

Mailing Date: November 13, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-0339
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

CONROY CATERING AT GLEN : License No. R-7915
FOERD, INC. :
5001 Grant Avenue :
Philadelphia, PA 19114-3199 :

Counsel for Licensee: Peter J. Mooney, Esquire
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Counsel for Bureau: James E. Dailey, Esquire
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OPINION

Conroy Catering at Glen Foerd, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), wherein the ALJ sustained the citation and imposed a five hundred dollar (\$500.00) fine.

The citation charged that on May 27, 29, June 11, September 10, October 1, 15, 22, November 5, December 17, 31, 2005, and January 1, 2006, 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 other entertainment, or the advertisement thereof, could be heard outside.

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 raises a list of objections to the ALJ's Adjudication. Specifically, Licensee contends that the Pennsylvania Liquor

Code does not extend its protection to residents of the state of New Jersey, and that the ALJ lacks statutory power to sanction a noise violation which affects a resident of a neighboring state. Licensee also contends that it is not subject to the Board's Regulations regarding amplified music pursuant to Act 26 of 2006, which should be applied retroactively. Licensee further contends that, due to its substantial investment in a conservatory on its grounds, which includes sound insulation, the citation has become moot. Licensee also asserts that the ALJ lacked evidence that the music allegedly heard by the complaining witness was produced by a loudspeaker or similar device, as required by section 5.32(a) of the Board's Regulations, that the ALJ lacked substantial evidence that the music allegedly heard by the complaining witness emanated from Licensee's premises, the ALJ lacked evidence that Licensee caused any meaningful disturbance, and that the ALJ lacked substantial evidence that alcohol was being served at the times of the alleged disturbances. Lastly, Licensee contends the ALJ committed an error of law and abused his discretion in rendering the Adjudication, and that his decision was not based on substantial evidence.

An examination of the record reveals that Michael Templeton resides at 621 Delaware Avenue, Wilmington, New Jersey, approximately six thousand

(6,000) feet across the Delaware River from the licensed premises. (N.T. 4-6). Mr. Templeton stated that during the period May, 2005 through January, 2006, he experienced continuing problems of loud party noise emanating from Licensee's premises, especially on weekends. (N.T. 5-6). Mr. Templeton could hear recorded music, live band music, and public address announcements, usually beginning around 8:30 p.m. and continuing until approximately 1:00 a.m. (N.T. 6). During the period in question, Mr. Templeton kept a record of observations he made from his home of activities taking place at the licensed premises. (N.T. 6-7; Ex. B-3). He could see the noise came from Licensee's premises by the flash bulbs, strobe lights, disco ball, colored lights, people in formal attire, wedding parties in the parking lot, etc. (N.T. 6). There was no such activity in any other nearby place. (N.T. 8). On most occasions, he could identify the exact songs being played. (N.T. 8-12; Ex. B-3). Mr. Templeton's problem with music or loud noise began in 2001 and he has complained to both Licensee and the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") over the years. (N.T. 9-12). He has also complained to a multitude of other entities. (N.T. 16-18).

On or about January 17, 2006, Julie Kohler, a Bureau agent, did receive, via e-mail from Jennifer Berwick, Licensee's Event Coordinator, a detailed log of events occurring at the licensed premises during the period May 27, 2005, through December 31, 2005. (N.T. 22-23; Ex. B-5). The information provided to Officer Kohler confirms that Licensee held wedding parties at its licensed premises on May 27, 29, June 11, September 10, October 1, 15, 22, December 7, 31, 2005 and January 1, 2006, and on each occasion entertainment was provided by either a disc jockey or a band. (N.T. 23, 26; Ex. B-5).

Bureau Officer Cooper drove to the licensed premises on November 5, 2005 about 9:15 p.m. (N.T. 27). Officer Cooper could hear amplified music and people yelling and cheering. (N.T. 28-31). Officer Cooper did not go to the New Jersey side of the river. (N.T. 32).

Although represented by legal counsel at the hearing before the ALJ on February 7, 2007, Licensee chose not to present any witnesses. (N.T. 34).

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.

