

Mailing Date: September 14, 2006

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-1581  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

BIGDOGZ GRILL, INC. : License No. R-13784  
1750 Bedford Street :  
Johnstown, PA 15902-3424 :

Counsel for Licensee: Robert Davis Gleason, Esquire  
Gleason, McQuillan, Barbin & Markovitz, LLP  
206 Main Street  
Johnstown, PA 15901-1682

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Bureau of Liquor Control Enforcement  
313 Mount Nebo Road  
Pittsburgh, PA 15237

**OPINION UPON RECONSIDERATION**

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ dismissed Counts 1, 2 and 3 of the four (4) count citation, sustained Count 4 of the citation, and imposed a fifty dollar (\$50.00) fine.

The first count of the citation charged that, on June 25 and July 3, 2005, Bigdogz Grill, Inc. (“Licensee”) by its servants, agents or employees, violated section 499(a) of the Liquor Code [47 P.S. § 4-499(a)] by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half (1/2) hour after the required time for the cessation of the service of alcoholic beverages.

The second count charged that, on June 25, 2005, Licensee, by its servants, agents or employees, violated section 499(a) of the Liquor Code [47 P.S. § 4-499(a)] by permitting 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 charged that, on June 25, 2005, Licensee, by its servants, agents or employees, violated section 493(21) of the Liquor Code [47 P.S. § 4-493(21)] by refusing enforcement officers the right to inspect completely the entire licensed premises at a time during which the premises was 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 charged that, on June 25, 2005, Licensee, by its servants, agents or employees, violated section 5.41 of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 5.41] by failing to display on the licensed premises documentary evidence that the premises meets all sanitary requirements for a public eating place.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal 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).

The review of the record in this matter reveals that the citation was first issued to Licensee on August 12, 2005. (Admin. Notice). A hearing was held before the ALJ on May 10, 2006. (Admin. Notice). The ALJ's Adjudication and Order dated June 14, 2006 was mailed to the parties on

June 22, 2006. (Admin. Notice). The Bureau filed its appeal to the Board (per its postmark) on July 24, 2006. (Admin. Notice).

Section 17.21(b)(2) of the Board's Regulations [40 Pa. Code § 17.21(b)(2)] and section 471(b) of the Liquor Code [47 P.S. § 4-471(b)] set forth that appeals from decisions of the ALJ shall be filed or postmarked within thirty (30) calendar days of the mailing date of the adjudication.

The filing deadline for this appeal from the ALJ's Adjudication and Order, pursuant to section 471 of the Liquor Code, was July 22, 2006. Licensee's appeal, although dated July 22, 2006, was not filed with the Board until July 24, 2006, which is clearly beyond thirty (30) days from the mailing date of the ALJ's Adjudication and Order. Therefore, the appeal of the Bureau was is dismissed on September 6, 2006. On September 11, 2006, the Bureau filed a motion for reconsideration, on the basis that July 22, 2006 was a Saturday, thus making its filing of the appeal on the following Monday, July 24, 2006, timely. The Board finds the Bureau's argument to be meritorious. [See 1 Pa. Code § 31.12; Desi's Pizza, Inc., Citation No. 01-0786]. Therefore, the Bureau's motion for reconsideration is granted, the Bureau's appeal was timely filed, and the Board will now consider the merits of the Bureau's appeal.

The facts of this case reveal that on June 25, 2005, at approximately 3:05 a.m., three (3) Bureau enforcement officers, Officers Killion, Coble, and Siko, saw four (4) persons inside the licensed premises. (N.T. 10-12). The four (4) persons were later identified as Michele Ziants, the wife of Licensee's sole corporate officer, John Rosiek, Eric Lapinsky, and Marcey Crum, all employees of Licensee. (N.T. 12-14, 77-79, 81, 94, 101-103). When the officers first arrived, Mr. Rosiek and Ms. Crum were seated at the bar, Mr. Lapinsky was standing at the end of the bar, and Ms. Ziants was behind the bar counting money from the cash register. (N.T. 13-14). The officers observed a bottle of beer in front of Ms. Rosiek and a plastic cup in front of Ms. Crum. (N.T. 14). Officer Killion knocked on the front door, and Ms. Crum came to the door and looked out. (N.T. 15-16). Officer Killion held up his badge/photo identification, but Ms. Crum would not let him in, saying she had been advised by RAMP training not to let them in after the bar had closed, unless there was a uniformed police officer present. (N.T. 16). Officer Killion tried again a couple minutes later, with the same result. (N.T. 17-19). Ms. Crum acknowledged who they were but reiterated that based on her RAMP training, she was not going to let them in until a uniformed officer was present. (N.T. 19) Another attempt by

Officer Coble to enter was similarly rebuffed by Ms. Crum. (N.T. 20-21) Officer Siko contacted the local police and upon arrival of a uniformed police officer at 3:22 a.m., the officers were allowed entrance to the premises. (N.T. 22-23).

