

Mailing Date: JUN 26 2006

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-2100
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-318396
v.	:	
	:	LID - 47217
DANICCO ASSOC INC	:	
T/A MODA	:	
110 CHESTNUT ST	:	
PHILADELPHIA PA 19106-3009	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-13706	:	BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: James E. Dailey, Esq.
For Licensee: Gregory Quigley, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on October 19, 2005. The citation alleges that Licensee violated §13.102(a)(3) of the Liquor Control Board Regulations, 40 Pa. Code §13.102(a)(3), on September 16, 2005, by selling and/or serving an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited 12-ounce Bud Light bottles and well drinks were served for the set price of \$10.00.

A hearing was held on Thursday, April 27, 2006, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and the citation.

FINDINGS OF FACT:

1. The Bureau of Liquor Control Enforcement received an anonymous complaint alleging that Licensee was conducting an open bar from 9:00 p.m. to 11:00 p.m. on September 16, 2005. Liquor Enforcement Officer Julie Kohler did a Google search for Licensee's web site and confirmed to her satisfaction that there was, in fact, an event at the licensed premises open to the public between 9:00 p.m. and 11:00 p.m. for a \$10 cover (N.T. 4-6).

2. Officer Kohler arrived at the licensed premises at about 9:10 p.m. on September 16, 2005. There was a man at the door collecting money and checking identification. She asked him what she needed to enter, and he said he needed to see her I.D. and \$10. She asked him what was going on inside and he said it was an unlimited drink special from 9:00 to 11:00 p.m. She told the man that some friends were going to meet her there and he suggested that it would be a good place for them to stay at least until 11:00 to take advantage of the unlimited drinks. She

was not required to sign any type of guest book. After paying ten dollars and entering, the officer went straight to the bar (N.T. 4-8).

3. There were about twenty patrons being attended by three bartenders. There was no sign of a special event going on. There was no food service. The officer stood at the bar. She asked one of the bartenders what the special was, and the bartender said it was unlimited Bud Light bottles and all well drinks until 11:00 p.m. At about 9:15 p.m. the officer ordered a Bud Light bottle and it was served to her without charge (N.T. 7-8).

4. At about 9:40 p.m. the officer ordered another bottle of Bud Light, which was served to her without charge (N.T. 9).

5. Dan Leader has been the president of Danicco, Inc., the licensed corporation, for about five years. On September 16, 2005, Licensee had a promotion for a party from 9:00 to 11:00 p.m. Licensee contracted with philly2night.com to run the promotion. That entity is a social service which gathers people together “like a meet and greet type of organization.” (N.T. 15).

6. On September 13, 2005, Licensee entered into a catering contract with philly2night, through Brian Nagele, calling for a fee of one thousand dollars, an estimated number of guests of one hundred, and a serving time of 9:00 to 11:00 p.m. on September 16, 2005. Maneo, Inc., doing business as philly2night, issued a check for one thousand dollars to the order of Licensee on the same date (N.T. 16-17, Exhibit L-1).

7. When the event came to an end at 11:00 p.m., Licensee returned the uncashed check to Mr. Nagele and received one thousand dollars cash instead (N.T. 18-19, Exhibit L-2).

8. It was Licensee’s expectation that the open bar would be offered only to the people on a list at philly2night.com, which was at the front door. It was expected that the people on that list would receive a bracelet at the door upon payment of ten dollars. It was expected that people who were not on the list would not be served for free at the open bar (N.T. 19-20).

CONCLUSIONS OF LAW:

Sustained as charged.

DISCUSSION:

The narrowest basis on which this citation may be sustained arises from a breakdown in execution which prevented Mr. Leader’s expectations about the event from being realized. That is to say, I do not have to make any general findings about the limitations the law requires for catered events in order to uphold this citation. Even if this “catered event” had conformed in all respects to the law, it is clear that Officer Kohler obtained admission on no basis other than her status as a member of the general public. She was not required to – and did not – hold any status as a member of philly2night, but she nevertheless obtained admission to this “catered event.”

40 Pa. Code §13.102, relating to discount pricing practices, provides in its entirety as follows:

(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, but may not engage in discount pricing practices between 12 midnight and the legal closing hour. Retail licensees may not engage in the following discount pricing practices unless specifically excepted in subsection (b):

(1) The sale or serving, or both, of more than one drink of liquor, wine, or malt or brewed beverages at any one time to any one person, for the price of one drink.

(2) The sale or serving, or both, of an increased volume of one drink of liquor, wine, or malt or brewed beverages without a corresponding and proportionate increase in the price for the drink.

(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.

