

Mailing Date: October 3, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-2634  
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 :

Counsel for Licensee: Steven M. Greenwald, Esquire  
664 Citizens Bank Center  
8 West Market Street  
Wilkes-Barre, PA 18711

Counsel for Bureau: Craig A. Strong, Esquire  
PENNSYLVANIA STATE POLICE,  
Bureau of Liquor Control Enforcement  
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OPINION

S & B Restaurant, Inc. t/a The Woodlands, An Inn (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Daniel T. Flaherty (“ALJ”), wherein the ALJ dismissed the first and second counts of the citation, and imposed a fine in the amount of one

thousand five hundred dollars (\$1,500.00) for the third count of the citation.<sup>1</sup>

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) filed a separate appeal from the Adjudication and Order of the ALJ relative to the dismissal of the first and second counts of the citation.

The first count of the citation charged that, on May 6 and June 17, 2005, 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 \$10.00.

The second count of the citation charged Licensee with violation of section 13.102(a) of the Board’s Regulations [40 Pa. Code § 13.102(a)] in that Licensee, by its servants, agents or employees, discounted the price of alcoholic beverages for a period or periods other than a consecutive period of time not to exceed two (2) hours in a business day on May 6 and June 17, 2005.

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<sup>1</sup> Due to a clerical error within the Office of the Administrative Law Judge, an Amended Adjudication was issued on August 29, 2007 amending the penalty section of the Adjudication, issued July 23, 2007, relative to Citation No. 05-2634 to read: “Count 1- Dismissed, Count 2- Dismissed, Count 3 - \$1,500.00 fine.” (Admin. Notice).

The third count of the citation charged that, on July 9, 2005, Licensee, by its servants, agents or employees, violated section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male minor.

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 committed an error of law in dismissing the first and second counts of the citation, and in finding that the events in question at the licensed premises on May 6, 2005 and June 17, 2005 were legitimate catered events falling within the exception

provided by section 13.102(b)(1) of the Board's Regulations. In support of its contention, the Bureau argues that the testimony showed the Fiveday Getaway Club, Inc. is a sham organization with no purpose other than weekly parties at the licensed premises designed to allow Licensee to evade the restrictions of section 13.102(a).

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 May 6, 2005, at approximately 5:45 p.m., Bureau Officer Biehl was informed that, in order to attend the happy hour event at the licensed premises, he had to obtain a membership card for one dollar (\$1.00) from the Fiveday Getaway Club, Inc. ("Getaway Club"). (N.T. 20-21, 84). The officer paid the dollar and received a membership card. (N.T. 21; Ex. C-4).

After receiving the membership card, the officer proceeded to where the happy hour was being held, at which point he was charged an entrance fee of ten dollars (\$10.00) by a doorman. (N.T. 21-22). His hand was

stamped, and he proceeded into the area where the happy hour was being held. (N.T. 21-22).

The officer observed that there was a food buffet set up. (N.T. 22). He proceeded to the bar area where he ordered and was served a Coors Light draft beer at no charge. (N.T. 22). Officer Biehl was served three (3) additional Coors Light beers on that evening, and no money was charged when he was served. (N.T. 22).

The officer departed the licensed premises at 6:40 p.m. and returned at 7:30 p.m. (N.T. 23, 31). At that time, he was allowed entrance because his hand had been stamped when he previously paid the ten dollar (\$10.00) fee. (N.T. 23). At that time, he observed that the happy hour event was continuing, and he obtained another beer at no charge. (N.T. 23). The happy hour event was over at 8:30 p.m. (N.T. 23-24).

Office Biehl proceeded to another part of the licensed premises, Club Evolution, where another happy hour event, sponsored by a radio station, was being held. (N.T. 24). No admission was charged to Club Evolution, and drinks were being sold for one dollar (\$1.00). (N.T. 24).

On June 17, 2005, at 5:30 p.m., Officer Biehl returned to the licensed premises for another Getaway Club event. (N.T. 24). He purchased

another membership card for one dollar (\$1.00), then proceeded down the hall to where the event was being held. (N.T. 24-25, 29-31; Ex. C-5). He paid a ten dollar (\$10.00) cover charge, had his hand stamped and entered the bar area where the Getaway Club event was being held. (N.T. 24-25). The officer ordered and was served three (3) "Gatorades", alcoholic mixed drinks, but was not charged for any of them. (N.T. 25). The event ended at 8:30 p.m., and the officer departed. (N.T. 25-26).

