

Mailing Date: July 5, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-2791
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

PARTH CORPORATION : License No. E-4125
3218-20 Red Lion Road :
Philadelphia, PA 19114-1109 :
:

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OPINION

Parth Corporation (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ sustained the citation and imposed a fine of one thousand two hundred fifty dollars (\$1,250.00), assessed ten (10) points against the record of Licensee, and ordered Licensee’s participation and certification in the Pennsylvania Liquor

Control Board's ("Board") Responsible Alcohol Management Program ("RAMP") within ninety (90) days.

The first count of the citation charged that, on November 17, 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 one (1) male minor, nineteen (19) years of age.

The second count of the citation charged that, on November 17, 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 one male minor, nineteen (19) 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 decision of the ALJ was not based on substantial evidence. Specifically, Licensee contends that the ALJ erred in concluding that Licensee failed to act in good faith, and in finding that Licensee's witnesses were not credible. Licensee also asserts that the assessment of points pursuant to section 479 of the Liquor Code [47 P.S. § 4-479] (Act 239 of 2004) violates due process and the equal protection of laws, inasmuch as the Act only applies to retail licensees in Philadelphia County.

The record reveals that, on November 17, 2005, at approximately 8:30 p.m., a male minor, born on August 9, 1986, entered the licensed premises and was permitted to purchase a forty (40)-ounce bottle of Budweiser beer. (N.T. 5-7, 9, 13-14). His age was not questioned. (N.T. 14). During the preceding year, the subject male minor visited the licensed premises fifteen (15) times or more unaccompanied by a parent or guardian. (N.T. 15, 17). On some of the prior occasions, the minor's age was questioned and he produced an expired Pennsylvania driver's license belonging to an adult friend who looks similar to him. (N.T. 11-12, 15-17). The expired license would not go all the

way through a scanning device because it had a hole in the bottom corner of the license. (N.T. 16).

Shashikant Patel, Licensee's vice president, stated that Licensee uses a swipe machine to check identifications ("IDs") of youthful-appearing patrons. (N.T. 22). The swipe machine used by Licensee is the same machine used by it to verify age relative to tobacco and lottery purchases. (N.T. 34). The machine does not produce a printout or record of the ID; it only indicates the cardholder's age. (N.T. 28-29).

Mr. Patel recalls the subject male minor being at the licensed premises on various other occasions and recalls swiping his ID. (N.T. 22-23, 25-26). Mr. Patel believes he personally scanned the minor's ID, but does not believe that it was expired. (N.T. 23, 25-26). Mr. Patel stated that if a customer comes to the store three (3) or more times and they know he is "okay," the customer is no longer asked for ID. (N.T. 34). On June 22, 2006, Licensee passed an age compliance check conducted by the Bureau. (N.T. 24-25; Ex. L-1).

Michael Catinella, Licensee's deli manager and cashier, was employed at the premises on the evening in question. (N.T. 22-36). Mr. Catinella stated that Licensee's policy is to card all youthful-looking patrons; to swipe their cards

and serve them. (N.T. 36). Mr. Catinella recalls seeing the minor on various occasions at the premises, and recalls swiping his card. (N.T. 37-38).

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 and if the licensee acted in good faith. [47 P.S. § 4-495(f)].

A review of the facts supports a finding that, on November 17, 2005, and numerous other dates, Licensee either failed to question the male minor about his age and/or failed to establish that the minor’s identification was valid. However, Licensee argues that it should escape liability because, whereas the ALJ concluded that Licensee failed to act in good faith because the identification card produced by the minor and examined by Licensee was an expired driver’s license, the driver’s license produced was still valid as proof of age.

While Licensee suggests that a license owned by another individual, showing that individual’s photo and evidencing a hole indicating that it is

expired, should be deemed valid, the Board cannot agree. The Merriam-Webster Online Dictionary defines “valid” as “having legal efficacy or force; especially: executed with the proper legal authority and formalities.” [Merriam-Webster Online Dictionary, www.m-w.com/dictionary/valid]. The dictionary defines “expire” to mean “to come to an end.” [Merriam-Webster Online Dictionary, www.m-w.com/dictionary/expire]. In light of the definitions set forth above, it is reasonable to conclude that an expired Pennsylvania driver’s license cannot be deemed valid because, once expired, it is no longer effective as a legal document.

Licensee further asserts that the mere fact that a transaction scan device was used to determine the validity of the proof of age card showed good faith on its part. The ALJ chose to resolve the obvious discrepancies between the testimony of the minor witness and Licensee’s witnesses in favor of the Bureau. In reaching this conclusion, the ALJ relied on his judgment on 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 male minor to be more credible and adequate to support the charges in the citation.

Furthermore, Licensee was unable 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 using a swipe system which produces no record of the age check or the dates in which such checks occurred puts Licensee at its own peril when underage patrons are found on the premises.

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 589 (Pa. Cmwlth. 1993).

Because Licensee failed to provide proof that it requested identification from a minor who purchased beer at the premises on November 17, 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 has completed the required RAMP training, and is now certified.

It is ordered that ten (10) points are hereby assessed against the record of Licensee pursuant to 40 Pa. Code § 3.122(d).

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

Board Secretary