

Mailing Date: April 1, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 06-0924
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
RAY-AMATO, INC., t/a	:	License No. R-15992
STICK'S	:	
8900 WEST CHESTER PIKE	:	
UPPER DARBY, PA 19082	:	

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**OPINION**

Ray-Amato, Inc. t/a Stick's ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), wherein the ALJ sustained the citation, imposed an aggregate fine in the amount of four thousand three hundred fifty dollars (\$4,350.00) and suspended the subject

license for four (4) days.<sup>1</sup> Contemporaneous with its present appeal, Licensee filed an Application for Supersedeas.

The citation in the present matter contained eleven (11) separate counts; however, counts nine (9) and ten (10) are not raised by Licensee on appeal and accordingly will not be addressed in this opinion.

Count 1 of the citation charged Licensee with violation of section 493(21) of the Liquor Code [47 P.S. § 4-493(21)], and alleged that on September 21, 2005, Licensee, by its servants, agents or employes, refused Liquor Control Enforcement officers the right to inspect completely the entire licensed premises at a time during which the premises were open for the transaction of business or when patrons or guests or members were in that portion of the licensed premises wherein alcoholic beverages are sold.

The second count charged Licensee with violation of section 471 of the Liquor Code [47 P.S. § 4-471], and sections 2706 and 5101 of the Crimes Code [18 Pa.C.S.A. §§ 2706, 5101], in that on September 21, 2005, Licensee by its servants, agents or employes, interfered with a Liquor Control Enforcement Officer in the performance of his duties.

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<sup>1</sup> The ALJ further ordered that Licensee become compliant with the Responsible Alcohol Management provisions of section 471.1 of the Liquor Code within ninety (90) days of the mailing date of the Order.

Count three charged Licensee with violation of section 471 of the Liquor Code [47 P.S. §4-471], in that on September 21, 2005, the licensed establishment was operating in a noisy and/or disorderly manner.

The fourth count charged Licensee with violation of section 493(1) of the Liquor Code [47 P.S. § 4-493(1)], in that on September 21, 2005, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

The fifth count charged Licensee with violation of section 471 of the Liquor Code [47 P.S. § 4-471], in that on September 21, 2005, the corporate secretary was visibly intoxicated on the licensed premises.

Count six charged Licensee with violation of section 493(1) of the Liquor Code [47 P.S. § 4-493(1)], in that on September 21, 2005, and various other occasions within the past year, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) male minor, twenty (20) years of age.

Count seven charged Licensee with violation of section 493(14) of the Liquor Code [47 P.S. § 4-493(14)], in that on September 21, 2005, and various other occasions within the last year, Licensee, by its servants, agents or

employees, permitted one (1) male minor, twenty (20) years of age, to frequent the licensed premises.

Count eight charged Licensee with violation of section 5.32 of the Pennsylvania Liquor Control Board's ("Board") regulations [40 Pa.Code § 5.32(a)], in that on September 21, 2005, Licensee, by its servants, agents or employees, used or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

Count eleven charged Licensee with violation of section 467 of the Liquor Code [47 P.S. § 4-467], in that on September 21 and September 27, 2005, Licensee by its servants, agents or employees, failed to constantly and conspicuously expose Restaurant Liquor License No. R-15992 under transparent substance on the 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/her discretion, or if his/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).

Licensee's prolix appeal encompasses eight separate enumerated issues, many of which contain sub arguments regarding challenges to sufficiency of the evidence, assertions that the ALJ abused its discretion and that the findings and conclusions constituted errors of law. In reviewing Licensee's copious claims, the Board is reminded of the astute observation of Judge Aldisert of the United States Court of Appeals who stated:

I have said in open court that when I read [a]... brief that contains ten or twelve points, a presumption arises that there is no merit to *any* of them. I do not say that it is an irrebuttable presumption, but it is a presumption that reduces the effectiveness of ... advocacy. ...[A]dvocacy is measured by effectiveness, not loquaciousness. Commonwealth v. Leib, 588 A.2d 922, 925 (1991), quoting United States v. Hart, 693 F.2d 286, 287 n. 1 (3d Cir.1982) (emphasis in the original).

