

Mailing Date: July 22, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-0681
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
CLUB XS, INC.,	:	
T/A CLUB XS	:	License No. R-16758
36-38 WEST 11 th AVENUE	:	
YORK, PA 17404	:	LID 56899
	:	

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OPINION

Club XS, Inc., t/a Club XS, (“Licensee”) appeals from the Order and Adjudication of Administrative Law Judge Daniel T. Flaherty, Jr. (“ALJ”),

wherein the ALJ sustained both counts of Citation No. 08-0681 and imposed a fine of five hundred dollars (\$500.00).

Count 1 of the citation charged Licensee with violating section 499(a) of the Liquor Code [47 P.S. § 4-499(a)], in that Licensee, by its servants, agents or employees, failed to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages. Count 2 of the citation charged Licensee with violating section 499(a) of the Liquor Code, in that Licensee, by its servants, agents or employees, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

On appeal, Licensee admits to Count 2 of the citation, in that patrons did possess alcoholic beverages on the premises at 2:57 a.m. However, Licensee asserts that the ALJ committed an error of law or abused his discretion or that his decision was not based on substantial evidence with regard to Count 1 of the citation. Licensee contends that as a holder of an extended hours food permit, Licensee falls into the section of 499 which permits patrons to be on the licensed premises after 2:30 a.m.

Pursuant to section 471 of the Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Pennsylvania Liquor Control Board (“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).

The Board has reviewed the record, including the ALJ’s Adjudication and Order, Licensee’s Appeal of ALJ’s Adjudication, the Pennsylvania State Police, Bureau of Liquor Control Enforcement’s (“Bureau”) Response, and the hearing transcript, with Licensee’s contention in mind. Since Count 2 of the citation is not in dispute, it will not be addressed, except to state that the ALJ acted properly when he sustained Count 2 of the citation.

Regarding Count 1 of the citation, the record reveals the following relevant facts: On February 17, 2008, at 2:57 a.m. two officers of the Bureau arrived at the licensed premises, observed approximately twenty (20) vehicles

in the parking lot and numerous individuals entering and exiting the premises. [N.T. 6-7; Stipulation 1]. The officers then entered through an unlocked front door and observed a male patron holding and consuming a bottle of Miller Lite beer [N.T. 6-7; Stipulation 2]. The officers also observed two other male patrons at the other end of the bar who were each holding bottles of Miller Lite beer. [N.T. 7; Stipulation 3]. The officers identified themselves to an employee and asked to speak to the owner. [Stipulations 4-5]. While waiting for the owner, the officers saw an employee behind the bar discard three (3) beer bottles. [N.T. 7; Stipulation 6]. The officers subsequently spoke to the corporate president and manager, Joel Weinstein. [N.T. 7; Stipulations 7-10]. Mr. Weinstein said that Licensee tries to get people to leave at 2:30 a.m., but it sometimes takes them some time to exit. [N.T. 7; Stipulations 8-9]. The officers left the licensed premises at 3:07 a.m. on February 17, 2008. [Stipulation 11].

On appeal, Licensee contends that because it has an extended hours permit, and the licensed premises always has food available to feed thirty to forty (30-40) people, it falls within the exception of section 499(a). [N.T. 10]. Mr. Weinstein, however, does not recall whether anyone was eating at the

time the officers came into the licensed premises and there was no testimony in that regard. [N.T. 11].

The Bureau's response is that in order to fall within the extended hours permit exception to section 499(a), Licensee must prove that food was being served to patrons. [Bureau's Response p. 2]. The Bureau contends that the record is silent as to whether any patrons had requested food, whether any food was bring prepared, or whether food was being consumed by any patrons. [Id.] As there were patrons at the premises after 2:30 a.m., and those patrons were consuming alcoholic beverages as opposed to consuming food, the Bureau opines that Licensee is liable for both Count 1 and Count 2 of the citation. [Id. at 3].

Section 499(a) of the Code [47 P.S. § 4-499(a)] provides, in part, as follows:

- (a) Except as provided elsewhere, all patrons of a licensee shall be required to leave that part of the licensed premises habitually used for the serving of liquor or malt or brewed beverages to guests or patrons not later than one-half hour after the time the licensee is required by this act to cease serving liquor and/or malt or brewed beverages

Section 499(b) of the Code [47 P.S. § 4-499(b)] provides, in part, an

exception to the above, as follows:

- (b) A licensee may remain open between the hours of 2:00 a.m. and 7:00 a.m. for the purpose of serving food on any day if such licensee either possesses or is eligible to purchase a Sunday Sales Permit and receives an Extended Hours Food license.

Section 499(b) is silent as to any requirement that food consumption or preparation for consumption is occurring for a licensee with an extended hours food permit to allow patrons to remain on the licensed premises after 2:30 a.m. The Liquor Code only states that a licensee may remain open, under an extended hours food permit, for the *purpose* of serving food. Black's Law Dictionary defines "purpose" as an objective, goal or end. Black's Law Dictionary, Second Pocket Edition, 2001. Merriam-Webster defines "purpose" as something set up as an object or end to be attained. Merriam-Webster Online Dictionary. 2010. Therefore, a licensee charged with allowing a patron to remain on the licensed premises after 2:30 a.m., need only establish that it possesses a valid extended hours food permit with the purpose of providing food to the public.

Applying the foregoing law to the facts in the instant case, while there were patrons at the licensed premises after 2:30 a.m., Licensee has an

extended hours permit and had food available. Therefore, the ALJ committed an error of law by sustaining Count 1 of the citation.

ORDER

The decision of the ALJ is reversed as to Count 1.

The decision of the ALJ is affirmed as to Count 2.

Since the fine in this case was for Counts 1 and 2, as merged, this case is returned to the ALJ to reset the fine.

Board Secretary