

Mailing Date: September 1, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-1802
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
LANDMARK OF WEST CHESTER, LLC,	:	License No. R-14161
T/A LANDMARK AMERICANA TAP &	:	
GRILL	:	LID 57163
158 W. Gay St.	:	
West Chester, PA 19380-2915	:	

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OPINION

Landmark of West Chester, LLC, t/a Landmark Americana Tap & Grill
("Licensee") appeals from the May 5, 2010 Adjudication and Order of

Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ sustained Citation No. 09-1802 and imposed a two hundred fifty dollar (\$250.00) fine.¹

The citation charged Licensee with violating section 13.102(a)(3) of the Pennsylvania Liquor Control Board (“Board”) Regulations in that on May 7, 2009, Licensee, by its servants, agents or employees, sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited Miller Lite bottles and well drinks² were served for a set price of ten dollars (\$10.00). [40 Pa. Code § 13.102(a)(3)].

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).

¹ A motion for reconsideration was filed by Licensee on May 24, 2010. The ALJ dismissed the motion as untimely.

² Well drinks or “rail drinks” are mixed drinks made from bottom shelf liquor.

Licensee raises seven (7) different issues in its appeal as to why the ALJ had committed an error of law and/or abused his discretion. Many of these are similar and/or relate to the same issue and, therefore, will be condensed for efficiency. The crux of Licensee's appeal focuses on its contention that the ALJ erred by finding, contrary to Pennsylvania State Police, Bureau of Liquor Control Enforcement v. American Serbian Club of Pittsburgh, 750 A.2d 405 (Pa. Cmwlth. 2000), ("American Serbian") and Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Mad River Manayunk, LLC, Board Opinion, Citation No. 09-0760 (February, 2010), ("Mad River"), that Licensee committed a violation by concluding that Licensee did not conduct a catered event, but rather a self-sponsored event, on May 7, 2009, in violation of section 13.102(a)(3) of the Board's Regulations. [40 Pa. Code § 13.102(a)(3)].

The Board has reviewed the record, including the ALJ's Adjudication and Order, Licensee's Application for Reconsideration and the ALJ's Order in Response to the Motion for Reconsideration, the hearing transcript, Licensee's Appeal and Brief and the Bureau's Response to Appeal, with the Licensee's contention in mind, and has concluded that the ALJ acted properly in sustaining the charge against Licensee.

The record reveals that a liquor enforcement officer visited the licensed premises at about 9:20 p.m. on May 7, 2009. [N.T. 11-12, 14-15]. A bouncer at the second entrance asked for identification and the officer provided his undercover driver's license, which bears his picture and correct birth date, but a fictitious name. [N.T. 15-16]. The bouncer reviewed a list he had, and appeared to be looking on the list for the name shown on the officer's identification. [N.T. 16]. He asked the officer if he was on the list. [N.T. 16]. The officer replied, "I don't know, I didn't sign up or anything."³ The bouncer said "well, I don't turn anybody away," and wrote something on the list. [N.T. 16]. The officer entered the premises, in a foyer, where a woman seated at a desk asked for ten dollars (\$10.00). [N.T. 16-17]. When the officer paid, she gave him a wristband to wear. [N.T. 17].

Once inside the serving area, the officer observed about seventy (70) patrons attended by four (4) bartenders. [N.T. 18]. Most of the patrons were wearing wristbands like the officer's wristband. [N.T. 18]. The officer asked the bartender, "What do I get for the wristband?" [N.T. 19]. The bartender replied that "it gives you unlimited beer and mixed drinks, bottom shelf mixed

³ The officer did not sign up for any type of event at the licensed premises through "philly2night.com" although he knew prior to attending the licensed premises that the investigation involved philly2night.com. Signing up under his fictitious name would defeat the investigation as the officer wanted to see if could be served without being on the list. [N.T. 23-34].

drinks.” [N.T. 19]. The officer asked for and was given a bottle of Miller Lite beer. [N.T. 19]. About half an hour later, he obtained another bottle of Miller Lite beer. [N.T. 20]. No payment was requested for either service. [N.T. 19-20].

The officer did not order food, nor did he see food being served to anyone. [N.T. 21, 34-35]. However, according to Licensee’s general manager, there was a buffet that was continuously available from 9:00 p.m. to 11:00 p.m. consisting of nachos and chicken fingers. [N.T. 65-70]. The hostess collecting money in the vestibule testified that she understood the arrangement was that the ten dollars (\$10.00) was for “all you can drink” for two hours and it did not include food, but food could be purchased separately from the menu. [N.T. 43, 53-55].

The officer also did not observe any signs in the bar area or vestibule referring to “philly2night.com⁴,” nor was there any indication a special event was happening. [N.T. 37].

