

Mailing Date: March 17, 2004

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 03-0741
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :
 :
 :
 vs. :
 :
 :
 LATINO'S, INC. : License No. R-8409
1313 Parade Street :
Erie, PA 16503-1125 :
 :
 :

Representative for Licensee: Julio C. Reyes, Pro Se
1313 Parade Street
Erie, PA 16503-1125

Counsel for Bureau: Nadia L. Vargo, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
Suite 100
One Parkway Center
875 Greentree Road
Pittsburgh, PA 15220

OPINION

Latino's, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Roderick Frisk ("ALJ"), wherein

the ALJ sustained Count Two of a two (2)-count citation and imposed a fine in the amount of one thousand dollars (\$1,000.00).

At the hearing before the ALJ, counsel for the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) withdrew Count One and amended Count Two to reflect two (2) female minors, instead of three (3) female minors and, two (2) male minors. (N.T. 17, 122, 148-149).

After the Bureau’s amendments, the citation charged that, on January 25, 2003 and on divers other occasions within the past year, Licensee, by its servants, agents or employees, permitted two (2) female minors, sixteen (16) to nineteen (19) years of age, to frequent its licensed premises, in violation of section 493(14) of the Liquor Code [47 P.S. § 4-493(14)].

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 or abused his discretion, or if his decision was not based upon substantial evidence.

The Commonwealth Court has defined “substantial evidence” as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Johnson v. Pennsylvania Bd. of Probation and Parole, 706 A.2d 903 (Pa. Cmwlth. 1998); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal, Licensee claims that the ALJ did not want to accept Licensee’s argument, that on January 25, 2003, Licensee’s sales of food and non-alcoholic beverages were more than a fifty percent (50%) ratio, as compared to its sales of food and alcoholic beverages, under the “Pizza Hut exemption,” that the ALJ chose to ignore its argument of same, and that both female minors were away from the bar in a dancing area at least sixty (60) to seventy (70) feet away from the bar. Further, Licensee requests this Board to see its Motion for Reconsideration which was filed with the ALJ.

A review of the record before the ALJ reveals that, on January 25, 2003, Bureau Officers John Hupp and Stephen Brison observed two (2) very young-looking females enter Licensee’s premises. (N.T. 11, 29). Upon entering the premises, the officers informed Licensee’s

manager, Pedro Vargas, what they observed prior to their entrance and, thereafter, began carding various youthful-looking patrons they observed in the premises. (N.T. 13-14). After identifying two (2) male patrons ages, eighteen (18) and nineteen (19) years of age, the officers observed Mr. Vargas escorting other youthful looking patrons out the door at which time the officers stopped this flow of patrons in order to identify the patrons' ages. (N.T. 15, 18).¹ As a result, the officers identified three (3) additional female patrons that were minors, Jomaira Quinones, Jane Mary Quinones and Gabrielle Salter.² (N.T. 18-19). Further, each of these female patrons indicated that they were under twenty-one (21) years of age, and that they went to the licensed premises to listen to music and to dance. (N.T. 19). Officer Hupp also testified that, upon entering the establishment, the two (2) minor females were observed sitting at a booth in the bar area, approximately twenty (20) to twenty-five (25) feet from the bar, with no separation between the bar and the booths. (N.T. 41-42).

¹ Both minors were subpoenaed to be present at the administrative hearing; however, neither appeared. As such, Count One of the citation regarding these minors was withdrawn by the Bureau. (N.T. 17).

² Gabrielle Salter, the third minor female referred to in Count Two of the citation, failed to appear at the administrative hearing. Count Two was, therefore, amended by the Bureau to reflect two (2) minor females.

Jane Mary Quinones, one (1) of the three (3) minor females found in the licensed premises on January 25, 2003 was seventeen (17) years of age, having been born on February 16, 1985. (N.T. 54-55). She further testified that she was on the licensed premises on January 25, 2003 with her sister, Jomaira, and that between January 25, 2002 until the date of the citation, January 25, 2003, she had been on the licensed premises four (4) to seven (7) times. (N.T. 55-56). During these occasions, she went to Licensee's establishment just to dance. (N.T. 57). No one questioned her age on January 25, 2003, or at any time during her prior visits, nor was she asked to fill out a declaration of age card. (N.T. 58-59). She was only asked whether she was drinking, and she described that patrons who said they were drinking were then asked to produce identification and, if they were over twenty-one (21), they were given wristbands. (N.T. 59).

Jane Mary Quinones testified that, on January 25, 2003, she witnessed fifteen (15) to twenty (20) teenagers leaving the dance floor, having been told that everyone under twenty-one (21) had to leave because the police were present. (N.T. 61). She further, stated that,

on two (2) or three (3) occasions, she attended teenagers' parties held by Licensee on the Licensee's premises. (N.T. 63-64).

Jomaira Quinones, the minor sister of Jane Mary Quinones, testified that, in January of 2003, while on Licensee's premises, she was sixteen (16) years old, with a date of birth of March 29, 1986. (N.T. 65-66). She further testified that on January 25, 2003, while at Licensee's premises, no one questioned her age, and she did not have alcohol to drink or food to eat, nor did she witness anyone else eating with a parent or guardian and she did not fill out a declaration of age card. (N.T. 56-67). She also testified that this was her first occasion in Licensee's premises. (N.T. 67).

