

Mailing Date: August 20, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 06-1082
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
TIMMY'S CORPORATION,	:	License No. D-2069
5840 Harbison Avenue	:	
Philadelphia, PA 19135-4046	:	
	:	

Counsels for Licensee: Stewart J. Berger, Esquire
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Counsel for Bureau: Erik S. Shmukler, Esquire
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6901 Woodland Avenue, Third Floor
Philadelphia, PA 19142

OPINION

Timmy's Corporation ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), wherein the

ALJ sustained the citation and imposed a fine in the amount of two thousand five hundred dollar (\$2,500.00) fine.

The citation charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that, on April 1, 2006, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, eighteen (18) 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/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).

On appeal, the Licensee suggests that the ALJ's Findings of Fact were based upon inconsistent information and cannot support the citation.

The Board has reviewed the record, including the ALJ's Adjudication and Order, with Licensee's contention in mind, and has concluded that the ALJ's decision is supported by substantial evidence.

On the morning of April 1, 2006, a male minor, whose date of birth is April 16, 1987, while making his way to a Philadelphia Phillies game, stopped at Licensee's establishment. (N.T. 20-22, 42-43). Upon entering the premises, the minor retrieved from Licensee's cooler section two (2) thirty (30)-packs of beers, specifically, one (1) case each of Natural Ice and Milwaukee's Best. (N.T. 22, 34). After obtaining the beer, the minor made his way to the front of the establishment and handed cash to the clerk, which the clerk accepted. (N.T. 23, 29, 31). There was no evidence that the clerk ever checked the minor's identification or even asked if the minor possessed identification ("ID"). (Admin. Notice).

After purchasing the beer, the minor proceeded to the Phillies game, at which time he was stopped by the police. (N.T. 28). During his encounter with law enforcement, the minor was asked to provide his date of birth and

whether he was the individual that purchased the Natural Ice and/or Milwaukee's Best. (N.T. 28). The minor never presented any sales receipts for the beer purchase, nor did the police ask that he provide such receipts. (N.T. 28-32). At some point, the minor also provided a written statement to the police¹ in which in indicated that the total price paid for the beer was approximately \$34.82. (N.T 33, 36, 41). The minor later explained that this amount was merely an estimated price that he provided to the police, and that he was not exactly sure how much he really paid for the two (2) cases of beer. (N.T. 37).

Licensee's employee, Jian Liu, was working at Licenee's premises on April 1, 2006 at approximately 10:30 a.m. (N.T. 47-48). He stated that he did not remember the minor coming into the store on April 1, 2006, nor did he recognize the minor from any previous encounter. (N.T. 47-48). He stated that Licensee sold thirty (30)-packs of Milwaukee's Best on April 1, 2006 for \$12.49. (N.T. 48; Ex. L-1). He further stated that Licensee sold thirty (30)-packs of Natural Light on April 1, 2006 for \$12.49. (N.T. 49-

¹ This written statement rests at the heart of the Licensee's argument, however, for whatever reason, counsel for the Licensee chose not to have this document marked as an exhibit, or to have the document admitted into evidence and made part of the record. (Admin. Notice). As a result of this omission, the Board is without the benefit of examining this document.

50; Ex. L-2). He claimed that the total cost of a purchase like that claimed to have been made by the minor at Licensee's premises on April 1, 2006 would have been \$26.73. (N.T. 51).

Section 493(1) of the Liquor Code provides that it shall be unlawful “[f]or any licensee or the board or any employe, servant or agent of such licensee or of the board, or any other person, 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)].²

In its appeal, Licensee avers that the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) produced legal documents that the minor paid approximately \$34.92 for beer which he purchased and, since Licensee did not sell the beer purchased by the minor at the price which the minor verified he paid, the only logical explanation is that the minor must have purchased the beer somewhere else.

² For the sake of completeness, it should be noted that 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)]. In the present case, Licensee has chosen not to set forth an affirmative defense and, instead, argues that the minor never purchased beer from Licensee.

The Board finds Licensee's argument to be both factually and legally flawed and, accordingly, it must fail. First, the Bureau never produced any "documentation" regarding the price of the beer purchased by the minor. Much to the contrary, the Bureau presented no evidence, documentary or otherwise, regarding the price the minor paid for the beer. In fact, it was counsel for Licensee who broached the issue of price, and confronted the minor about a written statement he made to the police at the time of his arrest.³

Second, the Board fundamentally disagrees with Licensee's assertion that "the only logical explanation [for the discrepancy in price] is that the minor purchased the beer somewhere else." Such a leap in logic is unsupported by the circumstances of this case. Any evidence regarding a discrepancy in the price paid for the beer proves nothing except, perhaps, the minor's poor accounting abilities.

Licensee asserts that the ALJ's finding is unsupported by credible evidence, which is a challenge that ultimately amounts to nothing more than dissatisfaction with how the ALJ accorded evidentiary weight. Licensee

³ As noted previously, this much maligned written statement was never made part of the record and cannot be considered by the Board.

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 male minor to be more credible and adequate to support the charge in the citation. The Board will not overturn the ALJ's well-reasoned opinion on nothing more than mere speculation and a suggestion that the minor was not credible.

