

Mailing Date: November 13, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-0046
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

SOUTH STREET EATERY, INC. : License No. R-11265
301 South Street :
Philadelphia, PA 19147-1518 :
:
:

Counsel for Licensee: Edward B. McHugh, Esquire
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Bensalem, PA 19020

Counsel for Bureau: Eric S. Shmukler, Esquire
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Bureau of Liquor Control Enforcement
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OPINION

South Street Eatery, 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 two thousand three hundred

dollars (\$2,300.00), and ordered Licensee's compliance with the Pennsylvania Liquor Control Board's ("Board") Responsible Alcohol Management Program ("RAMPS") within ninety (90) days.

The first count of the citation charged that, on October 18 and 19, 2006, Licensee, by its servants, agents, or employees, used, or permitted to be used on the inside of its licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside, in violation of section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)].

The second count of the citation charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that, on October 18, 2006, Licensee, by its servants, agents, or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

The third count of the citation charged that, on November 16, 17, 30 and December 6, 2006, Licensee, by its servants, agents, or employees, sold alcoholic beverages after its restaurant liquor license had expired on October 31, 2006, and had not been renewed and/or validated, in violation of

sections 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2), 493(16)].

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, as to counts one (1), two (2) and three (3) Licensee contends that the ALJ abused his discretion, committed an error of law and/or made a decision not based upon substantial evidence.

As to counts one (1) and two (2) of the citation, on October 18, 2006 Bureau Officer Mullen, along with Bureau Officer Kohler, visited the licensed premises at approximately 10:50 p.m. (N.T. 23-25). Upon entering the licensed premises, Officer Mullen heard rock music being played

from jukebox speakers. (N.T. 25). After a few minutes, Officer Mullen exited the premises and walked outside approximately fifty (50) feet to a pizza shop. (N.T. 26). Officer Mullen testified he heard the music emanating from the licensed premises from the pizza shop. (N.T. 27). He then walked approximately one hundred (100) feet away from the licensed premises and he continued to hear the music coming from the licensed premises. (N.T. 27).

Officer Mullen then returned to the licensed premises and sat at the bar next to Officer Kohler. (N.T. 27-28). Officer Mullen observed a young gentleman who was approximately twenty-three (23) or twenty-four (24) years old sitting near him at the bar. (N.T. 28, 31). The young man, named Eric, introduced himself to Officer Kohler and Officer Mullen. (N.T. 28). Officer Mullen observed that Eric, who was drinking a twenty-four (24)-ounce beer at the bar, had bloodshot eyes, slurred speech, and his breath smelled of alcohol. (N.T. 28). All of these observations led Officer Mullen to conclude that Eric was drunk. (N.T. 28). Eric invited Officer Mullen and Officer Kohler to join him in playing a computerized touch screen game, known as MegaTouch, located at the end of the bar. (N.T. 28-31). As they played the game with Eric, Officer Mullen observed Eric being served another

twenty-four (24) ounce can of beer while he played the MegaTouch game. (N.T. 32). Officer Mullen also observed Eric swaying and staggering as he played MegaTouch. (N.T. 31, 48). Eric left the premises with two (2) friends at 11:30 p.m. only to return ten (10) minutes later. (N.T. 32). At 11:40 p.m., Officer Mullen observed Eric dancing and stumbling to the music by himself. (N.T. 33). No other patrons were dancing. (N.T. 33). Eric grabbed a female patron that was seated at a table and tried to dance with her. (N.T. 33). Eric was also observed walking or stumbling into a chair. (N.T. 49). Officer Mullen observed that within five (5) minutes of his re-entry to licensed premises the barmaid served Eric again. (N.T. 33-34).

On October 19, 2006 at 10:40 p.m., Bureau Officer Bernesky investigated Licensee's premises and observed music emanating from the licensed premises at a distance of two hundred (200) feet. (N.T. 71-73).

As to count three (3) of the citation, Licensee stipulated to the charges that Licensee sold liquor without a license on the dates noted in the citation. (N.T. 6-9). Restaurant Liquor License No. R-11265 expired on October 31, 2006. (N.T. 8; Admin Notice). The record reveals that on December 6, 2006, Officer Kohler bought a drink from Licensee. (N.T. 8-9). Officer Kohler identified herself to Carl Pearson, President of Licensee. (N.T. 9,

88). Officer Kohler informed Mr. Pearson that the liquor license for the premises had expired, but that he could still serve food. (N.T. 9).

As to the merits of the first count of the citation, there is substantial evidence that amplified music emanating from Licensee's establishment could be heard on October 18 and 19, 2006 outside of the licensed premises.

As to the merits of the second count of the citation, section 493(1) of the Liquor Code provides in pertinent part that "[i]t shall be unlawful...[f]or any licensee...or any employe, servant or agent of such licensee...to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated...." [47 P.S. § 4-493(1)]. There is substantial evidence of record that the Bureau officers observed an individual being served alcohol on multiple occasions despite the fact that he had bloodshot eyes, smelled of alcohol, had slurred speech, staggered as he walked, swayed as he played a touch-screen game at the bar, and grabbed a female that was seated at a table to dance with him.

As to the merits of the third count of the citation, there is substantial evidence of record that Licensee sold liquor after its license had expired.

Further, the Board finds that the ALJ did not abuse its discretion or commit an error of law in rendering its decision in this matter.

Based on the foregoing, the ALJ's decision in this matter is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee must adhere to all other conditions set forth in the ALJ's
Order dated July 30, 2007.

Board Secretary