

Mailing Date: September 5, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-2832
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

X-TRA, INC. : License No. R-1097
212 South 13th Street :
Philadelphia, PA 19107-5467 :

Counsel for Licensee: John J. McCreesh, III, Esquire
7053 Terminal Square
Upper Darby, PA 19082

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

OPINION

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

The citation charged that, on March 31, April 24, May 10 and June 8, 2006, Licensee, by its servants, agents or employees, violated section

493(12) of the Liquor Code [47 P.S. § 4-493(12)] by failing to keep on the licensed premises and/or provide an authorized employee of the Bureau access to, or the opportunity to copy, complete and truthful records covering the operation of the licensed business.

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 argues that the ALJ committed an error of law by dismissing the above citation based on the erroneous finding that an *in pari materia* reading of Liquor Code sections 493(12) and 493(21) [47 P.S. §§ 4-493(12), 4-493(21)] provides that Licensee did not commit a violation by failing to turn over the requested records. The Bureau further contends

that there was no substantial evidence presented that supports the ALJ's Finding of Fact No. 4, stating that "[o]n all of the dates charged, Licensee or Counsel refused to provide the Bureau with any records." In support of its argument, the Bureau contends that the evidence shows that Licensee's counsel, John McCreesh, offered to turn over records. The Bureau finally avers that the ALJ did not address the dispute as to whether the Bureau is allowed access to operational records beyond purchases of alcohol and food.

In response to the Bureau's appeal, Licensee argues that the ALJ's conclusions were correct. Licensee contends that in light of the fact that the licensed premises was not open for business and was, in fact, in safekeeping as of April 5, 2006, Licensee had no obligation to comply with the Bureau's records request.

The record reveals that Libby Hess, a Bureau officer, visited the licensed premises on March 28, 2006, where she was met by Matt Miller, who stated that he was involved in operating the premises. (N.T. 8, 10). Officer Hess asked Mr. Miller to sign for and deliver her notice of request for records to Mr. Pat Demone, Licensee's sole corporate officer. (N.T. 10). Mr. Miller signed for the request and Officer Hess left the premises. (N.T. 10). The date for the records to be turned over to Officer Hess was April 3, 2006 at

8:30 p.m. (N.T. 11-14, 21). Officer Hess's intention was to come back for the records at the designated time. (N.T. 12). Licensee was open sporadically, but the premises was supposed to be open at the designated time. (N.T. 12-14).

Prior to the due date for the production of documents, on March 31, 2006, Officer Hess spoke by phone to Licensee's counsel at that time, Edward McHugh, Esquire. (N.T. 14-15). Officer Hess called Mr. McHugh to determine if she could meet with Licensee to pick up the records. (N.T. 14-15). Mr. McHugh advised that he was interested in proceeding with the transfer of the license, and that the Officer should "just cite the premises and take care of it." (N.T. 15-16). Mr. McHugh stated that he was not going to provide the records. (N.T. 16). Accordingly, no records were provided to the Bureau on March 31, 2006. (N.T. 15-17).

Officer Hess spoke with Mr. Miller by telephone on April 3, 2006. (N.T. 22). Mr. Miller told Officer Hess that he delivered the records request to Mr. Demone. (N.T. 21-24). Mr. Miller further advised that he had no idea where the records were. (N.T. 22). Officer Hess testified that she did not receive the requested records on April 3, 2006. (N.T. 11-12).

Officer Hess met with Mr. Miller at the licensed premises on April 4, 2006 to discuss the operation of the licensed business. (N.T. 26-28). At the time of the visit on April 4, 2006, the licensed business was not open or in operation. (N.T. 29). Officer Hess asked Mr. Miller for the requested records, but Mr. Miller advised that he did not have them. (N.T. 26-28).

Officer Hess sent a subsequent letter by certified mail on April 18, 2007 to Licensee's premises, Mr. Demone and Licensee's subsequent counsel, Mr. McCreesh.¹ (N.T. 29-32). Mr. McCreesh advised Officer Hess by letter received on April 24, 2006 that he would only produce Licensee's liquor and beer invoices, not records pertaining to the operation of the licensed business. (N.T. 32-33). Officer Hess sent another letter by certified mail on May 5, 2007 to Licensee's premises, Mr. Demone and Mr. McCreesh. (N.T. 29-32). By letter received May 10, 2006, Mr. McCreesh advised that he had the liquor and beer invoices and that Officer Hess should contact him arrange a meeting to obtain the documents. (N.T. 32-33). Eventually, the invoices were delivered to Officer Hess by courier. (N.T. 34). In a June 8, 2006 telephone conversation, Mr. McCreesh advised

¹ Board records reflect that Licensee placed the license into safekeeping on April 7, 2006. (Admin. Notice).

