

Mailing Date: MAY 05 2010

[Appeal](#)

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

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|------------------------------|---|-------------------------|
| PENNSYLVANIA STATE | : | |
| POLICE, BUREAU OF | : | Citation No. 09-1802 |
| LIQUOR CONTROL ENFORCEMENT | : | |
| | : | Incident No. W01-392085 |
| | : | |
| v. | : | LID - 57163 |
| | : | |
| LANDMARK OF WEST CHESTER LLC | : | |
| T/A LANDMARK AMERICANA | : | |
| TAP & GRILL | : | |
| 158 W GAY ST | : | |
| WEST CHESTER PA 19380-2915 | : | |
| | : | |
| CHESTER COUNTY | : | |
| LICENSE NO. R-AP-SS-14161 | : | |

JUDGE SHENKLE
 BLCE COUNSEL: James E. Dailey, Esq.
 LICENSEE COUNSEL: Allan A. Reuter, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on August 4, 2009. The citation alleges that Licensee violated §13.102(a)(3) of the Liquor Control Board Regulations, 40 Pa. Code §13.102(a)(3), on May 7, 2009, by selling and/or serving an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited Miller Lite bottles and well drinks were served for the set price of \$10.00.

A hearing was held on November 18, 2009, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On May 7, 2009, a liquor enforcement officer entered the licensed premises at about 9:20 p.m. A bouncer at the door asked for identification, and the officer provided his undercover

driver's license, which bears his picture and correct birth date but a fictitious name. The bouncer reviewed a list he had, and appeared to be looking on the list for the name on the identification. He asked the officer if he was on the list. The officer said, "I don't know, I didn't sign up or anything." The bouncer said "well, I don't turn anybody away," and wrote on the list (N.T. 14-16).

2. The bouncer returned the officer's identification and allowed him into the premises. In the foyer, a woman seated at a desk asked for ten dollars. When the officer paid it she gave him a wristband to wear. The officer did not have a conversation with this woman (N.T. 17).

3. In the serving area there were about seventy patrons attended by four bartenders. Most of the patrons were wearing wristbands like the one given to the officer. The officer asked a bartender, "what do I get for the wristband?" The bartender said "it gives you unlimited beer and mixed drinks, bottom shelf mixed drinks." The officer asked for and was given a bottle of Miller Lite beer. About half an hour later he obtained another bottle of Miller Lite beer. No payment was requested for either service (N.T. 18-20).

4. The officer did not order food, nor did he see food being served to anyone. When he left the premises at 10:15 p.m. the number of patrons was approximately the same (N.T. 22).

5. The officer described in the preceding four paragraphs was acting at the request of another officer to whom the case was assigned. He was aware before entering the premises that the investigation concerned philly2night.com, and he knew that he could have gone to that web site and could have provided the same fictitious name shown on his undercover driver's license, with the result that the name would have been on the list. However, the officer knew that this would have defeated his purpose, which was to see if he could get served without signing up (N.T. 23-34).

6. Licensee employs a woman as a hostess, whose duty is to greet customers and seat them. When the establishment holds an event such as the one held on May 7, 2009, she returns to the premises and acts according to rules given to her by her manager. The rule is that people who have signed up online have their names on a guest list, and when such a person comes to the door he or she is charged ten dollars, given a wrist band, and allowed into the event (N.T. 42).

7. The instruction given to the woman was that, if anyone requested admission without his or her name appearing on the guest list, she was to contact her manager. He, in turn, would explain to the patron the policy requiring advance registration. The manager would say that this must be done in the future, but for this time, he would admit the patron as his guest (N.T. 45-46).

8. Although the hostess was aware of the web site philly2night.com, neither she nor any of the patrons to her recollection mentioned its name during the evening of May 7, 2009. The hostess' understanding of the arrangement was that the ten dollars was for "all you can drink" for two hours and it did not include food, which could be purchased separately from the menu (N.T. 53-55).

