

Mailing Date: May 9, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1697
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

MIRIAM’S KIDS, INC. : License No. R-11539
1st Floor & Basement :
451-455 North 3rd Street :
Philadelphia, PA 19123-4109 :

Counsel for Licensee: Edward McHugh, Esquire
Two Greenwood Square
3331 Street Road
Bensalem, PA 19020

Counsel for Bureau: Erik S. Shmukler, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue, Third Floor
Philadelphia, PA 19142

OPINION

Miriam’s Kids, Inc. (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ sustained the citation, imposed a fine of five thousand three hundred dollars (\$5,300.00), and assessed one (1) point against the record of Licensee.

The first count of the citation charged that, on May 25, 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 using or permitting 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.

The second count of the citation charged that, on May 25 and June 8, 2006, Licensee, by its servants, agents or employees, violated section 471 of the Liquor Code [47 P.S. § 4-471] and section 955 of the Pennsylvania Human Relations Act [43 P.S. § 955] by engaging in unlawful discrimination, in that Licensee provided alcoholic beverages to female patrons at a reduced priced while charging full price to male patrons.

The third count of the citation charged that, on May 25, June 8 and 14, 2006, Licensee, by its servants, agents or employees, violated section 13.102(a) of the Board's Regulations [40 Pa. Code § 13.102(a)] by discounting the price of alcoholic beverages for a period or periods other than a consecutive period of time not to exceed two (2) hours in a business day.

The fourth count of the citation charge that, on May 25 and June 8, 2006, Licensee, by its servants, agents or employees, violated section 13.102 of the

Board's Regulations [40 Pa. Code § 13.102(a)] by furnishing an unlimited or indefinite amount of free alcoholic beverages for a period of three (3) hours, in violation of section 13.102 of the Board's Regulations. The fifth count of the citation charged that, on May 25 and June 8, 2006, Licensee, by its servants, agents or employees, violated section 13.102(a)(2) of the Board's Regulations [40 Pa. Code § 13.102(a)(2)] by selling and/or serving an increased volume of one (1) drink without a corresponding and proportionate increase in the price of the drink, in that double shots of liquor were served for the price of one (1) shot at seven (\$7.00) dollars.

The sixth count of the citation charged that, on June 14, 2006, Licensee, by its servants, agents or employees, violated section 13.102(a)(3) of the Board's Regulations [40 Pa. Code § 13.102(a)(3)] by selling and/or serving an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited draft beer was served for the set price of five dollars (\$5.00).

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 ALJ abused his discretion, committed an error of law and/or made a decision not supported by substantial evidence in sustaining all six (6) counts of the citation, and by disregarding counsels' joint recommendation of a proposed penalty in this matter.

The Board has reviewed the record with Licensee's objections in mind.

Licensee, although represented by counsel, failed to attend the hearing before the ALJ. (N.T. 4-9). While the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") was present and offered testimony from two (2) witnesses, they were never sworn under oath. (N.T. 13-20). Further, the Bureau's Pre-hearing Memorandum, while referenced on the record, was not admitted into evidence. (N.T. 15). However, the record appears to support that both counsel intended to agree by stipulation or proffer to the facts presented by Bureau Officers Connor and Amato. (N.T. 13-20).

In response to questioning by the ALJ, Bureau Officer Conner stated that, on May 25, 2006, at approximately 10:00 p.m., he and Bureau Officer Amato

parked across the street from the licensed premises. (N.T. 14-15). They heard music emanating from the licensed premises. (N.T. 15). When they went into the licensed premises, they observed a disc jockey playing music. (N.T. 15-16).

The record further reveals that, on May 25, 2006, from 9:00 p.m. to midnight, Licensee charged a penny (\$.01) a drink for female patrons, while charging two dollars (\$2.00) per drink for male patrons. (N.T. 15-17). The officers found, however, that Licensee did not actually require patrons to pay the penny for female patrons' drinks. (N.T. 17-18). The same practice also took place for the same time period on June 8, 2006. (N.T. 16-17).

Officer Connor further stated that, on June 14, 2006, Licensee permitted patrons to purchase a plastic cup for five dollars (\$5.00), which could then be used to obtain unlimited amounts of draft beer from a keg set up at the licensed premises. (N.T. 19). This practice went on for more than three (3) hours, up until midnight. (N.T. 19). Bureau officers also observed Licensee selling two (2) shots of liquor for the price of one, which was seven dollars (\$7.00). (N.T. 20).

The Board does not find the absence of sworn testimony to be fatal to the Bureau's case, as the fact that it was unsworn testimony does not necessarily disqualify it. Nor does the Board find the absence of the Pre-hearing Memorandum to be fatal to the Bureau's case. It is well known that a party to a

proceeding may waive any objection it has to the admission of evidence. Dilliaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974). In the instant matter, there are numerous instances of record where Licensee's counsel gives tacit agreement to the facts which were presented by the officers and in the Bureau's Pre-hearing Memorandum.

Further, section 505 of the Administrative Agency Law [2 Pa. C.S. § 505], specifies that a Commonwealth agency is not bound by technical rules of evidence at an agency hearing. If the evidence is relevant to the issues before the agency and is of reasonable probative value, the agency may receive it. Evidence is relevant if it tends to establish facts in issue. La Roi v. State Civil Service Comm'n, 34 Pa. Cmwlth. 90, 382 A.2d 1260 (1978). In the instant matter, the Board finds the information provided by the Bureau officers to be sufficient to establish facts in support of the ALJ Adjudication.

Relative to the first count of the citation, section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.21(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." The facts presented to the ALJ were that, on May 25, 2006, Bureau officers heard

music being played inside the licensed premises in the parking lot across the street from the licensed premises. These facts were not challenged by Licensee's counsel. The Board, therefore, concludes that there is substantial evidence to support the ALJ's finding of violation relative to the first count of the citation.