Once inside, the officers obtained the four (4) persons identities. (N.T. 23). Mr. Rosiek admitted the half-empty beer bottle was his; Ms. Crum admitted the plastic cup contained beer was hers. (N.T. 23, 32-35). There were no other cups or bottles present. (N.T. 33-34). At no time did the officers witness either Mr. Rosiek or Ms. Crum, or anyone else present, possess or drink any beverages. Michael Ziants, Licensee's owner, arrived at the licensed premises at 3:25 a.m. (N.T. 24). On their way out of the premises, the officers noticed that the health certificate posted by the door had expired, although Licensee had a current valid certificate which was not posted. (N.T. 6-9, 25-26). Officer Killon filed criminal charges against Ms. Ziants for failure to vacate and patrons in possession of alcohol under section 494 of the Liquor Code [47 P.S. § 4-494], but Ms. Ziants was found not guilty. (N.T. 26-28).

Licensee's witnesses, the four (4) employees present that evening, essentially verified that the events occurred as described. They were working

later than usual cleaning up, because there had been a large event, “Thunder in the Valley,” in the area that day and the premises had been very busy. (N.T. 81-82, 95, 101-103). Both Mr. Roziek and Ms. Crum had obtained their beers prior to 2:00 a.m., but had stopped drinking from them before 2:30 a.m. (N.T. 92, 95-97, 103, 105-106). The bottle and cup containing the remaining beer had just not been cleared from the bar when the officers arrived. (N.T. 89, 98). After finishing their cleaning duties, Licensee’s employees often leave together for safety reasons. (N.T. 31, 79.).

Five (5) of Licensee’s employees, including Ms. Crum and Ms. Ziants, attended a RAMP training session in April 2006, where one of them asked whether they were required to let anyone in after their doors were locked, and they were told no, not unless the person was with a uniformed officer. (N.T. 39-45, 48-49, 82-84, 103-105). After the Bureau officers arrived at the premises, either Ms. Crum or Ms. Ziants unsuccessfully tried to reach the local police on their non-emergency number. (N.T. 105).

As to the charge relating to July 3, 2005, a Bureau police officer, Officer Burns, arrived at the licensed premises at 3:26 a.m. accompanied by his supervisor, Officer Manion, (N.T. 68-70). Seeing some cars in the parking lot, the officers talked to Ms. Crum, who came to the back door of

the premises. (N.T. 71). Officer Manion presented a badge but not his photo identification. (N.T. 71). Once Officer Burns presented his photo identified, Ms. Crum let them in. (N.T. 72). The officers found a pilsner glass behind the bar area that was cold to the touch and had a foam residue on it. (N.T. 72-73). The officers never saw anyone drinking from or in possession of the glass. (N.T. 74). Mr. Rozisk was cleaning and waiting to walk the other employees out for the night. (N.T. 86-87).

After considering the evidence and prior relevant decisions of the Office of Administrative Law Judge, the ALJ dismissed the first three (3) counts of the citation and sustained the fourth count. Neither Licensee nor the Bureau appealed relative to the fourth count, and, thus, the ALJ's decision regarding the failure to display a current health certificate is affirmed.

The Bureau, however, appealed the dismissal of Counts 1, 2, and 3, as they concern the events of June 25, 2005 only.<sup>1</sup> The bases for Licensee's appeal are that Ms. Crum and Mr. Rosiek were "patrons" at the time of the Bureau's visit to the licensed premises because they were observed sitting at the end of the bar; that they were "in possession" of alcoholic beverages, i.e.,

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<sup>1</sup> The Bureau does not appeal the ALJ's dismissal of Count 1 as it concerns the events of July 3, 2005, and, in fact, actually tried, albeit unsuccessfully, to withdraw that charge at the administrative hearing. (N.T. 74).

beer; and that their failure to admit the Bureau officers immediately was a violation of law.

Section 499(a) of the Liquor Code [47 P.S. § 4-499(a)] states as follows:

(a) Except as provided for elsewhere in this section, all patrons of a licensee shall be required to leave that part of the premises habitually used for the serving of liquor or malt or brewed beverages to guests or patrons not later than one-half hour after the time the licensee is required by this act to cease serving liquor or malt or brewed beverages and shall not be permitted to have any previously served liquor or malt or brewed beverages in their possession, nor shall they be permitted to remove any previously served liquor or malt or brewed beverages from that part of the premises. Patrons of a licensee shall not be permitted to reenter that portion of the premises habitually used for the serving of liquor or malt or brewed beverages between the time designated by this act for patrons to vacate the licensed premises and the time designated by this act when the serving of liquor or malt or brewed beverages is allowed to begin unless the licensee has been granted a permit for extended hours food service.

