

Mailing Date: DEC 23 2015

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

|                             |   |                                |
|-----------------------------|---|--------------------------------|
| PENNSYLVANIA STATE POLICE,  | : | In Re Citation No.: 15-0721    |
| BUREAU OF LIQUOR CONTROL    | : |                                |
| ENFORCEMENT (BLCE)          | : |                                |
|                             | : | BLCE Incident No.: W02-489290  |
| v.                          | : |                                |
|                             | : |                                |
| RKJM ASSOCIATES, LLC        | : | PLCB LID No.: 67248            |
| T/A MULLIGAN'S IRISH PUB    | : |                                |
| MIDTOWN VILLAGE             | : |                                |
| 41 S. MAIN ST. BLDG. B      | : | PLCB License No.: R-AP-SS-2804 |
| WILKES-BARRE, PA 18701-1722 | : |                                |
|                             | : |                                |
| LUZERNE COUNTY              | : |                                |

**ADJUDICATION**

BEFORE: Felix Thau, Administrative Law Judge

FOR BLCE: Craig A. Strong, Esquire

LICENSEE COUNSEL: William J. Watt, III, Esquire

**BACKGROUND:**

This proceeding arises out of a citation, containing one count that was issued on May 4, 2015, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against RKJM Associates, LLC (Licensee).

The citation charges Licensee with a violation of Section 13.102(a)(3) of the Liquor Control Board Regulations [40 Pa. Code §13.102(a)(3)]. The charge is that Licensee, by your servants, agents, or employees, sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited draft beers and well drinks were served for the set price of \$20.00, on December 31, 2014 and January 1, 2015.

I presided at an evidentiary hearing on October 22, 2015 at 100 Lackawanna Avenue, Scranton, Pennsylvania.

Therefore, I make the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT:**

1. The Bureau began its investigation on December 23, 2014 and completed it on March 10, 2015. (N.T. 46)

2. The Bureau sent a notice of the alleged violation to Licensee at the licensed premises by certified mail, return receipt requested, on March 30, 2015. The notice was subsequently sent out by first class mail on April 28, 2015. The notice alleged the violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 36)

3. Through its webpage, Licensee advertised a free drink event for the business day of December 31, 2014 and January 1, 2015. The announcement further indicated that the drinks were to be provided by an unidentified person who was to pay the bill. (Commonwealth Exhibit No. C-3, N.T. 40)

4. As a result, an undercover Bureau Enforcement Officer entered the premises on December 31, 2014, at about 10:00 p.m. The Officer paid a \$20.00 cover charge at the door. Licensee provided a buffet. Domestic draft beer and “well drinks” were included at no charge above the entry fee. The practice continued until 2:00 a.m., January 1, 2015. (N.T. 41-44)

5. Licensee arranged in advance for food with a vendor. Licensee ordered food for about 250 persons. The food, consisting of chicken, salad, pasta, meatballs, and sausage was delivered at 9:30 p.m. Licensee paid the food vendor about \$625.00. (N.T. 67-70)

6. The owner of a martial arts school (owner), a friend of the corporate member<sup>1</sup>, and the corporate member arranged to have the owner purchase drinks in advance of the event. After the event, the owner paid a drink tab of \$1,541.00. The charge for drinks served from 10:00 p.m. until midnight was \$1.00 for 421 drinks or \$421.00. The unit price represents Licensee’s normal “happy hour” discount. Drinks served from midnight until 2:00 a.m. were priced at Licensee’s regular price of \$4.00 each. There were 280 drinks served for a cost of \$1,120.00. (N.T. 45-63)<sup>2</sup>

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<sup>1</sup> I purposefully do not identify the member as the corporate makeup, as told me at the hearing, was quite different than that indicated in the licensing record of the Pennsylvania Liquor Control Board.

<sup>2</sup> Licensee presented a document, at the hearing described as a contract but actually a bill, intended to prove the drink transaction was *bona fides*. The document was discussed on the record but not formally marked or admitted. Nevertheless, it remains part of this record. (N.T. 55-60)

7. Licensee applied the \$20.00 cover charge to the food bill, keeping any money in excess thereof.<sup>3</sup>

### **CONCLUSION(S) OF LAW:**

The Bureau has failed to prove that Licensee violated the discount pricing practices regulation.

