

Mailing Date: JUN 22 2006

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-1581
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-313657
v.	:	
	:	LID - 50602
BIGDOGZ GRILL, INC.	:	
1750 BEDFORD STREET	:	
JOHNSTOWN, PA 15902-3424	:	
	:	
	:	
	:	
	:	
	:	
	:	
	:	
CAMBRIA COUNTY	:	
LICENSE NO. R-AP-SS-13784	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Nadia L. Vargo, Esquire
Pennsylvania State Police
313 Mt. Nebo Road
Pittsburgh, PA 15237-1305

For Licensee
Robert Davis Gleason, Esq.
206 Main Street
Johnstown, PA 15901

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on August 12, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Bigdogz Grill, Inc. (Licensee), License Number R-AP-SS-13784.

This citation¹ contains four counts.

The first count charges Licensee with violations of Section 499(a) of the Liquor Code [47 P.S. §4-499(a)]. The charge is that on June 25 and July 3, 2005, Licensee, by servants, agents or employes, failed to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages.

The second count charges Licensee with a violation of Section 499(a) of the Liquor Code [47 P.S. §4-499(a)]. The charge is that on June 25, 2005, Licensee, by servants, agents or employes, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 A.M.

The third count charges Licensee with a violation of Section 493(21) of the Liquor Code [47 P.S. §4-493(21)]. The charge is that on June 25, 2005, Licensee, by servants, agents or employes, refused Enforcement Officers the right to inspect completely the entire licensed premises at a time during which the premises were open for the transaction of business or when patrons or guests or members were in that portion of the licensed premises wherein alcoholic beverages are sold.

The fourth count charges Licensee with a violation of Section 5.41 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.41]. The charge is that on June 25, 2005, Licensee, by servants, agents or employes, failed to display on the licensed premises documentary evidence that the premises meets all sanitary requirements for a public eating place.

An evidentiary hearing was conducted on May 10, 2006 at the Hampton Inn, 180 Charlotte Drive, Altoona, Pennsylvania.

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

FINDINGS OF FACT:

1. The Bureau began its investigation on June 25, 2005 and completed it on July 3, 2005. (N.T. 10-11)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on July 26, 2005. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 5)

1. Commonwealth Exhibit No. C-2, N.T. 5.

Count Nos. 1, 2 and 3:

3. On June 25, 2005, at 3:05 a.m., several Bureau Enforcement Officers approached the front door of the premises. They noticed there were four individuals inside, two of whom were seated at the bar. One Officer knocked on the front door. He held up his credentials which consisted of a badge and photo identification. One of the four approached the front door and stated that she knew who the Officers were and she was not going to let them in. The individual made reference to having been at a Responsible Alcohol Management Program Training where she was advised not to let anyone in unless they were with a uniformed police officer. (N.T. 14-16)

4. One Officer knocked on the door again at 3:08 a.m. The Officer announced his presence. The same individual again stated that she knew who they were and was not going to let the Officers in without a uniformed police officer present.

5. One of the Officer's contacted local police. The Officers were then allowed to enter with a uniformed police officer at 3:22 a.m. (N.T. 23)

6. The Officers observed no drinking while they were inside the premises or through the window. One of the individuals who was seated at the bar did have a bottle of beer directly in front of him. There was a second individual with an amber colored liquid in a plastic cup in front of her. (N.T. 31-32)

7. There was no drinking by any employe after 2:00 a.m. Nobody was served any alcoholic beverages after 2:00 a.m. There were four employes present that evening: a bartender; a server; a cook; the night manager. (N.T. 79-81)

8. There was a rather large event occurring in the area called: "Thunder In The Valley." Licensee had a large number of patrons. There was much cleaning up to do. The two beers present on the bar had yet to be cleaned up. (N.T. 94-96; 67-111)

9. At the RAMP Training, which preceded the events in question, one of Licensee's employes asked whether Licensee was required to let people in after closing time. The employe understood the instructor's answer to mean that Licensee is not required to allow anyone to enter without a uniformed police officer present after closing. (N.T. 80-84)