A “patron” is defined in section 102 of the Liquor Code [47 P.S. § 1-102] as “an individual who purchases food, nonalcoholic beverages, liquor, alcohol, or malt or brewed beverages for a consideration from a licensee or any person on the licensed premises except those actually engaged in an employment related activity.”

While the Bureau does not dispute that the four (4) persons in the licensed premises in the early morning hours of June 25, 2005 were

employees of Licensee, it contends that because at the exact moment when its officers approached the door of the licensed premises at 3:06 a.m., the fact that they saw two (2) of those persons seated at the bar rendered those persons patrons rather than employees engaged in an employment-related activity. The Bureau's interpretation would require the Board to find that employees who are cleaning up or conducting some other employment-related activity after a bar closes can never take a one or two minute break, or sit down to rest, without losing their "employee" status and becoming a "patron." The Board finds this position, that an employee must work continuously and unceasingly, to be impractical, unreasonable, and untenable and we concur with the ALJ that none of the four (4) persons present were patrons in the sense meant by the Liquor Code. (See Roman's Lounge and Catering, Inc., Citation No. 01-1628).

Similarly, the Board agrees with the ALJ that Licensee's employees, Ms. Crum and Mr. Rosiek, were not patrons in possession of alcoholic beverages after 2:30 a.m. The fact that they were not patrons has already been discussed. Further, although both persons freely admitted that the beers in question were theirs, and that they had been obtained sometimes before 2:00 a.m. they also testified that they were not consumed or possessed by them

after 2:30 a.m. Rather the beers remained half-consumed on the bar while the employees were in the process of cleaning up the premises and simply had not yet been removed. The Bureau witnesses saw neither employee consume any beer from the container; they saw neither employee touch the containers. Rather, the Bureau's argument is based on the mere presence of those containers near the employees at the bar. Again, in light of the Board's scope of review and the ALJ's credibility determinations,<sup>2</sup> the Board finds that the ALJ's conclusion that Ms. Crum and Mr. Roziek, even if they had been patrons, were not in possession of alcoholic beverages after 2:30 a.m. to be reasonable.

The third count is based on a language found in section 493(21) of the Liquor Code [47 P.S. § 4-494(21)]. The section states that it shall be unlawful for:

any licensee, or his servants, agents or employes, to refuse the board or the enforcement bureau or any of their authorized employes the right to inspect completely the entire licensed premises at any time during which the premises are open for the transaction of business, or when patrons, guests or members are in that portion of the licensed premises wherein either liquor or malt or brewed beverages are sold.

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<sup>2</sup> It is well-settled law that matters of witness credibility are the sole prerogative of the ALJ and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 83 Pa. Cmwlth. 379, 480 A. 2d 1253 (1984).

Again, given the Board's conclusion that Licensee's employees were not patrons on June 25, 2005, and they certainly were not guests or members, there is no violation of the above-quoted subsection since the premises were neither open for the transaction of business, nor were any patrons, guests, or members in the portion of the licensed premises where alcoholic beverages are sold. Therefore, Count 3 should be dismissed on this ground alone.

In addition, however, the Board notes with approval the ALJ's discussion regarding what constitutes a "refusal" to allow an inspection of the premises by Bureau employees. There is no indication on the record that Licensee was denying the Bureau officers access to the premises altogether, but rather, Licensee's employees were following what they then believed to be the law at the time, that they were not to let anyone in after hours unless that person was accompanied by a uniformed police officer. While Licensee's employee's belief was mistaken, it was reasonable under the circumstances of this case. The employees tried to call the local police, but were unsuccessful. The Bureau officers succeeded in reaching the local police by dialing 9-1-1, which was not tried by Licensee's employees. Regardless, everyone agreed that when the local uniformed police officer arrived up within ten (10) or

fifteen (15) minutes of being called, Licensee's employees willingly let everyone in. Under the very particular circumstance of this case, the Board tends to agree with the ALJ that the employee's action did not constitute a refusal under section 493(21).

Based on the foregoing, the Board's find the evidence presented the ALJ's decision was supported by substantial evidence and, therefore, the Board affirms the decision of the ALJ.

ORDER

The decision of the ALJ is affirmed.

The appeal of the Bureau is dismissed.

Counts 1, 2, and 3 of the Citation are dismissed.

Count 4 of the Citation is sustained.

Licensee has paid the fine in the amount of fifty dollars (\$50.00).

Licensee must adhere to all other conditions set forth in the ALJ's Order.

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Board Secretary