9. Licensee's general manager confirmed the account given by the hostess as to the procedure to follow in admitting patrons to the event, which Licensee called "Throwback Thursday." The manager understood that the need to be on a guest list was part of the rules and regulations of

having an open bar. The procedure he employed, admitting as his own guest people whose names were not on the list, occurred only a handful of times that evening (N.T. 62-65).

10. Licensee's general manager did not see a bouncer that evening in possession of a list, acting in the way described by the liquor enforcement officer in the first finding of fact above, although he did not remember the identity of the bouncer who was on duty. The expectation of the establishment was that buffet food would be continuously available during the event, from 9:00 to 11:00 p.m. The food provided that night was nachos and chicken fingers (N.T. 65-70).

11. If a person whose name was on the Philly2Night list signed up for four guests but arrived at the event with five, the general manager stated that he would have employed the same procedure used for the case of a person who was not in someone else's party or on the list (N.T. 85-86).

12. One of the four owners of the licensed corporation was approached by a representative of Philly2Night who wanted to do business with it. The representative proposed as a benefit to Licensee the idea that Philly2Night would host an open bar event once per month during the marketing campaign. The benefit to Philly2Night would be that it would drum up membership for them, because it was required to become a member to sign up for the event. The benefit to Licensee would be getting an additional event, with additional sales (N.T. 93-97).

13. As the owner understood the presentation, the event would be legal if the guidelines were followed. The form of contract prepared by Philly2Night's parent, Cities2Night.com, lists the "\$10 VIP OPEN BAR REQUIREMENTS." This provision requires the "venue" (i.e., Licensee) to provide light appetizers or buffet; mixed drinks, wine and beer product(s); a separate area for the event; allow entry only with proof of registration on a Cities2Night.com guest list, with proof of identification; and provide a wrist band and drink tickets for attendees (N.T. 96-98, Licensee Ex. 1).

14. The owner who testified was unable to locate the event contract pertaining to the event of May 7, 2009, but he identified the form of contract which would have been used, and testified that the actual contract would have been the same. The financial arrangement between Licensee and Philly2Night was that the restaurant paid a monthly fee to advertise on the web site, and the event organization came as a return benefit for the advertising. The ten dollars paid at the door by guests is retained by Licensee. The owner likened it to a previous experience he had with radio advertising, in which Licensee purchased advertising and in return the station scheduled remote broadcast events at the licensed premises (N.T. 98-100, 128-129).

15. The owner who testified received a visit from liquor enforcement officers who informed him of potential citations, naming the open bar as one of them. In response, the owner contacted the sales representative of Cities2Night with whom he had dealt. The representative forwarded an e-mail outlining the applicable law, including an excerpt from the Board's Advisory Notice No. 16 (Amended) and 40 Pa. Code §13.102. The owner thought that the procedure employed had complied with these rules, and he did not wish to violate any of them (N.T. 100-103, Ex. L-4).

16. The procedure for a visitor to Philly2Night as it related to the event of May 7, 2009, was fairly simple. The user signs up, then goes to the page for the event in which he or she is

interested, then clicks a button to make him or herself an attendee. There is also the option of adding guests. One must have an account to do this, and then one must be logged on to sign up for an event. The owner knew this because he had gone to the site prior to the May 7, 2009, event and saw that the procedure was common practice; there were quite a number of establishments hosting events on the same terms as the event of May 7, 2009 (N.T. 104-107).

17. The procedure employed by Licensee's manager, in which he admitted people whose names were not on the guest list by making them his own guests, might be subject to second-guessing after the fact, but the owner felt that the principal objective in such a situation should be to avoid creating any negative feeling in the prospective customer, either for Licensee or Philly2night. The owner believes that the hostess was mistaken in her impression that the admission fee did not include food, and he also believes it is possible that the liquor enforcement officer simply overlooked the available food, which was in a nook on the right as one comes down the stairs. Had he asked, the food would have been pointed out to him, the owner said (N.T. 107-119).

