

Mailing Date: January 6, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-2187
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

THE FLYING TORTILLA, LLC : License No. R-16298
16-22 W. 5TH Street :
Mount Carmel, PA 17851-2005 :

Counsel for Licensee: Michele Forry
PRO SE

Counsel for Bureau: Andrew J. Lovette, Esquire
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17110

OPINION

The Flying Tortilla, LLC (“Licensee”) appealed from the Order of Administrative Law Judge Daniel T. Flaherty (“ALJ”), wherein the ALJ sustained the citation and imposed a four hundred fifty dollar (\$450.00) fine.¹

¹ The procedural history is as follows:

By Order dated September 12, 2008, the ALJ sustained the two counts of the citation. On September 24, 2008, Licensee filed a Motion for Reconsideration requesting that all counts against the Licensee be dismissed. By Supplemental Order dated September 30, 2008, the Motion for Reconsideration was denied.

The first count of the citation charged that, on July 5, 16 and 27, 2007, licensed premises was not a bona fide restaurant and that Licensee, by its servants, agents or employees violated section 102 of the Liquor Code [47 P.S. § 1-102] by maintaining insufficient food, items and/or failing to provide food upon request.

The second count of the citation charged that, on July 27, 2007, 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 records on the licensed premises.

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, Licensee contends that the ALJ's decision lacks substantial evidence to support the two (2) counts listed in the citation. Licensee also argues in support of its position that statements in the Findings of Fact are not true and correct. Licensee further argues that the ALJ appeared "not fully involved" during the hearing and "to be elsewhere in thought and hasty," and that there was enough food at the premises, albeit frozen, to meet the requirements found in the Liquor Code.

A review of the record reveals that on July 5, 2007 at 5:35 p.m., Matthew Miller, an enforcement officer with the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") made an undercover visit to the licensed premises. The officer found only the six pack shop to be open. This is a small room on the right side of the licensed premises which has a counter and coolers (N.T. 10-11).

The officer asked the counter person in the six pack shop if he could order food. The counter person replied that he did not sell food, only six packs of beer (N.T. 11).

On July 16, 2007, Cheryl Seddon, an enforcement officer of the Bureau arrived at the licensed premises. She observed that there are two sections to the licensed premises. On the left hand side there is a restaurant

area, and the right hand side has a little room built on which is a six pack shop. The left hand side of the premises was closed. There were no lights in that section. Officer Seddon entered the six pack shop where she found a man who was later identified as Mike working (N.T. 17).

The officer obtained a diet coke from a cooler and asked Mike if he had any hoagies for sale. Mike told her that he did not have any hoagies for sale and more specifically, that the kitchen was not open because they were redoing the menu because Mexican food did not go over in town (N.T. 17).

On July 27, 2007, at 2:17 p.m., Lisa Harbach, also a Bureau enforcement officer, arrived at the licensed premises. She exited her vehicle and immediately recognized that the establishment operated two different types of business, one being a Mexican restaurant on the left side of the establishment, the other being a six pack shop (N.T. 21-22).

The officer peered into the front portion of the premises and observed that there were no interior lights or exterior lights on. She also observed chairs on top of tables (N.T. 22).

The officer further observed that right at the front entrance to the restaurant was a countertop that had an electronic cash register which was unplugged, and the cash drawer was empty and open.

The six pack store had interior and exterior lights and appeared to be open. (N.T. 22).

The officer proceeded into the six pack shop where she found a male employe. She asked the employe when the restaurant would open saying that she was hungry. The employe replied that the restaurant was not open at that time and that the restaurant had been closed now for approximately two to three months. The officer asked if there was a chance that she could get any type of food in the six pack shop, and the employe said no he did not have any food to sell at that time. He further stated that the owner anticipated that the restaurant would reopen in approximately one month as that Mexican food did not go over well and she was trying to revamp the restaurant into something different, possibly a buffet style restaurant. The officer exited the licensed premises at 2:20 p.m.

Officer Harbach returned to her vehicle, got the appropriate paperwork that she would need to do a routine inspection and reentered the licensed premises through the six pack store. Upon entry, officer Harbach identified herself as an officer of the Bureau and stated that she was there to conduct a routine inspection. At this time she was able to identify the counter person as Michael Catizone (N.T. 23).