The Board has reviewed the certified record, including the Notes of Testimony from hearings held on March 18, 2008, and September 10, 2008, as well as the ALJ's Adjudication and Order, with Licensee's contentions in mind and has concluded that the ALJ's ruling is without error and is supported by substantial evidence. Accordingly, we affirm.

Primarily, Licensee alleges that insufficient evidence was presented to support the ALJ's Findings of Fact and Conclusions of Law. The burden of proof in a citation proceeding involving a violation of the Liquor Code is upon the Bureau to prove its case by a clear preponderance of the evidence. Omicron Enterprises, 68 Pa.Commonwealth Ct. 568, 449 A.2d 857 (1982). Review of the two (2) transcripts in this matter reveal that Bureau Liquor Control Enforcement Officer Karem Davis entered the licensed premises on September 21, 2005, at approximately 5:50 p.m., in order to conduct a routine inspection. The establishment was open and operating at the time, providing service to between eight (8) to (10) patrons. A single male bartender, later identified as Matthew Hally was tending the bar. At the time of his entry, Officer Davis was wearing street clothing, i.e., khaki pants and a polo shirt. Officer Davis approached the bar and identified himself as a Liquor Control Enforcement Officer and presented his badge to Mr. Hally. Officer Davis informed Hally that a routine inspection of the premises would be conducted and requested to see the establishment's liquor license, beer and liquor receipts and coil cleaning records. Hally presented the liquor license but informed Officer Davis that he did not know the whereabouts of the other

requested documents. Officer Davis asked to speak with a manager or the owner. (N.T. 3/18/08 at 9-12).

At this point, Hally directed Officer Davis to a male, later identified as William O'Malley, who had been sitting at the bar. Mr. O'Malley approached Officer Davis, who again identified himself as Liquor Control Enforcement Officer and presented his credentials. Officer Davis believed that O'Malley attempted to identify himself as the owner of the premises, however, O'Malley's speech was heavily slurred and his eyes were bloodshot. Officer Davis detected a strong odor of alcohol on O'Malley's breath and, based upon his observations, concluded that O'Malley was visibly intoxicated. Officer Davis informed Mr. O'Malley that he needed to review the liquor and beer invoices in order to complete his inspection. (N.T. 3/18/08 at 12-15).

After making repeated requests to Mr. O'Malley to obtain the necessary information, Officer Davis again turned to the bartender, Mr. Hally and requested that Hally contact the owner. Mr. Hally provided Officer Davis with the liquor license. While Officer Davis was recording information from the license, Mr. O'Malley, who was on the opposite side of the bar, began to speak in a loud voice, rant, rave and curse at Officer Davis. Mr. O'Malley reached out

and attempted to grab the license out of Officer Davis's hand. (N.T. 3/18/08 at 15-16).

A patron, later identified as Michael Brady, began yelling at Officer Davis saying, "you can't do this, who do you think you are?" Officer Davis turned to Mr. Brady and asked if he was the owner; to which Mr. Brady replied that he was not. Officer Davis then informed Mr. Brady that the matter did not concern him. At this point, approximately four (4) other patrons began shouting at Officer Davis, saying that he had "no need to treat people like that" and "there's no need to act that way." Mr. Brady and Mr. O'Malley continued their collective tirade. (N.T. 3/18/08 at 17-18, 39-40).

In response to an increasingly volatile situation, Officer Davis backed away from the bar and toward the door and telephoned for backup. While Officer Davis was on the phone, Mr. O'Malley handed the keys to Mr. Hally and instructed the bartender to lock all of the doors. Mr. O'Malley turned to Officer Davis and stated, "Let me see you get out." Mr. Hally took a couple of steps, but did not move toward the door. No one ever actually locked the doors. (N.T. 3/18/08 at 21-23, 25, 41).

