

Mailing Date: December 17, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-2329  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

KATHY J. WHITEMAN, t/a : License No. R-11776  
THE BEAR'S DEN :  
144-144 ½ VALLEY ST. :  
LEWISTOWN, PA 17044 :

Counsels for Licensee: Frank C. Sluzis, Esquire  
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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement  
("Bureau") appeals the dismissal of Count 3 of Citation No, 07-2329 as set

forth in the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), dated August 26, 2008.

The citation in the present matter contained three (3) separate counts; however, Count 1 and Count 2 are not at issue in the present appeal and accordingly will not be addressed in this Opinion. Count 3 of the citation alleged that on August 20, 2007, Licensee failed to adhere to the conditions of a Conditional Licensing Agreement (“CLA”) entered into with the Pennsylvania Liquor Control Board (“Board”) placing additional restrictions upon the subject license, in violation of section 404 of the Liquor Code. [47 P.S. § 4-404].

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/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).

The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. It is well-settled that an abuse of discretion is not merely an error of judgment; however, if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused. Commonwealth v. Levanduski, 907 A.2d 3, 13-14 (Pa.Super. 2006)(*en banc*).

On appeal, the Bureau submits one issue for the Board's review. Specifically, the Bureau contends that the ALJ's conclusion that certain testimony was inadmissible hearsay constitutes an error of law. Further, the Bureau suggests that the evidence presented demonstrates that Licensee violated a CLA entered into by the Licensee to scan the identification of all patrons entering into the licensed establishment.

The Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the Notes of Testimony from the

hearing of June 10, 2008 and the ALJ's Adjudication and Order, with the Bureau's contention in mind, and has concluded that the ALJ's conclusion that the Officer's testimony constituted inadmissible hearsay was an error of law and accordingly, we reverse.

In the present matter, Licensee entered into a CLA with the Board, which required that the Licensee utilize a transaction scan device to scan the identifications of all patrons entering into the licensed premises. (N.T. at 6-7). On August 20, 2007, Liquor Control Enforcement Officer Earl Killion ("Officer Killion") entered the Licensee's establishment as part of an investigation and he observed five (5) patrons inside the bar. (N.T. at 20). After entering the establishment, Officer Killion asked the Licensee if she had scanned the five (5) patrons present in the bar, as required by the terms of the existing CLA. (N.T. at 21-22). In response to this question, Licensee replied, "God, I hope so." (N.T. at 22). Officer Killion then asked the Licensee when the last patron was scanned. The Licensee did not supply a verbal response, but instead operated the transaction scan device and showed Officer Killion the readout. (N.T. at 22-23). The readout indicated that the last time the scanner was used was the prior day, Sunday, August 19, 2007

at 10:42 p.m. (N.T. at 23). At no time did the Licensee offer any evidence to contradict the information displayed on the device or to attack the accuracy of this readout.

As a preliminary matter, it should be noted that while counsel for the Licensee counsel objected to the admission of Officer Killion's testimony regarding what was displayed on the device, the grounds for said objection were never stated with any meaningful specificity although it is clear that the basic was hearsay.<sup>1</sup> (N.T. at 22-25).

In reviewing the ALJ's opinion in this matter, it is apparent that the ALJ misapprehends the evidentiary standard relevant to an administrative hearing. Section 505 of Administrative Agency law provides that: "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted." 2 Pa.C.S.A. § 505. Our Supreme Court has interpreted this language as providing that "hearsay evidence may generally be received and

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<sup>1</sup> It should also be noted that the Pennsylvania Supreme Court has stated "it is beyond cavil that if the ground upon which an objection is based is specifically stated, all other reasons for its exclusion are waived." Commonwealth v. Arroyo, 555 Pa. 125, 142, 723 A.2d 162, 170 (1999).

considered during an administrative proceeding.” D’Alessandro v. Pennsylvania State Police, 594 Pa. 500, 512, 937 A.2d 404, 411 (2007).<sup>2</sup> As a result, the ALJ should have received and considered relevant evidence and not engaged in a burdensome and unnecessary analysis.

