

Mailing Date: May 6, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-0621
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
PW SOUTH LLC	:	License No. R - 72
150-152 SOUTH ST AND	:	
601-605 S. 2 ND STREET	:	
PHILADELPHIA, PA 19147-2415	:	

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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement, (“Bureau”) appeals the dismissal of Counts one (1) and two (2) of Citation No.

o8-0621 as set forth in the Adjudication and Order of Administrative Law Judge Tania E. Wright (“ALJ”), dated December 3, 2008.

The citation in the present matter contained two counts. Count one (1) charged Licensee with selling and/or serving an unlimited or indefinite amount of alcoholic beverages for a fixed price in that, on February 17 and 18, 2008, unlimited domestic draft beers were served for the set price of twenty dollars (\$20.00) in violation of section 13.102(a)(3) of the Liquor Control Board’s (Board's) Regulations. [40 Pa. Code § 13.102(a)(3)]. Count two (2) charged Licensee with having discounted the price of alcoholic beverages between 12:00 midnight and 2:00 a.m. on February 18, 2008 in violation of section 13.102(a) of the Board's Regulations. [40 Pa. Code § 13.102(a)].

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal 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/her discretion, or if his/her 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).

On appeal, the Bureau contends that the ALJ committed an error of law in dismissing the citation. Specifically, the Bureau avers that the ALJ erred in finding that PW South LLC ("Licensee") sufficiently established the affirmative defense of a scheduled catered event pursuant to the requirements of 40 Pa. Code § 5.83(b). In addition, as to count one, the Board alleges that the affirmative defense of a catered event is not established when the catered event began at 10:00 p.m. and the officer was provided beer at 9:40 p.m.

The Board has reviewed the record with the Bureau's objections in mind.

The parties stipulated on February 17, 2008, Bureau of Liquor Control Enforcement Officer Rowe entered the premises at 9:30 p.m. The first floor area was open and bartenders were working. At approximately 9:30 to 9:40 p.m., the officer proceeded to the second floor and was informed by a doorman that it would cost twenty dollars (\$20.00) to enter and that all domestic draft beers were included from 10:00 p.m. until 2:00 a.m. The Officer was served a draft beer at 9:40 p.m. and was not charged for the beer. He was served and not charged for additional beers until 12:05 a.m. At 12:10 a.m. on

February 18, 2008, the Officer returned downstairs and purchased a beer for four dollars (\$4.00). (Exhibit B-3)

The Bureau contends that Licensee failed to demonstrate that there was a catered event occurring at Licensee that evening. The Board Approved Manager, Mr. Kilkenny, testified that a customer named “Joe” utilized their banquet facility to host a promotional event (N.T. 10). The customers paid \$20.00 for unlimited draft beer, buttered appetizers, and a sandwich from the regular menu. (N.T. 8, 9) The Manager said that customers could purchase beer or other drinks from the first floor bar. (N.T. 18) Licensee produced a two page document purporting to be a catering contract, which gave details of the event and indicated that an expectation of one hundred (100) guests. (N.T. 12) The restaurant retained all proceeds from the sale of the tickets. (N.T. 21)

The ALJ held that while the documents were vague, the document and testimony were sufficient to establish that a third party held a promotional event on the premises. The ALJ noted that the Bureau did not make mention of the service of food, nor did they refute Licensee’s claim. In light of all of this, the ALJ advised Licensee to formalize their contracts, and found that Licensee

has presented sufficient evidence of a catered event exempting them from the rule prohibiting discount pricing practices.

While the Board can certainly see why the Bureau would challenge a finding that a catered event had occurred – the licensee could not identify the port, in question except for his first name, the licensee kept all the monies collected, etc. – such a challenge is essentially to the weight of the evidence and that is for the ALJ, not the Board, to determine. See Thorpe v. Pub. Sch. Employee's Ret. Bd., 879 A.2d 341 (Pa. Cmwlth. 2005). Thus, since a catered event was occurring on the night in question, the Board must affirm Count Two of the citation.

As to Count One however, the undisputed evidence is that the officer paid twenty dollars (\$20.00) for admission to the catered event, however the catered event did not commence until 10:00 p.m. (N.T. 15-16). He was served at least one and possibly more beer prior to the commencement of the catered event and was not charged an additional fee for the beer or the beers in question. Thus, the undisputed evidence establishes as a matter of law that the Licensee had provided an indeterminate amount of alcohol for a set price,

prior to the catered event. Therefore, the ALJ should have sustained Count One of the citation.

Based on the forgoing, the ALJ's decision to dismiss Count One is an error of law and is not supported by substantial evidence. Therefore, the Board reverses the ALJ's decision. The ALJ's decision as to Count Two is However, affirmed since the catered event extended until 2:00 a.m.

ORDER

The decision of the ALJ is reversed as to Count One and affirmed as to Count Two. This matter is remanded to the ALJ for the imposition of the appropriate penalty as to Count One.

Board Secretary