

Mailing Date: November 29, 2005

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-0748
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :
: vs. :
: :
SUPER SUPREME CORP. : License No. R-7747
5708-10 Germantown Avenue :
Second Floor :
Philadelphia, PA 19144-2137 :

Counsel for Licensee: Donald M. Moser, Esquire
235 South Eighth Street
Philadelphia, PA 19106-3519

Counsel for Bureau: James E. Dailey, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

OPINION

Super Supreme Corp. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), wherein the ALJ sustained the citation, imposed a two thousand dollar (\$2,000.00) fine, suspended Licensee's license for one (1) day, and assessed five (5) points against the license.

The citation charged Licensee with violation of sections 406(a)(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(2), 4-493(16)] in that, on March 5, 2005, Licensee, by its servants, agents or employees, sold, furnished, and/or gave 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. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused her discretion, or if her 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, Licensee argues that the ALJ abused her discretion and committed an error of law in that fine is unduly harsh and the point system established by Act 239 of 2004 is unconstitutional.

There is no dispute concerning the facts of this case.¹ On Saturday, March 5, 2005, at approximately 2:15 a.m., Philadelphia Police Officer Fairbanks entered the licensed premises. (Ex. B-3). The officer ordered and was served one (1) Heineken beer from a bartender. (Ex. B-3). Additionally, the officer witnessed several bartenders rendering service to approximately one hundred fifty (150) patrons in a second floor area. (Ex. B-3)

At approximately 2:30 a.m. on Saturday, March 5, 2005. E. Mullen, an officer with the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) entered the licensed premises as part of a pre-arranged detail of officers called in by Officer Fairbanks. (Ex. B-3). Officer Mullen witnessed bartenders rendering service to approximately one hundred fifty (150) patrons in the second floor bar area. (Ex. B-3). He observed that the patrons were in possession of alcoholic beverages and were dancing to hip-hop music. (Ex. B-3). Officer Mullen conducted a routine inspection of the licensed premises and provided Mr. Bentley, Licensee’s sole corporate officer, with a signed copy of the report. (Ex. B-3).

¹ At the hearing before the ALJ, Licensee stipulated to the facts underlying the citation and admitted to violations; however, Licensee preserved all constitutional issues regarding the point system.

Licensee's prior citation record reflects that Licensee has received four (4) citations since 1999. (Ex. B-3). Penalties for those violations ranged from five hundred dollars (\$500.00) to three thousand dollars (\$3,000.00), and included a three (3)-day suspension of its license. (Ex. B-3). Two (2)² of the prior citations contained counts for sales by Licensee between 2:00 a.m. and 7:00 a.m. (Ex. B-3).

Under Section 471 of the Liquor Code, the Board has no authority to alter a penalty if it is within the statutory guidelines of the Liquor Code. [47 P.S. § 4-471]. Section 471 of the Liquor Code [47 P.S. § 4-471] proscribes the penalty for a violation of section 493(16) as license suspension or revocation and/or a fine of not less than one thousand dollars (\$1,000.00) or more than five thousand dollars (\$5,000.00). The ALJ in the instant case imposed a two thousand dollar (\$2,000.00) fine and a one (1)-day suspension of Licensee's license. The penalty is within the statutory range set forth in Liquor Code section 471. Because the Board has no authority to alter the penalty imposed by the ALJ, the decision of the ALJ is affirmed.

² For one (1) of the two (2) citations, the ALJ dismissed the charge of sales by Licensee between 2:00 a.m. and 7:00 a.m. (Ex. B-3).

Licensee's second contention raised on appeal is that Act 239 of 2004 is unconstitutional. The Board is without authority to rule on the constitutionality of its enabling legislation. Bunch v. Bd. Of Auctioneer Examiners, 620 A.2d 578 (Pa. Cmwlth. 1993). Under Liquor Code Section 479(b)(4), an ALJ has discretion to assign five (5) to ten (10) points, depending upon the circumstances of the citation for violations of section 493(16) as it "relates to furnishing liquor at unlawful hours." [47 P.S. § 4-479(b)(4)]. The ALJ imposed five (5) points against Licensee's license in accordance with section 479(b)(4) [47 P.S. § 4-479(b)(4)]. Because the Board has no authority to rule on whether Act 239 of 2004 is constitutional, the decision of the ALJ is affirmed.

Because no error of law was committed by the ALJ and the record provides substantial evidence to support the decision of the ALJ, it is hereby affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee paid the fine of two thousand dollars (\$2,000.00) on November 16, 2005.

It is hereby ordered that Licensee's License No. R-7747 be suspended for a period of one (1) day, beginning at 7:00 a.m. on Monday, January 9, 2006, and ending at 7:00 a.m. on Tuesday, January 10, 2006. Licensee is directed on Monday, January 9, 2006, 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 outside the licensed premises, and to remove said license from the wall and place it in a secure location.

Licensee is authorized on Tuesday, January 10, 2006, at 7:00 a.m., to remove the placard of suspension and return the license to its original wall location.

It is further ordered that five (5) points be assessed against the record of Licensee, License No. R-7747, as required by section 479 of the Liquor Code [47 P.S. § 4-479].

Licensee must adhere to all other conditions set forth in the ALJ's Order dated September 27, 2005.

Board Secretary