It was the job of Licensee’s hostess for May 7, 2009 to greet customers and sell tickets to the event. [N.T. 41]. According to the hostess, there was a ten dollar (\$10.00) cover charge for people on the guest list who signed up online. [N.T. 41]. The hostess called the evening a “Throwback Thursday.”

[N.T. 42]. The customers got carded by the bouncer, then went to the hostess, who would check their name off the list, collect the cover charge, and give them a wristband. [N.T. 43, 51]. If the person's name was not on the list, the hostess was to get the manager, who would explain the policy about needing to be on the list, but the manager would allow them in for that night as his guest. [N.T. 44-45]. The hostess was aware of the website, philly2night.com, but neither she nor any of the patrons, to her recollection, mentioned its name during the evening of May 7, 2009. [N.T. 52, 57]. The officer departed at 10:15 p.m. [N.T. 22].

Licensee's general manager testified that he did not recall the undercover officer being at the licensed premises on May 7, 2009. [N.T. 61-62]. A Throwback Thursday event was occurring on May 7, where persons whose names were on the guest list were permitted to pay a cover charge, enter, and participate in an open bar of well drinks and Miller Lite beer from 9:00 p.m. to 11:00 p.m. [N.T. 62, 70]. A handful of persons were permitted to enter as the general manager's guests when their names were not on the list. [N.T. 63-64]. According to the general manager, the bouncers did not have a list, only the hostess did. [N.T. 65]. The list in question had sixty-one (61) names on it, plus

⁴ Interchangeably referred to as "cities2night."

about forty (40) to fifty (50) unnamed guests. [N.T. 72-73; Ex. L-3]. The list was created by philly2night. [N.T. 75]. The actual list that was used and marked off on May 7 was thrown out and not presented at the hearing. [N.T. 78-79]. Licensee pays a fee to philly2night for advertising and writing a guest list through its website. [N.T. 82].

One of the four (4) owners of the licensed corporation testified about being approached by a representative of philly2night proposing that as a benefit to Licensee, philly2night would host an open bar event once per month during its marketing campaign. [N.T. 91, 94]. The benefit to philly2night would be that Licensee would pay to advertise on philly2night.com and philly2night would obtain membership for the open bar events because it would require people to become a member of the website in order to register and attend the event.⁵ [N.T. 94-97].

The owner who testified was unable to locate the actual event contract pertaining specifically to the May 7, 2009 event, but identified the type of contract which would have been used. [N.T. 96, Ex. L-1]. Licensee paid a monthly fee to advertise on philly2night.com website and the organization of

⁵ However, on the date of incident, the owner admitted that he did not turn away any patrons who were not on the list/ members of philly2night. Essentially, regardless of philly2night's involvement and website requirement to be on the event list, anyone was allowed to attend the open bar. Furthermore, people who

the open bar was done via Philly2night as a benefit to the advertising. [N.T. 105]. The ten dollar (\$10.00) fee paid at the door by guests was retained by Licensee. [N.T. 98-100, 128-129]. Essentially, Licensee paid Philly2night to advertise on the website, but Philly2night did not pay for the drinks served, rental of space, use of Licensee's bartenders, bouncers, or anything else, on May 7, 2009. [N.T. 118-123].

A visitor to the Philly2night.com website had to sign up, i.e., have an account with Philly2night, then go to the page for the event in which the visitor was interested, and click a button to make himself/herself an attendee. [N.T. 103]. Unnamed guests could be added by clicking a button indicating how many. [N.T. 103]. Licensee's owner had checked out the website himself prior to May 7, 2009. [N.T. 103]. Licensee conducted the "Throwback Thursday" open bar event as described above over a period of months, but the May 7, 2009, event was the last one prior to the hearing on November 18, 2009. [N.T. 127-128].

On appeal, Licensee contends that the ALJ erred in concluding that Licensee held a self-sponsored event, as opposed to a catering event, because

signed up with Philly2night were allowed to bring unnamed guests simply by indicating the number of unnamed guests attending. [N.T. 107-119, 125-126].

it was not found that Philly2night paid for the event. Licensee argues that the ALJ's conclusion was contrary to Mad River and American Serbian.

The Bureau charged Licensee of selling an unlimited amount of alcohol for a set price in violation of section 13.102(a) of the Board's Regulations. That section states in relevant part:

- (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):

- (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.

[40 Pa. Code. § 13.102(a)(3)]. As an affirmative defense and an exception to the charge, Licensee contends that the event was a legitimate catered event.

Section 13.102(b)(1) of the Board's Regulations state:

- (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, 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 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 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 four (24) hours in advance of its occurrence;

3) The event was organized and paid for by someone other than the licensee; and

4) A record was maintained showing the date and time catering arrangements were made and the number of persons to be accommodated.

