

Mailing Date: November 16, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1940
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

R AND W RESTAURANT LLC : License No. R-AP-SS-EHF-
128 S. 19th Street : 6004
Philadelphia, PA 19103-4630 :

Counsel for Avram Hornick, Esquire
Licensee: (Pro Se)

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

OPINION

R and W Restaurant LLC (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright (“ALJ”), wherein the ALJ sustained the citation and imposed a four hundred dollar (\$400.00) fine.

The citation charged that, on May 27, June 9, 10 and 24, 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 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.

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).

A review of the record reveals that Eric Gall, an officer with the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), visited the licensed premises on May 27, 2006 at approximately 12:20 a.m.

(N.T. 35). The investigation in question was initiated by another officer from the Bureau, however, due to a scheduling conflict, Officer Gall agreed to make the visit to the premises on May 27, 2006. (N.T. 38).

Before entering the premises on May 27, 2006, Officer Gall heard a base sounding noise emanating from the licensed premises from approximately thirty-three (33) feet from the main entrance of the premises. (N.T. 35).

As Officer Gall crossed the street to the main entrance, the bass music became louder. Once he entered the premises, he noted that there were approximately seventy-five patrons inside and there was dance music or hip-hop music being played. (N.T. 35).

Officer Gall observed a disc jockey playing music, which was electronically amplified through six speakers. The speakers were all approximately the same dimensions. (N.T. 35-36).

At approximately 12:50 a.m., Officer Gall exited the premises. As he crossed over 19th street, approximately fifteen to twenty feet across the street, he could still hear music emanating from the licensed premises. The music was louder at the time he left than it was when he originally entered the premises. (N.T. 36).

Officer Gall walked in a southern direction on South 19th Street for approximately seventy-five feet to the intersection of Walnut and South 19th Street where he could no longer hear music, and then he retraced his steps. Officer Gall walked in a northerly direction approaching the premises and was able to hear music emanating from the premises. (N.T. 36-37).

Officer Gall stopped at the intersection of South 19th Street and Samson and continued to walk up the street until he could no longer hear music. The officer then crossed the street at which time he observed another establishment. Officer Gall walked up to the front door of the other licensed premises, but heard no music emanating from it. (N.T. 37).

The record further reveals that an investigation of the licensed premises was assigned to Officer Mullen on May 15, 2006, based upon a complaint, which came into the office of May 12, 2006 for loud music, disorderly operations and visibly intoxicated patrons. (N.T. 40-41).

Officer Mullen made his first visit to the premises on June 9, 2006 (N.T. 41). Upon his arrival at the premises at 11:30 p.m., he was accompanied by a trainee. Officer Mullen crossed Walnut Street and stood on the corner of Moravian, which was approximately twenty feet from the front door of the premises when he heard music emanating from the premises. The

music was hip-hop in nature and he could hear the bass. Officer Mullen then walked to the corner of 19th and Sansom where he could also hear the music. He went to another licensed premises, O'Shay's, right across the street. Officer Mullen determined that the music was not coming from that premises and determined the music he heard was coming from the licensed premises in question. (N.T. 42-43).

The licensed premises was approximately forty-five feet from the corner of 19th and Sansom where Officer Mullen could hear music emanating from the premises. (N.T. 43).

Officer Mullen entered the premises and saw approximately six loudspeakers on the premises. The speakers were approximately one and a half feet by one foot and the other three, he believed were two feet by one foot. Officer Mullen heard the same music on the inside of the premises that he heard on the outside. (N.T. 43-44).

Officer Mullen left the premises at 12:20 a.m. during the early morning hours of Saturday, June 10, 2006. Upon departing, Officer Mullen paced off the same distances that he had paced off before he entered the premises and he could still hear the music from those points. (N.T. 44-45).

Officer Mullen again visited the premises on June 24, 2006. He arrived at approximately 1:05 a.m. Officer Mullen stood on the corner of 19th and Samson where he could again hear music coming from the licensed premises. Officer Mullen checked O'Shay's, a licensed premises in the area but he could hear no music coming from that establishment. (N.T. 46).

Officer Mullen walked towards the licensed premises and he could hear music the entire time. Once inside, Officer Mullen heard music playing inside the premises. Officer Mullen identified the music as the same type of hip-hop music that was playing when he was outside the premises. Officer Mullen noted that the speaker setup was approximately the same six speakers, which he had seen on his earlier visit to the premises. (N.T. 46).

Officer Mullen left the premises at approximately 2:00 a.m. He then stood on the street and waited for everyone to depart the premises. They did so within ten to fifteen minutes and the music also ceased. (N.T. 47).

Officer Mullen concluded his investigation on July 25, 2006 when he contacted the complainant by phone. (N.T. 49-50).

On July 23, 2006, Officer Mullen went to the licensed premises but did not go inside. He was in line but heard no loud music so he departed the premises after standing in line for about two minutes. (N.T. 52-53).

Officer Burns, also from the Bureau, visited the premises on May 21, 2006 and found that they were doing renovations and were not open. (N.T. 54).

Officer Merlin, another Bureau officer indicated that he began his investigation of the premises on May 15, 2006 and it was closed on July 25, 2006. Officer Merlin called for the notice of violation letter to be sent. The violation letter was sent on August 1, 2006 by certified mail, return receipt requested. The letter was addressed to R & W Restaurant, L.L.C. at 128 S. 19th Street, Philadelphia, PA. The letter was returned to sender as not being deliverable as addressed. (N.T. 57-58 and Exhibit B-1).

