

Mailing Date: July 22, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-2312
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

NORTHEAST CONCESSIONS, L.P. : License No. R-15046
1280 State Highway :
Route 315 :
Wilkes-Barre, PA 18702-7002 :

Counsel for Licensee: Francis X. O'Brien, Esquire
411 Walnut Street
Harrisburg , PA 17101

Counsel for Bureau: Craig A. Strong, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Parkway
Macungie, PA 18062

OPINION

Northeast Concessions, L.P. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Daniel Flaherty ("ALJ"), wherein the ALJ sustained Citation No. 07-2312 and imposed a one thousand dollar (\$1,000.00) fine.

The citation in the present matter charged that, on September 1, 2, 3 and 4, 2007, Licensee, by its servants, agents or employees, violated sections 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2) and 4-493(16)] by permitting the sale of alcoholic beverages after its restaurant liquor license expired on August 31, 2007.

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 Pennsylvania Liquor Control Board ("Board") shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/her 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).

Licensee lists numerous contentions in support of its appeal. First, Licensee contends that the ALJ committed an error of law by refusing to merge the alleged violation of Liquor Code section 493(16) into the charges under sections 491(1) and 492(2). Further, Licensee contends that the ALJ

committed an error of law by refusing to address the issue of Licensee's detrimental reliance (through the attorney who handled the renewal) on the fact that the Board did not notify Licensee that it owed a one hundred dollar (\$100.00) late fee that must be paid or the license would not be renewed. Licensee further avers that the ALJ committed errors of law by finding that there was a violation, despite Licensee's uncontroverted testimony regarding detrimental reliance and prior course of conduct and by sustaining the citation in violation of Licensee's constitutional rights to due process and equal protection. In addition, Licensee argues that the ALJ's decision was not based upon substantial evidence because the ALJ did not consider the evidence regarding detrimental reliance, and the course of dealings between the Board's Bureau of Licensing and the attorney who was handling the renewal and because he did not consider the fact that the Board refunded one hundred and fifty dollars (\$150.00) of the two hundred and fifty dollar (\$250.00) late filing fee, indicating that Licensee had not failed to do what was necessary to renew the license before it expired.

A review of the record reveals that Licensee's restaurant liquor license was due to expire on August 31, 2007. (Ex. C-3). On September 4, 2007, Terrance James Higgs, an officer with the Pennsylvania State Police,

Bureau of Liquor Control Enforcement (“Bureau”), ran a computer check and contacted the Board in Harrisburg to confirm that Licensee’s license had not been renewed. (N.T. 7). The officer then proceeded to the licensed premises, arriving at 11:00 a.m. (N.T. 7-8). Officer Higgs proceeded to one of the downstairs bars where he purchased a Coors Light Draft Beer for three dollars and fifty cents (\$3.50). (N.T. 8). While at the premises the officer observed additional sales of beer and wine to other patrons in the premises. (N.T. 8)

The Bureau also presented the testimony of Brian Langan, a supervisor for the Bureau’s office in Wilkes-Barre, Pennsylvania. (N.T. 12). On Sunday, September 2, 2007, Officer Langan, through a routine check of expired licenses in the county, became aware that the license issued to Licensee had not been renewed. (N.T. 12). Officer Langan checked his computer, which showed that the license had expired and was not renewed. (N.T. 12). After receiving information from a Pennsylvania State Police Gaming Enforcement officer that he was unable to see a valid liquor license posted at the licensed premises with valid dates beyond the expiration date, Officer Langan contacted Licensee’s beverage manager, Ms. Kristie Hynoski, advising her that he was fairly certain that the licensed premises did not have

the authority to sell malt or brewed beverages, spirits or wine. (N.T. 13) Officer Langan further advised Ms. Hynoski that if Licensee did not have a valid license, it should cease service of alcoholic beverages and any further sales would be considered a violation. (N.T. 14, 52-53).

