

Mailing Date: May 4, 2006

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-0855
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

78 H & N ENTERPRISES, INC. : License No. R-4242
202½ – 204½ South 43rd Street :
and 4302 Walnut Street :
Philadelphia, PA 19104-2936 :

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OPINION

78 H & N Enterprises, Inc. (“Licensee”) appeals from the Adjudication
and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein

the ALJ sustained the first count of the citation, and sustained the second count of the citation in reference to one (1) male minor frequenting.¹ The ALJ imposed an aggregate penalty of a one thousand five hundred dollar (\$1,500.00) fine, the assessment of ten (10) points against Licensee's record, and ordered compliance with Liquor Code section 471.1, pertaining to responsible alcohol management.

The first count of the citation charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)], in that, on February 10, 2005, and on divers other occasions within the past year, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to two (2) male minors, twenty (20) years of age.

The second count of the citation charged Licensee with violating section 493(14) of the Liquor Code [47 P.S. § 4-493(14)], in that, on February 10, 2005, and on divers other occasions within the past year, Licensee, by its servants, agents or employees, permitted two (2) male minors, twenty (20) years of age, to frequent its licensed premises.

¹ The ALJ did not sustain the second count against Licensee with regard to the second minor frequenting.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal of 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 Pennsylvania 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. Worker’s 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 contends that the ALJ’s Findings of Fact one (1) and two (2) are not supported by substantial evidence. The ALJ’s first finding of fact provides:

1. On February 10, 2005, a young man who had been born on July 16, 1984, entered the licensed premises at about 10:15 p.m. He saw some friends of his seated at a table, so he joined them. One of them, an adult, had purchased a six-pack of bottled beer. This minor took one of the bottles and drank from it. His age was not questioned. During the preceding year, he had been to the premises on two other occasions, on one of which he also drank beer. (N.T. 11-18).

The ALJ's second finding of fact provides:

2. On February 10, 2005, a young man who had been born on July 31, 1984, entered the licensed premises, with the minor born July 16, 1984, at about 10:15 p.m. He also sat at the table on which the six-pack of bottled beer had been placed, and also took one of the bottles and drank from it. His age was not questioned. On a previous occasion, longer than a year earlier, this minor had given Licensee a privately-issued identification card falsely showing him to be an adult. Licensee's employee had photocopied this card and retained it (N.T. 21-25, Exhibit L-1).

The Board has reviewed the record, including the ALJ's Adjudication and Order, with Licensee's contention in mind, and has concluded that the ALJ's decision is supported by substantial evidence.

On February 10, 2005, Larry Redmond, an enforcement officer with the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), along with Officers Collins and Spera, visited the licensed premises in an undercover capacity. (N.T. 4-5). Upon arrival, Officer Redmond observed approximately seven (7) to ten (10) patrons on the premises and two (2) employees behind the counter, with no one attending

the door of the premises. (N.T. 5-7). As soon as Officer Redmond entered, he observed a youthful-appearing male patron sitting at a table, drinking a twelve-ounce (12 oz.) bottle of Labatt's beer. (N.T. 7, 10). Upon requesting identification from the patron, Officer Redmond was given a University of Pennsylvania identification card picturing the patron, which included the name Robert Leshner. (N.T. 8-9, 13). Mr. Leshner's date of birth is July 16, 1984; he was twenty (20) years old on February 10, 2005. (N.T. 8, 11, 13). Mr. Leshner was issued a citation by Officer Redmond for underage drinking. (N.T. 8).

That same evening, Officer Redmond observed another male patron at Mr. Leshner's table drinking a twelve-ounce (12 oz.) bottle of Labatt's beer. (N.T. 9-10). This patron was also cited, however, by a different enforcement officer. (N.T. 9-10).

Officer Redmond spoke with the owner of the licensed premises, who was behind the counter, regarding whether a minor identification card file was kept. (N.T. 9). The owner responded that such was not maintained; however, the owner provided that identification cards of a questionable nature were copied. (N.T. 10). There were no identification cards or copies

of such, nor was there an age declaration card found in Licensee's file, with reference to Mr. Leshner. (N.T. 10).

Mr. Leshner stated that he was present at the licensed premises on February 10, 2005, that he joined friends at a table, and that he drank Labatt's beer which was part of a six (6)-pack that was on the table. (N.T. 12-13). He sat fifteen (15) feet away from the counter where the employees, one of which was Licensee's president, were present at the counter. (N.T. 14). No one attempted to ascertain his age. (N.T. 14). Mr Leshner also described that, between February 10, 2004 and February 10, 2005, he had been in the licensed premises on two (2) prior occasions, during which he never presented any type of identification, and that, on one of the prior occasions, it was his belief that he consumed an alcoholic beverage. (N.T. 14, 15).

With regard to both February 10, 2005 and Mr. Leshner's prior visits to the licensed premises, another individual had purchased the alcoholic beverages he consumed. (N.T. 15, 16).

Jacob LaMay was present on the licensed premises with Mr. Leshner on February 10, 2005. (N.T. 18, 21). There was a six (6)-pack of Labatt's beer on the table at which they were seated and he drank one (1) beer from

the six-pack. (N.T. 22). His date of birth is July 31, 1984 and, on February 10, 2005, he was twenty (20) years of age. (N.T. 21). No one requested that he produce any identification, nor was he requested to sign anything in acknowledgement of his age. (N.T. 22-23). Mr. LaMay stated that he had previously been on the licensed premises, more than one year prior to February 10, 2005, at which time he signed an age verification card, had his false identification photocopied, and was eighteen (18) or nineteen (19) years of age at that time. (N.T. 23-26; Ex. L-1).