A review of the record reveals that according to the records of the Bureau of Enforcement, the letter was unclaimed and it was resent by certified mail on August 16, 2006. The citation was sent by the Bureau of Enforcement on August 22, 2006 by certified mail, return receipt requested. That letter was sent to R and W Restaurant, L.L.C., 128 S. 19th St., Philadelphia, PA 19103-4630. (N.T. 59).

Licensee lists numerous contentions in support of its appeal. All of Licensee's contentions allege that the ALJ erred as a matter of law when she determined that notice requirements of the Liquor Code section 471(b) [47 P.S. § 4-471(b)] had been satisfied. Specifically, Licensee contends that the ALJ committed an error of law in finding that "All statutory prerequisites for notice to the Licensee were satisfied."

Licensee also argues that the ALJ committed an error of law in finding that, although the notice was never sent, the citation letter (Citation) sent by the Bureau is sufficient statutory notice under the requirements of section 471(b) of the Liquor Code. [47 P.S. § 4-471(b)].

Licensee further argues that the ALJ committed an error in law in finding that the citation constituted statutory notice without making a finding of fact that the citation letter was sent or caused to be sent by the Bureau of Enforcement Officer whose duty it was to conduct the investigation.

Lastly, Licensee argues that the ALJ committed an error in law not finding that the Bureau violated the due process of the Licensee because the Licensee could not prepare an adequate defense without knowing the dates of the investigation before the hearing.

The Board has reviewed the record with Licensee's objections in mind and does not agree with Licensee's contentions.

Section 471(b) [47 P.S. 4-471(b)] provides, in relevant part: "No penalty provided by this section shall be imposed for any violation provided for in this Act unless the bureau notifies the licensee of its nature within thirty days of the completion of the investigation." In support of its position, Licensee relies upon the Commonwealth Court's ruling in Pennsylvania Liquor Control Board v. Gatling Saloon and Dance Hall Corp., 98 Pa. Commw. 3777, 511 A.2d 272 (Pa. Cmwlth. 1986). Licensee argues that because the normal procedure of the Bureau is to send a notice of violation letter (Exhibit-B) and the ALJ concluded that the Bureau attempted to mail the notice of violation letter on August 1, 2006, but failed to correctly address the letter causing said letter to not be delivered, these circumstances constitute untimely notice, requiring the violation to be dismissed. The Board finds Licensee's reliance on Gatling is misplaced. In Gatling, the facts relevant to an ongoing investigation which began on or about June 22, 1983 included two (2) visits to the premises on June 22 and June 29, 1983 during which two (2) violations were observed. No further investigative action took place until August 16, 1983 when another enforcement officer made another visit

after she was assigned the investigation. Finding no violation on August 16, 1983 the newly assigned enforcement officer sent a notice of violation letter on August 19, 1983 listing June 22 and June 29, 1983 as dates of violation. The question on appeal in Gatling was whether the notice violation letter which was sent on August 19, 1983 was sufficient to satisfy the requirements of section 471(b) of the Liquor Code, in light of the long period of inactivity between the start of the investigation, June 22, 1983, and its completion date, August 19, 1983. Gatling focused more on when an open investigation should be deemed closed when violations are found after an extended period of inactivity.

In the instant case, both the Bureau and Licensee agree that the alleged fatal flaw in the actions taken by the Bureau was in addressing the envelope containing the notice letter to “R & W Restaurant” instead of “R and W Restaurant”. All other portions of the address were otherwise correct. Notwithstanding the obvious confusion caused by the fact that the mailing envelope contained an “ampersand”, rather than the word “and”, and that sufficient evidence exists to establish that there seems to be no other reason as to why the notice letter was marked “undeliverable as addressed”, the ALJ

found that the Citation was adequate statutory notice of the pending charges since it was mailed correctly and in a timely fashion.

Licensee further argues that the ALJ committed an error of law in finding that, the citation (Ex-A) sent on August 22, 2006 by the Bureau is sufficient statutory notice under the requirements of section 471(b) of the Liquor Code [47 P.S. § 4-471(b)]. In support of its contention, Licensee relies upon Pennsylvania Liquor Control Board v. Greenspan, t/a 743 Bar, 213 Pa. Super 29, 246 A.2d 433 (1968), vacated, 438 Pa. 129, 264 A.2d 690 (1970). Again, the Board finds Licensee's reliance on Greenspan is misplaced. In Greenspan, the question before the Court was whether notice, as specified by the Liquor Code, must be given when the Board makes no independent investigation of its own, but rather issues citations solely on the basis of information supplied by other agencies such as local police departments. In the instant case, the Bureau issued the citation in question as the result of an investigation by its own enforcement officers. A review of the language contained in the citation clearly and succinctly notified Licensee that "the Bureau is in possession of facts which lead it to believe that a Liquor Code violation has occurred." The citation further informs Licensee of the dates in which the violations are alleged to have occurred and the nature of

the violation having to do with a loudspeaker or similar device whereby the sound of music or other entertainment...could be heard outside.

Licensee also contends that the ALJ committed an error of law not finding that the Bureau violated the due process of the Licensee because the Licensee could not prepare an adequate defense without knowing the dates of the investigation before the hearing. The Board finds that because the citation clearly lists the exact dates of violation at issue, Licensee had sufficient notice of the charges to permit preparation of an adequate defense and thus meet the minimum due process required. Further review of the citation supports the ALJ's finding that the requirements of section 471(b) have been met. The Board will not otherwise disturb the ALJ's findings of facts.

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.

It is hereby ordered that Licensee pay the fine in the amount of four hundred dollars (\$400.00) within twenty (20) days of the mailing date of this Order. Failure to do so shall result in license suspension and/or revocation.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated October 16, 2007.

Board Secretary