

Mailing Date: December 3, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation Nos. 06-1312,
BUREAU OF LIQUOR CONTROL : 06-1911, 06-3001
ENFORCEMENT : (consolidated under 06-
: 1312)

vs.

RISTORANTE PAPARAZZI, INC. : License No. R-17815
47-49 Lehigh Avenue :
Frackville, PA 17931-1423 :
:

Counsel for Licensee: Stephen P. Elwood, Esquire
400 North 2nd Street
Pottsville, PA 17901

Counsel for Bureau: Craig Strong, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Parkway
Macungie, PA 18062

OPINION

Ristorante Paparazzi, Inc. (“Licensee”), appealed from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ sustained Consolidated Citation No. 06-1312 (“citation”), and imposed a fine of six hundred dollars (\$600.00).

Citation No. 06-1312 charged that on April 15, 2006, Licensee, by its servants, agents, or employees violated section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code §5.32(a)], by permitting a loudspeaker or similar device to be heard outside the premises. Citation No. 06-1911 charged that on July 7 and 8, 2006, Licensee, by its servants, agents, or employees violated section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code §5.32(a)], by permitting a loudspeaker or similar device to be heard outside the premises. Citation No. 06-3001 charged that on December 1, 2006, Licensee, by its servants, agents, or employees violated section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code §5.32(a)], by permitting a loudspeaker or similar device to be heard outside the premises. A motion to consolidate these citations under 06-1312 was granted on April 12, 2007.

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, Licensee contends that there is insufficient evidence to support the ALJ's findings and conclusions. Licensee contends that the ALJ had no basis upon which to completely discount Licensee's testimony while crediting that of the enforcement officers. Licensee further contends that the ALJ had no basis upon which to conclude that the officers' unaided ears were more reliable than the audio recording produced by Licensee.

As to Citation No. 06-1312, the evidence revealed that on April 15, 2006, Bureau Officer Rutkowski, along with a trainee Bureau Officer, made an undercover visit to the licensed premises at approximately 12:50 a.m. (N.T. 7-8). After paying a cover charge, the two (2) officers entered the bar area. (N.T. 8). The band area consisted of a stage with four (4) speakers stacked upon one another to a height of about eight (8) feet high on each side of the band. (N.T. 8). Officer Rutkowski consumed two (2) twelve-ounce (12 oz.) bottled beers and left the premises at just prior to 1:45 a.m. (N.T. 9, 21). At approximately 1:45 a.m., Officer Rutkowski paced two hundred (200) feet up North Lehigh Avenue and established that he could hear the same music that was electronically amplified by the band. (N.T. 9).

At this point, there were approximately eight (8) residences within two hundred (200) feet of the premises. (N.T. 9).

As to Citation No. 06-1911, on July 7, 2007, Bureau Officer Rutkowski made an undercover visit to the licensed premises at approximately 11:50 p.m. (N.T. 11-12). Upon exiting his vehicle, Officer Rutkowski could hear music from inside the premises. (N.T. 12). Officer Rutkowski was carded and paid the cover charge to enter. (N.T. 12). The music performed by the band was amplified through eight (8) speakers stacked on top of each other four (4) high on each side of the band. (N.T. 12-13). Officer Rutkowski consumed two (2) twelve-ounce (12 oz.) bottled beers while there. (N.T. 21). There were only approximately four (4) or five (5) patrons in the club that evening, and Officer Rutkowski departed at approximately 12:35 a.m. (N.T. 13). Officer Rutkowski walked about one hundred fifty (150) feet away and could still hear music emanating from the premises. (N.T. 13). In this instance, Officer Rutkowski could hear the vibration of the bass more so than the actual guitar and drummer. (N.T. 14). At this point, there were approximately six (6) residences within one hundred fifty (150) feet of the premises. (N.T. 13, 14).

