

Mailing Date: November 13, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-0361
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

HOSPITALITY GROUP SERVICES, : License No. H-4613
INC. :
t/a Ramada of Historic Ligonier :
216 West Loyalhanna Street :
Ligonier, PA 15658 :

Counsel for Licensee: Gregory T. Nichols, Esquire
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Greensburg, PA 15601

Counsel for Bureau: Michael C. Nickles, Esquire
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313 Mt. Nebo Road
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OPINION

Hospitality Group Services, Inc. t/a Ramada of Historic Ligonier
("Licensee") appealed from the Adjudication and Order of Administrative
Law Judge Robert F. Skwaryk ("ALJ"), wherein the ALJ sustained the

citation as to two (2) dates and imposed a fine of one thousand two hundred dollars (\$1,200.00) and R.A.M.P. training.

The citation in this matter charged Licensee with violation of section 493(1) of the Liquor Code [47 P.S. § 4-493(1)], in that on February 19, 2006 and divers other occasions within the prior year, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted the sale, furnishing or giving of alcoholic beverages to one (1) male minor, seventeen (17) years of age. The ALJ sustained the citation only to the dates of February 18-19, 2006.

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. Comwlth. 49, 484 A.2d 413 (1984).

On appeal, Licensee contends that the ALJ's conclusion that Licensee violated section 491(1) is not based on substantial evidence and/or is an abuse of discretion. Essentially, Licensee argues that the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") did not prove by preponderance of the evidence that the minor in question obtained the alcohol in question at the licensed premises.

The record reveals that the minor, Sean Nemcheck, was seventeen (17)-years old at the time of the events in question. (N.T. 5). He was employed by Licensee as a busboy and dishwasher. (N.T. 15, 34, 42). On February 18-19, 2006, Sean was working at Licensee's hotel. (N.T. 24, 54). On the early morning of February 19, 2006, Sean was involved in a one (1)-vehicle accident which resulted in his death. (N.T. 12). His blood alcohol content was found to be .141. (N.T. 12; Ex. C-6).

Bureau Officer Brown conducted an investigation concerning the accident as it related to Licensee. (N.T. 11). Officer Brown made an undercover visit to the licensed premises on July 14, 2006 to observe the layout of the bar area. (N.T. 13). The kitchen of the premises is located to the right of the bar. (N.T. 13) The bar is not immediately visible from the front desk area. (N.T. 13). The bar's liquor was not locked in locked

cabinets. (N.T. 13, 20-21; Ex. L-A). Officer Brown unsuccessfully attempted to contact a coworker of Sean's, Matthew White, several times. (N.T. 14-15). Sean and Matthew White worked the same hours on February 19, 2006. (N.T. 17-18). On February 6, 2007, Officer Brown finally spoke to Matthew White. (N.T. 18).

Kevin Behie, age 20, testified that Sean had been his best friend. (N.T. 23). On February 18, 2006, Kevin spoke to Sean around 5:00 p.m. or 6:00 p.m. and they made plans to meet after Sean finished work. (N.T. 23-24, 36). Their plans included drinking beer at Kevin's house. (N.T. 24-25). Sean had obtained the beer and brought it to Kevin earlier in the week in a trash bag. (N.T. 25). Kevin had never obtained beer from Sean before. (N.T. 26). After he learned about Sean's accident, Kevin threw the beer in a dumpster. (N.T. 26). Kevin had been with Sean on a prior occasion in December of 2005 at the licensed premises and tasted Sean's drink which tasted like it had soda and hard liquor in it. (N.T. 28-29, 33, 36-37). Sometimes when Kevin picked up Sean from work, he would smell alcohol on Sean's breath, and he exhibited signs of having been drinking alcohol. (N.T. 29-30). On another occasion, Kevin went to the licensed premises to see

Sean and he was really drunk, so Sean took him somewhere to sober up before he drove home. (N.T. 31-32).

Kimberly McKlveen, age 21, testified that she worked with Sean at the licensed premises for approximately two (2) years. (N.T. 39). Kimberly worked as a waitress, then a banquet server, then at the front desk. (N.T. 39). She was eighteen (18) years of age when she started. (N.T. 39). Generally, there was a bartender on duty, but sometimes the servers mixed their own drinks. (N.T. 40-41). After banquets, she would collect the glasses, plates, and silverware and put them in bus pans to go to the kitchen, and reset tables. (N.T. 41). This process would take an hour or two (2). (N.T. 41). Someone was generally there to supervise them until they were done. (N.T. 42). Kimberly never saw Sean serving any alcohol or consuming any alcohol, but she did see him intoxicated towards the end of a shift. (N.T. 42-43). Kimberly informed Deborah Crouch, the bartender, of her suspicion that Sean had been drinking. (N.T. 42, 46). Kimberly had no knowledge of the night of February 18-19 2006, because she stopped working at the licensed premises a couple of weeks before. (N.T. 47, 50). Kimberly indicated that she thought Sean had mood swings that could have

stemmed from drug, and not alcohol, use, but she smelled alcohol on him once. (N.T. 49-50).