### **DISCUSSION**

Conventional wisdom has long supposed it to be the use of a kipper (a strong smelling smoked fish) to divert hounds from the correct route while on the scent of a rabbit. Although the accuracy of this story may be apocryphal, a “red herring” has come to mean something that misleads or distracts. The term is employed either as a fallacy of logic or literary device. In this matter, the red herring represents a legal fallacy of logic, which I initially accepted as accurate throughout the hearing.

The citation’s wording is framed in a manner so that the described conduct unquestionably violates the discount pricing practices regulation [40 Pa. Code §13.12, et. seq.]. The Bureau’s testimony regarding the buffet was designed to prove the event was not legitimately catered. Consequently, the exception allowing for discount pricing practices at catered events could not apply.<sup>4</sup>

The discount pricing practices regulation and its exception for catered events are squarely within the definition of red herring when considering this case’s facts. When one examines these facts without the intellectual interference of the legal provisions supposedly in dispute, there can be little doubt. The charge must be dismissed.

There is nothing to prevent a customer from purchasing drinks for others. The purchasing customer’s motive to do so, whether commercial or otherwise, is largely irrelevant. Although a restaurant liquor licensee is mandated to provide food, the distinction between buffet or menu, is also of no consequence. Such a licensee who provides food for a fixed fee has broken no law.<sup>5</sup>

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<sup>3</sup> The Fact Finding was agreed to by the parties, after hearing, by email exchange, which are now part of the official record.

<sup>4</sup> A catered event/function is defined in Liquor Code Section 102 [47 P.S. §1-102] and applied in Liquor Code Section 406(f) [47 P.S. §4-406(f)] as well as the discount pricing practices regulation.

<sup>5</sup> Licensee complied with the discount pricing practices regulation by ceasing the discount at midnight. Not an issue in this case as Licensee was not charged, licensees promoting discount pricing practices (happy hour) must prominently post a happy hour notice at least seven days prior to the promotion [47 P.S. §4-406(g)]. Had Licensee faced that charge, Licensee would have been penalized.

I understand the Bureau's concern. Allowing a patron to purchase an indefinite number of drinks for others rubs directly against the discount pricing practices regulation's underlying policy as well as the interpretational imperative of Liquor Code Section 104 [47 P.S. §1-104]. Both regulation and preeminent law are aligned to limit excessive alcoholic beverage consumption. This objective is more precisely embodied in Liquor Code Section 493(1) [47 P.S. §4-493(1)], which includes a limitation of the quantity of alcoholic beverages served to every customer at all times.

Licensee's are forbidden to serve any customer who is visibly intoxicated. This restriction is the ultimate safeguard against inordinate consumption, a violation which the Liquor Code identifies as more severe than a discount pricing practices violation by virtue of the higher penalty parameters applicable to the former.<sup>6</sup>

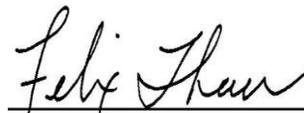
To licensees who see this Adjudication as a vehicle to promote "free drinks," I offer a warning. This outcome is fact driven. Licensee presented credible testimony and records (although not the best). A licensee who attempts to circumvent the law illegally, whether by contrivance, artifact, or straw man, will be held accountable. Even so, if a transaction is arm's length and accompanied by an accurate paper trail, the arrangement is lawful.

**ORDER:**

*Dismissal*

I dismiss the citation.

Dated this 11<sup>TH</sup> day of December, 2015.



Felix Thau, A.L.J.

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<sup>6</sup> The question remains whether the investigation was centered on this broader, more serious violation.

### General Information

This Adjudication is a legal document. It affects your rights, privileges, and obligations. The information which follows is a general guide. If you have not already done so, it may be prudent for you to consult with an attorney.

### Applying for Reconsideration

If you want the Administrative Law Judge to reconsider this Adjudication, you must submit a written application and a nonrefundable \$25.00 filing fee. Both must be received by the Office of Administrative Law Judge, (PLCB - Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, PA 17110-9661) within fifteen days of this Adjudication's mailing date. Your application must describe the reasons for reconsideration. The full requirements for reconsideration can be found in Title 1 Pa. Code §35.241.

### Appeal Rights

If you wish to appeal this Adjudication, you must file an appeal within thirty days of the mailing date of this Adjudication by contacting the Office of Chief Counsel of the Pennsylvania Liquor Control Board (717-783-9454). For further information, visit [www.lcb.state.pa.us](http://www.lcb.state.pa.us). The full requirements for an appeal can be found in 47 P.S. §4-471.