

Mailing Date: April 23, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-2305
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

S.D.C. ENTERPRISES, INC. : License No. H-3186
t/a Boomerang's Bar and Grille :
547 Philadelphia Street :
Indiana, PA 15701-3901 :

Counsel for Licensee: Christopher S. Welch, Esquire
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Indiana, PA 15701

Counsel for Bureau: Nadia Vargo, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
313 Mount Nebo Road
Pittsburgh, PA 15237-1305

OPINION

S.D.C. Enterprises, Inc. t/a Boomerang's Bar and Grille ("Licensee")
appealed from the Opinion and Order Upon Evaluating Licensee's
Application for Reconsideration and the Bureau's Response Thereto issued by

Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ denied Licensee’s request for reconsideration.

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).

A review of the record in this matter reveals that the citation out of which this appeal arose consisted of two (2) counts. The first count of the citation charged that, on August 11, 2007, Licensee, by its servants, agents or employees, violated section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) male minor, twenty (20) years of age. (Admin. Notice).

The second count of the citation charged that, on August 11, 2007, Licensee, by its servants, agents or employees, violated section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron. (Admin. Notice).

On or about October 22, 2007, Licensee submitted an Admission, Waiver and Authorization (“waiver”) to the Office of the Administrative Law Judge (“OALJ”). (Admin. Notice). The waiver form reflects that it was filed relative to Citation No. 07-2305, and it was signed by Shane Caylor, Licensee’s sole corporate principal. (Admin. Notice).

The waiver provided that Licensee: (1) acknowledged receipt of the citation; (2) admitted to the violations charged in the citation; (3) waived its right to a hearing; (4) authorized the ALJ to enter an adjudication based upon a summary of facts and Licensee’s prior citation history; (5) acknowledged that the possible penalty included a fine ranging from one thousand dollars (\$1,000.00) to five thousand dollars (\$5,000.00) and/or suspension or revocation of the license and/or permits incidental to the license; and, (6) waived any right to appeal the adjudication. (Admin. Notice).

The ALJ issued an Adjudication and Order on December 5, 2007 that sustained the citation, imposed a two thousand five hundred dollar (\$2,500.00) fine, and ordered Licensee to remain in compliance with the Board's Responsible Alcohol Management Program ("RAMP") for a period of one (1) year from the mailing date of the Adjudication. (Admin. Notice).

On December 17, 2007, Licensee submitted a Motion for Reconsideration to the OALJ, stating that the filing of the waiver was a clerical error, in that it was meant to be filed relative to another citation, not this one. (Admin. Notice). Licensee requested that the waiver be withdrawn, and that a hearing be held on the merits. (Admin. Notice).

On December 19, 2007, the ALJ issued an Opinion and Order in Response to Licensee's Application for Reconsideration, stating that Licensee failed to delineate any defenses it claims to have to the subject charges, and providing Licensee seven (7) days from the mailing date of the Order to fully delineate its assertions. (Admin. Notice). The Order stayed the Adjudication and Order issued December 5, 2007. (Admin. Notice).

On December 31, 2007, the OALJ received Licensee's Amended Motion for Reconsideration, which set forth some defenses to the charges in the citation. (Admin. Notice). On January 16, 2008, the ALJ issued an

Opinion and Order upon Licensee's Application for Reconsideration giving the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") fifteen (15) days to respond, and further staying the Adjudication and Order issued December 5, 2007. (Admin. Notice).

On January 30, 2008, the Bureau filed its Response Objecting to Licensee's Application for Reconsideration stating, inter alia, that Licensee's Amended Motion set forth defenses which were arguably not viable and failed to demonstrate the manifest injustice required, in criminal law, to have a plea withdrawn. (Admin. Notice).

On February 1, 2008, the ALJ issued an Opinion and Order Upon Evaluating Licensee's Application for Reconsideration and the Bureau's Response Thereto, in which he agreed with the Bureau and denied Licensee's Motion for Reconsideration. (Admin. Notice).

On February 29, 2008, Licensee filed an appeal from the ALJ's Opinion and Order Upon Evaluating Licensee's Application for Reconsideration and the Bureau's Response Thereto. (Admin. Notice). On appeal, Licensee contends that the ALJ committed an error by not determining whether the waiver should be withdrawn. Licensee also contends that the ALJ committed an error in considering only what was submitted as

argument of counsel and not testimony at a hearing before rendering an adjudication. Lastly, Licensee contends that manifest injustice would result if Licensee is not entitled to withdraw its waiver and have a hearing on the merits of the citation.

In response to Licensee's appeal, the Bureau asserts that such appeal was untimely, in that the Adjudication appealed from bears a mailing date of December 5, 2007, and the date of Licensee's appeal to the Board was February 29, 2008. The Board does not agree.

The ALJ's Orders of December 19, 2007 and January 16, 2008 clearly stated that the December 5, 2007 Adjudication and Order was stayed pending its ruling on Licensee's Motion for Reconsideration. The ALJ's Opinion and Order Upon Evaluating Licensee's Application for Reconsideration and the Bureau's Response Thereto was issued February 1, 2008. Whether Licensee's appeal was filed relative to the Adjudication and Order issued December 5, 2007, or Opinion and Order Upon Evaluating Licensee's Application for Reconsideration and the Bureau's Response Thereto issued February 1, 2008, it was filed within thirty (30) days and is, therefore, timely.

Relative to the ALJ's denial of Licensee's request for reconsideration, where a licensee appeals an order denying reconsideration, the Board, on review, may consider whether the ALJ abused its discretion in denying the motion, but may not consider a review of the merits of the case. Bd. of School Directors of Avon School v. Dept. of Education, 375 A.2d 851 (Pa. Cmwlth. 1977); Keith v. Dept. of Welfare, 551 A.2d 333 (Pa. Cmwlth. 1988). When filing a request for reconsideration, the licensee is required to state concisely the alleged errors in the adjudication or allege new matters that have arisen since the hearing and adjudication which are grounds for vacating, modifying or reversing the adjudication. [1 Pa. Code § 35.241(b)].

Licensee avers that it is entitled to withdraw its waiver after the Adjudication and Order was issued December 5, 2007 by the ALJ. Licensee provides no basis to support that conclusion. The ALJ's February 1, 2008 Opinion and Order, reflects that, since there is no standard upon which to evaluate a request to withdraw a waiver after an adjudication has been issued, he followed a standard he applied when deciding this issue in Young Democratic Club of Clarence, 30 ALJ Sel.Op. 5, in which he concluded that a criminal law analogy, like that set forth by the Bureau, was applicable. The ALJ, therefore, determined that, in order for Licensee to prevail, it must

establish that a manifest injustice will occur if its request is not granted. The ALJ reviewed Licensee's original and amended Motions for Reconsideration and concluded that Licensee failed to provide a sufficient factual presentation which would establish a manifest injustice should the ALJ refuse to allow Licensee to withdraw its waiver.

The Board has reviewed the ALJ's analysis and concurs with his finding that Licensee's Amended Motion for Reconsideration fails to specifically identify what direct evidence Licensee intended to present if a hearing had been held on the merits of the case. Given that the ALJ permitted Licensee two (2) separate opportunities to state its case and, in both instances, Licensee provided possibilities and vague scenarios for how the incidents may have occurred, the Board finds no abuse of discretion on the part of the ALJ in denying Licensee's Motion for Reconsideration. Therefore, the appeal of Licensee must be dismissed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of two thousand five hundred (\$2,500.00) dollars.

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

Board Secretary