

Mailing Date: March 21, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-0820
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

S. & B. RESTAURANT, INC. : License No. R-3050
t/a The Woodlands, An Inn :
1073 Route 315 :
Wilkes Barre, PA 18702-6926 :

Counsel for Licensee: Steven M. Greenwald, Esquire
664 Citizens Bank Center
8 West Market Street
Wilkes Barre, PA 18711

Counsel for Bureau: Craig A. Strong, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
8320 Schantz Road, Second Floor
Breinigsville, PA 18031

OPINION

S. & B. Restaurant, Inc. t/a The Woodland's, An Inn ("Licensee")
appealed from the Adjudication and Order of Administrative Law
Judge Daniel T. Flaherty ("ALJ"), wherein the ALJ sustained the citation as
to the December 3, 2004 date, imposed a one thousand two hundred and
fifty dollars (\$1,250.00) fine, and ordered Licensee's participation and

certification in the Board's Responsible Alcohol Management Program ("RAMPS") within ninety (90) days.

The citation charged that, on December 3 and 19, 2004, Licensee, by its servants, agents or employees, violated section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] by selling, furnishing and/or giving or permitting such sale, furnishing and/or giving of alcoholic beverages to one (1) visibly intoxicated male patron and one (1) visibly intoxicated female patron.¹

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).

¹ The ALJ dismissed the citation as to the date of December 19, 2004, and Licensee did not appeal that decision.

Licensee lists numerous contentions in support of its appeal. First, Licensee argues that the ALJ erred in not dismissing the citation in its entirety, in that a hearing was not held until March 22, 2006, more than fourteen (14) months after the investigation began, and more than thirteen (13) months after the incident in question, contrary to section 471 of the Liquor Code [47 P.S. § 4-471].

Licensee also argues that the ALJ committed an error of law or abused his discretion in not dismissing the citation based upon the credibility of the officer's testimony as to what factors triggered the investigation and why it began on November 1, 2004.

Licensee also argues that the ALJ committed an error of law and abused his discretion in imposing a one thousand two hundred fifty dollar (\$1,250.00) fine, in that Licensee is RAMP compliant and has not been cited and/or found to have any violations within the previous four (4) years.

Licensee further argues that the ALJ abused his discretion and committed an error of law, in that his decision was not based upon substantial evidence. The officer testified that he was not able to hear what the alleged visibly intoxicated person ordered, that there was no mention of the order of

alcohol, slurred speech or spillage of drinks, and no consideration was given to the presence of strobe lights at the licensed premises.

Licensee argues that the ALJ abused his discretion in crediting the officer's testimony that the alleged visibly intoxicated person staggered and took "stutter steps" in spite of the fact that he was holding onto a railing.

Licensee also argues that the ALJ abused his discretion and committed an error of law in finding that Licensee, by its agents, knew or should have known that the patron was visibly intoxicated prior to serving him a drink.

Lastly, Licensee argues that the ALJ abused his discretion in that the officer's testimony was equivocal, inconsistent, not credible and not sufficient to permit the ALJ to find, by a preponderance of the evidence, that the male patron was visibly intoxicated.

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

Terrance J. Higgs, Jr., an officer with the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), began his investigation of the licensed premises on November 1, 2004, based upon information obtained from Pennsylvania State Police INET sources. (N.T. 8-9). Officer Higgs visited the premises on December 3, 2004 at approximately 10:00 p.m. (N.T. 9). While in the section of the licensed premises known as "Club

Evolution,” Officer Higgs saw five (5) bartenders serving approximately two hundred (200) patrons. (N.T. 10, 38, 46).

Officer Higgs observed a male patron swaying as he stood on the dance floor near the right rear corner. (N.T. 11). The patron was holding onto a rail as he swayed, and he staggered and took stutter steps as he walked away from the railing. (N.T. 11-12). Officer Higgs opined that the patron was not swaying to the music. (N.T. 23-24). The patron went behind a curtain to use his cell phone and when he came out from behind the curtain he staggered, holding onto the railing as he made his way up to the bar. (N.T. 12, 21-22). Once at the bar, the patron leaned heavily on the bar and ordered a drink. (N.T. 12-13). One of Licensee’s bartenders served the patron a drink which included rum. (N.T. 12-13). Officer Higgs observed the patron for approximately twenty (20) minutes or more during his visit to the licensed premises on December 3, 2004. (N.T. 11, 26). In Officer Higgs’ opinion, the patron was visibly intoxicated. (N.T. 14). While there were flashing colored lights used at the premises, they did not affect his ability to perceive the patron’s walking. (N.T. 24-25).

The record in this matter reveals that the investigation in question began on November 1, 2004 and was completed on December 19, 2004. (N.T.

9; Ex. C-1). The citation in question was issued by the Bureau on May 2, 2005. (Ex. C-2). The citation hearing notice was sent by certified mail to the Licensee on October 21, 2005. (Admin. Notice).

Licensee's Director of Security and Alcohol Compliance Education for fifteen (15) years, Catherine Kaminski testified that she did not receive any incident reports from her staff on the date of December 3, 2004. (N.T. 37-38, 40-41, 46). Licensee's staff is trained to look for patrons who are staggering. (N.T. 52). Ms. Kaminski stated that Licensee requires that incident reports be completed when someone is refused service, or if they exhibit signs of visible intoxication. (N.T. 43-45).