The officer indicated that she was there for a routine inspection and wanted to look at the liquor license and health permit to see if they were valid and Mr. Catizone said, "Well you don't want to talk to me, let me get the manager, she's here."

The officer identified herself to Tina DeLong, the manager. The officer asked her how long she had the role of manager and she stated she had been manager since April of 2006 (N.T. 24-25).

After verifying that the liquor license and health permit were valid, the officer proceeded into the restaurant portion of the licensed premises. At this time she observed forty-two (42) chairs on top of twelve (12) tables. The cash register was not operational, being unplugged and with the drawer open. There was a small refrigerator that was turned off and its door was propped open. It contained various soda products (N.T. 25).

The officer observed that in the kitchen preparation area there was a prep table which was refrigerated. This table was unplugged and not operational. There were no perishable food items in that prep table (N.T. 25).

The officer inspected the kitchen area, and did not observe any food in the kitchen area. She observed a three door refrigerator that contained no

food and it was unplugged and not operational. Tina DeLong stated to the officer that this was where the food was kept when the restaurant itself was open and operational (N.T. 26).

The officer examined other areas of the licensed premises. She observed that where the office area is located there is a long corridor type room which doubles as a dry storage area. In that storage area there was a large chest freezer. The officer opened it up and observed that it contained many food items, all of which were frozen. At that time the officer did not see anything being prepared or thawed out or prepared for use later that day (N.T. 26-27).

In the storage area the officer observed a large quantity of items such as cornmeal, bags of tortilla chips, condiments, cans of refried beans and cheese sauces.

The officer spoke with Ms. DeLong about the operation of the restaurant itself. DeLong indicated that the restaurant had been shut down for a couple of months and said that the establishment had failed because it was a Mexican restaurant, and that just did not go over well in Mount Carmel. The officer asked DeLong if she could tell her what the specific date was that it had shut down, and DeLong said that she could, she went to the

computer, pulled up her daily sales and pinpointed the date as April 21, 2007 (N.T. 27-28).

The officer then asked DeLong for sale invoices for the period from January 1, 2007 through July 27, 2007. DeLong was able to produce records that consisted of February, March, April, May and then July. Therefore out of the seven month period the officer was missing the records for January and June, 2007. The officer asked DeLong why January and June records were missing. After DeLong explained it the officer still was not sure why the records for January could not be produced. DeLong did say that June was not available because the computer had a glitch and erased all of those records so that is why June was not available (N.T. 28-29).

The records that DeLong produced indicated that in February of 2007, one hundred eight (108) meals were sold producing five hundred fifty-two dollars and fifteen cents (\$552.15) in revenue (N.T. 30 and Exhibit C-4).

The records further indicated that for the month of March 2007, thirty (30) meals were sold producing revenue of one hundred sixty-three dollars and fifty-five cents (\$163.55). For the month of April, four (4) meals were sold for total revenue of thirty-two dollars and fifty cents

(\$32.50). For May and July there were no meals sold (N.T. 31 and Exhibit C-4).

After reviewing the sales invoices, officer Harbach asked DeLong for food invoices for food that was purchased during the period January of 2007 through July of 2007. DeLong went to her desk and produced a folder which she handed to the officer stating that all 2007 food invoices were in that folder. The officer went through the folder and could not find any 2007 food invoices. She asked DeLong who was the food provider for the licensed premises, and DeLong replied that Sysco provided the licensed premises with the majority of the food, however, they would buy local items from Massers in that area. The last Sysco food sales invoice that the officer was able to find was for September, 2006.

When she could find no food invoices for 2007, the officer brought this to the attention of DeLong and asked if DeLong would be able to contact the principal for Licensee's corporation, Michele Forray. DeLong was successful in contacting Forray on the phone. She talked to her for a few minutes and then turned the phone over to the officer. The officer indicated that she was there to do a routine inspection and indicated that she was reviewing records and could not find food invoices for 2007. At that time

Furray indicated that she was in possession of those food records which were currently located in the trunk of her vehicle which was in Texas. Furray explained that she did not know she had to have the food records on the premises and that she was taking the invoices to her accountant. Furray indicated that the restaurant had failed and that she had shut it down and thought that the only thing she had to do in order to keep her liquor license valid without placing it into safekeeping was to keep the six pack shop open. The officer indicated that that would be permissible, however, she still had to provide food from the location when customers came in and asked for it. Furray explained that she was revamping into a buffet style restaurant and hoped to have it open in two weeks (N.T. 33 and 34).

