

Mailing Date: June 20, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-1816  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

6643 GERMANTOWN, INC. : License No. E-211  
6643-45 Germantown Avenue :  
Philadelphia, PA 19119-2253 :

Counsel for Licensee: John J. McCreesh, III, Esquire  
McCreesh, McCreesh, McCreesh & Cannon  
7053 Terminal Square  
Upper Darby, PA 19082

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

OPINION

6643 Germantown, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), wherein the ALJ sustained the citation and imposed a two hundred fifty dollar (\$250.00) fine, and assessed two (2) points against the subject license.

The citation charged that Licensee violated section 102 of the Liquor Code [47 P.S. § 1-102] on August 4, 2005, in that the licensed premises was not a bona fide eating place because Licensee, by its servants, agents or employees, maintained insufficient seating.

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 contends that the ALJ's findings of fact were not supported by substantial evidence.

The record reveals that, on August 4, 2005, Brian Hendrzak, an enforcement officer with the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), arrived at the licensed premises at

approximately 4:30 p.m. (N.T. 5). Upon arrival, Officer Hendrzak observed several patrons in a large serving area consuming beer in a seating area containing twenty-two (22) chairs and four (4) tables. (N.T. 6-7, 12-13, 16). Officer Hendrzak observed an employee, John Hung, seated behind a wall with bullet-proof glass. (N.T. 6-7). After identifying himself to Mr. Hung, Officer Hendrzak was let into the area behind the glass partition, and observed that area to be used for food preparation and beer sales. (N.T. 8-9). Officer Hendrzak asked Mr. Hung to show him the licensed areas and was shown the first floor area. (N.T. 9). During the inspection, Officer Hendrzak asked to see the seating arrangements, and Mr. Hung pointed to the chairs in the front area with twenty-two (22) chairs at four (4) tables. (N.T. 10, 13,16).

Licensee's president, Adam Xu, stated that he was not at the premises when Officer Hendrzak arrived, but he had other seating in the eating area consisting of bench seating at a counter area which is three and one-half (3½) feet wide and sixteen (16) feet long. (N.T. 16-18). Mr. Xu stated that, in addition to the twenty-two (22) seats at the four (4) tables, the wooden benches, which are the same height as chairs, provide seating for eight (8) more people. (N.T. 17-19). Mr. Xu indicated that when he went to the

premises on the evening of August 4, 2005, the premises was set up with seating for a total of thirty (30) persons at tables and the counter. (N.T. 17-18).

Khum Lim, a cashier at the licensed premises since August of 2005, supported Mr. Xu's description of the seating in the eating area, indicating there were twenty-two (22) chairs at tables and seating for eight (8) patrons on benches. (N.T. 20).

Licensee argues that the ALJ's findings of fact were not supported by substantial evidence.

Section 102 of the Liquor Code [47 P.S. § 1-102] defines eating place as:

...a premise where food is regularly and customarily prepared and sold, having a total area of not less than three hundred square feet available to the public in one or more rooms, other than living quarters, and equipped with tables and chairs, including bar seats, accommodating thirty persons at one time.

Based upon review of the evidence presented, the ALJ determined that the testimony offered by the Bureau officer was most credible and, accordingly, the ALJ found that the licensed premises was not a bona fide eating place because it maintained insufficient seating on August 4, 2005.

It is well-settled law 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).

Officer Hendrzak testified that the only seating he observed at the premises on August 4, 2005 consisted of twenty-two (22) seats at four (4) tables. Accordingly, the Board finds that substantial evidence existed to support the ALJ's finding, that on August 4, 2005, the licensed premises was not a bona fide eating place in that Licensee, by its servants, agents or employees, maintained insufficient seating.

The ALJ's decision is, therefore, affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of two hundred fifty (\$250.00) dollars.

Two (2) points are hereby assessed against Licensee's license, pursuant to section 479(d)(9) of the Liquor Code. [47 P.S. § 4-479(d)(9)].

Licensee must adhere to all conditions set forth in the ALJ's Order dated April 11, 2007.

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Board Secretary