

Mailing Date: October 20, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

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| PENNSYLVANIA STATE POLICE, | : | Citation No. 07-2750 |
| BUREAU OF LIQUOR CONTROL | : | |
| ENFORCEMENT | : | |
| | : | |
| | : | |
| v. | : | |
| | : | |
| 60 TOMS, INC. | : | License No. R-10927 |
| 60 EAST BALTIMORE AVENUE | : | |
| CLIFTON HEIGHTS, PA 19018 | : | LID 54213 |
| | : | |

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OPINION

60 Toms, Inc., also known as Tailgaters Sports Bar and Grill, (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Tania Wright (“ALJ”), wherein the ALJ sustained Citation No. 07-2750 and imposed a

fine of one thousand dollars (\$1,000.00) and a suspension of the liquor license for a period of forty-five (45) days.

The citation charged Licensee with violating section 471 and 493(31) of the Liquor Code [47 P.S. §§ 471 and 4-493(31)] and section 780-101, *et seq.*, of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act [35 P.S. §780-101] in that on March 17 and 23, April 14, 20, 25 and 28, May 11, and June 29, 2007, Licensee, by its servants, agents or employees, aided, abetted or engaged in the traffic of, or sale of, a controlled substance on licensed premises and/or permitted the use of licensed premises in furtherance of the traffic in, or use of, a controlled substance.

On appeal, Licensee contends that the ALJ committed an error of law, abused its discretion and made a decision that was not based upon substantial evidence. Licensee argues that the ALJ lacked the evidence on the record to conclude that either the substances were illegal or that trafficking actually took place on or in the immediate vicinity of the premises. Licensee also questions the credibility of Bureau's witnesses. Licensee is specifically challenging the ALJ's findings of fact three (3) through nineteen (19) and twenty one (21) through forty one (41). Although Licensee admits it was aware of possible drug activity, it argues that the ALJ ignored uncontested testimony in the form of

three (3) witnesses that had provided sufficient evidence that it was taking substantial steps to prevent any alleged drug trafficking in the premises. Accordingly, Licensee opines that the appeal should be granted and the ALJ's decision to be reversed.

Pursuant to section 471 of the Pennsylvania 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).

The Board has reviewed the record, including the ALJ's Adjudication and Order, Licensee's Appeal of ALJ's Adjudication, the Pennsylvania State Police, Bureau of Liquor Control Enforcement's ("Bureau") Response to Licensee's Appeal and the hearing transcript with Licensee's contention in mind.

The record reveals the following relevant facts: The Bureau conducted an investigation of the licensed premises pursuant to a complaint by the Clifton Height Police Department (“Police Department”). On September 4, 2007, an officer for the Bureau met with officers from Police Department and collected reports and conducted interviews of the officers. [N.T. 7-8]. The information provided was relative to an undercover drug operation. [N.T. 8]. From August 24 to October 5, 2007, the Bureau officer collected information from the undercover drug operation and issued a citation based on that information. [N.T. 9; Exs. B-1, B-2].

Sergeant Timothy Rockenbach has been employed by the Police Department for about twenty (20) years. [N.T. 11-12]. He has undergone significant training and has conducted approximately one hundred (100) drug investigations. [N.T. 12-13]. Sergeant Rockenbach was certified in 2000 for identification and field testing of narcotics. [N.T. 13]. He uses a NIK test, which is used mostly on street drugs, heroin, cocaine and marijuana. [N.T. 13]. These drugs are field tested and then sent to the Pennsylvania State Police Crimes Lab. [N.T. 13-14]. The NIK testing is not performed on prescription medications; rather those are done at the Crimes Lab. [N.T. 13-14].

The undercover drug investigation relative to the licensed premises was conducted by the Police Department from March through June, 2007. [N.T. 14]. Sergeant Rockenbach's responsibilities included overseeing the undercover operation. [N.T. 14; 24]. At no time during the investigation was Sergeant Rockenbach inside the licensed premises. [N.T. 36]. Sergeant Rockenbach first entered the licensed premises on July 11, 2007, during the execution of a search warrant. [N.T. 59].

Officer Maria McKnight has been employed as an officer with the Police Department since March, 2007. [N.T. 70]. At the time of this investigation, she was employed as an undercover narcotics officer. [N.T. 71]. She was trained by the Criminal Investigation Unit and she went out with other officers to purchase narcotics in an undercover capacity. [N.T. 71-72]. During this investigation, Officer McKnight was working with Officer Shaun McGee and Sergeant Rockenbach was their supervisor. [N.T. 72].¹

Citation 07-2750 addresses instances that occurred on the licensed premises on the following dates: March 17, 23, April 14, 20, 25, 28, May 11, and June 29, 2007.

