

Mailing Date: MAY 06 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-1705
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-356163
v.	:	
	:	LID - 48775
1102 LAM INC	:	
1102-06 S 47 th ST	:	
PHILADELPHIA PA 19143-3615	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-SS-8230	:	BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: Erik S. Shmukler, Esq.
For Licensee: John J. McCreesh, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on August 14, 2007. The citation alleges that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on June 16, 2007, on the basis that the licensed premises was not a *bona fide* restaurant because there was insufficient seating.

A hearing was held on February 14, 2008, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and the citation.

FINDINGS OF FACT:

1. Liquor Enforcement Officer Justin Clarke inspected the licensed premises at 4:45 p.m. on Saturday, June 16, 2007. He saw a large customer serving area about 35 feet long and 15 feet wide. There were about five customers. There was an employee serving area, separated from the customer area by Plexiglas. In the customer serving area there were three small tables with two chairs at each. There was a somewhat larger table with four plastic armchairs. There were two additional tables covered with flattened cardboard boxes. There were 22 chairs stacked in the area, many of them in poor condition, in Officer Clarke's opinion (N.T. 5-8).

2. There was enough room that the chairs could have been set out individually on the floor, though it would have been tight. The chairs could also be put around the perimeter and there might be enough room, although it might also be a fire code violation (N.T. 12-13).

3. The customer serving area contained 525 square feet of space (N.T. 14).

4. Licensee's owner, Jeffrey Lam, follows a daily routine when he opens the store at 10:00 a.m. Lunch time is around 11:30 a.m. to 2:00 p.m. After lunch Mr. Lam stacks the seats and sweeps and/or mops the floor. Before dinner time the seats are unstacked and afterwards stacked again in order to clean up. Mr. Lam has been doing it this way for six years and has passed inspections by the Liquor Board at least once a year (N.T. 16-18).

5. Some of the covering on the chairs is ripped and they are a bit old, but safe. When the officer pointed out the condition of the chairs to Mr. Lam, he responded that he would obtain new chairs immediately. The officer said he would be given a warning, but the next day he called Mr. Lam and said he would have to be given a citation. The chairs have since been replaced. The amount of seating is the same as when Mr. Lam purchased the place (N.T. 18-19).

CONCLUSIONS OF LAW:

The evidence did not prove that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on June 16, 2007, on the basis that the licensed premises was not a *bona fide* restaurant because there was insufficient seating.

DISCUSSION:

There is ample precedent in the previous decisions of administrative law judges for both of the possible outcomes in this case.

In an adjudication of Citation No. 96-1142, issued to *Timothy R. Brier*, 28 *Sel. Op. ALJ* 81, the Honorable Gerald R. Ruth found that the licensed premises was a fully functioning deli/restaurant which had tables and chairs sufficient to accommodate 30, but they had been pushed together at the time of the liquor enforcement officer's mid-afternoon inspection, because of a recent delivery of beer.

Judge Ruth wrote "It is unclear why a citation was even considered in this particular case. It is not the intent of the law or the compliance requirements to supervise or control housekeeping and normal temporary movement of furniture. This is so whether it be for deliveries, safety precautions because of damage to floor or roof or some other unusual event that can be taken care of in a short period of time." 28 *Sel. Op. ALJ* at 85.

A panel of administrative law judges held, in the adjudication of Citation No. 99-1168, issued to *Edmondson, Inc.*, that the enforcement bureau was estopped from bringing the charge of insufficient seating, where the total of 21 chairs at 6 tables was the same as it was on the date the PLCB approved the license.

Most of the citations based on insufficient seating have been sustained, however. In an adjudication of Citation No. 05-0957, issued to *H & M Beer, Inc.*, I sustained the citation where there were a sufficient number of tables and chairs, but the chairs were stored in stacks of three or four, and there was a large quantity of paper towels in boxes stored on the tables.

To the contrary was *5934 Lee, Inc.*, Citation No. 05-1613, where there was no seating on the first floor of the premises, but the second floor licensed area was properly equipped. There were no undercover visits to the premises, so no one was refused seating, and I found the circumstance that the licensee's owner had to unlock the door to the second floor seating area insufficient to conclude that the premises was not a *bona fide* restaurant.

Judge Wright sustained Citation No. 05-0299, also issued to *5934 Lee, Inc.*, but the two cases are not in conflict. In Judge Wright's case an undercover officer purchased a beer and a person behind the counter told the officer that "there was no seating available to drink the beer that he had just purchased." In the case I heard, there was no refusal of seating.

After reviewing these precedents I am persuaded that the evidence in this case was not sufficient to prove that Licensee was not operating a *bona fide* restaurant.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 07-1705 is DISMISSED.

Dated this 29th day of April, 2008.

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.