The Commonwealth Court has previously held that evidence, including the testimony of minors who illegally purchase liquor, is sufficient to support a finding that a liquor licensee served alcoholic beverages to minors. New Sorrento, Inc. v. Com., Pennsylvania Liquor Control Bd., 440 A.2d 676 (Pa. Cmwlth. 1982). In the instant matter, the Bureau presented the minor's testimony that he was less than twenty-one (21) years of age, and that he

purchased beer from Licensee on April 1, 2006. The ALJ found the minor's testimony to be credible and adequately supported the charge in the citation.

Based upon the foregoing, 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 must adhere to all other conditions set forth in the ALJ's

Order issued July 3, 2008.

Board Secretary

Mailing Date: September 17, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

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6901 Woodland Avenue, Third Floor
Philadelphia, PA 19142

OPINION

Timmy's Corporation ("Licensee") seeks reconsideration of the Pennsylvania Liquor Control Board's ("Board") Opinion and Order issued August 20, 2008, wherein the Board affirmed the decision of Administrative Law Judge David L. Shenkle ("ALJ") sustaining the present citation and imposing a fine in the amount of two thousand five hundred dollars (\$2,500.00).

The citation in question charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that, on April 1, 2006, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, eighteen (18) years of age.

On August 20, 2008, the Board issued its Opinion and Order affirming the ALJ's decision. In its Opinion, the Board noted that the Licensee's argument relied heavily upon a document that was referenced during the administrative hearing but was never actually marked as an exhibit. The Board stated that the Licensee's failure to properly mark and introduce this exhibit deprived the Board of its ability to examine the document itself.

In its request for reconsideration, Licensee presents the same argument previously rejected by this Board in its August 20, 2008, Opinion but suggests that the Board erred in reaching its decision because the document referenced at the administrative hearing was in fact attached to the Commonwealth's pre-hearing memorandum. The Licensee contends that because the document was part of the official record it should be considered by the Board.

While the Board has before it a motion to reconsider its August 20, 2008 decision in this matter, it should be noted that pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the Board's review of 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 has 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).

As an initial matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge and has determined that the parties' pre-hearing memoranda *are not* part of the certified record.⁴ A certified record should consist of the "original papers and exhibits filed in the lower court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court." See Pa.R.A.P. 1921 (Composition of Record on Appeal); Frank v. Frank, 587 A.2d 340, 342-43 n. 5 (Pa. Super. 1991). "It is the *obligation of the appellant* to make sure that the record forwarded to an appellate court contains those documents necessary to allow a complete and judicious assessment of the issues raised on appeal." Fiore v. Oakwood Plaza Shopping Center, Inc., 585

⁴ A true and correct copy of the July 28, 2008, Pennsylvania Liquor Control Board Office of Administrative Law Judge Attestation/Certification of Official Records is attached hereto as Exhibit A.

A.2d 1012, 1019 (Pa. Super. 1991) (emphasis added). “For purposes of appellate review, what is not of record does not exist.” Frank v. Frank, *supra*. In the present matter, the document referenced by the Licensee is not part of the certified record and as a result does not exist for purposes of the Board’s review.

Even assuming *arguendo* that the disputed document had been properly admitted and made part of the certified record, it does not change the Board’s ultimate conclusion. Indeed, the Board does not dispute that the minor, at some point, indicated that the purchase price of the beer was *approximately* thirty-four dollars and eighty-two cents (\$34.82). In fact, the record plainly reveals that the minor witness acknowledged telling the police that he paid approximately thirty-four dollars and eighty-two cents (\$34.82) for the beer. (N.T. 33, 36-37). The record further demonstrates that the minor was confronted with this information and was thoroughly cross-examined regarding this inconsistency. During his testimony, the minor explained that the price he provided to the police was merely an estimated price and that he was not exactly sure how much he really paid for the two (2) cases of beer. (N.T. 37). This mistake in recalling the actual purchase

price is not necessarily fatal to the minor's credibility regarding where he purchased the beer.⁵

Human memory is seldom perfect and it is well-settled under the law that a fact-finder is "free to believe all, part or none of the evidence presented." Commonwealth v. Cosentino, 850 A.2d 58 (Pa. Cmwlth. 2004), Commonwealth v. Hoffman, 938 A.2d 1157 (Pa. Cmwlth. 2007). In the instant case, the ALJ found the testimony of the male minor regarding where he purchased the beer to be credible and adequate to support the charge in the citation. The Board will not overturn the ALJ's well-reasoned opinion on the Licensee's bald contention that the minor was not credible regarding the origin of the beer.

Based upon the foregoing, the Board again finds that the ALJ's decision is supported by substantial evidence and shall not be disturbed. Accordingly, the Licensee's request for reconsideration is hereby denied.

⁵ As we noted in our original decision, the Licensee's argument amounts to nothing more than a disagreement with the ALJ's decision to believe the witness regarding one part of his testimony. Indeed, the Licensee's argument seemingly suggests that the minor witness was credible regarding the price of the beer, but is not credible regarding the origin of the beer.

EXHIBIT A

ORDER

The Licensee's Application for Reconsideration is DENIED.

The Board's Order with a mailing date of August 20, 2008 remains in full force and effect.

Board Secretary