Mr. Vargas testified that, prior to January 25, 2003, he remembered seeing Jane Mary Quinones in the licensed establishment approximately three (3) times. (N.T. 84). He did not see the parents with the two (2) girls on January 25, 2003 or on any day prior to January 25, 2003, nor did he witness or identify any legal guardian with either of the minors. (N.T. 85-86).

During his testimony, Julio C. Reyes, Licensee's corporate officer and shareholder, admitted that the two (2) minor females were on the licensed premises on January 25, 2003. (N.T. 142).

While offering no contradictory testimony to the charge, that two (2) minor females were, in fact, on the licensed premises on January 25, 2003, Mr. Reyes relies upon his assertion and his submission of Licensee's license renewal application for licensing period ending July 31, 2005 for the purpose of establishing a defense that Licensee's calculation of sales of food and non-alcoholic beverages and sales of food and alcoholic beverages equates to fifty percent (50%) or higher. Licensee relies upon its calculation found on line 13(f) of its renewal application, which reflects a percentage ratio of 56.67% for the period beginning May 6, 2002 to May 5, 2003. Such application having been submitted to the Board on or about May 6, 2003, the date Mr. Reyes signed Licensee's Application, nearly four (4) months after receiving the citation in the instant matter. (N.T. 21-22, 32-35, 37-43, 51-53, 75-79, 101-137, 139, 145-154). Such assertion and documentation are offered in Licensee's attempt to establish that it is exempted from the prohibition of minors frequenting its restaurant, as

found in section 493(14) of the Liquor Code [47 P.S. § 4-493(14)].

Section 493(14) provides in relevant part:

It shall be unlawful...[f]or any... restaurant...licensee, ...his servants, agents or employes, to permit minors to frequent his licensed premises or any premises operated in connection therewith...except minors who frequent any restaurant...whose sales of food and non-alcoholic beverages are equal to fifty per centum or more of the combined gross sales of both food and alcoholic beverages on the condition that the alcoholic beverages may not be served at the table or booth at which the said minor is seated at the time...and on the further condition that only table service of alcoholic beverages or take-out service of beer shall be permitted in the room wherein the minor is located...

[47 P.S. § 4-493(14)].

However, such application is offered in contradiction to Licensee's preceding certified license renewal application for the period ending July 31, 2003, wherein Licensee's calculation of its ratio is reflected as 42.32 percent. (N.T. 20; Ex. C-4). This application having been submitted June 2001, by Licensee for the effective term in which Licensee received the instant citation. (Ex. C-4). Throughout the licensing period ending July 31, 2003, Licensee did not make any amendment to the reported ratio of 42.32 percent. (N.T. 118).

The Board finds that the ALJ did not commit an error of law or an abuse of discretion in refusing to accept Licensee's defense, that, on the date of January 25, 2003, Licensee's sales were equal to or in excess of the above-described fifty percent (50%) of its sales. Further, the Board finds no evidence of record to support Licensee's contention that the ALJ ignored its argument on this point. Quite the contrary, the record is replete with testimony and discussion between Licensee, the ALJ and the Bureau in reference specifically to Licensee's claimed defense under section 493 of the Liquor Code. (N.T. 21-22, 32-35, 37-43, 51-53, 75-79, 101-137, 139, 145-154; Exs. A, C-4).

In that the Board has found no error of law or abuse of discretion in reference to the ALJ's rejection of section 493(14) of the Liquor Code as a valid defense for Licensee, it now examines section 493(14) in reference to Count Two as charged in this citation.

As discussed above, section 493(14) of the Liquor Code provides, in relevant part, that it shall be unlawful

[f]or any...restaurant...licensee, ...his servants, agents, or employes, to permit minors to frequent his licensed premises or any premises operated in connection therewith, except minors accompanied by parents, guardians, or under proper supervision...

[47 P.S. § 4-493(14)].

Applying section 493(14) to the facts in evidence in this matter, the Board hereby affirms the findings of the ALJ in part and reverses in part. After the Bureau's amendment of the citation, the citation charged Licensee with permitting two (2) female minors to frequent its licensed premises in violation of section 493(14) of the Liquor Code. As described above, one (1) female minor, Jomaira Quinones, testified that January 25, 2003 was her first occasion on Licensee's premises. This testimony was uncontroverted.

To "frequent" in the context of section 493(14) "means to visit often or to resort to habitually or to recur again and again, or more than one or two visits." Appeal of Speranza, 416 Pa. 348, 206 A.2d 292 (1965). As such, the Board finds that there was not substantial evidence in the record before the ALJ to find that the female minor, Jomaira Quinones, frequented Licensee's premises in violation of section 493(14). However, with regard to female minor, Jane Mary Quinones, the Board affirms the Order of the ALJ, finding that she frequented Licensee's premises in violation of section 493(14) and,

therefore, Count Two is still affirmed as Licensee permitted a minor to frequent.

Based on the foregoing, it is unnecessary to address the additional claims of Licensee on appeal.

ORDER

The appeal of Licensee is dismissed.

The decision of the ALJ with respect to Count Two is affirmed.

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 November 18, 2003.

Board Secretary