Officer Davis testified that when the officer entered the premises the jukebox was playing at a normal volume. However, in an apparent effort to

further exacerbate the situation, Mr. O'Malley handed the bartender an unknown quantity of money and instructed him to increase the jukebox volume. The bartender, Mr. Hally, complied with Mr. O'Malley's instructions, came from behind the bar, put money into the jukebox, selected several different songs and played the music very loudly. The music was sufficiently loud so as to make it difficult for the party on the other end of the phone to hear, as Officer Davis placed his call. (N.T. 3/18/08 at 23).

During this commotion, Mr. O'Malley instructed the bartender to give him another shot. There were already shot glasses on the bar in front of Mr. O'Malley. The bartender served Mr. O'Malley, but the Officer was unable to determine the type of liquor that was given to him. (N.T. 3/18/08 at 28).

Officer John Bernesky responded to licensed premises along with other officers in order to assist Officer Davis. The officers parked about twenty-five (25) feet from the premises and as they approached were able to hear loud music and the sound of bass coming from within the bar. Upon entry, Officer Bernesky confirmed that the music he heard outside the establishment was emanating from within the premises. The officers identified themselves to the patrons and investigated who had been giving Officer Davis a problem. Officer Davis identified Mr. O'Malley. Officer Bernesky asked Mr. O'Malley to provide

identification and Mr. O'Malley refused. O'Malley's eyes were glassy and he appeared to be visibly intoxicated. As a result, Mr. O'Malley was handcuffed and cited for public drunkenness and disorderly conduct. (N.T. 3/18/08 at 55-57, 60).

Officer Ed Mullen was part of the detail of Bureau officers that responded to the licensed establishment to assist Officer Davis on September 21, 2005. When Officer Mullen arrived, he heard loud music emanating from the premises at distances of up to thirty (30) feet. Officer Mullen determined that the loud music was coming from the jukebox, which he then unplugged. Officer Mullen cited Mr. Hally for disorderly conduct based upon information that he obtained from Officer Davis. (N.T. 3/18/08 at 65-68).

After the detail of officers arrived, Officer Davis was able to complete the routine inspection. The inspection revealed that the premises did not keep beer and liquor invoices, financial records or coil cleaning records on the premises. Licensee did not have its liquor license displayed in a proper manner, having been located under the counter, behind some liquor bottles. (N.T. 3/18/08 at 26-29).

Officer Mullen returned to the premises at on the morning of September 27, 2005 to inspect the Licensee's business and financial records. At the time of

this return visit, the premises was open and operating. Once again, the records were not available, even though Officer Mullen had indicated during the September 21<sup>st</sup> visit that officers would return to the establishment in a week to examine at Licensee's invoices. (N.T. 3/18/08 at 69-71).

Officer Eric Gall accompanied Officer Mullen to the establishment on September 27, 2005. During this visit, the bartender on duty indicated that he knew nothing about the whereabouts of the records. (N.T. 3/18/08 at 74-76).

Gary Ford is currently a trooper with the Pennsylvania State Police; however, on September 21, 2005, he was employed as a Liquor Control Enforcement Officer with the Bureau. On September 21, 2005, Trooper Ford arrived at the licensed premises along with a detail of Bureau officers. He had been directed to the premises after Officer David reported that some of the patrons were unruly and that he was having a hard time conducting a routine inspection. The officers identified themselves immediately upon entering the premises. (N.T. 9/10/08 at 5-6).

While inside the establishment, Trooper Ford observed a youthful appearing male patron at the bar, consuming a twelve (12)-ounce bottle of Miller Lite beer. Trooper Ford requested identification from the male, who stated that he was twenty-one (21) years of age but did not have identification.

Trooper Ford contacted the District Office to have the suspect's information verified. At that point, the male stated that his identification was in his truck. Trooper Ford and the male proceeded to the truck and retrieved the male's identification. Trooper Ford was then able to identify the male as Robert Anhrendtsen, twenty years of age, born March 1, 1985. Based upon this information, Trooper Ford cited Anhrendtsen for underage drinking. The Licensee did not present Trooper Ford with a declaration of age card file, scanning device or photocopy of any identification card. (N.T. 9/10/08 at 7-16).

