

Mailing Date: JUL 31 2007

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-2629
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-318281
	:	
RCP NO. 3 INC.	:	
105-107 GRAPE ST.	:	LID - 53249
PHILADELPHIA PA 19127-1401	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-EHF-9078	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

JAMES E. DAILEY, ESQ.

FOR THE LICENSEE:

EDWARD B. McHUGH, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on December 19, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against RCP No. 3, Inc., License Number R-AP-SS-EHF-9078 (hereinafter "Licensee").

An Administrative hearing was held on Tuesday, August 22, 2006, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

The citation charges Licensee with violation of Section 13.102(a)(3) of the Liquor Control Board Regulations, 40 Pa. Code Section 13.102(a)(3), in that on October 28, 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 Anheuser Busch products and well drinks were served for the set price of \$10.00.

FINDINGS OF FACT:

1. Officer Libby Hess is employed by the Bureau of Enforcement and was so employed on October 28, 2005. On that date, she conducted an investigation of the licensed premises. The officer arrived at the premises at 9:20 p.m. (N.T. 7).

2. Prior to going to the premises, she visited the website, philly2night.com at 7:00 p.m. on the evening of October 28, 2005. She did so in order to ascertain information for the premises advertising any happy hour special. After looking at the web site, she telephoned the licensed premises. She asked the male who answered the phone whether there were any specials on that evening. Based upon the person's reply, she asked to have her name put on a list. She used a fictitious name, Elizabeth Elliott (N.T. 7-11).

3. After completing her phone conversation, the officer went to the premises. As she approached the premises, she found an unidentified male standing out in front of the building along with other individuals. She entered the premises and spoke to the unidentified male who had a list of names. She asked him what kind of specials were available that evening. He stated that from 9:00 to 11:00 p.m., there was a happy hour, which included well drinks, and Anheuser Busch bottles for ten dollars. At that point, she indicated that her name was on the list and told him that she had called the premises earlier and gave him the name of Elizabeth Elliott (N.T. 11-12).

4. He told her that the name Elizabeth Elliott was on the list. The officer paid ten dollars and was permitted to enter the premises. She was told that everyone on the premises was there for the special (N.T. 12).

5. There were no signs in the premises indicating that any drink special was taking place. The officer noted that there were approximately sixty patrons on the premises (N.T. 16).

6. The officer ordered a Peach Schnapps and cranberry juice alcoholic beverage from a male bartender. The bartender indicated that he did not know whether that was included in the special but that he would give it to her anyway. He provided the drink at no charge. At approximately 9:55 p.m., the officer ordered another Peach Schnapps and cranberry juice alcoholic beverage from an unidentified female bartender. The officer was in the premises approximately two and a half hours (N.T. 18-20).

7. The officer did not see an emcee nor did she see any food on display. She did see a waitress delivering food to persons who ordered it. There was no buffet table set up (N.T. 20-21).

8. The waitress did not offer Officer Hess any food. They did not advise her of any food source at the door (N.T. 21-22).

9. After the second drink, Officer Hess departed the premises (N.T. 22).

10. The advertisement indicated that Philly2night was having a VIP party at the licensed premises for members and their guests (N.T. 25).

11. Officer Hess indicated that the investigation was not assigned to her, however, she was making a visit to the premises for another officer (N.T. 26-27).

12. Philly2night is a website with public access (N.T. 30).

13. Richard Podulka is the president and sole officer, director and shareholder of the licensed premises. He is also the operating manager. He is familiar with the day-to-day operation of the premises (N.T. 37-38).

14. Mr. Podulka has been the owner since the premises opened in November, 2004. On October 28, 2005, he recalls having a function at the premises during the evening hours. He indicated that it was a VIP private Halloween party for Philly2night and their members and their member's guests. He indicated that he is a client of Philly2night and does some advertising through them. He uses their newsletter to send out e-mails for informational purposes. He works with the sales reps at Philly2night. He indicated that Philly2night proposed the party (N.T. 38-39).

15. The party was a private party in that in order to be admitted your name had to be on the guest list. He indicated that the premises was to provide food to the public (N.T. 39).

16. Licensee indicated that the food was to include frozen hors d'oeuvres, which included baked and deep fried spring rolls and things of that nature, which were to be placed on dining tables (N.T. 40-41 and Exhibit L-1).

