

Mailing Date: JUL 10 2013

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	IN RE: Citation No.: 12-1608
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	BLCE Incident No.: W04-449416
	:	
TENT RESTAURANT	:	
OPERATIONS, INC.	:	PLCB LID No.: 54731
T/A FOX & HOUND	:	
ENGLISH PUB & GRILLE	:	PLCB License No.: R-AP-SS-7901
UNIT 900 NORTHWAY MALL	:	
PITTSBURGH, PA 15237	:	
	:	
	:	

**BEFORE:** JUDGE RODERICK FRISK

APPEARANCES:

**BLCE COUNSEL:** EMILY L. GUSTAVE, ESQUIRE  
**LICENSEE COUNSEL:** STANLEY J. WOLOWSKI, ESQUIRE

**ADJUDICATION**

BACKGROUND:

This proceeding arises out of a citation that was issued on November 13, 2012, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Tent Restaurant Operations, Inc., t/a Fox & Hound English Pub & Grille, License Number R-AP-SS-7901, (hereinafter Licensee).

This citation charges Licensee with a violation of Section 13.102(a) of the Liquor Control Board Regulations, [40 Pa. Code 13.102(a)], in that on September 9 and 23, 2012, Licensee, by its servants, agents or employees, discounted the price of alcoholic beverages between 12:00 midnight and 2:00 a.m.

Tent Restaurant Operations, Inc.  
t/a Fox & Hound English Pub & Grille  
IN RE: Citation No. 12-1608

An administrative hearing was conducted on April 16, 2013, at Pittsburgh, PA. The Bureau was represented by Emily L. Gustave, Esquire. Licensee was represented by Stanley J. Wolowski, Esquire.

At the administrative hearing, counsel for Licensee stipulated that the notice requirements as set forth at Section 471(c) of the Liquor Code have been satisfied. (N.T. 5)

After hearing the testimony presented, and upon review of the evidence submitted, the following Findings of Fact and Conclusions of Law are entered:

FINDINGS OF FACT:

1. On September 8, 2012, at 11:40 p.m., a Liquor Enforcement Officer entered Licensee's premises in an undercover capacity and observed three female bartenders rendering service to approximately 60 patrons. (N.T. 8)
2. The enforcement officer took a seat at the bar and asked a bartender if there were any "specials." (N.T. 8)
3. The bartender replied that a 22-oz. glass of Samuel Adams Boston Lager draft beer was \$4.00 for the entire month. (N.T. 8, 18, 23)
4. The enforcement officer then purchased a 22-oz. glass of Samuel Adams Boston Lager draft beer from the bartender, paying \$4.00. (N.T. 8, 23)
5. The enforcement officer asked if the Samuel Adams Boston Lager was \$4.00 after midnight, and the bartender replied in the affirmative. (N.T. 9, 23)
6. The enforcement officer remained on Licensee's premises after midnight, then being September 9, 2012, and proceeded to purchase two additional 22-oz. glasses of Samuel Adams Boston Lager draft beer from the bartender, again paying \$4.00 for each purchase. (N.T. 9, 23)
7. During the course of this visit, the enforcement officer did not look at a drink menu and observed no signage advertising the 22-oz. glass of Samuel Adams Boston Lager draft beer for \$4.00. (N.T. 9-10, 16-19, 24-30, 36-40, 23)
8. On September 22, 2012, at 11:15 p.m., the enforcement officer returned to Licensee's premises in an undercover capacity, took a seat at the bar, and purchased a 22-oz. glass of Samuel Adams Boston Lager draft beer, paying \$4.00. (N.T. 10, 12, 23)
9. The enforcement officer remained on Licensee's premises after midnight, then being September 23, 2012, and at 12:05 a.m., purchased another 22-oz. glass of Samuel Adams Boston Lager draft beer, paying \$4.00. (N.T. 10, 23)

10. During the course of this visit, the enforcement officer reviewed Licensee's drink menu and noted that a 22-oz. glass of Samuel Adams Boston Lager draft beer was referenced "for September" with a price listed at \$4.00. The enforcement officer did not observe any reference to the 22-oz. glass of Samuel Adams Boston Lager draft beer as a "special" or as a "discounted price." (N.T. 10-11,16-21, 23-30, 36-46)
11. On October 11, 2012, at 7:50 p.m., the enforcement officer returned to Licensee's premises in an undercover capacity and asked a bartender if a 22-oz. glass of Samuel Adams Boston Lager draft beer was still \$4.00. The bartender replied that Licensee still carries that particular draft beer in a 22-oz. glass, but the current price is \$5.75. (N.T. 12-13, 23)
12. The enforcement officer then purchased a 22-oz. glass of Samuel Adams Boston Lager draft beer from the bartender, paying \$5.75. (N.T. 13)
13. Michael Simpson is Licensee's district manager, who is responsible for overseeing the operation of seven units in a three-state territory, including Licensee's premises which is the subject of this citation. (N.T. 22-23)
14. Licensee's price for a 22-oz. glass of Samuel Adams Boston Lager draft beer during the month of September and for the first week of October 2012 was \$4.00. This \$4.00 price was not advertised by Licensee as a daily special, special, discounted price or as a price reduction of any type. (N.T. 16-17, 23, 25-30, 46)
15. During the same 4-6 week period in September/October 2012, Licensee offered "daily specials" between 11:00 a.m. and midnight and offered "happy hour" specials for periods of two hours prior to midnight on weekdays. (N.T. 25-26, 31, 37-38, 43-45)
16. Licensee periodically changes its regular prices it charges to customers for alcoholic beverages every four to six weeks or, in some instances, quarterly. (N.T. 26, 28-29, 40-42)
17. In August 2012 and on October 11, 2012, Licensee's regular price for a 22-oz. glass of Samuel Adams Boston Lager draft beer was \$5.75. (N.T. 13, 35)