Relative to the second count of the citation, the Pennsylvania Human Relations Act [43 P.S. § 955] provides makes it unlawful for Licensee's to discriminate based upon one's gender. The facts were that, on May 25, 2006 and June 8, 2006, between 9:00 p.m. to midnight, Licensee charged a penny (\$.01), which it did not even collect, a drink for female patrons, while charging significantly more for drinks for male patrons. These facts were not challenged by Licensee's counsel. Since the facts establish unlawful sex discrimination in violation of section 471 of the Liquor Code [47 P.S. § 4-471] and section 955 of the Pennsylvania Human Relations Act [43 P.S. § 955], the Board concludes that there is substantial evidence to support the ALJ's findings of violations relative to the second count of the citation.

Relative to the third, fourth, fifth and sixth counts of the citation, section 13.102 of the Board's Regulations provides, in pertinent part, the following:

- (a) *General.* Retail licensees may discount the price of alcoholic beverages for a consecutive period of time not to exceed 2 hours in a

business day, but may not engage in discount pricing practices between 12 midnight and the legal closing hour. Retail licensees may not engage in the following discount pricing practices unless specifically excepted in subsection (b):

(1) The sale or serving, or both, of more than one drink of liquor, wine, or malt or brewed beverages at any one time to any one person, for the price of one drink.

(2) The sale or serving, or both, of an increased volume of one drink of liquor, wine, or malt or brewed beverages without a corresponding and proportionate increase in the price for the drink.

(3) The sale or serving, or both, of an unlimited or indefinite amount of liquor, wine, or malt or brewed beverages for a set price.

(4) The pricing of alcoholic beverages in a manner which permits the price to change within the 2-hour period.

(b) *Exceptions.* Nothing in subsection (a) prohibits:

(1) The sale or serving, or both, of an unlimited or indefinite amount of liquor, wine or malt or brewed beverages for a fixed price for catered events which have been arranged at least 24 hours in advance.

(2) The offering for sale of one specific type of alcoholic beverage or drink per day or a portion thereof at a reduced price, if the offering does not violate subsection (a). For purposes of this section, a specific type of alcoholic beverage means either a specific registered brand of malt or brewed beverages, a type of wine, a type of distilled spirits or a mixed drink. Examples of permissible drink discounts are found in Board Advisory Notice 16.

The facts before the ALJ were that, on May 25, 2006 and June 8, 2006, from 9:00 p.m. to midnight, Licensee charged a penny (\$.01) a drink for female

patrons, while charging two dollars (\$2.00) per drink for male patrons. Licensee, however, did not actually require patrons to pay the penny for female patrons' drinks. Clearly, Licensee discounted the price of alcoholic beverages for a period of three (3) hours. These facts were not challenged by Licensee's counsel. The Board, therefore, concludes that there is substantial evidence to support the ALJ's findings of violations relative to the third count of the citation.

The facts before the ALJ were that, on May 25, 2006 and June 8, 2006, Licensee did not charge anything for an indefinite and unlimited amount of alcoholic beverages for female patrons, while is charged male patrons for the same drinks. However, Licensee did charge male patrons. These facts were not challenged by Licensee's counsel. The Board, therefore, concludes that there is substantial evidence to support the ALJ's findings of violations relative to the fourth count of the citation.

The facts before the ALJ were that, on June 14, 2006, Licensee sold two (2) shots of liquor for the price of one (1) shot. These facts were not challenged by Licensee's counsel. The Board, therefore, concludes that there is substantial evidence to support the ALJ's findings of violations relative to the fifth count of the citation.

The facts before the ALJ were that, on June 14, 2006, Licensee permitted patrons to purchase a plastic cup for five dollars (\$5.00), which could then be used to obtain unlimited amounts of draft beer from a keg set up at the licensed premises. These facts were not challenged by Licensee's counsel. The Board, therefore, concludes that there is substantial evidence to support the ALJ's findings of violations relative to the sixth count of the citation.

Based on the foregoing, the Board finds that the ALJ's findings of fact are supported by substantial evidence, that his decision is without error of law, and that it does not constitute an abuse of discretion.

Relative to Licensee's contention that the ALJ abused his discretion, committed an error of law and/or made a decision not supported by substantial evidence by disregarding counsel's joint recommendation of a proposed fine in this matter, it must be pointed out that the imposition of penalties is the exclusive prerogative of the ALJ. Section 471 of the Liquor Code [47 P.S. § 4-471] proscribes the penalty for a violations of the Board's Regulations and the Liquor Code set forth in the subject citation, as license suspension or revocation and/or a fine of not less than fifty dollars (\$50.00) or more than one thousand dollars (\$1,000.00). The ALJ in the instant case imposed a three hundred dollar fine for the first count, and one thousand dollar (\$1,000.00) fines for each other

count. In addition, strictly in accordance with section 479 of the Liquor Code [47 P.S. § 4-479], the ALJ assessed one (1) point against Licensee's license. There is nothing that requires the ALJ to accept a joint recommendation of a penalty. Since the penalty is clearly within the statutory ranges set forth in Liquor Code, and the Board has no authority to alter the penalty imposed by the ALJ, the decision of the ALJ as to the penalty is affirmed.

Accordingly, the record, as presented, provides substantial evidence to support the decision of the ALJ.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee pay the fine in the amount of five thousand three hundred dollars (\$5,300.00). Failure to pay the fine within twenty (20) days of the mailing date of this Order will result in license suspension and/or revocation.

It is further ordered that one (1) point is hereby assessed against the record of the Licensee pursuant to 40 Pa. Code § 3.122(d).

Licensee must adhere to all other conditions set forth in the ALJ's Order dated February 5, 2007.

Board Secretary