Testimony presented at the hearing established that on September 21, 2005, Anhrendtsen was served, in possession of, purchased and consumed alcoholic beverages inside the licensed premises. He was not accompanied by a parent or legal guardian. On September 21<sup>st</sup>, Anhrendtsen ordered and was served one twelve (12)-ounce bottle of Miller Lite beer. Anhrendtsen was not challenged relative to his age on that occasion nor was he required to sign a declaration of age card. He was in the establishment the night before, at which time he presented false identification. Anhrendtsen testified that he presented the false identification on various occasions when he visited the licensed premises and in fact on one occasion had this fake identification scanned but is unaware of the actual results of that scan. Anhrendtsen admitted to being

served, in possession of, and purchasing and consuming alcoholic beverages on at least fifteen (15) to twenty (20) occasions within the past year. (N.T. 9/10/08 at 17-20, 55).

Given the evidence presented, the Board finds that the Bureau has met its burden of proof by a clear preponderance of the evidence. While evidence presented by Licensee disputed the Bureau's version of events, Licensee's challenge ultimately amounts to nothing more than dissatisfaction with how the ALJ accorded evidentiary weight. Licensee invites the Board to engage in a reevaluation of witness credibility on a cold record. Such an invitation has been previously rejected by the Commonwealth Court, and is similarly rejected by the Board in regard to this case. See Thorpe v. Pub. Sch. Employee's Ret. Bd., 879 A.2d 341 (Pa. Cmwlth. 2005). 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 Liquor Control Enforcement Officers to be credible and adequate to support the charges in the present citation. The Board will not overturn the ALJ's opinion on nothing more than mere speculation and a suggestion that these

officers were not credible. Accordingly, the Board rejects Licensee's assertions as they concern to sufficiency of the evidence.

In addition to its sufficiency challenge, Licensee presents a number of general allegations that the ALJ erred as a matter of law in determining that Licensee committed the present offenses. The Board will address only those issues raised with sufficient specificity to merit discussion.

The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. It is well-settled that an abuse of discretion is not merely an error of judgment; however, if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused. Commonwealth v. Levanduski, 907 A.2d 3, 13-14 (Pa.Super. 2006)(*en banc*).

Licensee first suggests that the ALJ either misinterpreted or chose to ignore portions of testimony provided by Licensee's bartender, Matthew Hally. Specifically, Licensee cites a portion of the ALJ's Opinion which states:

Mr. Hally now claims that he turned up the jukebox in order to drown out the argument between the officer and the patrons. Turning up the jukebox made it difficult for the officer to place a

call for assistance. Mr. Hally minimized the role of Mr. O'Malley and claims that primarily the melee was between the customers and the Enforcement officer. He claims that after only saying a few words, Mr. O'Malley returned to his seat.

*December 22, 2008 Opinion of ALJ at p. 10 (emphasis added).*

Licensee suggests that the ALJ's use of the word "now" infers Mr. Hally provided prior testimony or statements that were subsequently changed or altered in some fashion. Licensee argues that the ALJ is required to make its decision solely on the evidence presented before the court and that while the ALJ has the right to determine credibility, the ALJ does not have the ability to create testimony. The Board summarily rejects this argument because there is nothing in the record or the ALJ's opinion to support Licensee's present claim. While the ALJ's word choice may have not been precise, there is clearly no reference made to any prior inconsistent statements and the Board will not engage in speculation regarding the ALJ's choice of words.

Licensee also claims that the ALJ committed an error of law and abused its discretion in determining that Licensee violated section 5101 of the Crimes Code [18 Pa.C.S.A. § 5101], because the criminal charges brought against Licensee were dismissed by the Court of Common Pleas. The Board finds this argument unpersuasive since it ignores the fact that an administrative

proceeding such as the one in this matter is civil, not criminal, in nature. As the Commonwealth Court has noted, it is well settled that:

resolution of criminal charges in favor of a criminal defendant does not bar subsequent civil or administrative proceedings concerning the same underlying misconduct.... [A] judgment or sentence in a criminal prosecution is neither a bar to a subsequent civil proceeding found on the same facts, nor is it proof of anything in such civil proceeding, except the mere fact of rendition. So, where the same acts or transactions constitute a crime and also give a right of action for damages or for a penalty, the acquittal of [a] defendant when tried for the criminal offense is no bar to the prosecution of the civil action against him, nor is it evidence of his innocence in such action....