¹ Officer McGee did not testify, as he was unable to be reached, for the April 15, 2009, hearing of the instant citation.

On March 17, 2007, Officer McKnight arrived at the premises along with Officer McGee. Officer McKnight sat at the bar, when the licensed premise was open and operating. There were approximately three (3) bartenders on duty. On this night, the officer made two (2) purchases from two (2) different individuals. The first contact was with Robert Williams. Later in the evening, twenty dollars (\$20.00) was given to him in exchange for small baggies with a white substance believed to be cocaine. Officer McKnight witnessed the hand-to-hand exchange between Officer McGee and Mr. Williams. [N.T. 73-77, 84, 107-108].

Officers McKnight and McGee engaged in conversation with the second patron, Anthony Zecca, while he was at the bar. As a result of the conversation with Mr. Zecca, the officers left the bar and drove five to ten (5-10) minutes to Upland in order for Mr. Zecca to obtain some pills. Once the pills were obtained, they drove back to the location of the bar where the officers actually purchased the prescription tablets from Mr. Zecca. [N.T. 77-81].

Later in the evening, the officers met with Sergeant Rockenbach and handed over the six (6) prescription tablets and a substance believed to be cocaine, to Sergeant Rockenbach. [N.T. 80-82]. Sergeant Rockenbach was in the vicinity of the premises as backup. The prescription tablets were

subsequently sent to the Crimes Lab, and were determined to be alprazolam, a Schedule IV drug, which is commonly known as Xanax. [N.T. 17-19; Ex. B-3].

On appeal, Licensee contends that there is no evidence on the record establishing that the white substance recovered on this date was illegal. It argues that there is no property receipt or lab report submitted regarding the items that were transferred inside the premises. Also, Licensee argues that the ALJ erred when it considered evidence of the activity that took place across the street from the licensed premises.

On March 22, 2007, into the early morning hours of March 23, 2007, Officer McKnight entered the premises with Officer McGee. Sergeant Rockenbach was outside the premises. The premises was open and operating and a bartender was on duty. Both officers remained seated at the bar in an undercover capacity. The officers engaged in a conversation with Mr. Williams and money was exchanged for two (2) plastic baggies containing a white powdery substance believed to be cocaine. Officer McKnight, again, saw the hand-to-hand transfer between Mr. Williams and Officer McGee. The officers turned those baggies over to Sergeant Rockenbach later in the evening. Sergeant Rockenbach conducted a NIK field test and determined that the substance in the two (2) bags were cocaine. [N.T. 19-21; 83-87; Ex. B-3].

Licensee contends that the ALJ erred in finding that money was exchanged for two plastic baggies containing a white powdery substance. Licensee argues that Officer McKnight did not observe Officer McGee receive anything and since Officer McGee did not testify, the record does not support the ALJ's finding.

On April 14, 2007, Officers McKnight and McGee visited the licensed premises and Sergeant Rockenbach was in the area outside. The licensed premises was open, operating and a bartender was on duty. On this occasion, the officers engaged in conversation with two (2) females, which resulted in the officers meeting Matthew Hartnet, inside the premises. Mr. Hartnet approached Officer McKnight and she asked him for cocaine. She handed him two (2) twenty dollar (\$20.00) bills in exchange for two (2) bags of a white powder substance, believed to be cocaine. [N.T. 24-25, 87-92].

At the end of the night, the officers turned over two (2) green plastic Ziploc bags containing a white powder. Sergeant Rockenbach field tested that product using the NIK test and it was positive for cocaine. These items were then turned over to the PSP Crimes Lab for analysis and were determined to be cocaine, consistent with the NIK test. [N.T. 24-26, 90-92; Ex. B-3].

Licensee does not contest this incident. Therefore, it will not be discussed in the legal analysis.

On April 20, 2007, Officers McKnight and McGee arrived at the licensed premises and sat at the bar. They engaged in another conversation with Mr. Hartnet and purchased two (2) bags of suspected cocaine for twenty dollars (\$20.00) each. [N.T. 93-94]. Later, the officers turned over two (2) purple Ziploc bags containing a white powder to Sergeant Rockenbach who conducted a field NIK test. The substance was determined to be positive for cocaine and was turned over to the PSP Crimes Lab for additional analysis. The items were determined to be cocaine, consistent with the NIK test. [N.T. 26-28, 91-92; Ex. B-3].

Again, Licensee does not contest this incident. Therefore, it will not be discussed in the legal analysis.

