

Mailing Date: February 24, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-0760
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
MAD RIVER MANAYUNK, LLC	:	
4100 Main Street	:	License No. R-1708
PHILADELPHIA, PA 19127-1618	:	
	:	

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**OPINION**

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), appeals the dismissal of Citation No. 09-0760 as set forth in the

Adjudication and Order of Administrative Law Judge David Shenkle (“ALJ”), dated October 7, 2009.

The citation charged Licensee with violating section 13.102(a)(3) of the Liquor Control Board Regulations in that on February 24, 2009, by selling and/or serving an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that Coors Light beer and bottom shelf liquor were served for the set price of ten dollars (\$10.00). [40 Pa. Code § 13.102(a)(3)].

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. [47 P.S. § 4-471]. 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, 484 A.2d 413 (Pa. Cmwlth. 1984).

On appeal, the Bureau argues that the ALJ committed an error of law when he dismissed the citation. Specifically, the Bureau argues that the ALJ erred in relying on the Commonwealth Court’s holding in PSP/BLCE v. American

Serbian Club of Pittsburgh, 750 A.2d 405 (Pa. Cmwlth. 2000) in concluding that the Licensee conducted a catered event on February 24, 2009, in conformity with Section 13.102(b)(1) of the Liquor Control Board Regulations. [40 Pa. Code § 13.102(b)(1)]. The Bureau asserts that the holding in American Serbian Club is not applicable because it did not deal with the issue of whether a legitimate catering event had occurred.

The Board has reviewed the record, including the ALJ's Adjudication and Order, the hearing transcript and the brief submitted by the Bureau, with the Bureau's contention in mind, and has concluded that the ALJ erred when he determined that a catered event was held on the date in question at Licensee's premises.

The record reveals that two (2) liquor enforcement officers visited the licensed premises at about 7:55 p.m. on February 24, 2009. While standing in the vestibule, a bouncer checked identification and told the officers an "open bar" was taking place that night but it had not started yet. The cost of the open bar was ten dollars (\$10.00) for "all you can drink." The officers entered the premises and went into the bar area to the right of the bouncer. (N.T. 4-7).

The officers later went back out to the vestibule and stood in a line. Officer McGrath told the bouncer at the head of the line they wanted to pay

ten dollars (\$10.00) for the open bar. The bouncer asked for a last name, the officer provided a fake name. The investigating officers had not registered for any type of event at the licensed premises through “philly2night.” The bouncer indicated he could not find the name on the list, the officer told the bouncer his name should be on the list. The bouncer spoke with a woman and returned to the line and told the officers they could go in. Officer McGrath paid twenty dollars (\$20.00) and both gentlemen were given wrist bands and admitted to the separate bar area on the left. (N.T. 7-11).

Once inside the bar area, the officers ordered alcoholic drinks from a bartender. They were served beer and a mixed alcoholic drink for no charge. The officers obtained service of another round of the same beverages at no cost. (N.T. 10-13). The officers did not observe any signs in the bar area referring to “philly2night,” nor was there any indication a special event was going on. There was a disk jockey, but he did not announce anything to indicate a special event was taking place. (N.T. 10-13). There was an unlimited quantity of Jambalaya available until 10:00 p.m. (N.T. 30-32).

While the event was going on, Licensee still permitted non-participants to enter the right-hand bar. Such patrons were prevented from entering the left-hand bar by bouncers, who looked for wrist bands (N.T. 30-32). The

Bureau's investigation did not include contact with Licensee to request catering records or a catering contract. (N.T. 19, 24).

The Bureau accused Licensee of selling an unlimited amount of alcohol for a set price in violation of § 13.102 of the Board's Regulations.

(a) *General.* Retail licensees may discount the price of alcoholic beverages for a consecutive period of time not to exceed 2 hours in a business day, but may not engage in discount pricing practices between 12 midnight and the legal closing hour. Retail licensees may not engage in the following discount pricing practices unless specifically excepted in subsection (b):

- (1) The sale or serving, or both, of more than one drink of liquor, wine, or malt or brewed beverages at any one time to any one person, for the price of one drink.
- (2) The sale or serving, or both, of an increased volume of one drink of liquor, wine, or malt or brewed beverages without a corresponding and proportionate increase in the price for the drink.
- (3) The sale or serving, or both, of an unlimited or indefinite amount of liquor, wine, or malt or brewed beverages for a set price.
- (4) The pricing of alcoholic beverages in a manner which permits the price to change within the 2-hour period.

[40 Pa. Code § 13.102(a)]. As an affirmative defense to the charge, Licensee argues that the officers attended a legitimate catered event, an exception to the discount pricing practices regulation set forth in § 13.102(b)(1) of the Board's Regulations.

(b) *Exceptions.* Nothing in subsection (a) prohibits:

- (1) The sale or serving, or both, of an unlimited or indefinite amount of liquor, wine or malt or brewed beverages for a fixed price for catered events which have been arranged at least 24 hours in advance.