After her conversation with Ms. Furray, the officer turned the phone back to DeLong. DeLong was instructed by Furray to contact Sysco to get the food invoices for the officer (N.T. 35).

At 4:18 p.m. the food invoices were faxed to the licensed premises by Sysco. The officer reviewed these invoices and observed that the last delivery invoice reflected a date of July 20, 2007. Between March 9, 2007 and July 20, 2007, the only delivery items consisted of paper bags. The last food

delivery was reflected on an invoice with a date of March 9, 2007 (N.T. 35 and Exhibit C-4).

Section 102 of the Liquor Code provides in pertinent part:

“Restaurant” shall mean a reputable place operated by responsible persons of good reputation and habitually and principally used for the purpose of providing food for the public...equipped with tables and chairs, including bar seats, accommodating at least thirty (30) persons at one time.

[47 P.S. § 1-102]

Upon full review of the record, Licensee’s contentions must be rejected. The ALJ’s findings of fact relative to the bona fide restaurant charge are clearly supported by substantial evidence. The ALJ’s conclusions are based upon the testimony of three (3) enforcement officers regarding their own observations that upon each one making a request for food while in the six-(6) pack portion of the licensed premises, each one was told there was no food available. (N.T. 11, 17, 22-23). Two (2) of the officers were given the same explanation for the lack of food, because the owner was in the process of revamping the restaurant. (N.T.17, 23). The ALJ took into account these admissions made by Licensee’s own employees. While conducting a routine inspection, Officer Seddon observed a nonworking cash register, a refrigerated prep table that contained no food items and was not

operational, a kitchen area that contained no plates or dishes, and a three (3) door refrigerator that was unplugged and contained no food. (N.T. 25-26). Officer Seddon did inspect a large freezer chest and upon opening it she found it to contain plenty of frozen food products such as meat and beef products. (N.T. 26-27). However, Officer Seddon further noted that during her visit between 2:17p.m. and 4:18 p.m., she did not see anything being prepared or thawed out for later use. (N.T. 27). The only other food observed on the premises by Officer Harbach included bags of tortilla chips, corn meal and cans of refried beans and cheese sauces. (N.T. 27).

As to count two (2) of the citation, the ALJ's findings relative to Licensee's failure to keep records on the licensed premises, are also clearly supported by substantial evidence. By her own admission, Licensee's sole corporate principal informed Officer Seddon that some of the records she was requesting to see on July 27, 2007, were in fact with Ms. Forray in the trunk of her car in Texas. While there may have been conflicting testimony offered by Licensee, it is clear that when rendering a decision, the ALJ determined the Bureau's witnesses to be more credible than Licensee's.

It is fundamental that matters of witness credibility, and the weight and sufficiency of any evidence given by them, are the sole prerogative of the fact

finder (i.e. the ALJ). Borough of Ridgway v. Pennsylvania Public Utilities Comm'n., 480A.2d 1253 (Pa. Cmwlt. 1984). In making its determination, the ALJ may give a witness' testimony such consideration as it may deserve, and accept it or reject it in whole or in part. McFarland Landscape Service v. Workmen's Comp. Bd. Of Appeal, 557 A.2d 816, 817-818 (Pa. Cmwlt. 1989); Hollenbach v. North Wales Foundry Co., 136 A.2d 148, 150 (Pa.Super 1957). In light of this, it is clear that the ALJ therefore made a decision based on substantial evidence and committed no error.

There is no basis in the record to support Licensee's argument that the ALJ was not fully involved in the course of the hearing, nor is there any support for the notion that the ALJ did not fully review the record in this case prior to rendering a decision. To the contrary, the record indicates that the ALJ was engaged throughout the proceeding and even asked several questions of the witnesses. (N.T. 14, 19, 24).

Accordingly, the record, as presented, provides substantial evidence to support the decision of the ALJ.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of four hundred fifty (\$450.00) dollars.

Licensee must adhere to all conditions set forth in the ALJ's Orders in this matter.

Board Secretary