18. Licensee paid money to Philly2night to advertise on the web site, but Philly2night did not pay a fee for the drinks served on May 7, 2009. Only persons who attended the event paid. The owner analogized this to a catered wedding, in which a payment for each person is made. Although unlimited drinks would be available, no individual would be permitted to consume so much that he or she became visibly intoxicated. The owner thought Licensee should be no more liable for gatecrashing for this event than it would be for gate-crashers at a wedding (N.T. 119-123).

19. Licensee's position was that Philly2night was hosting this event, and the people coming to it were their guests, notwithstanding the fact that Philly2night did not pay Licensee for its services, but rather each person attending as a guest paid ten dollars for food and drink (N.T. 124).

20. Since it was possible for a person signing up through Philly2night to bring unnamed guests simply by indicating the number who would be coming, Licensee had no way to know the names of such guests. Licensee's owner did not believe there would be any impediment to holding an event such as this every night, but did not think Philly2night would be interested (N.T. 125-126).

21. Licensee had conducted the "Throwback Thursday" event as described above over a period of some months, but the May 7, 2009, event was the last one prior to the hearing on November 18, 2009 (N.T. 130-131).

CONCLUSIONS OF LAW:

Sustained as charged.

DISCUSSION:

Counsel drew my attention to the decision of my colleague the Honorable Tania E. Wright in *RCP No. 3, Inc.*, Citation No. 05-2629. The case is very similar to this one, except that Judge Wright

found as a fact that food was not provided on the date in question. Judge Wright sustained the citation and concluded that “Philly2night did not have a catered event on the premises, rather they assisted Licensee in advertising its own drink special.”

In this case, however, I have concluded that there was a simple buffet sufficient to qualify the requirement for food, and that possibly the liquor enforcement officers did not notice it. There is evidence on both sides, and I am simply giving Licensee the benefit of the doubt. This factual conclusion requires that I confront the alternative theory alluded to by Judge Wright in *RCP No. 3, Inc.*: the event was not a catered event, but rather a self-sponsored one.

This distinction is valid and relevant. I confess that it was not foremost in my mind when I adjudicated Citation No. 09-0760, *Mad River Manayunk, LLC*. The Bureau appealed my dismissal of the citation in that case and the Board reversed, finding that the licensee failed to meet the burden of proving its affirmative defense, in that the event was not paid for by the event organizer. It was for this reason that the Board found my reliance on *PSP, BLCE v. American Serbian Club of Pittsburgh*, 750 A.2d 405 (Pa. Cmwlth. 2000) to be misplaced. I agree that the crucial factor – that the entity making arrangements paid the licensee to hold the event – was absent in that case.

The same factor is absent in the case at bar. The business arrangement between Licensee and philly2night.com was that Licensee was an advertising client of the web site. The web site provided a mechanism whereby people who had no previous affiliation with it could obtain entry into an event on special terms. The web site did not pay Licensee for its services; therefore, this was not a catered event. It was, instead, Licensee’s own event, arranged with the assistance of the web site. Philly2night was nothing more than Licensee’s agent in the promotion and execution of a promotional activity intended for Licensee’s own benefit.

After the record in this case was transcribed I received correspondence from counsel for Licensee indicating a belief that there is a need for me to delay making a decision, pending the submission of an ancillary request for relief in the way of discovery of a BLCE officer’s report. I have delayed preparation of this adjudication for a time I consider more than reasonable, but do not have before me any motion upon which I can act.

Counsel for the Bureau responded to the correspondence by pointing out that the time for discovery in this case is past. This is undoubtedly so. If some harm has been done to Licensee’s rights, there is ample remedy available.

PRIOR RECORD:

Licensee has been licensed since February 8, 2007, and has had no prior violations.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$50.00 to \$1,000.00 range, or both, for violations of this type.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Landmark of West Chester, LLC, t/a Landmark Americana Tap & Grill, License No. R-AP-SS-14161, shall pay a fine of two hundred fifty dollars (\$250.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

Dated this 22ND day of APRIL, 2010.



David L. Shenke, 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.

Detach Here and Return Stub with Payment

The fine must be paid by cashier's check, certified check or money order. Personal and business checks are not acceptable unless bank certified. Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661

Citation No. 09-1802
Landmark of West Chester, LLC