

Mailing Date:

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 04-1711
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

WILSBACH DISTRIBUTORS, INC. : License No. ID-178
905 Katie Court :
Harrisburg, PA 17109 :

Counsel for Licensee: Francis X. O'Brien, Esquire
F.X. O'Brien Associates, LLC
411 Walnut Street
Harrisburg, PA 17101-1904

Counsel for Bureau: Thomas M. Ballaron, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17110

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") appealed from the Adjudication and Order of Administrative Law Judge Daniel T. Flaherty, Jr. ("ALJ"), wherein the ALJ dismissed the citation.

The citation charged Licensee with violation of section 493(12) of the Liquor Code [47 P.S. § 4-493(12)], in that Licensee, by its servants, agents or employees, falsified records covering the operation of the licensed business on July 2, 2004.

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 defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal, the Bureau argues that the ALJ's dismissal of the citation constitutes an error of law. The ALJ dismissed the citation because he found that the Bureau failed to establish that Licensee's personnel intentionally falsified the record in question. The ALJ stated that the Bureau's charge used the word "falsify", which necessarily infers intent, and that falsification

cannot take place without the intent to do so. (Citing Black's Law Dictionary, 5th Ed.). The Bureau argues that requiring the Bureau to prove the intent or scienter of a licensee charged with a violation of the Liquor Code because of the wording of the charge is not supported by any governing legal precedent or theory of law. The Bureau further argues that the only question before the ALJ with respect to the wording of the charge in the citation is whether it comports with due process.

The Board has reviewed the record with the Bureau's objections in mind.

James C. L. Tyler is employed as a sales representative for Licensee. (N.T. 29-30; Ex. C-8). He handles ninety-five (95) accounts in Perry, Mifflin and Juniata counties, one of which is Sherman's Creek Inn. (N.T. 31-32, 36; Ex. C-8).

On July 2, 2004, Mr. Tyler was contacted by his friend, Mike Diller, who said that he was having a family get-together, and he asked if Mr. Tyler could help him out with the purchase of beer. (N.T. 38; Ex. C-8). Mr. Tyler told him he would call him back. (N.T. 38). When Mr. Tyler finished

his work for the day, at approximately 5:00 p.m.,¹ he met Mr. Diller at Mr. Diller's house, and they drove to Licensee's facility accompanied by Mr. Diller's girlfriend, Lorri Schweitzer. (N.T. 38-39, 46-47, 49, 51-52; Ex. C-8).

Mr. Diller told Mr. Tyler that he wanted a half (1/2)-keg of Michelob Ultra, a half (1/2)-keg of Yuengling Lager, a case of Bacardi O3 and two (2) cases of Yuengling Lager. (N.T. 40-41; Ex. C-8). Mr. Tyler took the order to Steve Apostolopoulos, an employee in Licensee's warehouse, telling him the order was for Sherman's Creek Inn. (N.T. 40; Ex. C-8). Mr. Apostolopoulos typed the order in the computer, generated an invoice in the name of Sherman's Creek Inn, and gave it to a man in the warehouse who picked the order and brought it out to Mr. Tyler with a forklift. (N.T. 40-42, 69-72; Exs. C-7, C-9). Mr. Tyler and Mr. Diller loaded the beer onto Mr. Diller's truck. (N.T. 42).

Licensee's warehouseman gave Mr. Tyler the invoice. (N.T. 42-43). Mr. Tyler gave it to Mr. Diller and asked him for payment. (N.T. 42-43). Ms. Schweitzer handed a check to Mr. Tyler who, in turn, gave it to Mr. Apostolopoulos with a copy of the invoice. (N.T. 43; Exs. C-5, C-8). Ms.

¹ While Mr. Tyler stated that the subject sales transaction took place after 5:00 p.m. on July 2, 2004, the sales invoice reflects that it was printed at 4:02 p.m. (45-47, 72, 74-75, 77, 94-95; Ex. C-9).

Schweitzer and Mr. Diller remained outside Licensee's premises during the course of the transaction. (N.T. 50).

The subject purchase was made after Mr. Tyler completed his work for Licensee for the day, it had nothing to do with his work for Licensee, and it was made without the knowledge of any of Licensee's employees that the order was placed for a friend in the name of Sherman's Creek Inn. (N.T. 49-50, 63, 83; Ex. C-8).

Mr. Tyler's pay from Licensee is based partially on commission and partially on salary. (N.T. 35). His sales volume per month is approximately one thousand five hundred (1,500) barrels. (N.T. 53). If he experienced any financial benefit from this sale to Mr. Diller and Ms. Schweitzer, it would have been about one dollar (\$1.00). (N.T. 53).

According to Licensee's president, Frank Sourbeer, it is not Licensee's policy to allow employees to purchase alcoholic beverages using different licensees' names. (N.T. 61-62). Mr. Sourbeer and Licensee's Vice President of Financial and Information Systems, James Waechter, stated that Mr. Tyler was not authorized to make the subject purchase for Mr. Diller and Ms. Schweitzer on July 2, 2004. (N.T. 63, 78-80).

Mr. Waechter became aware of the subject purchase when the check used to make the purchase bounced. (N.T. 83). The check was forwarded to the Bureau by Licensee. (N.T. 10, 23; Ex. C-4). When Licensee determined that Sherman's Creek Inn was not involved in the transaction, Licensee clarified the situation in a letter to the Bureau. (N.T. 85-86; Ex. C-6). Licensee contends that this situation occurred because Mr. Tyler lied to Licensee. (N.T. 90-91).

The Bureau charged that Licensee, by its servants, agents or employees, falsified records covering the operation of the licensed business on July 2, 2004, in violation of section 493(12) of the Liquor Code. Upon review of the facts and arguments presented by both Licensee and the Bureau, the Board finds that there is sufficient evidence to establish that a violation of section 493(12) of the Liquor Code occurred.

The Bureau has proven the essential elements of the charge by a preponderance of the evidence. Specifically, Mr. Tyler admitted that he was employed as a sales representative of the Licensee and as such, was acting as an agent of Licensee while involved in the sales transaction occurring on July 2, 2004. The violation occurred at the moment Mr. Tyler misrepresented the exact nature of the transaction and acquiesced to the use of the name of

the Sherman's Creek Inn on the sales invoice. It is of little significance whether or not Licensee's warehouseman or any other of Licensee's employees knew of the false nature of the information given to him by Mr. Tyler, or whether or not Mr. Tyler acted alone in making such representations. Mr. Tyler's actions orchestrated the chain of events which ultimately resulted in the creation of a false document.

Once the Bureau shows proof by a clear preponderance of the evidence that a violation of the Liquor Code or the Board's Regulations has occurred, a licensee is held strictly liable. TLK, Inc. v. Pennsylvania Liquor Control Bd., 518 Pa. 500, 544 A.2d 931 (1988). Accordingly, Licensee can be held strictly liable for the actions of its sales agent. While the Bureau was perhaps too crafty in wording the violation as it did, the Board finds that the decision of the ALJ in dismissing the citation was not based on substantial evidence.

The decision of the ALJ is, therefore, reversed, and this matter is remanded to the ALJ for imposition of an appropriate penalty.

ORDER

The appeal of the Bureau is sustained.

The decision of the ALJ is reversed. This matter is remanded to the ALJ for purposes of determining a penalty that is consistent with this Opinion.

Board Secretary