

Mailing Date: April 7, 2003

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 02-0304
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

STEUBENVILLE PIKE FOOD : License No. R-14681
ASSOCIATES, INC. :
t/a Primanti Brothers :
4501 Steubenville Pike :
Pittsburgh, PA 15205-9656 :

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Counsel for Bureau: Michael Nickles, Esquire
PENNSYLVANIA STATE POLICE
Bureau of Liquor Control Enforcement
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875 Greentree Road, Suite 100
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OPINION

Steubenville Pike Food Associates, Inc. t/a Primanti Brothers
("Licensee") appeals from the Adjudication and Order of Administrative Law

Judge Roderick Frisk (“ALJ”), wherein the ALJ sustained the citation against Licensee and imposed a fine of one thousand dollars (\$1,000.00).

The citation charged Licensee with violation of section 493(14) of the Liquor Code [47 P.S. § 4-493(14)], in that on November 6, 13, 20, 27, December 4, 11, 18, 2001, January 4 and 8, 2002 and divers other dates within the past year, Licensee, by its servants, agents or employees, permitted twenty-one (21) female minors and fourteen (14) male minors, fifteen (15) to twenty (20) years of age, to frequent its licensed premises.

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. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law, abused his discretion, or if his decision was not based on substantial evidence.

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. Cmwlt. 1998); Chapman vs. Pennsylvania Board of Probation and Parole, 86 Pa. Cmwlt. 49, 484 A.2d 413 (1984).

On appeal, Licensee challenged the application of section 493(14) of the Liquor Code [47 P.S. § 4-493(14)] to the facts in this case.

No testimony was offered by witnesses at the hearing. Licensee and the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) stipulated to the facts as set forth in the Bureau’s Pre-Hearing Memorandum, with the additional stipulation that, at the time of the open inspection by the Bureau, minors were seated at both tables and at the bar on the licensed premises.¹ (N.T. 5, 9; Exs. C-5, C-6).

The record revealed that at the times indicated in the citation, thirty-five (35) unsupervised minors were seated at both tables and at the bar on the licensed premises without proper supervision. (N.T. 9; Ex. C-5). Furthermore, thirteen (13) of the thirty-five (35) minors had frequented the licensed premises more than two (2) times within the preceding year. (Ex. C-5). The facts further indicate that Licensee’s food sales were in excess of seventy percent (70%). (N.T. 5, 6; Exs. C-5, C-6).

Licensee contended at the hearing before the ALJ that since the Board’s Bureau of Licensing approved the physical configuration of the premises, Licensee cannot be held to be in violation of section 493(14) of the Liquor

Code. In response, the Bureau argued that Licensee’s premises does not meet the proper configuration that would accommodate minors without proper supervision on its premises under the “Pizza Hut” rule.

Section 493(14) of the Liquor Code provides that minors are not permitted to frequent the licensed premises unless they are accompanied by a parent or legal guardian or are under proper supervision. [47 P.S. § 4-493(14)]. Section 493(14) provides an affirmative defense to the charge of allowing minors to frequent the licensed premises if the minors are under “proper supervision.” Commonwealth of Pennsylvania Liquor Control Board v. T.J.J.R., Inc., 548 A.2d 390 (Pa. Cmwlth. 1988). Section 493(14)² defines “proper supervision” as follows:

“Proper supervision,” as used in this clause, means the presence, on that portion of the licensed premises where a minor or minors are present, of one person twenty-five years of age or older for every fifty minors or part thereof who is directly responsible for the care and conduct of such minor or minors while on the licensed premises and in such proximity that the minor or minors are constantly within his sight or hearing. The presence of the licensee or any employee or security officer of the licensee shall not constitute proper supervision.

[47 P.S. § 4-493(14)].

¹ The courts have recognized that stipulated facts are indeed binding upon the court, as well as the parties. Park v. Delaware Valley Savings Loan, 523 A.2d 771 (Pa. Super. 1987).

² Although not applicable to the instant matter, Act 212 of 2002 amended Liquor Code section 493(14) and reduced the number of minors each supervisor can supervise from fifty (50) to five (5). [47 P.S. § 4-493(14)]. The amendment was effective February 7, 2003.

There is also an exception to the rule for licensed restaurants, known as the “Pizza Hut” rule, which have a ratio of the sales of food and nonalcoholic beverages equal to seventy percent (70%)³ or more of the combined gross sales of food and nonalcoholic beverages. In such a case, a minor may be present on a licensed premises as long as the alcoholic beverages are not served at the table or booth at which the minor is seated, unless this minor is accompanied by a parent or legal guardian or is under proper supervision as described above. In such a case, only table service of alcoholic beverages or takeout service of beer is allowed in the room where the minor is located, as long as the minor is not seated in the area of the establishment which has a bar. It is permissible to use a partition to segregate the bar area from the remainder of the licensed premises. In order to establish a valid division between two (2) areas of the licensed premises, a licensee must maintain a permanent partition at least four (4) feet high. [40 Pa. Code § 3.54].

In the instant case, Licensee’s food and nonalcoholic beverage sales were in excess of seventy percent (70%) of its total sales. The licensed

³ Act 10 of 2002, effective April 22, 2002, reduced this percentage from seventy (70) to fifty (50).

premises consisted of a dining room and a bar area, and there were no permanent partitions separating the dining room area from the other bar area. Officer Whitman observed minors seated at tables and at the bar and ordering food for take-out on the premises while alcohol was being served. At that time, there were no parents, guardians or proper supervisors on the licensed premises to supervise the minors. Because the minors were not accompanied by a parent, legal guardian or proper supervisor and because they were not seated in an area of the premises where only table service of alcoholic beverages occurred, Licensee violated section 493(14) by allowing them on its premises.

Pennsylvania's appellate courts have defined the word "frequent" to mean to visit often, more than one (1) or two (2) visits. See, Appeal of Speranza, 416 Pa. 348, 206 A.2d 292 (1965); Pennsylvania Liquor Control Board v. S & B Restaurants, Inc., 112 Pa. Cmwlth. 382, 535 A.2d 709 (1988). The Speranza Court noted that to sustain a frequenting charge, it must be established by a fair preponderance of the evidence that, as a course of conduct, the licensee permits minors to come onto the premises. Speranza, 206 A.2d at 352.

In the instant case, the record revealed that nineteen (19) minors visited the licensed premises one (1) time on January 8, 2002, three (3) minors visited the licensed premises on two (2) separate occasions, and thirteen (13) minors visited the licensed premises on four (4) to approximately one hundred (100) separate occasions. Clearly, minors frequented the licensed premises numerous times in violation of section 493(14) of the Liquor Code. Thus, the Board finds that there is substantial evidence to support the ALJ's decision.

Based on the foregoing, the decision of the ALJ 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 one thousand dollars (\$1,000.00).

Licensee must adhere to all other conditions set forth in the ALJ's Order dated February 4, 2003.

Board Secretary