Licensee's President and Chief Executive Officer ("CEO"), Gary Kornfeld, stated that Licensee has a combination of intelligent lights and "boomer" strobe lights. (N.T. 47-50). The strobe lights project an image in such a way that it is difficult to determine how quickly a person is moving or if they are in one specific area. (N.T. 50-51). The lights were at the premises on December 3, 2004. (N.T. 49-50). Mr. Kornfeld stated that the types of lights employed by Licensee make it impossible for someone to tell if a patron is staggering. (N.T. 51).

Board records indicate that Licensee undertook Owner-Manager Training under the Board's RAMP program on March 20, 2002. (Admin. Notice). Licensee has not otherwise participated in or been certified as having successfully completed the RAMP program. (Admin. Notice).

Licensee suggests in its appeal that the ALJ should have dismissed the citation in its entirety based upon the credibility of the Bureau's witness. However, matters of credibility are the sole prerogative of the fact finder and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pa. Public Utilities Comm'n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984).

Based upon a review of the evidence, the ALJ determined that the testimony offered by Officer Higgs was most credible regarding the December 3, 2004 visit to the licensed premises and, accordingly, the ALJ found that the patron was visibly intoxicated. While Licensee contends the ALJ reached his decision after determining whether or not the Licensee knew or should have known that the patron was intoxicated prior to being served, the Board does not agree. A licensee is responsible for the actions of its employees, servants and agents under section 493(1) of the Liquor Code [47 P.S. § 4-493(1)]. It is well established that, 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 strictly liable. TLK, Inc. v. Pennsylvania Liquor Control Bd., 518 Pa. 500, 544 A.2d 931 (1988).

Licensee's contention that the ALJ's fine is excessive in light of the fact that Licensee's staff was RAMP certified is without merit. Section 470(b) of the Liquor Code provides that licensees who are in compliance with the RAMP program and who are found to have provided alcohol to a visibly intoxicated patron shall have their fine reduced from a range of between one thousand dollars (\$1,000.00) and five thousand dollars (\$5,000.00) to a range between fifty dollars (\$50.00) and one thousand dollars (\$1,000.00). [47 P.S. § 4-470(b)].

In order to be considered "in compliance" with the Board's RAMP provisions, at least fifty percent (50%) of Licensee's alcohol service personnel must be certified as having successfully completed server training, its owner or manager must be certified as having successfully completed server training, all of its new employees must have undergone new employee orientation, and it must have posted appropriate responsible alcohol service signage on the licensed premises. [47 P.S. § 4-471.1(d)]. RAMP certifications are valid for only two (2) years. [47 P.S. § 4-471.1(f)].

Licensee presented no documentation relative to, and the Board has no record of its successful completion and certification in, the Board's RAMP program under Liquor Code section 471.1 [47 P.S. § 4-471.1], such as would entitle it to a reduced penalty under Liquor Code section 470(b) [47 P.S. § 4-470(b)]. Certification for the Owner-Manager Training Licensee received in 2002 was expired as of March 20, 2004. The offense upon which the third count of the citation is based occurred on October 1, 2004. Therefore, the penalty imposed by the ALJ was proper in this instance.

Licensee also contends that the ALJ erred in not dismissing the citation, whereas the hearing was not held until March 22, 2006, more than fourteen (14) months after the investigation began and more than thirteen (13) months after the incident in question. Licensee further contends such actions prejudiced the Licensee and are contrary to section 471 of the Liquor Code [47 P.S. § 4-471] and contrary to Licensee's due process rights. Pursuant to the Liquor Code, administrative prosecutions against liquor licenses must be initiated by the Bureau within one (1) year of the violation. [47 P.S. § 4-471(a)]. The record in this matter reveals that the investigation in question began on November 1, 2004 and was completed on December 19, 2004. The citation in question was issued by the Bureau on May 2, 2005. The

citation hearing notice was sent by certified mail to the Licensee on October 21, 2005. Accordingly, Licensee was duly notified within five (5) months of the violation, in compliance with section 471 of the Liquor Code.

With respect to the constitutional questions raised by Licensee, the Board is unable to address these assertions, as an administrative agency has no jurisdiction to consider a challenge to the validity of the statutes or regulations which enable it. Smolow v. Com., Dept. of Revenue, 419 Pa. Cmwlth. 327, 547 A.2d 478, 481 (1988); Feingold v. Com., State Board of Chiropractic, 130 Pa. Cmwlth. 602, 568 A.2d 1365 (1990). The Board notes, however, that Liquor Code section 493(1) has been found to pass constitutional muster. In Re Tahiti Bar, Inc., 395 Pa. 355, 150 A.2d 112 (1959).

Based upon the foregoing, the ALJ's decision in the matter is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee paid the fine in the amount of one thousand two hundred and fifty dollars (\$1,250.00) on February 2, 2007.

Licensee must adhere to all conditions set forth in the ALJ's Order dated January 9, 2007.

Board Secretary