Matthew White, age 18, testified that he is employed by Licensee as a dishwasher and banquet server. (N.T. 52-53). He and Sean were friends and Sean helped him obtain his job at the licensed premises. (N.T. 53). They worked together approximately once or twice a week. (N.T. 53). On February 18-19, 2006, Matthew was working with Sean at the licensed premises beginning at 4:00-5:00 p.m. (N.T. 54). They had to clear everything from the banquet that was held that evening and do the dishes, which began about 10:30 p.m. (N.T. 54-55). It took up to forty-five (45) minutes to clear the tables, then they began washing the dishes, which took two (2) or three (3) more hours. (N.T. 55). Sean set up for the next day's banquet while Matthew did the dishes. (N.T. 55). Licensee's cook, a waitress, and the bartender, were present at various times during the evening, but no one was there after 1:00-1:30 a.m. (N.T. 56, 66). Debbie, the bartender, left about 1:30 a.m. (N.T. 71). Usually Matthew did not work that late, but every once in a while, he would work until 1:00 a.m. (N.T. 56). On those occasions, the bartender was usually gone before Matthew was finished. (N.T. 56). Normally, the bar was not locked from the kitchen,

although sometimes it would be locked. (N.T. 57). On February 18, 2007, the door was not locked. (N.T. 57, 72).

At various points that evening, Matthew and Sean went into the bar to restock the glasses and take out the trash and sweep. (N.T. 59). Matthew never took or drank any of the alcohol in the bar. (N.T. 59). However, on other occasions, he had seen Sean drink beer in his truck in Licensee's parking lot, and he assumed Sean had obtained it from the bar. (N.T. 59-60). In November or December of 2005, Matthew drank beer on five (5) occasions with Sean in Sean's truck. (N.T. 60-61). On February 18-19, 2006, Matthew saw Sean drinking from a soda glass. (N.T. 62). At one point, when Matthew picked up Sean's glass by mistake and drank some, he noticed that it tasted sweeter than his soda. (N.T. 63-64). Based on his experience, Matthew felt it contained rum or whisky and soda. (N.T. 64, 69). Matthew never saw Sean drink rum from the premises on this or any occasion. (N.T. 64). Sean went into the bar and refreshed his drink twice as they were working. (N.T. 64-65). There were considerable periods of time on this night that Matthew and Sean were not working together. (N.T. 69). Matthew never saw Sean procure any alcohol on that night. (N.T. 69-70). Matthew was aware that there was a locked box in the kitchen that contained

keys, but he did not have access to the code to get into the box. (N.T. 71-72).

Sean and Matthew left the premises at 3:05 a.m. on February 19, 2006. (N.T. 65). Sean drove Matthew home in Sean's truck. (N.T. 66). Matthew did not see Sean consume any alcohol or have any alcohol in the truck. (N.T. 66). Matthew did not smell any alcohol on Sean's breath or notice any difference in Sean's driving. (N.T. 67). Sean dropped Matthew off at 3:15 a.m. (N.T. 67). The accident occurred about ten minutes (10) miles from Matthew's house around 4:00 a.m. (N.T. 67-68).

Deborah Crouch testified for Licensee. She is a bartender, waitress, and banquet server. (N.T. 77). She was working on February 18-19, 2006 for the banquet. (N.T. 77). A bartender named Gaby was also working that evening. (N.T. 77-78). Ms. Crouch begins her shift at 4:00 p.m. and finishes between 1:00-1:30 a.m. (N.T. 78). On February 19, 2007, she clocked out around 1:15 a.m., whereupon she noticed Matthew and Sean were still in the deli area. (N.T. 78-79, 83). She told them to leave. (N.T. 78-79). They said they were leaving once they threw away the garbage. (N.T. 79, 84). She locked the three (3) doors to the bar, one (1) of which is from the kitchen/deli. (N.T. 80-81). She deposited the keys in the locked

front desk safe along with the night's proceeds. (N.T. 80). She did not recall seeing Sean or Matthew behind the bar at anytime on her shift. (N.T. 81). The only way anyone could get into the bar after she locked the doors was with a key, and the key in the kitchen is in a lock box with a combination. (N.T. 81). The morning cooks know the combination. (N.T. 82). Ms. Crouch believed that Matthew and Sean were usually gone by 1:15 a.m. (N.T. 84-85). Ms. Crouch washes the glasses for the bar area before she leaves. (N.T. 89-90).