10. On July 3, 2005, a Bureau Enforcement Officer arrived at the premises at 3:26 a.m. He was accompanied by a Bureau Enforcement Officer Supervisor. On one side of the premises the doors were not locked. The Officers proceeded to the parking lot to record the registrations on the vehicles. At 3:30 a.m., an employe came to the back door and asked the Officers what they were doing. The Supervisor identified himself with his credentials. The Supervisor did not have his photo identification with him. The Supervisor directed the Officer to present his photo identification. They were then allowed to enter the premises. The Supervisor found a glass behind the bar which was cold to the touch and had a foam residue on it. There were three people present. All three had been engaged in cleaning the premises. One was waiting for the others for a ride home. (N.T. 70-73; 107-111)

Count No. 4:

11. The health license which was on display had expired on June 25, 2005, although Licensee was issued a current license.

CONCLUSIONS OF LAW:

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

Count No. 1:

2. The Bureau has **failed** to prove that Licensee, by servants, agents or employes, failed to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages on June 25 and July 3, 2005.

Count No. 2:

3. The Bureau has **failed** to prove that Licensee, by servants, agents or employes, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m., on June 25, 2005.

Count No. 3:

4. The Bureau has **failed** to prove that Licensee, by servants, agents or employes, refused Enforcement officers the right to inspect completely the entire licensed premises at a time during which the premises were open for the transaction of business or when patrons or guests or members were in that portion of the licensed premises wherein alcoholic beverages are sold, on June 25, 2005.

Count No. 4:

5. **Sustained** as charged.

DISCUSSION:

Right To Inspect A Licensed Premises

Enforcement Officers do not have an unfettered right of access to a licensed premises. I repeat, Enforcement Officers do not have an unfettered right of access to a licensed premises. In fact, because such inspections trigger Fourth Amendment scrutiny, that right is narrowly circumscribed.

The right to inspect (search), without warrant or probable cause, is limited to a well recognized exception to the warrant requirement for closely regulated industries. Pursuant to Liquor Code Section 493(21) [47 P.S. §4-493(21)], Enforcement Officers may inspect a licensed premises without warrant or probable cause, when the licensed premises is open for business or when patrons are present.²

If those pre-conditions exist, then and only then, may the Bureau claim that a refusal to allow entry violates the Liquor Code. In so charging a licensee, the Bureau cannot be successful by gaining entry, subsequently finding patrons present and then do a “reach back” to establish a refusal. The conditions required for entry without warrant or probable cause must be established prior to entry in order to sustain a charge of refusing the right to inspect. *Roman’s Lounge and Catering, Inc.*, Adjudication No. 04-1628, www.lcb.state.pa.us.

Of course, Officers may enter, with probable cause but without warrant, subject to the generally accepted exceptions to the warrant requirement. Obviously, Officers may also enter with Warrant. In either of these situations, the charge of refusing the right to inspect pursuant to Liquor Code Section 493(21) [47 P.S. §4-493(21)] is not implicated.

Because I have concluded there were no patrons present on the licensed premises which was then closed, Licensee had an absolute right to refuse to allow Enforcement Officers to enter thus requiring that the charge be dismissed.

2. See *Dennis W. Hilliard*, Adjudication No. 99-1184, www.lcb.state.pa.us for a full discussion including references to precedent.

The Investigation

I was shocked to learn that criminal charges were brought against one of Licensee's employees pursuant to Liquor Code Section 494 [47 P.S. §4-494]. Given the facts of this case, in my mind, such an action borders on the outrageous and oppressive. No effort was made to substantiate Licensee's claim that quick access to the licensed premises was denied the Bureau because of information Licensee received in Responsible Alcohol Management Program (RAMP) training. Had that investigative effort been made, the Bureau would have readily discovered the truth of Licensee's assertion instead of relying on some notion that Licensee's staff was laughing derisively at the Officers.

Of course, if the assumption is made that all licensees are exceedingly cunning and will do anything to put one over on the government, one will view almost anything that licensees do with that filter. That filter, that lens, desperately needs to be removed so that the full palette of investigative options may be employed.

An investigation is nothing more than a fact gathering process. Once all facts are gathered, it is then and only then that the sifting and weighing process is engaged to determine the extent to which unlawful conduct has occurred. I regret, it does appear that some investigations are designed to target only those facts which support a charge and nothing more.

What Constitutes A Refusal?