Spence v. Pennsylvania Game Commission, 850 A.2d 821, 823 (Pa.Cmwlt. 2004). Thus, an acquittal in criminal proceedings has no preclusive effect in a subsequent administrative proceeding and Licensee's claim to the contrary is without merit. See VJR Bar Corporation v. Commonwealth, 390 A.2d 163 (Pa. 1978).

Next, Licensee contends that the ALJ erred in finding that Mr. O'Malley was intoxicated and that he was served alcohol while intoxicated. However, the ALJ's finding was based on the observations of Officers Davis and Bernesky and those observations are sufficient to establish both that Mr. O'Malley was visibly intoxicated and that he was provided alcohol while he was in that state.

Next, Licensee contends that the ALJ committed an error of law in determining that Licensee was prohibited from presenting a defense other than evidence produced in the nature of a signed declaration of age card. Once again, the ALJ's determination is not error. In Pennsylvania Liquor Control Board v. TJJR, 548 A.2d 390, 392 (Pa. 1988) the Pennsylvania Commonwealth Court clearly noted that:

When a statute defines the factual basis of an offense or entitlement, and then states a further factual element as a basis for an exception, the Pennsylvania Supreme Court has treated the exceptional element as a matter for affirmative defense, placing the burden on the defending party to show the affirmative, rather than subjecting the other party to proof of a negative proposition.

As result, proof of an affirmative defense rests with the Licensee. Licensees are only assured a defense to a citation issued under section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] if while acting in good faith, required execution of a declaration of age card, retained a photocopy or video presentation of the valid identification upon which they have relied, or used a card scanning device to test the validity of the identification presented. [47 P.S. § 4-495]. Contrary to Licensee's assertion, a minor's use of a convincing false identification does not afford Licensee greater protections. In the

present matter, Licensee failed to satisfy its burden of proof and accordingly its affirmative defense was properly rejected.

Next, Licensee asserts that the ALJ abused its discretion by “ignoring the fact that the noise was attempting to quell what was becoming a vocal disturbance between the unprofessional actions of the Enforcement officer engaging in confrontational actions with patrons.” The Board rejects this absurd and baseless argument. It is beyond logic that any responsible person would attempt to abate a tumultuous situation by adding more noise. As the ALJ properly noted, adding loud music only further exacerbated the situation.

Lastly, Licensee submits that the ALJ abused its discretion in finding that Licensee failed to properly expose its liquor license. There are few sections of the Liquor Code written with more clarity than section 467 [47 P.S. § 4-467] which states:

Every license issued under this article shall be constantly and conspicuously exposed under transparent substance on the licensed premises and no license shall authorize sales until this section has been complied with.

The evidence presented at hearing showed that the license was located behind the bar with bottles in front of it. Clearly, the license was not conspicuously exposed if it was behind the bar, obscured by bottles. As a

result, the Board finds that the ALJ's decision was not an abuse of discretion and shall not be disturbed. Accordingly, the decision of the ALJ is affirmed.<sup>2</sup>

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<sup>2</sup> Having decided to appeal on the merits, the Licensee's request for supersedeas is moot.

## **ORDER**

The decision of the ALJ in regard to Citation 06-0924 is affirmed.

The appeal of Licensee is denied.

The fine has not been paid.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-15992 be suspended for a period of four (4) days beginning at 7:00 a.m., Monday, April 6, 2009 and ending at 7:00 a.m. on Friday, April 10, 2009.

Licensee must adhere to all other conditions set forth in the ALJ's Order issued December 22, 2008.

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Board Secretary