

Mailing Date: September 5, 2001

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 00-1669
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

SAND DOLLAR TAVERN, INC. : License No. R-1094
2723 East Allegheny Avenue :
Philadelphia, PA 19134-5915 :

Counsel for Licensee: Gregory H. Quigley, Esquire
2501 South 11th Street
Philadelphia, PA 19148-3607

Counsel for Bureau: Edward B. McHugh, Esquire
PENNSYLVANIA STATE POLICE
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19148

OPINION

Sand Dollar Tavern, Inc. (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein

the ALJ sustained the three-count citation against Licensee and imposed a fine of \$1,000.00.

The first count of the citation alleged that Licensee violated section 499(a) of the Liquor Code [47 P.S. §4-499(a)] on September 9, 2000, by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages.

The second count alleged that Licensee violated section 499(a) of the Liquor Code [47 P.S. §4-499(a)] on September 9, 2000, by permitting patrons to possess and/or remove alcoholic beverages from that portion of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

The third count alleged that Licensee violated sections 406(a)(2) and 493(16) of the Liquor Code [47 P.S. §§4-406(a)(2) and 4-493(16)] on September 9, 2000, by selling, furnishing and/or giving alcoholic beverages between 2:00 a.m. and 7:00 a.m.

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. Where

the decision of the ALJ is based upon substantial evidence, the Board must affirm the decision.

The Commonwealth Court defined “substantial evidence” to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion requiring something more than a scintilla creating mere suspicion of the fact to be established. Johnson vs. Pennsylvania Board of Probation and Parole, 706 A.2d 903 (Pa. Cmwlth. 1998); Chapman vs. Pennsylvania Board of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

It is Licensee’s contention on appeal that the Adjudication is against the weight of the evidence. Licensee further contends that its witnesses were more credible than those of the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"). Finally, Licensee asserts that the ALJ's Conclusions of Law are in error in that they are based on insufficient and incredible testimony of the Bureau.

A review of the record reveals that the Bureau presented the testimony of one witness, the enforcement officer who conducted the investigation at the licensed premises. Specifically, the officer testified that he visited the licensed establishment on September 9, 2000, arriving at 12:45 a.m. (N.T. 5). After being introduced to the bartender, Nancy, the officer purchased a

beer and later departed the premises at 1:30 a.m. (N.T. 5). Shortly thereafter, the same officer returned to the establishment at 1:50 a.m. (N.T. 5-6, 9). At that time, Nancy announced "last call" and he ordered a Coors Light beer for which he paid Nancy two dollars. (N.T. 6). The amount was rung up on the register and the cash deposited inside. (N.T. 6).

The enforcement officer further testified that at approximately 2:00 a.m., Nancy asked the officer to lock the door, which he did. (N.T. 6, 9). Once the door was locked, the lights were dimmed and Nancy asked all the patrons to take their money off the top of the bar. (N.T. 6). All patrons including the Bureau officer complied. (N.T. 6). He observed several patrons with shot glasses turned over in front of them. (N.T. 7). Eventually, the officer observed all the other patrons turn in their shot glasses in exchange for beer or alcohol. (N.T. 7, 9-10). At 3:00 a.m., Nancy announced that it was time for everyone to leave. (N.T. 7). Following her announcement, all patrons including the officer departed the establishment. (N.T. 8).

In defense of the charges, Licensee presented the testimony of two witnesses. The first witness, Nancy Wilson, confirmed that she was the bartender on duty on the morning of September 9, 1999. (N.T. 30).

While Ms. Wilson acknowledges working the 6:00 p.m. to closing shift, she had very little specific knowledge of the actual events which took place at the bar that evening. (N.T. 30-31). She does not recall meeting the enforcement officer, or whether or not the air conditioner was on or how many patrons were present at closing time. (N.T. 30-32). However, Ms. Wilson did testify that following the last call announcement which usually takes place between 1:30 and 1:45 a.m., she allowed patrons to pay for drinks and then she placed an upside down shot glass in front of the patron. (N.T. 32-33). The patron is then expected to “drink that drink” before 2:00 a.m. (N.T. 33). When questioned by the ALJ regarding the necessity for the shot glass if no drinks were to be given after 2:00 a.m., Ms. Wilson responded “we do it to give a customer...one last chance to get an [alcoholic beverage] because its 2:00 a.m.” (N.T. 49).

Licensee also presented the testimony of Daniel Cordero, the father of the corporate president, John Cordero. (N.T. 51). Mr. Cordero testified that during the period December, 1999 to the time of the citation hearing, he was involved on a daily basis with the closing and renovation work at the establishment. (N.T. 51-52). Mr. Cordero testified generally to the procedure that is followed during closing time, but admitted that he had no

specific recollection of the date in question. (N.T. 59). Mr. Cordero had no recollection of seeing the Bureau officer at the establishment at any time during his period of renovation work. (N.T. 57, 59, 64).

Upon review of the evidence presented, the ALJ determined that the evidence presented by both parties was less than fully satisfactory and that the weight entitled to each side's evidence was nearly equal. However, the ALJ sustained the citation based upon his interpretation of the testimony presented by the bartender and a determination that Mr. Cordero's testimony was not credible. The Board agrees.

As the sole trier of facts, the ALJ is charged with determining the weight and sufficiency of all testimonial evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984). While deeming the enforcement officer's testimony to be scant and less satisfactory than he would prefer, the ALJ determined it necessary to attribute less weight to the bartender's explanation for the use of shot glasses as tokens for drinks owed to patrons, and considerably less weight to the testimony of Mr. Cordero.

Based on the following, the Board concludes that the ALJ's decision is supported by substantial evidence on the record. Therefore, it is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of \$1,000.00.

Licensee must adhere to all other conditions set forth in the ALJ's
Order.

Board Secretary