

Mailing Date: AUG 16 2019

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	IN RE Citation No.: 18-1963
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No.: PA 2018-1436218
v.	:	
	:	PLCB LID No.: 63180
BIG D RESTAURANTS LLC	:	
7246 KELLY STREET	:	PLCB License No.: R-AP-SS-7831
PITTSBURGH PA 15208-1809	:	
	:	
ALLEGHENY COUNTY	:	
	:	

BEFORE: JUDGE RICHARD O'NEILL EARLEY

APPEARANCES:

PLCB COUNSEL: NADIA L. VARGO, ESQ.

LICENSEE COUNSEL: CHARLES L. CAPUTO, ESQ.

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on January 11, 2019, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Big D Restaurants LLC, License Number R-AP-SS-7831, (Licensee).

The citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-491(6), alleging that on December 7, 2018, Licensee, by its servants, agents or employees, failed to conduct a catered event in conformity with the Liquor Code.

An administrative hearing was conducted on June 25, 2019, at 2:30 p.m., at Two Parkway Center, 875 Greentree Road, Pittsburgh, Pennsylvania. The Bureau was represented by Emily L. Gustave, Esq. Licensee was represented by Charles L. Caputo, Esq.

I make the following Findings of Fact and reach the following Conclusions of Law:

BIG D RESTAURANTS LLC
IN RE CITATION NO. 18-1963

FINDINGS OF FACT:

1. The Bureau commenced its investigation of Licensee's premises on December 4, 2018, and completed its investigation on December 7, 2018. (Exhibit C-1)
2. On December 7, 2018 a Liquor Enforcement Officer entered an event catered by Licensee off its licensed premises. Upon entering the Officer saw there was a bartender serving alcohol, but he saw no sign of food. The bartender was an employee of Licensee's. (N.T. pp. 51-52, 53-54.) Michael Syke approached the Officer and identified himself as "the person in charge." (N.T. p. 10.) The Officer asked Mr. Syke if they were serving food and Mr. Syke stated popcorn was available. (N.T. p. 17.) Although service of alcohol continued, there was no food visible during the Officer's stay from 5:30 p.m. to 5:55 p.m. (N.T. pp. 9, 18, 32.) Additionally, there were no tables, chairs, plates, flatware, or napkins. (N.T. pp. 17-18.)
3. Licensee testified that on December 7, 2018, he arrived at the catered event with food at approximately 6:40 p.m., roughly 90 minutes after alcohol sales began. (N.T. p. 52.)
4. The Bureau notified Licensee of the nature of the alleged violation disclosed by its investigation by letter dated December 19, 2018, which was sent by certified mail and received by Licensee on December 20, 2018. (Exhibit C-1)
5. On January 1, 2019, the Bureau cited Licensee for serving alcohol without food in violation of §491(16). The Bureau mailed the citation by certified mail on January 11, 2019, and Licensee received it on January 14, 2019. (Exhibit C-2)
6. The Office of Administrative Law Judge scheduled the citation for a hearing on June 25, 2019.
7. On March 14, 2019, Chief Judge Maunus ordered Licensee to file a Pre-Hearing Memorandum (PHM) by April 4, 2019. Chief Judge Maunus informed the Licensee "failure to comply with this Order may result in Licensee's loss of the right to present testimony and/or documents" at the hearing. (March 14, 2019, Maunus Order.) Licensee did not file its PHM by April 4, 2019.
8. Instead, Licensee submitted its PHM on June 13, 2019, 12 days before the hearing. Licensee did not seek permission to file its memorandum late. Nor did it offer any explanation for not filing it timely. Licensee's PHM lists two witnesses: Derrick Hemby, Licensee's owner; and Michael Syke, "Agent of Licensee." The PHM does not list any exhibits.
9. Five days later, on June 18, 2019, Licensee requested a continuance. The request did not raise any issues concerning newly acquired evidence, or difficulty securing witnesses. Licensee's motion suggested the reason for the request was wholly related to a future, unscheduled non-renewal proceeding. Because Licensee did not contend

this matter would interfere with the non-renewal proceeding or cause prejudice if it had to proceed as scheduled, I denied the motion.

