

Mailing Date: June 5, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-1076
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

BIG HEADS OF NEW BRITAIN, LLC : License No. R-5923
t/a Blue Dog Family Tavern :
4275 County Line Road :
Chalfont, PA 18914 :

Counsel for Licensee: Christopher Staub, Esquire
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Warminster, PA 18974

Counsel for Bureau: Roy Harkavy, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
8320 Schantz Road, Second Floor
Breinigsville, PA 18031

OPINION

Big Heads of New Britain, LLC t/a Blue Dog Family Tavern (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ sustained the citation and imposed a one thousand three hundred dollar (\$1,300.00) fine.

The citation in this matter consisted of three (3) counts. The first count of the citation charged that, on April 13, 2005, Licensee, by its servants, agents, or employees, violated section 5.32(a) of the Pennsylvania Liquor Control Board's ("Board") Regulations, [40 Pa. Code § 5.32(a)] by permitting the use on the inside of the licensed premises of a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The second count of the citation charged that, on April 13, 2005, and divers other occasions within the past year, 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 or giving of alcoholic beverages to four (4) female minors, twenty (20) years of age.

The third count of the citation charged that, on April 13, 2005, and divers other occasions within the past year, Licensee, by its servants, agents, or employees, violated section 493(14) of the Liquor Code [47 P.S. § 4-493(14)] by permitting four (4) female minors, twenty (20) years of age, to frequent its licensed premises.

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's conclusion that Licensee violated section 5.32(a) is not based on substantial evidence and/or is a *de minimis* violation under the circumstances, since Licensee had the only open business in the area at the time. Licensee also contends that the ALJ reached an improper conclusion concerning the alleged violations of sections 493(1) and 493(14) of the Liquor Code, in that the ALJ failed to infer a negative inference from the failure of a New Britain Township Police Department officer to respond to Licensee's subpoena. Licensee contends that the officer's refusal to appear, despite being subpoenaed, effectively thwarted

Licensee's ability to present an affirmative defense to the charges in the citation.

The record reveals that, on April 13, 2005, Gina Kepler, an officer of the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), entered Licensee's parking lot at about 11:20 p.m. (N.T. 5, 7). After parking in a space approximately twenty (20) feet from the door of the licensed premises, she heard music emanating from inside the premises. (N.T. 7). Upon entering the premises, she observed the same music heard outside being played inside through speakers by a disc jockey in front of a bay window. (N.T. 7-8).

The record further reveals that, on April 13, 2005, at approximately 11:40 p.m., Bureau Officer Bandy conducted a minors check at the licensed premises. (N.T. 23). He discovered minors on the licensed premises. (N.T. 23-25). A female minor, twenty (20) years of age, born on December 28, 1984, purchased a mixed alcoholic beverage from the bartender in the licensed premises. (N.T. 25-27, 29). Her age was not questioned. (N.T. 27). During the preceding year, she had visited the licensed premises eight (8) or nine (9) times, and drank alcohol on six (6) or seven (7) of those

occasions without question as to her age. (N.T. 27-28). The female minor was charged with underage drinking. (N.T. 32).

Also, on the same date, another female minor, twenty (20) years of age, born on November 19, 1984, entered the licensed premises. (N.T. 35). Her age was not questioned. (N.T. 36). During the preceding year, she had visited the licensed premises more than once, and drank alcohol on some of those occasions. (N.T. 36-37, 41). During her first or second visit, her age was questioned, and she presented an identification card on which the birth date had been changed to make her older than twenty-one (21). (N.T. 37). She pled guilty to possessing false identification. (N.T. 39-40).

Also on April 13, 2005, a young woman, twenty (20) years of age, born on June 5, 1984, entered the licensed premises. (N.T. 42). Her age was not questioned. (N.T. 43). During the preceding year, she had visited the licensed premises about six (6) times, and drank alcohol on two (2) or three (3) occasions. (N.T. 43-44). During one (1) visit, her age was questioned, and she presented an identification card on which the birth date had been changed to make her older than twenty-one (21). (N.T. 44). She pled guilty to possessing false identification. (N.T. 45-47).

On the same date, a fourth female minor, twenty (20) years of age, born on April 12, 1985, entered the licensed premises. (N.T. 48-49). Her age was not questioned. (N.T. 49). During the preceding year, she had visited the licensed premises ten (10) or twelve (12) times, and drank alcohol. (N.T. 50). She was charged with possessing false identification. (N.T. 55).

Robert Hyde was Licensee's General Manager for four and a half (4½) years, and was on duty on the evening of April 13, 2005. (N.T. 59). On Wednesday nights, Licensee features a disc jockey and Bacardi Girls. (N.T. 59-60). The majority of the crowd consists of people in their early twenties. (N.T. 60). Two (2) doormen were on duty, and they were to check identifications of everyone who came in. (N.T. 60, 63, 68). Mr. Hyde stated that it is Licensee's policy to give Declaration of Age Cards to out-of-state and questionable license holders. (N.T. 59-60, 67-68). Mr. Hyde saw Declaration of Age Cards being filled out on the evening in question, but did not know what happened to them after the police and Bureau Officers arrived. (N.T. 65-66). Licensee did not have an identification scanner on April 13, 2005. (N.T. 69).

