

Mailing date: March 6, 2002

BEFORE THE PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 01-0365  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

License No. R-14299

HEPP'S ENTERPRISES, INC. :  
2701 Brown Street :  
Philadelphia, PA 19130-1703 :

Licensee Represented By: Elaine Hepp, Corporate Officer  
Hepp's Enterprises, Inc.  
2701 Brown Street  
Philadelphia, PA 19130-1703

Counsel for Bureau: James E. Dailey, Esquire  
Pennsylvania State Police  
Bureau of Liquor Control Enforcement  
6901 Woodland Avenue  
3<sup>rd</sup> Floor  
Philadelphia, PA 19142

OPINION

Hepp's Enterprises, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), wherein the ALJ sustained all three counts of the citation against Licensee and imposed a penalty consisting of a three hundred

dollar (\$300.00) fine and suspended Licensee's license for one (1) day, with such suspension continuing thereafter until Licensee pays the Commonwealth the amount of twenty-five dollars and five cents (\$25.05) for the total estimated loss of profit and unpaid taxes.

The first count of the citation charged Licensee with violating section 491(2) of the Liquor Code [47 P.S. § 4-491(2)] in that on January 12, 2001, Licensee, by its servants, agents or employees, unlawfully possessed and/or transported within this Commonwealth in excess of one (1) gallon of liquor upon which Pennsylvania State Tax had not been paid.

The second count of the citation charged Licensee with violating section 491(3) of the Liquor Code [47 P.S. § 4-491(3)] in that on January 12, 2001, Licensee, by its servants, agents or employees, obtained liquor from sources other than Pennsylvania State Stores.

The third count of the citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 9011 of the Malt Beverage Tax Law [72 P.S. § 9011] in that Licensee, by its servants, agents or employees, purchased and/or transported assorted brands of malt or brewed beverages into the Commonwealth of

Pennsylvania for its own use, or for sale or delivery therein, without payment of the Pennsylvania Malt Beverage Tax.

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).

Licensee on appeal argued that Findings of Fact Nos. 3, 6, 11, 12, 16, 18 and 19 are not supported by substantial evidence and that the evidence does not support the penalty.

The Board has reviewed the record, the ALJ’s Adjudication and Order, and particularly, the Findings of Fact, with Licensee’s allegations in mind.

Officer Powers, of the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), testified that on January 12, 2001, she was conducting border patrol in New Jersey. (N.T. 7). On border patrol, Bureau Officers patrol liquor stores in New Jersey to determine if Pennsylvania residents are purchasing alcoholic beverages in New Jersey and transporting them to Pennsylvania in contravention of the laws of the Commonwealth. (N.T. 7). While on duty, Officer Powers and another Bureau officer observed Licensee's sole corporate officer, Elaine Hepp, placing alcoholic beverages in the rear of a vehicle bearing Pennsylvania registration. (N.T. 8-10). Officer Powers then determined that the vehicle was registered to Ms. Hepp and proceeded to her residence, which is above Licensee's premises. (N.T. 9-10).

Officer Powers established a surveillance of Ms. Hepp's residence and the licensed premises and observed the arrival of the vehicle into which the alcoholic beverages had been loaded in New Jersey. (N.T. 10). The occupants of the vehicle were observed exiting the vehicle, unloading it, and carrying groceries and alcoholic beverages through a side door to the licensed premises. (N.T. 10 -11). Officer Powers then identified herself to Ms. Hepp and her companion, William

McKinley. (N.T. 8,12). At Officer Powers' request, Ms. Hepp surrendered the alcoholic beverages and a receipt from the liquor store in New Jersey. (N.T. 12; Exs. B-3, B-4). Mr. McKinley retrieved two cases of Heineken beer from the bar area of the licensed premises. (N.T. 12, 17-18).

Licensee's sole corporate officer, Elaine Hepp, admitted that she had purchased liquor and malt or brewed beverages in New Jersey and transported them to Pennsylvania on January 12, 2001. (N.T. 26, 31). She further acknowledged that some of the items purchased in New Jersey were found by Bureau officers on the licensed premises. (N.T. 32). She alleged that these items were not purchased in her capacity as a representative of Licensee but as a private citizen. (N.T. 26, 33-34). Ms. Hepp claimed that she had purchased the liquor and malt or brewed beverages for use at a private party, not for sale by Licensee. (N.T. 26-27).

When Ms. Hepp arrived at the licensed premises, she went upstairs to her residence on the second floor to use the bathroom. (N.T. 31). Her residence and the licensed premises share a common entrance from the outside into a hallway (N.T. 36-37). From the

hallway, the licensed premises can be entered through another door or her residence can be entered by climbing a flight of stairs. (N.T. 37-39). Allegedly, Mr. McKinley carried the alcoholic beverages from the car to just inside the entrance to the building and an unidentified man who was doing some work in the licensed premises carried the two cases of Heineken from just inside the door onto the licensed premises. (N.T. 32, 41-42).

Ms. Hepp argued that the alcohol was purchased for her personal use and not for Licensee's business. The General Assembly, in enacting the Liquor Code, intended licensees to be strictly liable for direct violations of the Liquor Code. Pennsylvania Liquor Control Board v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988); Commonwealth v. Koczvara, 397 Pa. 575, 155 A.2d 825 (1959). There is no distinction made in the Liquor Code between the private or commercial use of unlawfully acquired, untaxed alcohol.

On appeal, Licensee set forth the same fact pattern as before the ALJ. After hearing the testimony, the ALJ found that Licensee lacked credibility and rejected Ms. Hepp's version of the events of January 12, 2001. It is well established that matters of witness credibility are the

sole province of the fact finder. State Correctional Institution vs. Robinson, 561 A.2d 82 (Pa. Cmwlth. 1989); Borough of Ridgway vs. Pennsylvania Public Utility Comm'n, 480 A.2d 1253 (Pa. Cmwlth. 1984).

The ALJ found that Licensee's sole corporate officer, Elaine Hepp, had purchased liquor and malt or brewed beverages in the State of New Jersey and transported them to Pennsylvania. She further found that the Bureau officers had seized both the liquor and malt or brewed beverages purchased in New Jersey and that some of the items seized were physically located on the licensed portion of Licensee's premises. Based on the admissions of Licensee's sole corporate officer, and the testimony of the Bureau's witnesses, there is substantial evidence to support the findings of fact made by the ALJ and to sustain all counts of the citation.

The penalty imposed by the ALJ is within the parameters set forth in section 471(b) of the Liquor Code [47 P.S. § 4-471(b)] for violations of the type enumerated in this citation and the Board is without authority to alter it.

Based on the foregoing, the decision of the ALJ is supported by substantial evidence and is therefore sustained.

## ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is ordered that Licensee pay the fine in the amount of three hundred dollars (\$300.00) within twenty (20) days of the mailing date of this Order. Failure to do so will result in license suspension or revocation.

It is further ordered that Licensee's License No. R-14299 be suspended for period of one (1) day beginning at 7:00 a.m. on Monday, April 15, 2002 and ending at 7:00 a.m. on Tuesday, April 16, 2002 and continuing thereafter until Licensee pays the amount of twenty-five dollars and five cents (\$25.05) for lost profit and taxes.

Licensee is directed on Monday, April 15, 2002 at 7:00 a.m. to place the enclosed Notice of Suspension placard (Form No. PLCB-1925) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from the outside of the licensed premises and to remove said license from the wall and place it in a secure location.

The license is thereafter suspended until further order from the Office of Administrative Law Judge.

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

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Board Secretary