

Mailing Date: September 19, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-2794X
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

201 NORTH SECOND STREET, INC. : License No. R-12649
t/a Fisaga :
201-209 North Second Street :
Harrisburg, PA 17101 :

Counsel for Licensee: Frank C. Sluzis, Esquire
2148 Deodate Road
Elizabethtown, PA 17022

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PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17110

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from the Adjudication and Order of Administrative Law Judge Daniel T. Flaherty (“ALJ”), wherein the ALJ dismissed the citation.

The citation charged that, Licensee, by its servants, agents or employees, violated section 493(26) of the Liquor Code [47 P.S. § 4-

493(26)] by issuing checks or drafts dated September 1, 2006, in payment for purchases of malt or brewed beverages, when it had insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks.

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, the Bureau contends that the ALJ committed an error of law in dismissing the citation. In support of its contention, the Bureau argues that the statute at issue requires Licensee to have sufficient funds in its account to meet the obligation of the check and those funds must be available to pay the check.

At the hearing before the ALJ, the Bureau and Licensee stipulated to a summary of the facts. The record reveals that, on September 1, 2006, Licensee issued a check in the amount of one thousand one hundred forty-nine dollars and forty-three cents (\$1,149.43) for the purchase of malt or brewed beverages from W & L Sales Company, Inc. (N.T. 6-11; Ex. C-5). The check was presented for payment at Licensee's bank on September 6, 2006. (N.T. 10). On September 5, 2006, Licensee had in its account in its bank, the amount of two thousand two dollars thirty cents (\$2,002.30). (N.T. 10). On September 6, 2006, the Internal Revenue Service ("IRS") placed a lien on Licensee's account in the amount of one hundred and two thousand dollars and thirty cents. (\$102,000.00). (N.T. 10, 12-13; Ex. L-1). Licensee's bank dishonored the check and returned it to Licensee marked "frozen/blocked account". (N.T. 7, 12-13; Exs. C-5, L-1). Licensee's bank also notified Licensee, by telephone and fax, of the situation, so that it could be remedied. (N.T. 10). The check was subsequently made good by cash payment on September 14, 2006. (N.T. 11).¹ But for the

¹ Licensee had been issued a letter of warning by the Bureau with regard to a check dated August 31, 2006 issued to W & L Sales Company, Inc., in the amount of one thousand sixty-eight dollars and ninety-six cents (\$1,068.96), which was made good in a timely fashion. (N.T. 6; Ex. C-4).

IRS levy on Licensee's account, the check would have been honored by the bank. (N.T. 12-13; Ex. L-1).

Section 493(26) of the Liquor Code provides that:

[it] shall be unlawful ... [f]or any retail licensee ... to make, draw, utter, issue or deliver, or cause to be made, drawn, uttered, issued or delivered, any check ... in payment for any purchase of malt or brewed beverages, when such retail liquor licensee ... has not sufficient funds in, or credit with, such bank ... for the payment of such check.

[47 P.S. § 4-493(26)].

The Bureau argues that, notwithstanding the fact that when the lien was placed on the account there were sufficient funds in the account to cover the check, due to the IRS levy, there were no funds available in the account, nor did Licensee have credit with the bank to meet the obligation of the check. The Bureau argues that the statute requires the Licensee to have sufficient funds in his account to pay the check. In support of its contention, the Bureau relies on the holding in Marburg Bottling Works, Inc., Liquor License Case, 223 A.2d 890 (Pa. Super. 1966). In Marburg, the Superior Court confronted the specific question of whether the licensee had to have sufficient funds in his checking account at the time the check was written, or at the point when the check was presented for payment to the bank. The lower

court in Marburg read the statute as requiring the licensee to have sufficient funds to cover the check at the time the check was written. The Superior Court disagreed with this reasoning and held that:

It was the plain intention of the legislature to require a licensee, if he would avoid committing a violation, to have sufficient funds in bank to insure payment of the checks he issues. The pivotal question is the situation which exists at the time the checks are presented for payment. The construction adopted by the lower court would defeat the basic purpose of the statute.

Marburg, 223 A.2d at 892. (Emphasis added).

In light of the fact that Marburg remains the controlling precedent, there is support for the Bureau's argument that, in order for a licensee to avoid a violation of section 493(26) of the Liquor Code, it must have funds available in its account at the time the check is presented for payment to the bank.

In the instant matter, the ALJ dismissed the citation against Licensee despite the fact that Licensee did not have funds available to meet the obligation presented by the check issued to W & L Sales Company, Inc. The fact that the check was returned as dishonored and was not made good until September 14, 2006, fully supports the reasoning set forth in Marburg and requires the Board to reverse the decision of the ALJ.

Based upon the foregoing, there is sufficient evidence that the ALJ committed an error of law. As a result, the Bureau's appeal is granted, and the decision of the ALJ is reversed.

ORDER

The decision of the ALJ is reversed.

The Bureau's appeal is granted.

It is hereby ordered that this matter is remanded to the ALJ in order to impose a penalty consistent with this Opinion.

Board Secretary