Courtnee Grüss, a cocktail waitress employed by Licensee, was on duty on the evening of April 13, 2005. (N.T. 66, 71). She began her shift right before the police arrived. (N.T. 67). Ms. Grüss admitted that the four (4) underage females were on the licensed premises on the date in question; however, Ms. Grüss denies serving them or anyone else any alcohol before the police arrived. (N.T. 73, 75). As a cocktail waitress, she did not check identification because that was the responsibility of Licensee's doormen. (N.T. 71). A charge brought against Ms. Grüss for serving alcohol to minors was dropped. (N.T. 73-74).

Michael Ward, Licensee's cook and bouncer, was also employed on the premises on the evening in question. (N.T. 91). At the time of the Bureau inspection, Mr. Ward was helping out at the bar, as well as checking identifications, and making sure that there were no altercations. (N.T. 91-92). Mr. Ward stated that he was instructed to check identifications, make sure they looked legitimate and, anyone who was from out-of-state or who showed a questionable identification was asked to fill out a Declaration of Age Card. (N.T. 92, 95). On April 13, 2005, Mr. Ward issued one Declaration of Age Card to a person from New Jersey, but cannot recall whether he saw any other cards being issued. (N.T. 93). Mr. Ward does

not know what happened to cards that may have been completed on April 13, 2005. (N.T. 93).

Robert Scafidi, New Britain Township Police Chief, initiated the investigation which resulted in citation against Licensee at the request of the Bureau. (N.T. 76-77). He was asked by Licensee's counsel to investigate allegations that Officer Golembeski, a New Britain Police officer, invoked the Fifth Amendment during questioning in a prior citation matter against Licensee, and may have taken Declaration of Age Cards while on the licensed premises on April 13, 2005. (N.T. 77, 79-81, 88). After receiving the complaint regarding Officer Golembeski, Chief Scafidi ran it up the chain of command to the Township Manager and the Board of Supervisors and, to his knowledge, nothing came of it. (N.T. 88-89).

The ALJ's findings of fact relative to the loudspeaker charge are clearly supported by undisputed testimony in the record. Section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)] provides that:

[a] licensee may not use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard on the outside of the licensed premises.

Amplified music emanating from Licensee's premises was heard outside Licensee's premises on April 13, 2005. While the fact that Licensee is located in a strip shopping center that did not have any open businesses at the time of the alleged violation may have affected the penalty assessed by the ALJ, that factor does not change the fact that Licensee is strictly liable for violating the law on April 13, 2005. In the absence of evidence to refute the charge set forth in the first count of the citation, the Board finds that the ALJ's findings and conclusions relevant thereto are based upon substantial evidence.

Section 493(1) of the Liquor Code provides that it shall be unlawful "[f]or any licensee, ...or employee, servant or agent of such licensee . . . 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)]. Section 495 of the Liquor Code also provides that a licensee who has provided alcohol to a minor may, nonetheless, escape liability if the licensee required the minor to provide proper identification, and if the licensee acted in good faith. [47 P.S. § 4-495(e), (f)].

In the instant matter, Licensee contends that Officer Golembeski may have removed Declaration of Age Cards from the licensed premises on the evening in question. However, Officer Golembeski failed to appear before the ALJ, despite being subpoenaed to do so. Licensee further contends that the officer's failure to appear has thwarted its ability to present its affirmative defense under section 495. Licensee, without any supporting caselaw, suggests that, under these "unique and unusual circumstances," the burden should shift, and the alleged violations of sections 493(1) and 493(14) should be dismissed.

The record reveals that the ALJ heard Licensee's argument regarding its desire to question Officer Golembeski under oath. In response, the ALJ permitted a continuance of the case so as to permit additional evidence to be presented on that issue. The officer again failed to appear. Accordingly, the ALJ found that no competent evidence was presented in support of Licensee's allegation. The ALJ did however, find the testimony of the four (4) minor witnesses to be credible and adequate to fully support the charges in the second count. The Board agrees. None of Licensee's own witnesses acknowledged requesting a Declaration of Age Card from any of the four (4) minors found on the premises. Licensee's witnesses were either not sure if

any age cards were filled out on April 13, 2005, or admitted that at least one (1) of the minors may have been carded previously, but was not asked to fill out a Declaration of Age Card.

It is well-settled that matters of witness credibility are the sole prerogative of the ALJ and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n., 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984). In the instant case, the ALJ found the testimony of the minors to be most credible, and that decision shall not be overturned by the Board.

As to the third count of the citation, section 493(14) of the Liquor Code prohibits minors from frequenting licensed premises, except under certain conditions not at issue here. [47 P.S. §4-493(14)]. The ALJ found that the evidence supports the conclusion that three (3) minors frequented the premises in the year ending April 13, 2005. Licensee's employee, Michael Ward, admitted that at least one (1) minor "had been coming there prior... and he always carded them." Under the circumstances, there was substantial evidence to support the ALJ's findings relative to the third count of the citation.

As the ALJ based his decision of the credibility of the testimony of the minors, those findings shall not be disturbed.

The Board finds that the ALJ's decision is supported by substantial evidence and is without error of law.

The decision of the ALJ, therefore, is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of one thousand three hundred (\$1,300.00) dollars.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated March 8, 2007.

Board Secretary