Licensee's president, Hou Hue, stated that his practice was to copy blank age verification cards and a patron's identification, with the patron required only to sign the age verification card. (N.T. 34, 35). Mr. Hue acknowledged watching Mr. LaMay sign an age verification card on an occasion prior to February 10, 2005 and he observed Mr. LaMay enter the licensed premises on February 10, 2005. (N.T. 29, 30; Ex. L-1). Mr. Hue stated he saw Mr. LaMay sit with another male, believed to be twenty-one (21) years old, and drink beer approximately two (2) weeks before February 10, 2005. (N.T. 31). Mr. Hue stated that he had served alcoholic beverages to Mr. LaMay prior to February 10, 2005. (N.T. 32).

Relative to the first count of the citation, section 493(1) of the Liquor Code provides that it shall be unlawful “[f]or any licensee or the board or any employe, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given,... to any minor... .” [47 P.S. § 4-493(1)].

In Pennsylvania, licensees are deemed to have permitted alcoholic beverages to have been furnished to a minor when they acquiesce by failing to prevent such from occurring. Pennsylvania Liquor Control Bd. v. Abraham, 541 A.2d 1161 (Pa. Cmwlth. 1988). In the instant case, both underage minors corroborated the enforcement officer’s observations, that they each drank a twelve (12)-ounce bottle of Labatt’s beer from a six (6)-pack which was located on the table at which the minors were seated on Licensee’s premises on February 10, 2005.

A licensee will have a defense against a charge of serving a minor if the licensee requires one of the following acceptable forms of identification as proof of age: (1) a valid photo driver’s license from any state; (2) a valid photo identification card used by any state; (3) a valid armed forces/military identification card; or (4) a valid passport or travel visa with a photo. [47

P.S. § 4-495(a)]. If the licensee obtains a valid form of identification and either (1) has the patron complete a Declaration of Age card, (2) photocopies or videotapes the identification, or (3) ensures the validity of the identification by scanning the identification card with a transaction scan device, and so long as the licensee acts in good faith, the licensee will not be held liable for serving a minor. [47 P.S. § 4-495(e),(f),(g)]. Declaration of Age cards must be filed alphabetically by a licensee, in a file box containing an alphabetical index, at or before the close of business on the day the form is executed. [47 P.S. § 4-495(c)].

In the instant matter it is clear that Mr. Leshner never completed a Declaration of Age card, nor presented any identification to Licensee before consuming beer on February 10, 2005. Therefore, Licensee cannot avail itself of the defense in section 495. With respect to Mr. LaMay, Licensee produced a photo copy of Mr. LaMay's Michigan photo identification card showing a birthdate of March 21, 1982. Licensee also had Mr. LaMay sign a Declaration of Age card (Form PLCB-931); however, Mr. LaMay did not complete the card. Mr. LaMay admitted in his testimony that the Michigan identification card was not valid. The ALJ in holding that Licensee violated

section 493(1) found that Licensee did not act in good faith and the Board concurs. Thus, Count One is sustained.

Relative to the second count of the citation, section 493(14) of the Liquor Code provides, in pertinent part, that:

[m]inors may only frequent licensed premises if: (a) they are accompanied by a parent; (b) they are accompanied by a legal guardian; (c) they are under proper supervision; (d) they are attending a social gathering; or (e) the hotel, restaurant or retail dispenser licensee has gross sales of food and non-alcoholic beverages equal to fifty per centum or more of its combined gross sale of both food and alcoholic beverages.

[47 P.S. § 4-493(14)].

The Pennsylvania Supreme Court has established that the term “frequenting” as used in section 493(14) of the Liquor Code means:

to visit often or to resort to habitually or to recur again and again on more than one or two visits...we do not mean to say that it must be found that the same minor or minors come to the premises habitually. But it must be established by a fair preponderance of specific evidence that, as a course of conduct, licensees permit minors to come on the premises.

Appeal of Speranza, 416 Pa. 348, 206 A.2d 292 (Pa. Cmwlth. 1965).

In the instant matter, both minors testified that they each had been in the licensed premises on prior occasions. Mr. Leshner testified that he had been on the licensed premises on two (2) prior occasions, and Mr. LaMay

testified that he was in the licensed premises previously, more than one (1) year prior to the date of February 10, 2005. Moreover, Mr. Hue testified that he had served Mr. LaMay alcoholic beverages prior to February 10, 2005.² As substantial evidence existed that Licensee allowed a minor to frequent its licensed premises on more than one (1) occasion in the year prior to February 10, 2005, Count Two is also sustained.

Based on the foregoing, the Board finds that the ALJ's adjudication is based upon substantial evidence, and is, therefore, affirmed.

² It is important to note that neither of these minors provided any testimony, and the record is devoid of any indication that the minors were on the licensed premises in accord with any of the exceptions permitting such, as found in section 493(14) of the Liquor Code. [47 P.S. § 4-493(14)].

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of fifteen hundred dollars (\$1,500.00).

It is hereby ordered that ten (10) points are hereby assessed against the record of Licensee for License No. R-4242.

It is further ordered that Licensee shall comply with the requirements set forth in Liquor Code section 471.1 [47 P.S. § 4-471.1] pertaining to Responsible Alcohol Management in the following manner. Licensee must receive Responsible Alcohol Management certification from the Board's Bureau of Alcohol Education within ninety (90) days after the mailing date of this Opinion and Order. Licensee must remain in compliance with the Responsible Alcohol Management certification requirements for a period of one (1) year from the date such certification is issued.

Failure to comply with this Order will be grounds for modification of the penalty and may also constitute grounds for issuance of a new citation as authorized by section 471(d) of the Liquor Code [47 P.S. § 4-471(d)].

Licensee must adhere to all other conditions set forth in the ALJ's
Order dated February 24, 2006.

Board Secretary