

Mailing Date: MAR 22 2011

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-1321
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W08-408712
	:	
TENT RESTAURANT OPERATIONS	:	
INC	:	LID-54743
MILLCREEK PLAZA UNIT 250	:	
INTERCHANGE RD AT RTE 19	:	
MILLCREEK TWP	:	
ERIE PA 16565	:	
	:	
ERIE COUNTY	:	
LICENSE NO. R-AP-SS-8337	:	

ADJUDICATION

JUDGE: ROBERT F. SKWARYK

APPEARANCES:

BUREAU COUNSEL: Michael C. Nickles, Esq.

LICENSEE COUNSEL: Mark F. Flaherty, Esq.

BACKGROUND:

This proceeding arises out of a citation that was issued on July 2, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Tent Restaurant Operations, Inc., License No. R-AP-SS-8337 (hereinafter Licensee).

The citation charges Licensee with violation of Section 13.102(a) of the Liquor Control Board Regulations [40 Pa. Code, §13-102(a)], in that on April 21 and 28, 2010, Licensee, by its servants, agents or employees, discounted the price of alcoholic beverages between 12:00 midnight and 2:00 a.m.

The investigation which gave rise to the citation began on March 1, 2010, and was completed on May 31, 2010. The notice of violation letter was mailed to Licensee on June 14, 2010.

An evidentiary hearing was held on this matter on January 20, 2011, in Erie, Pennsylvania.

Based upon the admission(s) of Licensee and the summary of facts provided by the Bureau, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. Licensee is a corporation located in Erie County, Pennsylvania and holds Restaurant Liquor License Number R-AP-SS-8337. (N.T. 4).
2. Licensee is part of the Fox and Hound Restaurant Group and on Tuesdays is open for business from 11:00 a.m. to 2:00 a.m., Wednesday. (N.T. 15-16).
3. Licensee's standard draft beer glass contains 16-ounces of beer and sells for \$4.25, and their pub draft beer glass contains 14-ounces of beer and cost \$2.00. (N.T. 15-16, 22).
4. The standard draft and pub draft glasses appear identical except that the standard draft glass contains an etched "Fox and Hound" logo and the draft pub glass has a thicker bottom which accounts for the 2-ounce difference. (N.T. 16-17, 20).
5. On Tuesdays, Licensee removes all 16-ounce standard draft glasses from the bar and replaces them with the 14-ounce pub draft glasses without notice to patrons. (N.T. 17-18).
6. The 14-ounce pub draft, at \$2.00, is available on all days, and featured on Tuesdays. (N.T. 18-19).
7. The 16-ounce standard draft, at \$4.25, is available on Tuesdays, if requested. (N.T. 18).
8. On Saturday, March 27, 2010, at approximately 1:00 a.m. enforcement officer visited the licensed premises and found a menu that listed Licensee's drink specials which advertised \$2.00 drafts on Tuesdays. (N.T. 7-8).
9. Licensee's bartender told the officer that the special was for pint-sized glasses and was valid all day long on Tuesdays. (N.T. 9).
10. On Saturday, April 10, 2010, at 1:00 a.m., the officer visited the licensed premises and found no violations. (N.T. 10)
11. On Tuesday, April 20, 2010, at 11:00 p.m., the enforcement officer entered the establishment and purchased a glass of Blue Moon draft beer on special for \$2.00, which the bartender stated normally cost \$4.25. (N.T. 10).
12. The draft beer was served in what appeared to be a pint sized glass. (N.T. 10).

TENT RESTAURANT OPERATIONS, INC.

Citation No. 10-1321

13. At 12:15 a.m., then being Wednesday, April 21, 2010 the enforcement officer purchased another glass of Blue Moon draft beer on special for \$2.00, which the waitress stated normally cost \$4.25. (N.T. 11).

14. On Wednesday, April 28, 2010, at 12:15 p.m., the enforcement officer returned to the establishment and purchased a glass of Miller Lite draft beer on special for \$2.00, in what appeared to be a pint sized glass, which the bartender stated normally cost \$3.00. (N.T. 11).

15. During his visits to the premises, the officer did not purchase a Blue Moon or a Miller draft beer at the regular price. (N.T. 13).

16. Throughout the investigative period, the Bureau's investigation was continuous and ongoing. (By Stipulation, N.T. 12).

CONCLUSION OF LAW:

Citation 10-1321 is DISMISSED.

DISCUSSION:

The burden of proof is on the Bureau to show by a clear preponderance of the evidence that a violation of the Liquor Code occurred. Pa. Liquor Control Board v. PPC Circus Bar, Inc., 506 A.2d (Pa. Cmwlth. 1986); In Re: Omicron Enterprises, 449 A.2d (Pa. Cmwlth. 1982). The phrase "preponderance of evidence" has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. Black's Law Dictionary, Fifth Edition, West Publishing Company, Copyright 1979, Page 1064.

At the hearing held on the matter, the enforcement officer and Licensee's district manager appeared and testified. The on-duty bartenders were not called by either side. No briefs were submitted and counsels discussed Board advisory opinion 2010-452 and In Locy, 557 A.2d, 1164 (Pa. Cmwlth. 1989).

The officer testified that a bartender told him that the Tuesday special listed on the menu was for pint sized glasses. On Tuesday, April 20, 2010, at 11:00 p.m., and at 12:15 a.m., then being Wednesday, April 21, 2010, he purchased glasses of Blue Moon draft beer for \$2.00 each, served in what appeared to be pint glasses. He did not testify whether the glasses had the "Fox and Hound" logo. The servers told him that the regular price was \$4.25 each. He did the same on Tuesday April 28, 2010, buying Miller Lite draft beer for \$2.00 which normally costs \$3.00.

Licensee's district manager testified that the server staff is trained to remove the 16-ounce standard draft glasses on Tuesdays and serve the draft beer in 14-ounce pub draft glass without notice to the patrons.

I give no weight to the bartender's statements that the drafts were pint sized.

TENT RESTAURANT OPERATIONS, INC.
Citation No. 10-1321

I am dismissing the citation because the Bureau did not show that the \$2.00 drafts of beer served to the officer between midnight and 2:00 a.m., on April 21 and 28, 2010, were served in the 16-ounce standard sized glasses, rather than the 14-ounce pub sized draft glasses, which are routinely sold at \$2.00 each. Therefore, the draft beers were not discounted in price.

ORDER:

Citation No. 10-1321 is DISMISSED.

JURISDICTION IS RETAINED UNTIL CASE IS CLOSED.

Dated this 15TH day of MARCH, 2011.



Robert F. Skwaryk, J.

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.