As to Citation No. 06-3001, on December 1, 2006, Bureau Officer Rhinehammer made an undercover visit to the licensed premises at

approximately 12:35 a.m. (N.T. 23). Upon exiting his vehicle, Officer Rhinehammer could hear music from inside the premises. (N.T. 23). Officer Rhinehammer walked approximately ninety (90) feet on North Lehigh Avenue and could still hear the music. (N.T. 23). Inside the premises, the music was being performed by a trio and the sound was electronically amplified through two (2) two by one (2x1) foot speakers. (N.T. 24). Officer Rhinehammer remained on the premises for approximately one (1) hour, and consumed alcohol during that time period. (N.T. 24, 26). Upon his departure, the band was no longer playing. (N.T. 24, 26). Officer Rhinehammer testified that he had had visited the premises between ten (10) to twenty (20) times between September 6, 2005 and December 21, 2006 as part of his investigation. (N.T. 27). Officer Rhinehammer further testified that there were no violations observed during the other visits. (N.T. 27).

Sandra Burns, owner of Licensee, testified that there has been work done to the premises to soundproof the entire back and ceiling. (N.T. 29). The sound equipment is owned by Licensee and is operated by Mr. Burns. (N.T. 29-30). Ms. Burns further testified that she believed that Mr. Rutkowski had had more than two (2) twelve ounce (12 oz.) bottles of beer on July 7, 2006. (N.T. 30).

Thomas Burns, Ms. Burns' husband, stated that there is a limiter on the sound system that sets the volume so that it cannot go over a certain volume. (N.T. 31-32). The limiter is set so that the maximum amount that can be heard outside is sixty-eight (68) decibels. (N.T. 33). This level was set to prevent any problems with neighbors. (N.T. 33). Mr. Burns further described the soundproofing done in the premises. (N.T. 35). Licensee had the windows covered with sound control insulation, black insulation board, and celosias insulation blown into the walls. (N.T. 35). This work was done in February 2006. (N.T. 35). In response to complaints about noise, Mr. Burns went outside and measured the sound emanating from the sound system. (N.T. 32, 36). Mr. Burns stated that the sound from the inside emanating outside was sixty-eight (68) decibels, and the quietest car to drive by was measured at seventy-eight (78) decibels. (N.T. 36-37). Mr. Burns played a sound recording that he made from September 7, 2007. (N.T. 39). Mr. Burns described the "whooshing" sound heard on the tape as the sound of cars driving by. (N.T. 41). Mr. Burns further testified that one cannot hear anything outside the premises. (N.T. 44). Mr. Burns also stated that the officer's description of the speakers was inaccurate due to the fact that the speakers are not quite as wide as described. (N.T. 46-47).

Licensee contends that the ALJ abused its discretion, in that the Findings of Fact were against the weight of credible evidence, and in that, although the testimony of the Commonwealth's witnesses and Licensee's were diametrically opposed, the ALJ failed to consider the fact that both of the Commonwealth's witnesses were under the influence of alcohol at the time of the alleged incident.

The Pennsylvania Supreme Court in Hainsey v. Pennsylvania Liquor Control Bd. defined an abuse of discretion as "not merely an error of judgment, but 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." Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 602 A.2d 1300, 1305 (1992).

Based upon review of the evidence presented, the ALJ did not give credit to the tape recording because he did not believe that a mass market portable tape recorder has the capability of discerning sound more accurately than the unaided human ear. The ALJ reasoned that there are too many variables, on technical grounds alone, to give weight to the fact that no music could be heard on the tape. The ALJ further discounted the other testimony presented on behalf of Licensee based on self-interest. In reaching this

conclusion, the ALJ relied on his judgment regarding the demeanor of the witnesses.

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). In the instant case, the ALJ found the testimony of the enforcement officer to be more credible and adequate to support the charges in question.

As the ALJ based his decision of the credibility of the testimony of the enforcement officer, those findings shall not be disturbed.

The Board finds that the ALJ's decision is supported by substantial evidence and is without error of law.

The decision of the ALJ, therefore, is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee must pay the fine in the amount of six hundred dollars (\$600.00) within twenty (20) days of the mailing date of this Order.

Licensee must adhere to all other conditions set forth in the ALJ's Order with mailing date September 23, 2008.

Board Secretary