119). After enjoying some food, at approximately 10:20 p.m., she ordered a glass of White Zinfandel wine from the same female employee. (N.T. 119). Officer Williams proceeded from the ballroom to Club Evolutions and ordered another White Zinfandel from a bartender there at approximately 10:45 p.m. (N.T. 119). After ordering one (1) or two (2) more glasses of wine, she left Licensee's premises at approximately 11:30 p.m. (N.T. 119-120). Officer Williams did not receive a Getaway Club membership card, nor did she sign anything when she entered Licensee's premises on December 31, 2004. (N.T. 120). There is no evidence of record that indicates whether Officer

Williams was charged for the alcoholic beverages she ordered subsequent to the first one, for which she was not charged. (N.T. 119-120).

On February 5, 2005, Officer Williams left a records request at Licensee's premises with Jean Stanton. (N.T. 120). The records were to be on the premises for her review when she returned on February 7, 2005. (N.T. 121). Officer Williams returned to Licensee's premises on February 7, 2005 and reviewed records made available to her by Michelle Valente. (N.T. 121). She inquired as to who ran the New Year's Eve event, and whether anyone from the Getaway Club was present. (N.T. 122). She was informed that no one from the Getaway Club was present. (N.T. 122). She was, however, provided with a copy of the contract for the New Year's Eve event. (N.T. 122; Ex. C-10). On March 9, 2005, Officer Williams issued a request for an income journal for all events of the Getaway Club, a record of disbursement of all monies paid to the Getaway Club and paid by the Getaway Club to Licensee, records of all membership fees reimbursed to the Getaway Club during 2004, a contract for Tron Enterprises, a list of services contracted to Tron Enterprises and/or Judy Broody, and a W-2 or 1099 for Tron Enterprises. (N.T. 121, 131-132). Officer Williams did not receive those documents. (N.T. 132).

The contract for the New Year's Eve event held at Licensee's premises provides that the event was to be sponsored by the Getaway Club on Friday, December 31, 2004, and that it was to begin at 8:00 p.m. and end at 2:00 a.m. (N.T. 123; Ex. C-10). The event was booked by Rick Kornfeld. (N.T. 123; Ex. C-10). Licensee contracted to provide an extensive menu, and an open bar serving liquor, beer and wine. (Ex. C-10). The contract describes the event as a "celebration" with the number of guests being between one thousand (1,000) and one thousand five hundred (1,500). (Ex. C-10).

By letter dated March 16, 2005, Licensee informed Officer Williams that Getaway Club memberships are sold to the public for one dollar (\$1.00) at Licensee's premises by Licensee's security guards. (N.T. 123-124; Ex. C-11). Only Getaway Club members are entitled to gain entrance to Getaway Club events and, for an additional set fee, also collected by Licensee's security, they may have food and beverages at the events. (N.T. 124; Ex. C-11). The Getaway Club pays Licensee's security guard fifty dollars (\$50.00) per shift for his services. (N.T. 124; Ex. C-11). The Getaway Club and Licensee charge the same fee for each event; therefore, no money is exchanged between Licensee and the Getaway Club relative to these events.

(N.T. 124; Ex. C-11). The revenue generated from membership ticket sales are, however, paid by Licensee to the Getaway Club, less the amount paid to the security guard for his services. (N.T. 124; Ex. C-11). Licensee's letter indicates that does not maintain a contract for this business situation. (Ex. C-11).