On April 25, 2007, Officers McKnight and McGee visited the licensed premises while it was open, operating and a bartender was on duty. The officers engaged in conversation with Mr. Williams. Officer McGee went inside the men's room with Mr. Williams to complete the transaction. Officer McKnight left the premises with Officer McGee at which time Officer McKnight saw Officer McGee turn over two (2) clear plastic Ziploc bags containing a

white powder to Sergeant Rockenbach. A NIK field test was conducted as well as an analysis at the PSP Crimes Lab, in which the substance was determined to be cocaine. [N.T. 28-30, 92-96; Ex. B-3].

Again, Licensee argues that since Officer McGee did not testify and Officer McKnight was not in the men's bathroom to observe the transaction, that the ALJ erred in making a finding regarding this incident as the record does not support the ALJ's finding that an illegal substance was passed to Officer McGee.

On April 28, 2007, Officers McKnight and McGee entered the licensed premises at approximately 7:00 p.m. Officer McKnight engaged in conversation with a patron, Kelly Gray. The officers previously met Ms. Gray as they had become regulars at the premises and recognized bartenders and patrons from previous visits. Officer McKnight and Ms. Gray made a transaction in the women's bathroom at the licensed premises in which Officer McKnight purchased a drink for Ms. Gray in exchange for a pill. [N.T. 30-32, 96-100].

On the same occasion, the officers spoke with Kelly Fries, whom they recognized as an associate of Mr. Williams, and with whom they had had prior contact. In exchange for money, Ms. Fries stuck five (5) pills in Officer

McKnight's purse. At the end of the night, the officers turned over two (2) cellophane wrappers, each containing three (3) oblong white tablets marked M360. These items were turned over to the PSP Crimes Lab in which it was determined the tablets were dihydrocodeinone, a Schedule II drug. [N.T. 31-32, 100-102; Ex. B-3].

On appeal, Licensee argues that since Officer McKnight stated that Kelly Gray gave her one (1) tablet in the women's bathroom, but that the lab report states that it was received by a William Strauss, not Kelly Gray, that the ALJ mistakenly found that the substance transferred was illegal. Licensee also notes that Officer McKnight did not testify that the pill she received was in a cellophane wrapper; however, the lab report states otherwise. Accordingly, Licensee contends that the Bureau did not establish chain of custody and the illegality of the substance received in the women's bathroom. Further, Licensee states that the record does not support the ALJ's finding that there was further activity taking place on the premise on this date, but Licensee does not offer any further explanation.

On May 11, 2007, Officers McKnight and McGee entered the licensed premises when the premises were open, operating and bartenders were on duty. Officer McKnight engaged in a conversation with Ms. Fries and Mr.

Williams. In exchange for money, Ms. Fries placed five (5) pills in Officer McKnight's purse. Later in the evening, the two (2) officers turned over a cellophane wrapper containing five (5) round white tablets labeled 93832 to Sergeant Rockenbach. The tablets were determined, by the PSP Crimes Lab, to be clonazepam, a Schedule IV drug. [N.T. 32-33; 99-102; Ex. B-3].

Licensee does not contest this incident. Therefore, it will not be discussed in the legal analysis.

On June 29, 2007, the officers visited the licensed premises, during a time in which it was open and operating. Officer McGee conversed with Patrick Hayden and Officer McKnight did not see a drug exchange on this occasion. However, later in the evening, Officer McKnight saw Officer McGee hand over drugs he purchased to Sergeant Rockenbach. The substance was field NIK tested and determined by PSP Crimes Lab to be positive for marijuana. [N.T. 33-35, 102-104, 106].

Licensee contends that the ALJ erred in concluding anything illegal took place at the licensed premises on this date, as Officer McKnight admitted to not seeing the actual drug exchange.

Admittedly, at no time during the investigation was Sergeant Rockenbach inside the licensed premises, except for July 11, 2007, during the

execution of the search warrant. [N.T. 35-38, 57-58]. Anthony Zecca, Matthew Hartnet, Robert Williams, William Strauss and Kelly Fries were arrested for the sale of narcotics as a result of the investigation of the licensed premises. [N.T. 35-38]. During each night, Officers McKnight and McGee were involved in visits to a number of different locations. [N.T. 50-52]. The officers visited the licensed premises five (5) times a week from March to June, 2007. [N.T. 107]. During this time, Officer McKnight saw the owner, Michael Stern, in the bar quite a bit. [N.T. 105-106]. Also, during this investigation, the officers made numerous purchases of drugs. [N.T. 107]. Licensee was cited with regard to eight (8) illegal purchases of drugs made during this period. [N.T. 109-110]. The officers established a procedure where they would meet Sergeant Rockenbach after their visit to the licensed premises. [N.T. 108-109]. They would meet whether or not they had made any purchases of drugs. [N.T. 108].

