

Mailing Date: JUN 25 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-2326
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-359928
v.	:	
	:	LID - 53755
63 CVA INC	:	
2501 N 31 ST ST	:	
PHILADELPHIA PA 19132-2925	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. E-SS-113	:	BEFORE: JUDGE SHENKLE

APPEARANCES:

For Bureau of Enforcement: Eric 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 October 16, 2007. The citation alleges that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on August 28, 2007, on the basis that the licensed premises was not a *bona fide* eating place because there was insufficient seating.

A hearing was held on April 3, 2008, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. Liquor Enforcement Officer Ed Gartland inspected the licensed premises at about 4:00 p.m. on August 28, 2007. There was one employee present, but no patrons. In the downstairs licensed area he saw seating for 18 patrons at four tables. There were also 16 metal folding chairs, folded up and chained together in an upright position (N.T. 6-7).

2. The upstairs licensed area was locked, but the employee opened a gate and allowed the officer upstairs, where he found eight seats and five tables. Officer Gartland prepared a Routine Inspection Report in which he noted in the remarks section "seating for 18 at 4 tables downstairs/upstairs area locked" (N.T. 7-8, Exhibit B-3).

3. This was Officer Gartland's only visit to this licensed premises, and he closed the investigation on the same date. His recollection was that the downstairs seating was picnic-type bench seating, with benches attached to the tables, but photographs identified by the officer do not confirm this (N.T. 9-10, Exhibits L-1, L-2, L-4).

4. Christopher Aun had purchased this licensed premises about three years previously, and the licensed was transferred to this corporation on December 29, 2004. The premises looked and was equipped the same at the time of the transfer as it was on the date of the inspection in this case. Officers of the Bureau inspected the premises on July 28, 2005, October 24, 2006, and June 16, 2007, and in each case noted no violations of law (N.T. 17-19, Exhibit L-3).

CONCLUSIONS OF LAW:

The evidence did not prove that Licensee violated §102 of the Liquor Code, 47 P.S. §1-102, on August 28, 2007, on the basis that the licensed premises was not a *bona fide* eating place because there was insufficient seating.

DISCUSSION:

In preparing his report, Officer Gartland did not count the seats in the upstairs seating area because it was locked at the time he arrived at the premises at 4:00 p.m., although an employee let him through a door so that he could inspect it. I do not believe the law requires the officer to discount such an area during an inspection.

In addition, the officer's testimony as to the upstairs seating conflicted with the testimony of the owner, and in view of the discrepancy between the officer's description of the type of seating in use downstairs, I lack confidence in the accuracy of his description of the upstairs area.

However, even if one ignores the upstairs area, there were adequate seats downstairs, notwithstanding the fact that some of them were folded up and chained together. This inspection took place outside of normal meal times, and I do not believe the law requires the seating to be set up at such times. That is, Licensee's premises was properly equipped despite the fact that some minor effort would have had to occur before a party of thirty diners could be seated.

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.

In addition, it appears that this premises was in the same condition on the date of the inspection as it was at the time the license was approved.

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.

In *5934 Lee, Inc.*, Citation No. 05-1613, 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.

After reviewing these precedents I am not persuaded that the evidence in this case proved a violation of law.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 07-2326 is DISMISSED.

Dated this 11TH day of JUNE, 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.