Licensee interposes an estoppel defense arguing that information provided Licensee at RAMP training caused Licensee to delay access to the premises by Enforcement Officers until a uniformed police officer arrived.

That defense will not prevail. I take Official Notice that the RAMP training was not provided by the Pennsylvania Liquor Control Board but rather by a provider authorized by the Pennsylvania Liquor Control Board to engage in such training. Ordinarily, government cannot be held accountable for remarks made by its contractors.

In any event, what I gather from the testimony is that Licensee's staff asked a very general question, i.e, is a licensee required to allow individuals into the premises after closing time? I surmise the response to the effect that one ought not to do so absent a uniformed police officer was in the nature of common sense advice rather than a restatement of law.

Licensee's misunderstanding of the law to the contrary notwithstanding, I do not believe the interval of time from when the Officer's announced their request to enter and the time of actual entry with the assistance of a uniformed police officer (17 minutes) constitutes a refusal considering the very particular facts of this case. Certainly, had I concluded Licensee's defense was no more than pretext, I would have decided otherwise.

However incorrect Licensee's concept of the law might have been, it was unquestionably Licensee's intent to refuse (in the generic sense of the word) Officers access but only without uniformed police present. Once uniformed police arrived, entry was permitted. As I see it, that behavior is not a refusal within the meaning of the Liquor Code.

Patrons Present And/Or Possessing Alcoholic Beverages After 2:30 A.M.

I hoped the day had long passed when the prohibition at issue would no longer be applied in a rigid and mechanical manner in contradiction to the legislative intent and common sense. About one year ago, in *Roman's Lounge And Catering, Inc.*, www.lcb.state.us, mentioned above, I had occasion to address the very same concern. In so doing, I revisited a related group of Adjudications as a reminder to both the Bureau and myself regarding some interpretive standards.

Applying those standards to June 25, 2005, I conclude those present were all engaged in an employment related activity. The beer that was on the counter had yet to be removed as part of clean up (Finding of Fact No. 8). Consequently, there were no patrons present on the premises.

I draw the same conclusion as to July 3, 2005. Finding one glass behind the bar with "foam residue" on it is entirely consistent with cleaning the premises. Furthermore, the "cold to the touch" theory is so subjective and so fraught with intervening variables that, for all intents and purposes, it has no value.

I have no doubt the three people present on July 3, 2005 were engaged in employment related activities. An employee who waits for another employe for a ride home falls into that category as does the situation where employes all wait to leave together for security purposes. To interpret the statute otherwise is to ignore common sense.

In my approximate eighteen years of experience as an Administrative Law Judge, I cannot remember a case that was brought on such a slender and weak thread as that related to the incident of July 3, 2005. Undoubtedly, there are those whose particular information filter is such that they view any action on the part of government as being motivated by personal bias or other forms of inappropriate considerations.³ This citation, particularly the facts supporting the Bureau's allegation on July 3, 2005, does little to dispel these notions.

3. See the very recent Adjudications of *The Castle Pub, Inc.*, Adjudication Nos. 05-1718 and 05-2608, in which Licensee claimed the Bureau's charges were fabricated as part of a larger plot to close Licensee down by local and state law enforcement officials who were allegedly motivated by personal retribution. The two citations were issued out of the same Enforcement District Office as the instant matter.

PRIOR RECORD:

Licensee has been licensed since March 18, 2003, and has had two prior violations:

Adjudication No. 05-0529. Fine \$1,100.00

Sold alcoholic beverages after your
Restaurant liquor license expired and had
not been renewed and/or validated.
February 1 and 13, 2005.

Adjudication No. 05-0813. Fine \$1,000.00.

1. Failed to require patrons to vacate the
premises not later than one-half hour
after the required time.
March 26, 2005.
2. Permitted patrons to possess and/or
remove alcoholic beverages after 2:30 A.M.
March 26, 2005.

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 No. 4 in this case.

I impose:

Count No. 4 – \$50.00 fine.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$50.00 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

Dismissal of Count Nos. 1, 2 and 3

IT IS FURTHER ORDERED that Count Nos. 1, 2 and 3 of Citation No. 05-1581, issued to Bigdogz Grill, Inc., License No. R-AP-SS-13784, are DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 14th day of June, 2006.

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.