Following Officer Higgs' visit to the premises on September 4, 2007, Officer Langan visited the licensed premises and asked to see a current liquor license. (N.T. 15). A bartender on duty was unable to present a current license. (N.T. 15). Officer Langan then spoke to Ms. Hynoski and requested to see the liquor license. (N.T. 15). Ms. Hynoski told Officer Langan to contact the attorneys representing Licensee. (N.T. 15). Officer Langan was persistent in requesting to see a current liquor license, and the conversation with Ms. Hynoski continued for about ten (10) minutes before Officer Langan received a message to contact the Board's Bureau of Licensing. (N.T. 16). Upon contacting a licensing analyst, Officer Langan was then informed that an attorney representing Licensee was in Harrisburg making all necessary payments which would result in a valid license being issued on September 4, 2007. (N.T. 16). However, Officer Langan did not actually see Licensee cease sales of alcohol during his visit to the premises on September 4, 2007. (N.T. 17).

In defense of the charges, Licensee presented three (3) witnesses. Kristie Hynoski, Licensee's beverage manager, was employed at the premises on Labor Day weekend, 2007. (N.T. 23). Ms. Hynoski stated that during a phone call from Officer Langan, she was informed that the license had expired and no paperwork would be processed until Tuesday because of the holiday weekend. (N.T. 24). Ms. Hynoski denied that Officer Langan advised her that any service of alcohol would be against the law and that the premises would have to close or that she should stop the service of alcohol. (N.T. 24-25). Ms. Hynoski's recollection of the conversation she had in person with Officer Langan on September 4, 2007 was vague, although she did recall Officer Langan asking if Licensee had the renewed license and she recalls that at that time, Licensee did not have a current license. (N.T. 25).

Ms. Hynoski further stated that following the September 2, 2007 phone call from Officer Langan, she contacted her superiors and was told to continue serving. (N.T. 26).

Curtis Rogers, Licensee's corporate counsel, stated that while out of town, he received a call from Ms. Hynoski advising that she had been informed that the liquor license was expired. (N.T. 29-30). Mr. Rogers

asked Ms. Hynoski if she had been told by the Bureau officer to not continue the service of alcohol. Mr. Rogers stated after Ms. Hynoski indicated that she had not been so instructed, it was agreed that the issue would be addressed on Tuesday morning, after the holiday weekend. (N.T. 30-31). On Tuesday, Mr. Rogers contacted attorneys Barbara Ann Darkes and Kimberly Selemba to discuss the steps necessary to make sure the liquor license was current and valid. (N.T. 31). Mr. Rogers believed some confusion regarding the Department of Labor and Industry's understanding of Licensee's corporate structure may have been the reason why tax clearance was not timely received by the Board. (N.T. 32-33). Mr. Rogers did confirm for Ms. Hynoski that she could continue to serve alcohol at the licensed premises. (N.T. 34). Mr. Rogers believed Licensee's renewal application and fees had been submitted and he hoped that there was some bureaucratic mix-up in Harrisburg which could be addressed on Tuesday. (N.T. 35).

Barbara Ann Darkes, Esquire, of the law firm of McNess, Wallace, and Nurick, explained the steps she took to address a tax clearance issue involving the renewal of Licensee's liquor license in August, 2007. (N.T. 38-39). Ms. Darkes obtained a tax certification from the Department of Labor and Industry and had the certification hand delivered to the Board on August 16,

2007, along with a cover letter asking that she be contacted should the Board require anything further on Licensee's renewal application. (N.T. 40-41, Ex. L-4). Ms. Darkes did not receive any communications from the Board advising that there was anything else holding up the license renewal. (N.T. 47,49). On the morning of September 4, 2007, Ms. Darkes received a call from her colleague, Kimberly Selemba, advising that Licensee's license had expired. (N.T. 44).

Section 491(2) of the Liquor Code provides in part that it shall be unlawful—

- (1) For any person, by himself or by an employee or agent, to expose or keep for sale, or directly or indirectly, or upon any pretense or upon any device, to sell or offer to sell any liquor within this Commonwealth, except in accordance with the provisions of this act and the regulations of the board.

