

Mailing Date: MAY 27 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-2186
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-359155
v.	:	
	:	LID - 33106
N & K DELI INC	:	
6118-20 MARKET ST	:	
PHILADELPHIA PA 19139-3029	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-SS-OPS-1934	:	BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: Erik S. Shmukler, Esq.

For Licensee: John J. McCreesh, III, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on September 25, 2007. The citation alleges that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on August 22, 2007, on the basis that the licensed premises was not a *bona fide* restaurant because there was insufficient seating.

A hearing was held on March 11, 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 Officers Justin Clark and Amanda Bauer inspected the licensed premises on August 22, 2007. After entering the front door, Officer Clark saw a serving area about six feet wide and 30 feet deep. As he walked in and looked to the right, he saw another serving area about six feet wide and 15 feet long. At the end of that serving area there was a door, which was locked at the time of the inspection (N.T. 5-7).

2. Officer Clark saw no seating or tables in these areas. There was a Plexiglas divider between the customer area and an employee area. The officers asked an employee to speak with John Sing, president of the licensed corporation. The employee went upstairs and returned with Mr. Sing. Officer Clark informed Mr. Sing that the officers were conducting an inspection, and that he was a little concerned about his seating arrangements, since he did not see any (N.T. 8).

3. Mr. Sing and the employee informed Officer Clark that there was an additional serving area behind the locked door. The door was opened by using a buzzer that was behind the

Plexiglas, in the employee section of the premises. In the area thus accessed there were 34 chairs and eight to ten tables; i.e, appropriate seating (N.T. 8).

4. Officer Clark “informed Mr. Sing that he has to have chairs and tables maintained to the public at all times. They cannot be behind the locked door. I wrote that on the routine inspection and I wrote a violation observed, yes. And he was a little concerned why I wrote yes to the violation observed. I said seating was insufficient because it was not accessible to the public.” (N.T. 8-9).

5. Speaking through his son as an interpreter, Mr. Sing asked if the officers couldn’t give him a break this one time about the seating situation. Mr. Sing said he always leaves the door unlocked. The officer explained that the decision wasn’t going to be made at that moment. There were no signs or any other way by which a patron could tell that there was seating behind the door. The seating area behind the door also contained a working bathroom, in which the trash cans were empty (N.T. 9-10).

6. Although Officer Clark did not notice them, Officer Bauer wrote on the inspection report that there were “3 chairs at tables available, 34 behind locked door.” Licensee’s owner verified that there were three chairs and two tables in the serving area and, if those seats are filled, customers who want to sit down are admitted to the dining room by the use of a buzzer. No one has ever been refused access to the other room (N.T. 12-13, 16-18).

7. Licensee’s owner finds it desirable to keep the door to the dining room locked unless it is needed for customers because otherwise he would not have control over the dining room, which is not visible from the employee work area (N.T. 19-20).

CONCLUSIONS OF LAW:

The evidence did not prove that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on August 22, 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. 07-2186 is DISMISSED.

Dated this 20th day of May, 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.