Gary Kornfeld stated that the eighty-five dollar (\$85.00) charge to Officer Williams on December 31, 2004 included her annual membership fee of one dollar (\$1.00) for the Getaway Club. (N.T. 137, 139). He averred that the ticket she was given upon payment of the fee, which was taken by the doorman, represented her Getaway Club membership. (N.T. 137-138). The ticket was numbered and aids Licensee in determining how many memberships were sold that evening. (N.T. 138). Due to the volume of persons attending the event at Licensee's premises on December 31, 2004, Licensee did not have a separate person selling Getaway Club membership cards that night. (N.T. 139). Therefore, persons attending the event at Licensee's premises on December 31, 2004 would not have received membership cards to the Getaway Club. (N.T. 138). Licensee merely determined that anyone who paid the eighty-five dollar (\$85.00) fee was a member of the Getaway Club. (N.T. 139). Thus, if one was already a

member of the Getaway Club, he/she paid for another membership that night. (N.T. 140). Purchasers of tickets in advance for the December 31, 2004 event, likewise, paid the eighty-five dollar (\$85.00) fee. (N.T. 140-141). Members of the Getaway Club who presented membership cards on December 31, 2004 would not have been charged the same eighty-five dollar (\$85.00) fee, however. (N.T. 141). There was a remittance to the Getaway Club for memberships on the evening of December 31, 2004. (N.T. 141).

Ms. Broody is the sole stockholder and sole corporate officer of the Getaway Club, a social club which is a Pennsylvania for-profit corporation incorporated in 1985. (N.T. 55-56, 59-60, 69, 74, 79, 81-82). The address for the corporation is Ms. Broody's home address. (N.T. 55, 58-59, 81). The Getaway Club's members get together at events held at the licensed premises to network and for dating purposes. (N.T. 59-60). The Getaway Club has only unwritten, general rules of conduct. (N.T. 56-57, 62-63). Participants must be at least twenty-one (21) years of age. (N.T. 57, 63). No membership lists are maintained. (N.T. 63-64). It has no employees. (N.T. 58-59). The individuals who sell membership cards at Licensee's door are subcontracted by the Getaway Club, and are paid ten

dollars (\$10.00) for three (3) hours. (N.T. 59, 62, 65, 100-101, 105).

Advertisements for the Getaway Club are incorporated in advertisements of Licensee's business paid for by Licensee. (N.T. 65).

In order to attend a Getaway Club event, an individual must purchase a membership card or "ticket," at a cost of one dollar (\$1.00). (N.T. 60).

The fees collected are set aside and paid to the Getaway Club. (N.T. 98, 105). The Getaway Club receives approximately fifteen thousand dollars (\$15,000.00) per year from the sales of the tickets. (N.T. 67).

Typically, before entering a Getaway Club event, an individual would have to show the aforementioned ticket or membership card, and pay a ten dollar (\$10.00) fee to an employee of Licensee. (N.T. 104). This fee is kept by Licensee to cover the costs of the event, including food, alcoholic beverages, service personnel and space rental. (N.T. 78-80, 94-95, 97-98, 104-105). Licensee and

The choice of food and beverages provided at Getaway Club events is left to Licensee's employees who have the appropriate expertise. (N.T. 66-67, 95-96, 101). However, the 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 fee charged at the door. (N.T. 72-73, 93-94, 98, 102-103).

Ms. Broody is not, nor has she ever been an employee of Licensee. (N.T. 73-74). She has done business with Licensee over the years through a corporation known as Tron, Inc., which puts on special events, and through the Getaway Club. (N.T. 55-56, 70-71).

Based upon the evidence set forth in this matter, the Board concludes that there is substantial evidence to support the ALJ's dismissal of the first and second counts of the subject citation.

Relative to the first count of the citation, section 13.102 of the Board's Regulations provides that retail licensees may not sell or serve an unlimited or indefinite amount of alcoholic beverages for a set price, unless the offer is part of a catered event arranged at least twenty-four (24) hours in advance. [40 Pa. Code 13.102(a)(3), 13.102(b)(1)].

There was no evidence presented by the Bureau that indicates whether Officer Williams was charged for the alcoholic beverages she ordered subsequent to the first one, for which she was not charged. In order for the Bureau to present a prima facie case against Licensee relative to section 13.102(b)(1) of the Board's Regulations, it is necessary that the Bureau

present evidence that Licensee sold and or served an unlimited or indefinite amount of alcohol to Officer Williams or other patrons of its premises on December 31, 2004 for a set price.