In the case currently before the Board, there is evidence in the record to support elements one (1) and two (2). Although there is conflicting testimony regarding the presence of food, the ALJ gave Licensee the benefit of the doubt that chicken fingers and nachos were available and the officer just did not see the table from his location in the premises. [Adjudication p. 4].

Regardless of the presence of food, however, Licensee clearly did not satisfy elements three (3) and four (4). The instant case presents a nearly identical fact pattern as the citation cases of Mad River and Pennsylvania State Police, Bureau of Liquor Control Enforcement v. RCP No 3, Inc., Citation No. 05-2629, Adjudication by Judge Tania E. Wright (July 31, 2007) (“RCP”).

In Mad River, the licensee signed an “Event Contract” with cities2night (a related company) to host an event of approximately one hundred fifty (150) attendees for two (2) hours which included an open bar and light appetizers or buffet. Licensee was required to only allow entrance to the event with proof

of registration on a cities2night.com guest list, proof of identity and ten dollar (\$10.00) cover charge. In Mad River, it was determined that jambalaya was provided and available throughout the event, that the event was planned twenty four (24) hours in advance and a record of the event was properly maintained. The only issue left for the Board was whether the event held was paid for by someone other than the licensee. The Board noted that no one from cities2night was present at the event, that the ten dollar (\$10.00) revenue was kept in the licensee's cash register, there was conflicting testimony as to where the proceeds from the cover charge were divided (if at all) and that cities2night did not pay the licensee anything for the event. Accordingly, the Board reversed the ALJ on appeal and held that the "record makes it clear that philly2night/cities2night did not pay [Mad River] for the food, drinks or facility space, the only possible conclusion is that [Mad River] paid for the event . . . [Mad River] failed to meet its burden when it did not prove the catered event was paid for by someone other than [Mad River]." Id.

In RCP, the licensee also had a two (2) hour open bar event hosted by philly2night. Similar to the instant case and Mad River, there was a ten dollar (\$10.00) cover charge, a list with names of attendees that previously registered with philly2night.com and no signs or indication of philly2night inside the

licensed premises. The licensee in RCP also indicated that it was a client of philly2night, in that philly2night did advertising for the licensee. The undercover officer in RCP did not see any food, but the owner indicated that there was hors d'oeuvres available. There was also an agreement previously signed and dated by the licensee and philly2night. Licensee paid for the alcohol and paid the bartenders and the licensee could not recall how much money, received from the door proceeds, was portioned and paid to philly2night. The ALJ concluded that although this event was prearranged, it was not a catered event. Id. The only food service available was waitress service where food could be ordered and purchased.

Furthermore, in RCP there was no evidence present as to exactly how much money was split, if it was at all. Accordingly, it was held that “philly2night did not have a catered event on the premises; rather they assisted RCP in advertising its own drink special. That does not meet the qualifications of a catered event. In addition, there is nothing which would qualify one or disqualify one from being a member of philly2night.com . . . this group is no more than the general public who may for whatever reason access philly2night.com.” Id.

The instant case is nearly identical to both Mad River and RCP. The only real difference is that it is unclear whether food was truly served in the instant case and that Licensee failed to maintain a record of the event (the original signed agreement). In the instant case, as in Mad River and RCP, the event was not catered by a third party but was self-sponsored by Licensee. In essence, the arrangement was that Licensee entered into a contract with philly2night for advertising on its website an open bar at Licensee's premises on May 7, 2009. Licensee failed to prove that the event was paid for by someone other than itself. Licensee attempts to argue that the guests, who paid the ten dollar (\$10.00) cover charge to Licensee, are members of philly2night and, therefore, they "paid for" the event, not Licensee. This argument lacks teeth as Licensee admitted that it would allow anyone, regardless of being registered on philly2night.com, to enter the event as a guest. Again, in order to be a catered event it must be, "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)].

The Board is not attempting to make any classifications as to what is an acceptable “nonmember.” However, when the licensed premises is generally open to the public and allows those who are not members of philly2night participate in the “event”, it would be no different than any other night, except for the ten dollar (\$10.00) cover charge and open bar, which is in violation of the Board’s Regulations. The general public did not make prior arrangements, at least twenty-four (24) hours in advance, and may not even have known that a special function was taking place, especially due to the lack of presence and advertising from philly2night. Additionally, even if those who attended the event and did not register on philly2night.com were considered “nonmembers” for the sake of defining a catered event, the ten dollar (\$10.00) cover charge does not pay for the actual event. This cost may cover the alcohol given to the nonmembers, but Licensee was still responsible, used and paid for its own bartenders, bouncers, facility costs, bar-backs, food and any other expense associated with having a two (2) hour open bar event.