DISCUSSION:

The issue in this case is whether the Liquor Code or the Liquor Control Board Regulations prohibit a retail licensee from changing and lowering its regular price for a particular alcoholic beverage for a 4-6 week period when the new lower price is not advertised or promoted as a reduced or discounted price.

Tent Restaurant Operations, Inc.  
t/a Fox & Hound English Pub & Grille  
IN RE: Citation No. 12-1608

The record establishes that Licensee lowered its regularly charged price on a 22-oz. glass of Samuel Adams Boston Lager draft beer from \$5.75 to \$4.00 for the month of September and into the first part of October 2012. This citation was issued as the result of three undercover visits by an enforcement officer to Licensee's premises. During the first two visits of September 8-9 and 22-23, 2012, the enforcement officer entered late each evening at 11:40 p.m. and 11:15 p.m. respectively, and asked the bartender if there were any "specials." On each occasion, the bartender replied that a 22-oz. glass of Samuel Adams Boston Lager draft beer was \$4.00. Prior to midnight on September 8 and 22, 2012, the enforcement officer purchased this suggested draft beer for \$4.00. After midnight, then being September 9 and 23, 2012, the enforcement officer made additional purchases of a 22-oz. glass of Samuel Adams Boston Lager draft beer paying \$4.00 on each occasion. The enforcement officer made a final undercover visit to Licensee's premises on October 11, 2012 at 7:50 p.m. and was charged \$5.75 for a 22-oz. glass of Samuel Adams Boston Lager draft beer.

As a result of this investigation, the Bureau charged Licensee with discounting the price of alcoholic beverages between 12 a.m. (midnight) and 2:00 a.m. in violation of Section 13.102(a) of the Liquor Control Board Regulations, 40 Pa. Code §13.102(a).

At the hearing, the enforcement officer testified that during his September visits, he did not see any signs or advertisements inside or outside the premises indicating that a 22-oz. glass of Samuel Adams Boston Lager draft beer was being sold for \$4.00. During his second undercover visit to the premises on September 22-23, 2012, the enforcement officer recalled that he looked at a drink menu and that there was a menu insert referring to a 22-oz. glass of Samuel Adams Boston Lager draft beer for \$4.00 but he could not recall if the words "special" or "feature" were part of that menu insert. (N.T. 18-19)

Section 13.102 is titled "Discount pricing practices" and it is commonly known as the happy hour regulation. Specifically, Section 13.102(a) provides that retail licensees may discount the price of alcoholic beverages for a consecutive period of time not to exceed two hours in a business day but may not engage in discount pricing practices between 12:00 midnight and the legal closing hour.<sup>1</sup>

Therefore, an essential element of a violation of Section 13.102(a) is that there is a discount of the regular menu price of an alcoholic beverage pursuant to a happy hour, daily drink special or other discount promotion and the discounted price extends past midnight.

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<sup>1</sup> In a recent amendment to the Liquor Code at Section 4-442(g), the legislature authorized the extension of a happy hour for a period of up to four hours per day and up to fourteen hours per week during which the holder may discount the price of alcoholic beverages. No discounts may be given between the hours of midnight and the legal closing time.

Tent Restaurant Operations, Inc.  
t/a Fox & Hound English Pub & Grille  
IN RE: Citation No. 12-1608

In this case, there is no evidence in the record that the price of \$4.00 paid by the enforcement officer for the 22-oz. glasses of Samuel Adams Boston Lager draft beer after midnight was a discounted price pursuant to a happy hour, daily drink special or other discount promotion. In *P.S.P. v. Chi-Chi's USA, Inc.*, at Citation No. 91-1295, Selected Opinions, ALJ, Volume 10, Page 83, Administrative Law Judge Howard B. Elbling opined that the happy hour regulation Section 13.102 is not applicable to regular, everyday pricing practices.<sup>2</sup>

Licensee's district manager, Mike Simpson, presented un rebutted testimony that it is the business practice of Licensee to change its regular prices on alcoholic beverage drinks every few months. Furthermore, it is Licensee's regular business practice to "feature" particular types of draft beer throughout the year. Whenever Licensee features a certain type of draft beer, it lowers the regular menu price of that beer for a 4-6 week period. The new lower price is the price that is charged for the draft beer during the entire business day, each and every day during the 4-6 week period. This new regular price is not advertised or promoted by Licensee as a discounted price, happy hour price or a daily drink special.