Notwithstanding the fact that Bureau officers did not actually witness the source of the noise complained of by Mr. Templeton, the evidence in its entirety does support a violation. Licensee's own record information as set forth in Ms. Berwick's e-mail confirms that there were events catered at the licensed premises on May 27, 29, June 11, September 10, October 1, 15, 22, November 5, December 17, 31, 2005, and January 1, 2006. The events calendar together with the detailed observations recorded by Mr. Templeton and established by testimony are undisputed facts that constitute substantial evidence in support of a violation of section 5.32(a) of the Board's Regulations.

As the trier of fact, the ALJ determines the credibility of witnesses and their testimony. Based upon review of the evidence presented, the ALJ determined the testimony of Mr. Templeton to be credible.

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). The Board is in agreement with the ALJ's decision regarding the weight given to the testimony of Mr. Templeton and the Bureau's Exhibit B-5.

Relevant to Licensee's specific contention that the Pennsylvania Liquor Code does not extend protection to residents of New Jersey, the Board finds Licensee's argument to be without merit. While recognizing the novel jurisdictional issue initially raised by Licensee in relation to prior similar citations, i.e., Citation No. 03-2084 and 04-2105, the Board deems that the same outcome must result.

Section 104 of the Liquor Code states in part:

This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth and . . . all of the provisions of this act shall be liberally construed for the accomplishment of this purpose.

[47 P.S. § 1-104].

The fact that the music was heard in New Jersey by Mr. Templeton on the May, June, September, October, November and December 2005, and January 2006 dates does not negate the fact that music was heard outside a

licensed premises in Pennsylvania; it only demonstrates the severity of the noise level of the music.

Relative to Licensee's specific contention that the ALJ lacked evidence that Licensee caused any meaningful disturbance, it is not the Bureau's burden to demonstrate that Licensee's music or entertainment reached a certain noise level or disturbance level. The Bureau only needs to prove that amplified noise was heard "outside" of the premises; there is no requirement that anyone be disturbed. Hude v. Commonwealth, 423 A.2d 15 (Pa. Cmwlth. 1980); In re: Concord Ranch, Inc. d/b/a Encore Theater & Restaurant & Pulsations Nightclub, 134 Pa. Cmwlth. Ct. 131; 578 A.2d 1339 (1990).

Licensee also contends that it is not subject to the Board's Regulations regarding amplified music, pursuant to language in Act 26 of 2006 which states:

Notwithstanding any other provision of law to the contrary, a restaurant liquor license located on premises owned by a city of the first class, listed on the National Register of Historic Places and which contains a structure that is at least one hundred (100) years old shall not be subject to the Board's regulations regarding amplified music.

[47 P.S. § 4-493.1]. Act 26 was not signed into law until April 13, 2006, and it was not effective until June 12, 2006. The offenses in question all

occurred prior to these dates. Act 26 did not provide that its provisions should be applied retroactively. Further, Licensee's counsel stated on the record at the hearing before the ALJ that Act 26 was not an issue in the case as counsel was well aware that the events in question were prior to the effective date of the statute. Accordingly, Licensee's argument in this regard is completely without merit.

Licensee also contends that due to Licensee's substantial investment in a conservatory containing sound insulation on the grounds of the licensed business, the citation in question has become moot. Whether or not the newly-erected conservatory functions to insulate the sound emanating from the entertainment at the licensed premises is of no consequence to the citation at issue. Licensee has failed to produce any evidence in support of its contention and, therefore, the Board shall not give any weight to this assertion.

Relative to Licensee's contention that the ALJ lacked substantial evidence that alcohol was being served at the times of the alleged disturbances, it is not a specific requirement of the Board's Regulations that alcohol must be served during the period when Licensee provided music or entertainment. Accordingly, in the absence of evidence to refute the charges

set forth in the citation, the Board must find that the ALJ's findings and conclusions are based upon substantial evidence.

Based upon the foregoing, the decision of the ALJ 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 five hundred (\$500.00) dollars.

Licensee must adhere to all conditions set forth in the ALJ's Orders in this matter.

Board Secretary