17. Licensee indicated the premises was 40 feet by 60 feet or approximately 2,400 square feet (N.T. 42).

18. Food was available for purchase from the daily menu (N.T. 43).

19. The agreement between the parties is dated and signed October 28, 2005 However, Licensee indicates that it was set up prior to that date (N.T. 47-48 and Exhibit L-2).

20. The Licensee offers mixed drinks and Anheuser Busch products and domestic beer. There was an open bar from 9:00 p.m. until 11:00 p.m. at the cost of ten dollars (N.T. 45).

21. Licensee split the money between the bar and Philly2night. Philly2night was to be paid by check (N.T. 45).

22. Licensee did not recall how much money was received that night from the door, or what portion was paid to Philly2night (N.T. 46-47).

23. Licensee purchases the beer and pays the bartenders (N.T. 47).

24. Philly2night sends out e-mails for the Licensee on their website (N.T. 48).

25. Philly2night assured Licensee that they would run the promotion directly (N.T. 49).

26. Philly2night had run no other function on the premises before February of 2005 (N.T. 51).

27. Philly2night was paid according to the number of patrons who came to the function (N.T. 53-54).

CONCLUSIONS OF LAW:

On October 28, 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 Anheuser Busch products and well drinks were served for the set price of \$10.00, in violation of Section 13.102(a)(3) of the Liquor Control Board Regulations, 40 Pa. Code Section 13.102(a)(3).

PRIOR RECORD:

Licensee has been licensed since October 7, 2004, and has a record of prior violations as follows:

Citation No. 05-1356. \$400.00 fine.

1. Sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price.
February 8, 2005.
2. Sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price.
April 15, 2005.
3. Discounted the price of alcoholic beverages in excess of two hours in a business day.
March 2, 2005.

Citation No. 05-1764. \$100.00 fine.

1. Issued worthless checks in payment for malt or brewed beverages.
June 24, 2005.

DISCUSSION:

Section 13.102, 40 Pa. Code Section 13.102 allows retail licensees to discount the price of alcoholic beverages for a consecutive period not to exceed two hours in a business day. The sale or serving of more than one drink of malt or brewed beverages for the price of one drink is prohibited. The sale of an unlimited or indefinite amount of liquor and wine or malt for a set price is prohibited. Section 13.102(b) provides for an exception where there is a catering event, which has been arranged at least twenty-four hours in advance.

Attorney for the Licensee argued that their client's happy hour fell under the exception to Section 13.102. Attorney for Licensee indicated that he did not believe the officer was in the position to make certain observations with regard to food service and that according to the Licensee, food service was available on the other side of the bar. Section 13.102 indicates that if the event is prearranged, then the Licensee can permit unlimited alcoholic beverages.

Counsel for the Bureau argued that it was a "subsponsored" event in that the ten dollars collected at the door was kept by the house. The Bureau indicated there is no evidence present as to exactly how much money was split, if it was indeed split.

The Court concluded that although this event was prearranged, it was not a catered event. The only food service available was waitress service where food could be ordered and purchased. During the officer's visit to the premises, she found no food or did anyone advertise or discuss the availability of food with her when she paid the ten dollars cover charge. Philly2night did not have a catered event on the premises, rather they assisted Licensee in advertising its own drink special. That does not meet the qualifications of a catered event. In addition, there is nothing which would qualify one or disqualify one from being a member of Philly2night.com. The officer did nothing to make herself a member other than to access the website. The website indicates there is a VIP bar from 9:00 to 11:00 p.m. for Philly2night members and their guests. However, this group is no more than the general public who may for whatever reason access Philly2night.com. The Court does not find this a legitimate catered event, but rather is as the Bureau indicated a subsponsored event.

The Licensee has two prior violations, one of which is for violation of discount pricing practices. Under the circumstances, a \$450.00 penalty shall be imposed.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of 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.

RCP No. 3, Inc.
Citation No. 05-2629

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, RCP No. 3, Inc., License Number R-AP-SS-EHF-9078, pay a fine of Four Hundred Fifty Dollars (\$450.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

In order to insure compliance with this Order, jurisdiction of this matter is retained.

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, along with any required documentation, to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

Dated this 25th day of July, 2007.

Tania E. Wright, J.

NOTE: 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.

mm