Mailing Date: JUN 07 2007

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 06-2904
	:	Incident No. W03-343190
v.	:	
	:	LID - 54700
HARRISBURG FUDD, LLC T/A FUDDRUCKERS 421 FRIENDSHIP RD. HARRISBURG, PA 17111-1204	:	
DAUPHIN COUNTY LICENSE NO. R-SS-10194	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire
Pennsylvania State Police
3655 Vartan Way
Harrisburg, PA 17110

For Licensee
Collin Spencer
Member/Steward

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on December 21, 2006, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Harrisburg Fudd, LLC, t/a Fuddruckers (Licensee), License Number R-SS-10194.

The citation[1] charges Licensee with a violation of Section 13.102(a) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §13.102(a)]. The charge is that on November 11, 2006, Licensee, by servants, agents or employes, 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.

An evidentiary hearing was conducted on May 1, 2007 at the Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania. This matter was submitted by an agreement of facts and without any testimony taken.

Licensee was represented by its Member/Steward, Mr. Collin Spencer. I advised Mr. Spencer of Licensee's right to counsel, to cross-examine witnesses and to present testimony. Mr. Spencer acknowledged that he understood those rights and that he was prepared to go forward without an attorney.

Licensee originally was going to file an Admission, Waiver and Authorization (Waiver). Because I thought the facts presented to me by the Bureau did not constitute a violation, I could not in good conscious accept the Waiver.

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 November 11, 2006 and completed it on November 14, 2006. (N.T. 7)

2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on December 5, 2006. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1)

3. On November 11, 2006, Licensee had a business practice of selling twelve ounce bottles of domestic beer for $3.25. However, if one purchased the same domestic bottle of beer with a meal, the price for the beer was $1.00. (N.T. 8-10)

4. This is a practice which Licensee engages in as a normal part of its pricing structure. (N.T. 15-16)

1. Commonwealth Exhibit No. C-2.

CONCLUSIONS OF LAW:

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

2. The Bureau **failed** to prove Licensee, by servants, agents or employes, 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 November 11, 2006.

DISCUSSION:

The facts of this case fall squarely within the reasoning in the following Adjudications: ***Disilwhit, Ltd.***, I Sel.Op. ALJ 23; ***Chi-Chi's USA, Inc.***, 10 Sel.Op. ALJ 14; ***Sailtae, Inc.***, 05-2491 www.lcb.state.pa.us/webapp/Legal/PublicAdjudicationSrch.asp. and Whistle's, Incorporated, 03-0246.[2]

The Bureau argues this matter is readily separable from those Adjudications because it is the same bottle of beer which is being offered for two distinct prices. This is a distinction without a difference.

Consider the practice of selling one bottle of beer for a set price. Then consider that the very same bottle of beer being sold for twenty percent less if purchased with four additional bottles at one time. Perhaps, the licensee markets the five bottles in a bucket. If this is a normal, everyday pricing structure, there is no violation.

As the referenced Adjudications state, a licensee is virtually unfettered in establishing a pricing matrix that is competitive and consistent with its marketing strategies. The concept of discounting only comes into play when a licensee deviates from its everyday pricing practices.

2. At first glance, I thought this practice constituted an unlawful inducement. Upon further thinking, I concluded otherwise. Licensee's pricing structure promotes the sale of food (N.T. 12-13; 24)

ORDER:

NOW THEREFORE, it is ordered that Citation No. 06-2904, issued against Harrisburg Fudd, LLC, t/a Fuddruckers, License No. R-SS-10194, is DISMISSED.

Dated this 31st day of May, 2007.

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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.