(4) The pricing of alcoholic beverages in a manner which permits the price to change within the 2-hour period.

(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.

(2) The offering for sale of one specific type of alcoholic beverage or drink per day or a portion thereof at a reduced price, if the offering does not violate subsection (a). For purposes of this section, a specific type of alcoholic beverage means either a specific registered brand of malt or brewed beverages, a type of wine, a type of distilled spirits or a mixed drink. Examples of permissible drink discounts are found in Board Advisory Notice 16.

In pertinent part, Board Advisory Notice 16 (as amended April 14, 2004) provides that:

Licenses are permitted to sell and serve an unlimited or indefinite amount of alcoholic beverages at a fixed price for catered events arranged at least 24 hours in advance. This would include such events as weddings or private parties booked by an individual, a group or an organization for a specific number of people at a set date and time. A catered event must be conducted for a third party and a licensee may not conduct its own catered event.

Counsel for Licensee argued that “the spirit of the law was not broken here” as his client “did intend to register the event within the 24 hours and the open bar was limited to the two hours, so the spirit of the law was maintained here.” (N.T. 40).

Neither the regulation nor the advisory notice quoted above explicitly require that a “catered event” include the service of food, but there is a definition of “catering” found in 40 Pa. Code §5.83(a) which does impose that requirement:

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, card parties, banquets and the like; and which is paid for by the nonmembers.

Although this definition by its terms applies only to the operation of clubs, I believe the common understanding of the word “catering” necessarily includes food service.

Therefore I find that Licensee served and unlimited or indefinite amount of liquor, wine, or malt or brewed beverages for a set price, and I find also that the exception available under 40 Pa. Code §13.102(b)(1) does not apply because there was no food service provided as a part of this alleged “catered event.”

NOTICE OF ASSESSMENT OF POINTS PURSUANT TO ACT 239 OF 2004

Section 479 of the Liquor Code, 47 P.S. §4-479, establishes a numerical system for use in cities of the first class. Every restaurant and eating place licensee in cities of the first class who has been cited for a violation of §471 of the Liquor Code, 47 P.S. §4-471, on or after February 6, 2005, must have points assessed as of the date of the final adjudication. Points are in addition to other provisions of the Liquor Code regarding license transfer and renewal. Points are required to be assigned in addition to a monetary penalty and/or suspension and/or revocation of the license by the administrative law judge.

An enhanced penalty violation requires that the administrative law judge assign five to ten points, depending upon the circumstances surrounding the violation, to a license record, for each and every enhanced penalty violation. The Board has by regulation established a point system ranging from one to five points for other violations of the Liquor Code and Regulations not specifically set forth in §479.

Section 481(a), 47 P.S. §4-481(a) provides that when any license accumulates ten points or more, the administrative law judge must require the license holder to become compliant with and remain compliant with the provisions of §471.1, 47 P.S. §4-471.1, relating to the Responsible Alcohol Management Program (R.A.M.P.). Failure to comply with such an order within ninety days will result in two additional points being assessed against the license record.

Section 481(b), 47 P.S. §4-481(b) provides that when any license accumulates fifteen points or more, the administrative law judge must place the license in safekeeping. The license can only be removed from safekeeping upon approval by the board of a transfer to a disinterested third party. Upon completion of the transfer, the points assigned to it will be reduced to ten. If, within ninety days of the transfer the new owner voluntarily becomes compliant with and remains compliant with the responsible alcohol management provisions of §471.1, two additional points will be removed from the license record.

Notwithstanding other provisions of the Act, §481(c), 47 P.S. §4-481(c), provides that when any license accumulates twenty or more points in more than one citation, the administrative law judge must revoke the license.

PRIOR RECORD:

Licensee has been licensed since April 12, 2001, and has had prior violations, as follows:

Citation No. 04-0075. 2 days suspension.

1. Sales after restaurant liquor license expired on October 31, 2003, and had not been renewed and/or validated. December 31, 2003.

Citation No. 04-1134. 1 day suspension.

1. Failed to post a notice of suspension. June 7 and 8, 2004.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$50.00 to \$1,000.00 range, or both, for violations of the type found in this case.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Danicco Assoc., Inc., t/a Moda, License No. R-AP-13706, pay a fine of two hundred dollars (\$200.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

IT IS FURTHER ORDERED that one (1) point is hereby assessed against the record of Licensee, Danicco Assoc., Inc., t/a Moda, License No. R-AP-13706, as required by 40 Pa. Code §3.122(d).

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 PA 17110-9661

Dated this 20th day of June, 2006.

David L. Shenkle, J.

jb

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.