The events which the officer attended on May 6, 2005 and June 17, 2005 were held pursuant to a written contract entered into between Licensee and the Getaway Club. (N.T. 84, 89; Ex. L-2). The contract provides that Licensee will provide a catered event every Friday in 2005, to begin at 5:30 p.m. and end at 8:30 p.m. (N.T. 89; Ex. L-2). Licensee contracted to provide a "Cocktail Buffet (Chef's Choice)," and an open bar serving liquor, assorted wines, draft beer, soft drinks and juices. (Ex. L-2). The contract describes the event as a cocktail reception with the number of guests being approximately three hundred (300). (Ex. L-2). The contract also provides that a "[t]en dollar door charge goes toward payment of food & beverage. Membership Fee is sent to Getaway Club. Price subject to change based on

increased entertainment or food package.” (Ex. L-2). The contract is signed by Judy Broody on December 27, 2004. (Ex. L-2).

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).

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).

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 ten dollar (\$10.00) 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).

Section 13.102 of the Board's Regulations provides, in pertinent part, the following:

- (a) 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 beverage 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.

- (3) The sale, serving, or offering of an unlimited or indefinite amount of alcoholic beverages as part of a meal package after 7 a.m. on December 31, 1999, until 2:00 a.m. on the following day by a hotel licensee to registered overnight guests of the hotel.

[40 Pa. Code 13.102(a)].

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. The facts relative to the events 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 on December 27, 2004 for functions on Fridays in 2005, between the hours of 5:30 p.m. and 8:30 p.m., with specific details including a cocktail buffet and a three (3)-hour open bar. The contract further specifically provides that the "charge goes toward payment of food and beverage. Membership fee is sent to Getaway Club." Ms. Broody described

the Getaway Club as a social club whose members get together at events held at the licensed premises to network and for dating purposes.

Upon review of the evidence presented, the Board concludes that there is substantial evidence to support the decision of the ALJ. The happy hour events hosted by the Getaway Club on May 6 and June 17, 2005 meet the necessary criteria to be considered “catered events” in accordance with section 13.102(b)(1) of the Board’s Regulations. The functions were intended as private functions for cardholders, arranged more than twenty-four (24) hours in advance of the events, and for which a fixed price was charged for the event.

While the Bureau argues that the Getaway Club is a façade designed to provide Licensee a method to evade the restrictions of section 13.102(a), the Bureau’s argument is baseless in light of Pennsylvania State Police v. American Serbian Club, 750 A.2d 405 (Pa. Cmwlth. 2000) which specifically permits 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 and second counts of the citation.

Licensee lists numerous contentions relative to its appeal. First, Licensee argues that the ALJ committed an error of law in that the findings of fact upon which the ALJ based his decision are legally insufficient to find that Licensee violated Liquor Code section 493(1).

Licensee also argues that the ALJ committed an error of law and abuse of discretion in not dismissing the citation in its entirety by determining that the Bureau's investigation from April 26 to November 8, 2005 was a single, continuous and ongoing investigation into an alleged sales to one (1) specific minor, that the Bureau had all the information it needed to issue a citation on July 9, 2005, that the citation was not issued until four (4) months after the last conduct in question, and that a hearing did not take place until ten (10) months later, all to Licensee's prejudice, contrary to Liquor Code section 471.

Licensee further argues on appeal that the Bureau officer's testimony that, in essence, it took one-half (1/2) hour to determine that the person was visibly intoxicated, does not support the ALJ's conclusion. In support of its contention, Licensee suggests that there is no testimony of record that any employee of Licensee had the opportunity, on a continuous basis, to observe the male patron for a one-half (1/2) hour period of time.

The Board has reviewed the record with Licensee's objections in mind. Specific to the charge for sales to a visibly intoxicated person, the record reveals that, on July 8, 2005, Bureau Officer Biehl visited the licensed premises at approximately 10:30 p.m., accompanied by Bureau Officer Buckley. (N.T. 26, 50). At approximately 1:10 a.m. on July 9, 2005, the officers observed a male patron stagger over to the bar, bumping into both officers on his way. (N.T. 26-27, 50). The male patron, wearing jeans and a shirt which was "half on and half off," ordered four (4) Yeiger Bombs, which are alcoholic beverages consisting of Yeigermeister liquor and Red Bull energy drink. (N.T. 27, 50-51). After fumbling in his pockets, the male patron failed to produce any money, so a female patron eventually paid for the drinks by credit card. (N.T. 27, 51). He spilled one (1) of the drinks on the counter. (N.T. 27). After bumping into the officers again, the male patron handed two (2) of the drinks to friends while staggering back and forth. (N.T. 27). He had to hold onto the bar to prop himself up. (N.T. 27, 51). The patron removed his shirt while on the dance floor. (N.T. 27).

