

Mailing Date: November 2, 2005

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-0995
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

HARRY O'S PUB, INC. : License No. R-16618
2153 South Hancock Street :
Philadelphia, PA 19148-3331 :

Counsel for Licensee: Ira B. Shrager, Esquire – On Appeal
350 South Smedley Street
Philadelphia, PA 19103

Counsel for Bureau: James E. Daily, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue, 3rd Floor
Philadelphia, PA 19142

OPINION

Harry O's Pub, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), wherein the ALJ sustained the citation, imposed a five hundred dollar (\$500.00) fine, required Licensee to verify that conditions at the licensed premises have been corrected, and assessed two (2) points pursuant to section 479 of the Liquor Code [47 P.S. § 4-479].

The first count of the citation charged in that, on April 8, 2005, Licensee's establishment was not a bona fide restaurant, in that it maintained insufficient food items, in violation of section 102 of the Liquor Code [47 P.S. § 1-102].

The second count of the citation charged that, on April 8, 2005, Licensee, by its servants, agents or employees, failed to display on the licensed premises documentary evidence that the premises meets all sanitary requirements for a public eating place, in violation of section 5.41 of the Board's Regulations [40 Pa. Code § 5.41].

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, Licensee contends that the ALJ abused his discretion in not granting a continuance and, by so doing, depriving Licensee of a hearing contrary to

the Due Process clause of the Constitutions of the United States and the Commonwealth of Pennsylvania. Licensee further contends that Act 239 of 2004 is unconstitutional.

A review of the record reveals that an administrative hearing was scheduled to take place on July 19, 2005, at 2:30 p.m. (Administrative Notice). Approximately two (2) hours before the hearing was to begin, the ALJ received a telephone call from a person identified as Dr. Laurence T. McKinney, M.D. (N.T. 4; Administrative Notice). Dr. McKinney represented to the ALJ that Ira Shrager, Licensee's counsel, was extremely ill, and that he needed a continuance of the subject hearing. (N.T. 4; Administrative Notice). The same explanation was given in a facsimile letter received by the ALJ at 2:10 p.m. on the same date.¹ (Administrative Notice). Upon review of the docket of the Office of the Administrative Law Judge ("OALJ"), as well as his own files, and finding no notice of appearance filed on behalf of Mr. Shrager, the ALJ allowed the matter to proceed ex-parte. (N.T. 4-5; Administrative Notice). At 2:50 p.m. on July 19, 2005, when the case was called, no one appeared on behalf of Licensee. (Administrative Notice). The Bureau proceeded to present the testimony of two (2) witnesses. (N.T. 5-16).

¹ Although the letter in question was not made part of the record, it was attached to the appeal documents submitted by Licensee.

With the hearing proceeding ex-parte, and no evidence having been presented by Licensee, the ALJ sustained the citation, imposed a fine in the amount of five hundred (\$500.00) dollars, required verification that the premises now has sufficient food, and assessed two (2) points pursuant to section 479 of the Liquor Code [47 P.S. § 4-479].

Title 40, Chapter 15 of the Pennsylvania Code contains regulations regarding both continuances and representation before an agency. Section 15.54 of the Board's Regulations provides that "no case may be continued without just cause...." [40 Pa. Code § 15.54(a)]. Section 15.22 of the Board's Regulations provides that "[r]epresentation shall be in accordance with 1 Pa. Code Chapter 31, Subchapter C (relating to representation before agency)." [40 Pa. Code § 15.22].

Title 1 of the Pennsylvania Code provides in section 31.24(b) that:

If an attorney appears before an agency head or a presiding officer in a representative capacity in a particular proceeding which involves a hearing or an opportunity for hearing, he shall file with the office of the agency a written notice of the appearance, which shall state his name, address and telephone number and the name and address of the person or persons on whose behalf he appears. Additional notice or other written communication required to be served on or furnished to a person may be sent to the attorney of record for the person at the stated address of the attorney.

[1 Pa. Code § 31.24(b)].

It is well settled that the power to grant or refuse a continuance is an inherent power of an administrative agency, and it is subject to reversal only upon a showing of an abuse of discretion. Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 602 A.2d 1300, 1305 (1992). In Hainsey, the Pennsylvania Supreme Court defined an abuse of discretion as “not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.” [Id., 602 A.2d at 1305].

In the instant case, it is clear that Licensee failed to comply with the directive set forth in section 15.52 of the Board’s Regulations. Further, the citation issued to Licensee clearly provided:

You have the right to retain legal counsel to represent you. If you do hire an attorney, he or she must file a Notice of Appearance with the Office of Administrative Law Judge, Brandywine Plaza, 221 Paxton Church Road, Harrisburg, Pennsylvania 17110-9661, and forward a copy to the Assistant Counsel at the address listed below in accordance with 1 Pa. Code Subchapter C. Delay in obtaining counsel is not reason for any continuance.

(Administrative Notice).

Licensee failed to make sure that the procedure set forth above was complied with in a timely manner. The doctor’s note faxed to the ALJ on the date of the

hearing cannot be construed as a proper entry of appearance, as it fails to include the relevant information necessary to meet the requirements set forth in section 31.24 of the Board's Regulations.

The ALJ looked to the docket of the OALJ and sought to determine if any other communication had been submitted by Attorney Shrager. Finding no documentation sufficient to constitute an official notice of appearance, the ALJ allowed the matter to be heard ex-parte. The Board, therefore, finds that the ALJ did not abuse his discretion by proceeding with the subject hearing under the circumstances.

Relative to Licensee's contention that Act 239 of 2004 is unconstitutional, the Board is without authority to rule on the constitutionality of its enabling legislation, or the constitutionality of its own regulations. Bunch v. Bd. of Auctioneer Examiners, 620 A.2d 578 (Pa. Cmwlth. 1993).

Because 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 is assessed two (2) points pursuant to section 479 of the Liquor Code [47 P.S. § 4-479].

Licensee paid the fine of five hundred dollars (\$500.00). Licensee shall submit verification, within twenty (20) days of the mailing date of this Order, that the premises now has sufficient food. Failure to meet these conditions will result in a suspension and/or revocation of the license.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated August 29, 2005.

Board Secretary