[47 P.S. § 4-491(2)].

Section 492(2) of the Liquor Code provides that it shall be unlawful for any person, to sell to another for consumption upon the premises where sold or to permit another to consume upon the premises where sold, any malt or brewed beverages, unless such person holds a valid retail dispenser license or a valid liquor license issued by the Board authorizing the sale of malt or

brewed beverages for consumption upon such premises. [47 P.S. § 4-492(2)].

Section 493(16) of the Liquor Code provides that it is unlawful for any licensee, his servants, agents or employees, to give, furnish, trade, barter, serve or deliver any liquor or malt or brewed beverages to any person during hours or on days when the licensee is prohibited from selling liquor or malt or brewed beverages. [47 P.S. § 4-493(16)].

A review of the facts supports the ALJ's finding that on September 1, 2, 3 and 4, 2007, Licensee, by its servants, agents or employees, sold alcoholic beverages after its restaurant liquor license had expired on August 31, 2007 and had not been renewed and/or validated. In finding a violation of the Liquor Code, the ALJ imposed a fine in the amount of one thousand dollars (\$1,000.00) citing section 471 of the Liquor Code [47 P.S. § 4-471] as prescribing a penalty of license suspension or revocation or a fine of not less than one thousand dollars (\$1,000.00) or more than (\$5,000.00) dollars, or both, for violations of the type found in this case. However, Licensee argues that the ALJ committed an error of law by refusing to merge the violations of section 493(16) into the charges under sections 491(1) and 492(2). Licensee further stated that the violation of section 493(16) counts

toward a subsequent, mandatory suspension, so the penalty in this case becomes greater with the failure to merge. Licensee suggests that although the doctrine of merger of related offenses was developed in criminal matters, the doctrine should be applied in the present administrative context; however, the Board cannot agree. A review of the citations listed in support of Licensee's argument reveals that those cases are clearly criminal matters involving sentencing issues arising from convictions of criminal statutes. There is nothing in the rationale set forth in Heller v. Com., Department of Transportation, 867 A. 2d 735 (Pa. Cmwlth. 2005) which suggests that its conclusion should be applied to administrative proceedings involving fines, suspensions, or possible revocations of liquor licenses.

It is well settled that violations of the Liquor Code and its attendant laws and regulations are strict liability offenses. Pennsylvania Liquor Control Board v. TLK, Inc., 544 A. 2d 931 (Pa. 1988). Thus, the true issue underlying this appeal is whether or not Licensee permitted sales of alcohol and brewed beverages after its license expired on August 31, 2007. The record reveals that Licensee had ample notice that there was no valid, current liquor license in its possession as early as September 2, 2007 when Officer

Langan advised the alcohol beverage manager of his concerns in a phone call on September 2, 2007.

The ALJ is under no requirement to merge any violations of the Liquor Code as alleged in any citation matter before it. The ALJ's only obligation is to determine if the Bureau has established that Licensee violated the Liquor Code or Board's Regulations. Beyond that, the ALJ is required to issue a penalty within the parameters set forth in section 471 of the Liquor Code [47 P.S. § 4-471]. Section 471(g) identifies a violation of section 493(16) to be an enhanced penalty for which a fine ranging from one thousand dollars (\$1,000.00) to five thousand dollars (\$5,000.00) may be imposed. Accordingly, the penalty imposed by the ALJ was proper in this instance.

Relative to Licensee's contention that the ALJ committed an error of law by refusing to address the issue of Licensee's detrimental reliance on the fact that the Board did not notify Licensee that it owed a one hundred dollar (\$100.00) late fee that must be paid or the renewed license would not be issued, the Board does not agree. Licensee's own exhibit L-1 contradicts this allegation. The May 29, 2007 letter from the Board to Licensee clearly states that if tax clearance is not received on or before July 2, 2007, a late filing fee in the amount of one hundred dollars (\$100.00) is required.