Merriam-Webster's Online Dictionary defines "unlimited" to mean "lacking any control . . . unrestricted . . . boundless . . . infinite." It defines "indefinite" as "not precise . . . having no exact limits." The Board is unable to determine whether the offering of alcohol by Licensee on December 31, 2004 was unlimited and/or indefinite based upon a record that only specifically provides that Officer Williams did not have to pay for her first alcoholic drink. "Unlimited" or "indefinite," even under the strictest interpretations of those terms, would require that Officer Williams received more than one (1) alcoholic beverage without paying for it.

Due to the fact that the Bureau failed to establish that Licensee sold or served an unlimited or indefinite amount of alcoholic beverages to Officer Williams on December 31, 2004 for a set price, it did not support its charge in the first count of the citation. Based upon the evidence of record, the ALJ properly dismissed the first count of the citation. The Board, therefore, affirms the ALJ's decision as to the first count of the citation.

Even assuming, *arguendo*, the record relative to the first count of the citation as a whole implies that Officer Williams was not charged for her alcoholic beverages after the first one on December 31, 2004, based upon the record, the ALJ still properly dismissed the first count of the citation.

The facts relative to the December 31, 2004 event sponsored by the Getaway Club fulfill the requirements set forth in section 13.102(b)(1) of the Board's discount pricing practice Regulations. Specifically, Licensee provided evidentiary proof that the Getaway Club is a legitimate Pennsylvania business corporation that entered into a contract with Licensee for a function on December 31, 2004, with specific details including an extensive menu, and an open bar serving liquor, beer and wine.

The happy hour event hosted by the Getaway Club on December 31, 2004 meets the criteria of a "catered event" in accordance with section 13.102(b)(1) of the Board's Regulations. The function was intended as private function for cardholders, arranged more than twenty-four (24) hours in advance of the event, and for which a fixed price was charged for the event.

The Bureau argues that Licensee's arrangement with the Getaway Club as to the event on December 31, 2004 did not qualify as an exception to the

restrictions of section 13.102(a)(3). In Pennsylvania State Police v. American Serbian Club of Pittsburgh, 750 A.2d 405 (Pa. Cmwlth. 2000), the court specifically permitted the same type of scheme outlined in the contract between Licensee and the Getaway Club. Without any case law precedent to the contrary, the ALJ's decision must be affirmed as to the first count of the citation.

Relative to the second count of the citation, section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] provides that it is unlawful for “any liquor licensee . . . 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”

The evidence of record was that Licensee produced those documents requested by Officer Williams relative to licensee's operation as it relates to the Getaway Club event on December 31, 2004. Licensee did not, however, provide her with such documents as the income journal for all events of the Getaway Club, a record of disbursement of all monies paid to and by the Getaway Club, records of all membership fees reimbursed to the Getaway Club during 2004, a contract for Tron Enterprises, a list of services contracted to Tron Enterprises and/or Ms. Broody, and a W-2 or 1099 for

Tron Enterprises. The ALJ determined that those additional records are related to the revenue-generating activities of the Getaway Club, rather than the “operation of his licensed business” and, therefore, were not required to be maintained by Licensee at the premises pursuant to Liquor Code section 493(12).

Based upon the fact that Licensee produced, at the Bureau’s request, the contract for the December 31, 2004 event held by the Getaway Club at Licensee’s premises, and a letter addressing Officer William’s request for additional records which stated how the event was run, and that it does not have additional records covering the revenue-generating activities of the Getaway Club, the Board finds that Licensee maintained and produced records for the operation of its business related to the subject event. Since there was substantial evidence to support the ALJ’s dismissal of the second count of the citation, the Board affirms the ALJ’s decision as to the second count of the citation.

Based upon the foregoing, the ALJ’s dismissal of the first and second counts of the citation are affirmed.

ORDER

The appeal of the Bureau is dismissed.

The decision of the ALJ is affirmed.

Licensee must adhere to all conditions set forth in the ALJ's Order dated July 12, 2007.

Board Secretary