The Board finds this case to be an extremely difficult one to decide. The dire consequences of a minor unlawfully obtaining and drinking alcohol are no more apparent than in a situation such as the one presented herein. The only person who actually knows what really happened leading up to the fatal accident on February 19, 2006 is tragically unable to tell us. Sean's blood alcohol content clearly indicates that he imbibed alcohol at some point, somewhere, prior to his death, yet there is no direct evidence that he obtained that alcohol from Licensee. It is clear that none of Licensee's employees willfully gave Sean alcohol from the premises on February 18-19, 2006. However, his coworker, Matthew, testified that he saw Sean drinking from a cup and when he accidentally tasted that drink, it tasted sweet to him,

like it had rum or whisky mixed with soda, in it (a taste with which he stated he was familiar). Matthew also stated that on other occasions, he had seen Sean drinking beer in his truck in the hotel parking lot but he did not know where Sean had obtained the beer. Another co-worker witness, Kimberly, never saw Sean take or drink any alcohol while at work, but had smelled alcohol on his breath on at least one (1) prior occasion. A third witness, Kevin, a friend, had drunk alcoholic beverages with Sean in the past, including one time at the licensed premises when he tasted Sean's drink, which he believed contained a mixture of soda and alcohol. However, no one, not even Matthew, saw Sean actually obtain any alcoholic beverages while at work on February 18-19, 2006, so one would need to infer that Sean's access to the alcohol in the bar while he was cleaning up, prior to the bar area being locked, enabled him to surreptitiously obtain alcohol and he did, in fact, do so on the night in question.

Whether Sean obtained additional alcohol from his truck or at another location prior to 4:00 a.m. may be relevant in another forum, but here, in the context of a citation case, it only matters whether Sean somehow obtained alcohol from Licensee on February 18-19, 2006. Given Ms. Crouch's testimony that she locked the access door to the bar area before she

left, and the ALJ's finding that all the witnesses were credible, Sean would have had to obtain the alcohol, if he did, prior to when Ms. Crouch left at 1:15-1:30 a.m. or afterwards by unlocking the door. The fact that the testimony of Ms. Crouch and Matthew was at odds concerning whether the door was locked after she left makes this case even harder.

However, the Board is not charged with deciding the case based on the facts presented, but rather, it is charged with deciding whether the ALJ committed an error of law, abused his discretion, or failed to make his decision based upon substantial evidence. The Board finds no error of law or abuse of discretion; thus, the only issue before it is whether the ALJ's decision was not based upon such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Given this standard of review, the Board is constrained to find that the ALJ's decision was based on substantial evidence as defined herein. If Sean, who was lawfully on the premises as an employee, was able to obtain alcohol while working, and that acquisition occurred because Licensee failed to prevent his access to alcohol, Licensee is deemed to have furnished that alcohol. Commonwealth, Pennsylvania Liquor Control Board v. Abraham, 116 Pa. Cmwlth. 270, 541 A.2d 1161 (1988). While the Board has some doubts about the

circumstantial evidence in this case, its reading of cases such as Appeal of Old Express Limited, 70 Pa. Cmwlth. 382, 453 A.2d 679 (1982) and Pennsylvania State Police, Bureau of Liquor Control Enforcement v. J.E.K. Enterprises, Inc., 680 A.2d 53 (Pa. Cmwlth. 1996), do not convince the Board that the ALJ's decision must be reversed. Licensee's permitting its minor employees unsupervised control over or access to large amounts of alcohol for significant periods of time and its failure to heed Kimberly's warning to Licensee's employee, Ms. Crouch, on a prior occasion, that Sean smelled like alcohol, which should have given Licensee an inkling that there was a risk of a minor obtaining alcohol on the licensed premises, supports the ALJ's conclusion that Licensee failed to prevent the minor's acquisition to alcohol on the dates in question. Therefore, the Board concludes that the ALJ's decision is supported by substantial evidence and its decision is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of one thousand two hundred dollars (\$1,200.00).

Licensee must adhere to all other conditions set forth in the ALJ's Order dated September 6, 2007, regarding R.A.M.P. certification.

Board Secretary