

Mailing Date: December 19, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-2397
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

BRUBAR, INC. : License No. R-15865
228-234 North 2nd Street :
Harrisburg, PA 17101-1422 :

Counsel for Licensee: Peter M. Good, Esquire
River Chase Office Center
4431 North Front Street
Harrisburg, PA 17110

Counsel for Bureau: Andrew J. Lovette, Esquire
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Bureau of Liquor Control Enforcement
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OPINION

Brubar, Inc. (“Licensee”) appealed from the Amended Order¹ of Administrative Law Judge Daniel T. Flaherty (“ALJ”), wherein the ALJ sustained the citation and imposed a one thousand two hundred fifty

¹ The ALJ’s Amended Order, mailed November 20, 2007, amended his original Order, mailed November 6, 2007, to include a mandatory suspension pursuant to Liquor Code section 471(c) [47 P.S. § 4-471(c)]. (Admin. Notice).

dollar (\$1,250.00) fine, mandatory RAMP training and a three (3)-day suspension.

The citation charged that, on April 13 and 14, 2005, 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 two (2) female minors,² nineteen (19) years of age.

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).

² The ALJ sustained the charge against Licensee relative to only one (1) of the female minors. (Admin. Notice).

On appeal, Licensee contends that the decision of the ALJ was not based upon substantial evidence. Licensee further contends that the decision of the ALJ was an error of law, in that the ALJ failed to correctly apply the good faith defense provided in section 495 of the Liquor Code [47 P.S. § 4-495]. Licensee also asserts that the decision of the ALJ was an error of law and abuse of discretion in that the evidence showed that Licensee acted in good faith to exclude minors from the premises, pursuant to Skoritowski v. Pennsylvania State Police, Bureau of Liquor Control Enforcement, 742 A.2d 704 (Pa. Cmwlth. 1999) and CSC Enterprises, Inc. v. Pennsylvania State Police, Bureau of Liquor Control Enforcement, 782 A.2d 57 (Pa. Cmwlth. 2001).

The record reveals that, on April 13, 2005, at approximately 11:00 p.m., a female minor, born September 29, 1985, entered the licensed premises with a friend. (N.T. 17-20, 30). They were met at the door by Licensee's employee, Matt Beaver, one of Licensee's employees, who the female minor knew from having worked with him in the past. (N.T. 20-21, 26, 29-31). Mr. Beaver escorted the females to Licensee's "VIP" section. (N.T. 20, 26, 29-31, 38). Once inside the VIP section, the female minor encountered some male patrons who purchased and supplied the female

minor and her friend with drinks containing Malibu Rum and pineapple juice. (N.T. 21-22, 31, 36). On the same evening, the female minor and her friend were also supplied with another mixed drink containing Malibu Rum and pineapple juice, as well as shots of alcohol from other patrons. (N.T. 22-23, 31). They departed the premises when it was closing at 2:00 a.m. (N.T. 24). At no time during the visit to the licensed premises on April 13-14, 2005, was the female minor or her friend questioned regarding their age, nor were they required to show identification. (N.T. 20-21, 23, 25). The female minor and her friend were stopped by a police officer after leaving Licensee's premises. (N.T. 24, 32). The female minor was charged with underage drinking. (N.T. 24).

Judd Goodman sets Licensee's policies and oversees management of the premises. (N.T. 43-45). He stated that every person is carded and, if employees receive an identification ("ID") that is suspect, it is cross-referenced using certain manuals. (N.T. 45). In addition, all out-of-state IDs are subject to an electronic swipe machine. (N.T. 45, 49). Most Pennsylvania IDs are not scanned because the personnel who do the carding are very familiar with those IDs, and are not so familiar with the out-of-state licenses. (N.T. 48-49). Licensee has three (3) persons who have been

personally trained by Mr. Goodman regarding the carding procedures. (N.T. 47). One of whom, Jeret Spears, was Licensee's doorman on the night of April 13, 2005. (N.T. 46-47, 63).

Matthew Beaver, licensee's bartender, was on duty on the night of April 13, 2005, and knew the female minor prior to that date because they had worked together at another licensed premises almost two (2) years earlier. (N.T. 52-53). Mr. Beaver is aware of the carding procedure of licensee, and recalls seeing the female minor and her friend at the licensed premises on April 13, 2005, but denies that he served either of them any alcohol. (N.T. 53-55).

Mr. Spears is familiar with the carding process instituted by Mr. Goodman. (N.T. 63-64). He stated that, late on a Wednesday night, he would have carded everyone. (N.T. 65). He stated that he does not recall seeing the female minor at the licensed premises on April 13, 2005. (N.T. 63-64). He further stated that Mr. Beaver was not at the door on April 13, 2005. (N.T. 65-66).

Section 493(1) of the Liquor Code provides that it shall be unlawful "[f]or any license . . ., or any 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(f) of the Liquor Code 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, a photograph, photocopy or other visual or video presentation of the ID was made, and if the licensee acted in good faith. [47 P.S. § 4-495(f)].³

A review of the facts supports a finding that, on April 13, 2005, and into April 14, 2005, Licensee either failed to question the female minor about her age, failed to require that she show acceptable identification, and/or failed to prevent others from furnishing alcohol to her. However, Licensee argues that it should escape liability because all of Licensee’s witnesses testified that everyone who enters the licensed premises is required to show identification.

The ALJ chose to resolve the obvious discrepancies between the testimony of the minor witness and Licensee’s witnesses in favor of the

³ This provision of the Liquor Code was amended after Skoritowski v. Pennsylvania State Police, Bureau of Liquor Control Enforcement, 742 A.2d 704 (Pa. Cmwlth. 1999) and CSC Enterprises, Inc. v. Pennsylvania State Police, Bureau of Liquor Control Enforcement, 782 A.2d 57 (Pa. Cmwlth. 2001), and codify the state of the law on this issue.

Bureau. In reaching this conclusion, the ALJ relied on his judgment regarding the demeanor of the witnesses.

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 female minor to be more credible and adequate to support the charge in the citation.

Furthermore, Licensee failed to produce either a scan device printout, a declaration of age card, or photocopy of an identification card showing the minor to be at least twenty-one (21) years of age. Licensee's policy of checking Pennsylvania IDs by hand, and using a swipe system only on out-of-state IDs, without any proof of the IDs being processed in some tangible way, puts Licensee at its own peril when faced with a citation for service or furnishing of alcohol to minors.

Because Licensee failed to provide proof that it requested identification from a minor who was furnished multiple alcoholic beverages while at the licensed premises on April 13 and April 14, 2005 in violation of the Liquor

Code, the Board finds that the ALJ's decision is supported by substantial evidence and shall not be disturbed.

The decision of the ALJ 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 one thousand two hundred fifty (\$1,250.00) dollars.

Licensee is required to complete the required RAMP training within ninety (90) days of the ALJ Adjudication and Order dated November 6, 2007.

Licensee must adhere to all conditions set forth in the ALJ's Orders dated November 6 and November 20, 2007.

Board Secretary