Licensee's Director of Security and Alcohol Compliance Education for twenty-six (26) years, Catherine Kaminski, stated that everyone on staff is required to have TIPS certification. (N.T. 108). Licensee also instructs its

employees to look for behavioral clues and, if they identify such clues, to slow down service, provide the patron with fatty foods and, if needed, a cab ride or a room at Licensee's expense. (N.T. 108-109). If a bartender is found to have served a visibly intoxicated patron, he or she is warned that dismissal could result. (N.T. 110). Ms. Kaminski does not have any indication that any bartenders were warned or dismissed for any incident on or about July 8, 2005, nor was she made aware of any circumstances surrounding the incident in question. (N.T. 110-111). Licensee's employees are required to document incidents involving visibly intoxicated patrons. (N.T. 110, 112). No reports of any incident on July 9, 2005 was found in the log book used for such incidents. (N.T. 110).

Relative to Licensees' averments of procedural errors, the record reveals that Bureau Officer Biehl began his investigation of Licensee's operation on or about April 26, 2005, based upon an alleged happy hour violation. (N.T. 13-14). During the course of the investigation, Officer Biehl made visits to the licensed premises on May 6, May 13, June 17, July 8-9, August 29 and 31, and September 30, 2005. (N.T. 19-20, 26, 47-49). Officer Biehl completed all the necessary follow up and obtained requested records from Licensee no later than November 8, 2005. (N.T. 35-36, 39). The

investigation was, however, ongoing beyond the initial undercover visits to the premises relative to the happy hour violation because the Bureau received another complaint regarding an alleged sale to a minor. (N.T. 36-37). It was during the period when Officer Biehl was following up on the allegation involving a specific minor that he determined sufficient cause for a charge of sales to a visibly intoxicated person. (N.T. 26-27). Officer Biehl spent the time period between April 26 and November 8, 2005 investigating the alleged happy hour violation, the alleged sales to a minor and preparing his report for a charge of the sales to a visibly intoxicated patron. (N.T. 26-27, 35-38, 47-48). Officer Biehl was also assigned other investigations during the period in question. (N.T. 44-45). The citation was issued to Licensee on December 28, 2005. (N.T. 12; Ex. C-2).

Licensee's contentions that there was not sufficient evidence to support the ALJ's conclusion that Licensee violated Liquor Code section 493(1), that the officers' testimony that the male patron was visibly intoxicated, does not support the ALJ's conclusion, and that there was no evidence that Licensee's employees continuously observed the male patron on the date in question, are without merit.

Section 493(1) of the Liquor Code provides that it shall be unlawful “[f]or any licensee, . . . or employee, servant or agent of such licensee . . . to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated . . .”. [47 P.S. § 4-493(1)].

The Bureau officers’ testimony regarding the actions of the male patron on July 9, 2005 was unrefuted by Licensee. A male patron exhibiting very clear signs of intoxication was served alcoholic beverages by Licensee’s bartender on July 9, 2005. The fact that Licensee’s employees may have been trained and certified in responsible alcohol service does mitigate the facts, and Licensee can still be subject to an undercover investigation and citation issued by the Bureau. In addition, while Licensee challenges the credibility of the Bureau’s witnesses, matters of credibility are the sole prerogative of the fact finder. Borough of Ridgway vs. Pa. Public Utilities Comm’n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984).

Based on the foregoing, the Board concludes that substantial evidence existed for the ALJ to conclude that Licensee’s employees served alcohol to a patron who exhibited clear signs of intoxication on July 9, 2005.

Licensee also contends that the ALJ committed an error of law in not dismissing the citation in its entirety, in that a citation was not issued until four (4) months after the last conduct in question, that a hearing did not take place until ten (10) months later, to Licensee's prejudice and contrary to section 471 of the Liquor Code.

Pursuant to section 471(a) of the Liquor Code, administrative prosecutions against liquor licenses must be initiated by the Bureau within one (1) year of the violation. [47 P.S. § 4-471(a)]. The record in this matter reveals that the date of violation relative to the third count of the citation was July 9, 2005. The citation was issued to Licensee on December 28, 2005. Because it was issued five (5) months and twenty (20) days after the alleged violation set forth therein, the citation was issued well within the one (1) year period prescribed for the Bureau to issue a citation.

Based upon the foregoing, the Board concludes that the ALJ did not err in failing to dismiss the entire citation, as it was issued in accordance with Liquor Code section 471(a).

ORDER

The decision of the ALJ is affirmed.

The appeal of the Bureau as to the first and second counts of the citation is dismissed.

The appeal of Licensee as to the third count of the citation is dismissed.

Licensee has paid the fine in the amount of one thousand five hundred dollars (\$1,500.00).

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

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Board Secretary