10. During the June 25, 2019, hearing, Licensee's counsel offered exhibit L-2 into evidence. (N.T. p. 49.) BLCE's counsel objected based on surprise because Licensee did not previously disclose its intention to offer exhibits and did not offer them to the Bureau in advance. (N.T. p. 49.) Under questioning, Licensee's counsel stated he only recently received the exhibits he now wished to offer: a promotional flyer advertising the December 7, 2018, catered event; a photo of the food Licensee asserts he served; and a receipt for the Licensee's catering services for the event. (N.T. p. 55, 65.) Licensee's counsel did not explain why these exhibits only became available after June 13. Nor did he explain why he did not notify the Bureau or the Court that Licensee wished to supplement the PHM. Counsel did not contend Licensee would be unfairly prejudiced if the Court sustained the Bureau's objection. Instead, counsel stated he could proceed without them. (N.T. p. 50.) I sustained the Bureau's objection and precluded Licensee's unlisted exhibits. (N.T. p. 58.) Licensee did not object.

CONCLUSIONS OF LAW:

1. The notice provisions as prescribed by the Liquor Code at 47 P.S. §4-471 have been satisfied.
2. Count one: Licensee violated the Liquor Code at 47 P.S. §4-491(6), in that Licensee, by its servants, agents or employees, failed to conduct a catered event in conformity with the Liquor Code by failing to provide food at all times during which alcohol was offered.

DISCUSSION:

Licensee's argument is that it did not violate the Liquor Code by selling alcohol for roughly 90 minutes of a two-hour catered event before it made food available. I cannot agree. An off-premises catering permit primarily allows licensees to provide food off its premises, and, additionally, to sell alcohol. Licensee's conduct here turns this idea on its head by using its catering license primarily to sell alcohol and to provide food almost after the fact.

The Liquor Code is specifically intended to be interpreted in a fashion to "protect the public welfare [and] health ... of the people of the Commonwealth and to prohibit forever the open saloon." 47 P.S. §1-104(a) of the Liquor Code. To this end the Liquor Code requires that food is made available by a licensee any time alcohol is sold for consumption on the licensed premises. Therefore, the citation is sustained.

I must note that the decision in this case was not determined by the findings of fact Nos. 4 to 10. Those findings were included only in the interest of establishing a complete record. They serve primarily to establish that the admission or exclusion of Licensee's documentary evidence was discussed, and that Licensee agreed it could make its case without the documents.

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PRIOR RECORD:

Licensee has been licensed since April 29, 2010, and has had two prior violations:
IN RE:

Citation No. 10-2277. Fine \$500.00.

1. Failed to maintain complete and truthful records covering the operation of the licensed business for a period of 2 years.

Citation No. 13-1100. Fine \$800.00. Licensee's appeal to Board dismissed. Licensee's appeal to Common Pleas Court sustained. Memorandum Opinion by Judge Anne E. Covey: 9/8/16. Allegheny County Common Pleas Court's December 3, 2015 Order is reversed. (Citation sustained). Certificate of Remittal/Remand of Record: 11/1/16.

1. Smoked and/or permitted smoking in a public place where smoking was prohibited.
January 28, February 4, 20, and March 13, 2013.
2. Failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions on the license.
January 28, February 4, 20, and March 13, 2013.

PENALTY:

For violations of the type found in this case, the Liquor Code permits any of the following penalties: (1) a license revocation, (2) a fine in the range of \$50.00 to \$1,000.00, (3) a license suspension, or (4) any combination of a fine and suspension. (47 P.S. §4-471)

For the foregoing reasons, a fine of \$350.00 shall be imposed as an appropriate penalty in this case.

ORDER:

THEREFORE, it is hereby ordered that Big D Restaurants, LLC, License Number R-AP-SS-7831, pay a fine of \$350.00 within 20 days of the mailing date of this Order. In the event the fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

Jurisdiction is retained.

Dated this 14TH day of August, 2019.

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Richard O'Neill Earley, J.

BIG D RESTAURANTS LLC
IN RE CITATION NO. 18-1963

NOTE: 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 15 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.

IF YOU WISH TO APPEAL THIS ADJUDICATION, YOU MUST FILE AN APPEAL WITHIN 30 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. THE FULL REQUIREMENTS FOR AN APPEAL CAN BE FOUND IN 47 P.S. §4-471.

Detach Here and Return Stub with Payment – Note Citation Number on Check

The fine must be paid by cashier's check, money order, or a check drawn on the account of an attorney licensed in Pennsylvania. **Personal and business checks are NOT acceptable unless bank certified.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail it, along with any required documentation to:

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

Credit/Debit Cards may be used: If you have already registered with PLCB+ you should be able to pay by Credit/Debit card; if you have not registered with PLCB+ you may obtain the information on how to register by sending an email message to: RA-LBLICENSINGMOD@pa.gov.

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Big D Restaurants, LLC