Officer Hess that he was not entitled to any further documents beyond the liquor and beer invoices. (N.T. 34).

Section 4-493(12) of the Liquor Code provides that it shall be unlawful for any liquor licensee to fail to keep on the licensed premises for a period of at least two (2) years complete and truthful records covering the operation of his licensed business, or for any licensee, his servants, agents or employees, to refuse the enforcement bureau access thereto or the opportunity to make copies of the same when the request is made during business hours. [47 P.S. § 4-493(12)].

Further, section 4-493(21) of the Liquor Code provides, in pertinent part, that it shall be unlawful for any licensee to refuse the Bureau the right to inspect the licensed premises at any time during which the premises are open for the transaction of business, or when patrons, guests or members are in that portion of the licensed premises where either liquor or malt or brewed beverages are sold. [47 P.S. § 4-493(21)].

The ALJ , in interpreting these two (2) related provisions in light of each other, or in *pari materia*, held that the Bureau has the right to review a licensee's records at a time when the licensee is open for business or when patrons, guests or members are in the licensed portion of the premises.

Given this reading, the ALJ determined that because the Bureau officer did not make such requests for records at times when the licensed premises was open for business.

The Board finds that the ALJ committed an error of law in so holding. One of the purposes of the aforementioned sections of the Liquor Code is to protect a licensee from being cited by an enforcement officer who arrives at a licensed premises after it is closed and demands records when there is inadequate staffing to accommodate the request, limited access to such records, or limited ability to copy such records. Rather, the intent is to provide the licensee with fair and reasonable notice of such a demand for complete records, hence the requirement that such requests be made during business hours. The ALJ's very narrow interpretation of the statutes at issue would permit a licensee to avoid ever having to provide any records to the Board or the Bureau simply by making modifications to its hours of operation.

In the instant matter, Officer Hess entered the licensed premises on March 28, 2006 and hand-delivered a request that Licensee provide business records on April 3, 2006, at a time when Licensee was supposed to be open. This written request provided notice to Licensee that such records would need to be made available or copied for the officer upon her arrival six (6) days

later. On March 31, 2006, prior to the due date for the production of the records, Officer Hess spoke with Licensee's counsel, who advised that the records would not be provided. No records were provided to the Bureau on or before April 3, 2006.

As noted above, the citation charged that on March 31, April 24, May 10 and June 8, 2006, Licensee violated section 493(12) by failing to keep on the licensed premises and/or provide an authorized employee of the Bureau access to, or the opportunity to copy, complete and truthful records covering the operation of the licensed business. Despite the fact that Officer Hess provided a deadline of April 3, 2006 for Licensee to provide access to such records, Licensee, through its counsel, advised the Officer on March 31, 2006 that no such records would be provided and that, since transferring the license was of greater concern, she should, in fact, "just cite the premises and take care of it." Licensee's intention was made manifest when the records were not produced on April 3, 2006. The Board finds that the express refusal on March 31, 2006 to provide records, despite a Bureau officer's request for such records, constitutes a violation of section 493(12).

With respect to the other three (3) violation dates referenced in the citation, namely April 24, May 10 and June 8, 2006, the Board finds that

Licensee continued to be under an obligation to provide the requested records, despite the fact that Licensee placed the license into safekeeping on April 7, 2006. Licensee cites to Pennsylvania State Police Bureau of Liquor Control Enforcement v. D'Angio, Inc., 666 A.2d 1114, 1115 (Pa. Commw. 1995) to support his position that once the license is placed into safekeeping, a licensee is not subject to being cited under the Liquor Code. In fact, under D'Angio, if a licensee places its license into safekeeping and it is not physically displayed at the licensed premises, it is not considered a licensed premises under the Liquor Code and therefore the premises is not subject to citation for activity on its licensed premises (e.g., permitting lewd conduct on licensed premises, under D'Angio). However, Licensee remained obligated to fulfill the Bureau's request for documents after it placed the license into safekeeping, since the underlying request was made prior to placing into safekeeping.

Based on the foregoing, the Board finds that the ALJ committed an error of law in dismissing the citation with respect to the March 31, 2006 violation of section 493(12) of the Liquor Code. Therefore, the citation was improperly dismissed by the ALJ.

Accordingly, the ALJ's decision is reversed.

ORDER

The decision of the ALJ is reversed.

The appeal of the Bureau is granted.

This matter is hereby remanded to the ALJ for imposition of an appropriate penalty consistent with this Opinion.

Board Secretary