During that 4-6 week period when a particular draft beer is being featured, Licensee has a menu insert listing the featured beer and its price. While the insert may or may not state "feature" or "featured beer," the insert does not refer to the beer as a "special." The menu insert does not contain any reference to the price of the draft beer as being a reduced or a discounted price.

In September of 2012, Licensee decided to feature 22-oz. glasses of Samuel Adams Boston Lager draft beer. In that regard, Licensee re-set and lowered the price of this draft beer to \$4.00. This price of \$4.00 was charged all day and every day for the entire month of September and for the first part of October, 2012. This \$4.00 price was not advertised or promoted by Licensee as a reduced price, discounted price, daily drink special or happy hour promotion. However, during this period of time that Licensee was charging \$4.00 for a 22-oz. glass of Samuel Adams Boston Lager draft beer, Licensee was also running daily drink specials which were not available after midnight.

The Liquor Code and Regulations only regulate the manner in which retail Licensees can offer and sell alcoholic beverages at a discount from the regular menu price. Thus, the Liquor Code and Regulations address happy hours, daily drink specials and similar discount pricing promotions. However, the Liquor Code and Regulations do not address the prices that a licensee may establish as its regular prices for alcoholic beverages. Additionally, there is nothing that prohibits a retail Licensee from re-setting or changing its regular drink prices. Moreover, there is no requirement that the new lower regular price be in effect for a certain period of time.

In Advisory Opinion No. 00-94, the Board stated that the licensee could increase the price of each alcoholic beverage drink by \$0.25 during entertainment events so long as the higher prices are regularly charged during entertainment events.

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<sup>2</sup> Also see *P.S.P. v. Da Vinci, Ltd.*, Citation No. 07-2255.

Tent Restaurant Operations, Inc.  
t/a Fox & Hound English Pub & Grille  
IN RE: Citation No. 12-1608

In Advisory Opinion No. 10-452, the Board stated that a retail licensee could offer domestic beer at one regular price on Mondays and at a different regular price Tuesdays through Sundays. The Board further stated that the holder of a restaurant liquor license would be permitted to offer domestic beer at a different regular price each day of the week, as long as those different prices are regularly charged and are not advertised as daily drink specials or happy hour specials.

The Board's reasoning in these Advisory Opinions comes from an explicit recognition that there is nothing in the Liquor Code or Regulations that regulate the prices that licensees may establish as regular drink prices, and there is nothing in the Liquor Code or Regulations that mandate the length of time that regular drink prices must remain in effect. As the Board has noted, regular drink prices can be different each day of the week. The Liquor Code and Regulations only address happy hour specials, daily drink specials or other discount price promotions.<sup>3</sup>

In this case, the evidence is clear that on the dates charged, a 22-oz. glass of Samuel Adams Boston Lager draft beer was not being offered pursuant to a happy hour special or daily drink special. The \$4.00 price for a 22-oz. glass of Samuel Adams Boston Lager draft beer was not advertised or promoted as a discount, price reduction or special. Rather, the \$4.00 price was the regular price of a 22-oz. glass of Samuel Adams Boston Lager draft beer for a 4-6 week period during September/October 2012. It was the price charged all day and every day during that 4-6 week period.

Accordingly, this court concludes that the Bureau has failed to establish the violation as charged which prohibits a licensee from extending a discount promotion such as a happy hour or daily drink special past midnight.

#### CONCLUSION OF LAW:

The Bureau has failed to establish that on September 9 and 23, 2012, Licensee discounted the price of alcoholic beverages between 12:00 midnight and 2:00 a.m.

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<sup>3</sup> In each of its Advisory Opinions, the Board includes a disclaimer which states, "This opinion applies only to the factual situation described herein and does not insulate the licensee or others from consequences of conduct occurring prior to its issuance. The propriety of the proposed conduct has been addressed only under the Liquor Code and Regulations. The laws and policies on which this opinion is based are subject to change by the legislature or the Pennsylvania Liquor Control Board."

Tent Restaurant Operations, Inc.  
t/a Fox & Hound English Pub & Grille  
IN RE: Citation No. 12-1608

ORDER:

Accordingly, it is hereby ORDERED that Citation No. 12-1608 be DISMISSED.

Dated this 8<sup>TH</sup> day of JULY, 2013.



Roderick Frisk, J.

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NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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.

**IF YOU WISH TO APPEAL THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER, THE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE MAILING DATE OF THE ORDER. PLEASE CONTACT CHIEF COUNSEL'S OFFICE AT 717-783-9454.**