[40 Pa. Code § 13.102(b)(1)].

In order to succeed on an affirmative defense, the Licensee has the burden to prove each element of the defense. Pennsylvania Liquor Control Board v. T.J.J.R., 548 A.2d 390 (Pa. Cmwlth. 1988). The definition of a catered event is found in section 5.83(a) of the Board's Regulations. It provides that:

Catering, for the purposes of this section, means the furnishing of liquor or malt or brewed beverages, or both, to be served with food prepared on the premises or brought onto the premises already prepared, for the accommodation of groups of nonmembers who are using the facilities of the club by prior arrangement, made at least 24 hours in advance of the time for private meetings or functions, such as dances, card parties, banquets and the like; and which is paid for by the nonmembers.

[40 Pa. Code § 5.83(a)]. Furthermore, section 5.83(b) provides that “[a] record shall be maintained showing the date and time catering arrangements were made, the name of the person or organization making the arrangements and the approximate number of persons to be accommodated.” [40 Pa. Code § 5.83(b)]. Thus, in order to avoid violating the Board's discount pricing

practices, the licensee must prove the following to establish that a catered event occurred:

- 1) Food was provided as part of the event;
- 2) The event was arranged at least twenty (24) hours in advance of its occurrence;
- 3) The event was organized and paid for by someone other than the licensee; and
- 4) The agreement identified the approximate number of attendees.

In the case currently before the Board, there is evidence in the record to support elements one (1), two (2) and four (4). Joseph DeCandido, current general manager at Mad River Bar & Grill, testified that on February 1, 2009, authorized representatives of cities2night and Licensee signed a document entitled “Event Contract.” (N.T., Exh. L-1). It describes an event that would have approximately one hundred fifty (150) attendees on February 24, 2009, from 8:00 p.m. to 10:00 p.m. at Mad River Manayunk. In a section entitled “\$10 OPEN BAR REQUIREMENTS” the document states that Licensee was expected to provide light appetizers or buffet, mixed drinks, and wine and beer product(s) in a separate area. Licensee was required to allow entrance to the event only with proof of registration on a “cities2night.com” guest list and

proof of identity. The document requires Licensee to hold cities2night, philly2night, and their officers, employees, and agents harmless from all claims. (N.T. 33, Ex. L-1).

Both the officers and Licensee's witness testified that Jumbalya was provided by Licensee and available throughout the event. The event was arranged on February 1, 2009, well in advance of the event date of February 24, 2009. The Event Contract, signed by representatives of cities2night and Licensee, clearly states that philly2night/cities2night was the organizer of the event and the expected number of attendees was one hundred fifty (150). [N.T. 33, Exh. L-1].

The only remaining issue is whether the event held on February 24, 2009, was paid for by someone other than Licensee. The contract is silent as to the disposition of the ten dollar (\$10.00) payments. However, it does list cities2night as the billing name. (N.T., Exh. L-1). The manager explained that philly2night/cities2night did not have a representative present for the event. It was Licensee who checked the guest list that was provided by philly2night/cities2night and collected the ten dollar (\$10.00) charge for the event. [N.T. 30, 31]. The revenue generated by the cover charge was kept in Licensee's cash register. Licensee's manager, Mr. DeCandido, provided

inconsistent testimony on how the proceeds from the cover charge were to be divided. At one point, he stated that he was not privy to if and/or how the cover charge was divided between Licensee and Philly2night. He later stated that he believed the entire amount went to Philly2night. [N.T. 35-43].

Furthermore, the manager stated that Licensee does not pay Philly2night/Cities2night ahead of time for its promotional services. [N.T. 35]. The manager also testified that Philly2night/Cities2night did not pay Licensee anything for the event. [N.T. 35]. As the record makes it clear that Philly2night/Cities2night did not pay Licensee for the food, drinks or facility space, the only possible conclusion is that Licensee paid for the event.

Based on the foregoing, the Board concludes that the ALJ erred when he concluded that the evidence submitted by Licensee was sufficient to prove that a catered event occurred.<sup>1</sup> Licensee failed to meet its burden when it did not prove the catered event was paid for by someone other than Licensee. Therefore, the Board must reverse the decision of the ALJ to dismiss the citation.

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<sup>1</sup> The ALJ incorrectly relied on Pennsylvania State Police, Bureau of Liquor Control Enforcement v. American Serbian Club of Pittsburgh, 750 A.2d 405 (Pa. Cmwlth. 2000), in making his decision that a legitimate catered event had occurred. [Adjudication & Order, Oct. 7, 2009]. While American Serbian Club stands for the proposition that it is permissible for the event organizer to sell tickets at the door, the ALJ ignored the qualification of the holding that stated the event must be paid for by the event organizer. Id. at 408. In the instant case, the event organizer paid nothing to the licensee to conduct the event.



**ORDER**

The decision of the ALJ in regard to Citation No. 09-0760 is reversed and the matter is remanded to the ALJ for imposition of an appropriate penalty.

The appeal of the Bureau is granted.

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Board Secretary