Licensee's own counsel stated that the tax clearance from the Department of Labor and Industry was not issued until July 31, 2007. In the absence of any evidence to the contrary, Licensee was given proper notice of the fact that a late fee was required. Licensee's contention is therefore found to be without merit. Further, Licensee has failed to provide any supporting caselaw for its assertion that the ALJ committed an error of law by finding there was a violation despite Licensee's uncontraverted testimony regarding detrimental reliance and prior course of conduct. Again, Exhibit L-1 clearly put Licensee on notice of its obligation to submit a one hundred dollar (\$100.00) late filing fee. Without evidence to the contrary, there was no basis for the ALJ to consider detrimental reliance and/or prior course of conduct in determining a violation.

Relative to Licensee's contention that the ALJ committed an error of law by sustaining the citation in violation of Licensee's constitutional rights to the due process and equal protection, the Board is without authority to rule on the constitutionality of its enabling legislation or the constitutionality of its own regulations. Bunch v. Board of Auctioneer Examiners, 620 A. 2d 589 (Pa. Cmwlth. 1993).

As to Licensee's contention that the ALJ's decision was not based on substantial evidence because he did not consider the evidence regarding detrimental reliance and the course of dealing between the Board's Bureau of Licensing and the attorney who was handling the renewal for Licensee, the Board does not agree. As previously stated, because licensees are held strictly liable for violations of the Liquor Code, the ALJ's only issue for consideration was whether or not Licensee sold alcoholic beverages after August 31, 2007 when its license expired and had not been renewed. The Board finds that there is ample evidence to support the violation. Licensee's proffer of testimony relative to its detrimental reliance and the course of dealings are only relevant, if at all, for purposes of mitigation of the penalty.

As to Licensee's sixth contention, that the ALJ's decision was not based on substantial evidence because he did not consider the fact that the Board refunded Licensee one hundred and fifty dollars (\$150.00) of the two hundred and fifty dollar (\$250.00) late filing fee, as an indication that Licensee had not failed to do what it had to do to renew the license before it expired, the Board does not agree. As set forth in the May 29, 2007 letter to Licensee from the Bureau of Licensing, whether or not a late filing fee of one hundred dollars (\$100.00) or two hundred and fifty dollars (\$250.00)

is required is determined by whether or not the Board receives the tax clearance(s) on or before July 2, 2007 or after August 31, 2007. (Ex. L-1). In this instance, tax clearance was issued by the Department of Labor and Industry on July 31, 2007. (Ex. L-3). Accordingly, as the clearance was received after July 2, 2007 and before August 31, 2007, there was a one hundred dollar (\$100.00) late fee assessed against the renewal of the license. Further, the May 29, 2007 letter also states, "No authority will be given until tax clearance(s) is received along with any outstanding fees." Licensee was thus obligated to not only submit the necessary tax clearance, but to also timely submit the late fees. While Licensee appears to have submitted the requisite tax clearance certificates by cover letter dated August 16, 2007, there is no mention of the additional one hundred dollar (\$100.00) late fee that was due in order to obtain renewal. (Ex. L-4). The record does reveal a check in the amount of two hundred and fifty dollars (\$250.00) "for the late filing fee" was hand delivered to the Board on September 4, 2007. (Ex. L-5). Subsequently, the Board, having assessed the appropriate one hundred dollar (\$100.00) late fee, sent a letter informing Licensee that the excess fee of one hundred and fifty dollars (\$150.00) would be refunded under a separate cover. (Ex. L-6).

Therefore, the Board finds the decision of the ALJ was based upon substantial evidence as Licensee's exhibits support the ALJ's finding that the charge in the citation is sustained. Based upon this finding, the Board concludes that the ALJ's decision to sustain the citation was not an error of law and was supported by substantial evidence and shall not be disturbed.

The decision of the ALJ is therefore affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee paid the fine in the amount of one thousand dollars (\$1,000.00) on March 26, 2010.

Licensee must adhere to all conditions set forth in the ALJ's Order issued February 18, 2010.

Board Secretary