Nonetheless, contrary to the ALJ’s mistaken conclusion, the proffered testimony presented is not inadmissible hearsay. Hearsay evidence is defined as in-court evidence of an out-of-court statement, regardless of form, which is offered to show the truth of the out-of-court assertion. Commonwealth v. Lewis, 424 Pa.Super. 531, 623 A.2d 355 (1993). A statement can include nonverbal conduct of a person if that conduct is intended as a communication. Commonwealth v. Patosky, 440 Pa.Super. 535, 656 A.2d 499 (1995) (*citing* Packel & Poulin, Pennsylvania Evidence (1987), § 801 Hearsay at 541). The Pennsylvania Rules of Evidence clearly provide that hearsay is not admissible unless the statements fall within an established exception. Pa.R.E. 802.

While not explicitly argued by the Bureau, it is possible for the Board to determine that the proffered evidence is not even hearsay. In the present

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<sup>2</sup> The Commonwealth Court has also acknowledged that administrative agencies are not bound by technical rules of evidence in Murphy v. Com. of PA, Department of Public Welfare, 85 Pa. Commw. 23, 480 A.2d 382 (1984).

matter the Bureau was attempting to establish that the Licensee had failed to utilize the scanning device as required by the CLA; it was not required to identify the last patron scanned by the Licensee. Accordingly, testimony regarding the specific contents of device display did not have to be offered to prove the truth of the matter asserted. Officer Killion's specific observation regarding the information displayed on the scanning device is irrelevant, what is relevant is the absence of any records from Monday, August 20, 2007. This observation is not based on hearsay, but on investigation and direct observation.

Notwithstanding the fact that Officer Killion's observation of the scanning device may not even be hearsay, his testimony regarding the contents of the device's display clearly falls within the admission by party-opponent exception to the hearsay rule. The Pennsylvania Supreme Court has consistently held that a defendant's out-of-court statements are party admissions and are exceptions to the hearsay rule. See Pa.R.E. 803(25); Commonwealth v. Paddy, 569 Pa. 47, 800 A.2d 294, 312 n. 11 (2002); Commonwealth v. Laich, 566 Pa. 19, 777 A.2d 1057, 1060 (2001).

As our Supreme Court has explained, party admissions are not subject to hearsay exclusion because, “it is fair in an adversary system that a party's prior statements be used against him if they are inconsistent with his position at trial. In addition, a party can hardly complain of his inability to cross-examine himself. A party can put himself on the stand and explain or contradict his former statements.” Commonwealth v. Edwards, 588 Pa. 151, 183 A.2d 1139, 1157 (2006) (*citing* Commonwealth v. Chmiel, 558 Pa. 478, 738 A.2d 406, 420 (1999), *cert. denied*, 528 U.S. 1131, 120 S.Ct. 970, 145 L.Ed.2d 841 (2000)).

In the present case, Officer Killion asked the Licensee a direct question regarding the Licensee's use of an electronic identification scanning device. In response to this direct question, the Licensee provided the scanning device to Officer Killion for his inspection. This inspection revealed that the scanner had not been utilized as required. To allow the Licensee to escape the consequence of its actions simply because it showed Officer Killion the answer rather than speaking the words would be a perversion of justice.

The Board is further satisfied that the Bureau has adequately met burden of proof to demonstrate that Licensee failed to scan the identifications

of all patrons entering into the licensed premises. The uncontradicted evidence presented by the Board demonstrated that the Licensee had failed to utilize the identification scanner at any time on Monday, August 20, 2007, even though patrons were permitted to enter the establishment and consume alcohol. This failure by the Licensee was a clear violation of the terms of the CLA that the Licensee freely entered into with the Board.<sup>3</sup>

Accordingly, the decision of the ALJ to dismiss Count 3 of the citation is reversed.

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<sup>3</sup> It must be noted that the record in this case is teeming with statements from the presiding ALJ expressing his own personal opinions regarding the Board's use of CLAs in licensing matters. While an ALJ is free to hold its own beliefs, such beliefs should never be expressed on the bench when it involves an issue essential to the case before it. As the Pennsylvania Supreme Court has warned "[p]ersonal opinions concerning the adequacy or propriety of the law pertaining to a given situation have no place on the trial bench." Commonwealth v. White, 589 Pa. 642, 659, 910 A.2d 648, 658 (2006).

**ORDER**

The decision of the ALJ in regard to Count 3 is reversed.

The appeal of Bureau is sustained.

This matter is remanded to the ALJ for implementation of an Order consistent with the Board's decision.

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Board Secretary