Licensee attempts to distract from the real issues of whether the May 7, 2009 event was paid for by someone other than the Licensee and whether proper records of the event were maintained, by attempting to apply the decision in American Serbian. American Serbian involved a catering club

licensee who was cited for selling alcohol to nonmembers when it held a dinner dance sponsored by the Serbian National Federation and sold tickets at the door to enter the club. The Federation had made arrangements with American Serbian about a month in advance of the event. In American Serbian, the Commonwealth Court held that all the catering elements were met and that the only remaining issue dealt with group affiliation. Therefore, the real issue in American Serbian was not that the licensee was in violation of section 13.102 of the Board's Regulations, but rather that individuals, unaffiliated with the nonmember group, should not have been served alcohol. The Court held that it was "permissible for [the host, akin to philly2night] to sell tickets to its dinner dance to individuals unaffiliated with its group, *so long as the event was paid for by [the host]* and arrangements were made at least 24 hours in advance." Id. at 408 (emphasis added). Thus, American Serbian is not analogous to this case as the catering elements were not met and philly2night (the host) did not pay for Licensee's open bar event.

Licensee herein also attempts to argue that it lacked the intent to commit a violation and that it complied with the law in spirit and intent. Unfortunately, intent does not apply to the Liquor Code. "Knowledge of its provisions or intent to violate the Code is not, therefore, necessary elements to

be found for the Board to cite and fine a licensee for violations” Allegheny Beverage Company Inc. v. Pennsylvania Liquor Control Board, 67 Pa. Cmwlth. 487, 447 A.2d 725 (1982); see also, Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959).

Licensee also contends that the ALJ decision cannot stand because of “constitutional and similar concerns” in that the ALJ’s determination appears to implicate “concerns of unconstitutionality and vagueness, among other principles.” However, as the Bureau notes, the Board, as an administrative agency, is unable to address assertions as to the validity of the statutes or regulations which enable it. Borough of Green Tree v. Board of Property Assessments, 328 A.2d 819 (Pa. 1974); Maryland Cas. Co. v. Odyssey Contracting Corp., 894 A.2d 750 (Pa. Super. 2006); Smolow v. Commonwealth, Department of Revenue, 547 A.2d 478 (Pa. Cmwlth. 1988).

Finally, Licensee argues that it was denied due process of law in that the Bureau failed to mention testimony and evidence, regarding the Philly2night guest list and Officer McGrath, in its Pre-Hearing Memorandum. Although often referred to by Licensee, the Bureau’s Pre-Hearing Memorandum was not entered into the record for the Board to review. However, on appeal the Bureau contends that its Pre-Hearing Memorandum, pursuant to section 15.43

of the Board's Regulations, summarized the testimony it was to offer to establish its case-in-chief, that being that Licensee sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited Miller Lite bottles and well drinks were served for a set price of ten dollars (\$10.00) in violation of Board Regulations. The Bureau has no obligation to submit rebuttal testimony or negate Licensee's affirmative defenses in its Pre-Hearing Memorandum. Pennsylvania Liquor Control Board v. T.J.J.R., Inc., 548 A.2d 390 (Pa. Cmwlth. 1988).

In its Pre-Hearing Memorandum, Licensee set forth the testimony presented by Officer McGrath, with regard to the list and the use of Philly2night. These are issues central to Licensee's affirmative defense, not to the Bureau's case-in-chief. However, once these issues were raised by Licensee, the Bureau was allowed to use Officer McGrath and other evidence, at the hearing, to rebut Licensee's affirmative defense. As the Bureau was allowed to present its rebuttal evidence and/or testimony either during its case-in-chief or in rebuttal to Licensee's defense (after Licensee's defense was complete), the Bureau did not violate any procedure by choosing to do so in its case-in-chief. Accordingly, the Board does not find that Licensee was prejudiced or subjected

to “unfair surprise” by Officer McGrath’s testimony or any other rebuttal testimony presented by the Bureau.

Applying the applicable law to the facts in the instant case, the Board concludes that there was such relevant evidence as a reasonable person might accept as adequate to support a conclusion that the Bureau proved that Licensee violated section 13.102 of the Board’s Regulations by selling and/or serving unlimited or indefinite amount of alcohol beverages for a fixed price, in that unlimited Miller Lite bottles and well drinks were served for a set price of ten dollars (\$10.00). Furthermore, there was insufficient evidence presented by Licensee to meet the affirmative defense that the May 7, 2009, event was catered, in that it was not paid for by someone other than Licensee and it did not properly maintain a record showing the date and time catering arrangements were made.

ORDER

The decision of the ALJ is affirmed.

The appeal of the Licensee is denied.

The fine of two hundred fifty dollars (\$250.00) has been paid.

Board Secretary