In its defense, Licensee argues that it took substantial affirmative steps to guard against the known pattern of illegal activities. Michael Stern is the sole corporate officer, director and shareholder of Licensee. [N.T. 148]. He has operated the establishment for approximately four (4) years. [N.T. 148-149]. He testified that he installed outdoor cameras in October, 2007 and updated the old system from four (4) cameras, with VCR systems, to nine (9) cameras,

in color and motion sensitive. [N.T. 154-156; Ex. L-7]. Licensee renovated the premises when he first acquired it in 2005. [N.T. 160]. Licensee has a kitchen, menu and food preparation services; maintains a dress code in the evening; maintains house pool leagues, karaoke, a DJ, and live bands. [N.T. 157-159, 161-162]. Licensee indicated that all his employees became RAMP-certified in the summer of 2007 and the premises was RAMP-certified on January 27, 2010. [N.T. 164].

Mr. Stern testified that around March of 2007, he became aware of the narcotics activity and/or an investigation taking place on the premises. [N.T. 165]. Accordingly, he went to the Chief of Police to offer his cooperation. [N.T. 165]. Licensee indicated that they had always had a no drug policy and had stepped up the procedures to include increased security. [N.T. 166-168]. Licensee has two to three (2-3) bouncers on the weekend, but none on weekdays unless there are all females working. [N.T. 167-169]. Mr. Stern testified that he employed someone to card individuals and uses the swipe machine. [N.T. 168]. He also hired an individual as a “floater” to look into the restrooms and the pool room on Friday and Saturday nights. [N.T. 167-168]. Licensee also placed signage on the premises with regard to the dress code, the drug policy and requirement for identification. [N.T. 169-179]. Licensee also

established a policy that any person involved and caught conducting any type of drug activities in the licensed premises would be banned for life. [N.T. 181-183; Exs. L-14, L-15].

Section 493(31) of the Liquor Code [47 P.S. § 4-493(31)] provides, in part, that it is unlawful for any licensee to possess, furnish, sell, offer to sell, aid and abet any controlled substance or drug paraphernalia on the licensed premises unless the actions of the licensee are authorized by law. Pursuant to Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988), the Bureau must prove that Licensee knew or should have known of the illegal activity. In the instant case, the evidence presented indicates that Licensee's establishment was the site of eight (8) drug purchases made by undercover officers between March 17, 2007 and June 29, 2007. Six (6) different people at the licensed premises either offered or made drugs available to the officers, which led to these individuals' arrest. The officers were able to purchase cocaine, marijuana and various prescription drugs.

It is clear that there was substantial evidence presented by the Bureau to establish that Licensee knew or should have known of drug trafficking in the premises. Id. Sergeant Rockenbach and Officer McKnight credibly testified that on the above eight (8) dates, drug trafficking and/or discussions of potential

drug exchanges occurred inside the premises in a short time span which would constitute a pattern of illegal activity about which Licensee's owner and/or employees should have known.

Licensee objects to most of the incidents alleging that the ALJ committed an error of law, abused her discretion and made decisions not based upon substantial evidence. Licensee challenges the credibility of the Bureau witnesses with respect to chain of custody of the illegal substances and if, indeed, the items were actually illegal controlled substances. However, it is the ALJ's sole prerogative to settle matters of credibility and those decisions are not to be disturbed absent showing of insufficient evidence. Borough of Ridgeway v. Pennsylvania Public Utility Comm'n, 480 A.2d 1253 (Pa. Cmwlth. 1984).

In the instant case, there was sufficient evidence that Licensee knew or should have known of the drug activity, a chain of custody was well established, and the drugs collected were in fact controlled substances. In the adjudication of JH Properties, Inc. [Citation 00-1667], it was determined that in the administrative forum, as well as the criminal forum, the law is clear that physical evidence may be properly admitted despite gaps in testimony regarding custody, and such gaps go to the weight given to the testimony and

not the admissibility. Commonwealth of Pa. v. Bolden, 406 A.2d 333 (Pa. 1979). The officers' testimony and documentary evidence, taken in its entirety, clearly demonstrated that there was no chain of custody issue. Further, even if we were to dismiss some of Licensee's incidents based on supposed chain of custody issues, there remains numerous other incidents of drug trafficking of established illegal controlled substances sufficient to show a pattern of illegal activity about which Licensee should have known.

On each specific incident, Officers McKnight and McGee entered the licensed premises together in an undercover capacity. One (1) of the officers would purchase illegal controlled substances from an individual inside the premises. The officers would leave the premises together and together they would turn the illegal controlled substance to Sergeant Rockenbach. Sergeant Rockenbach would then either field test the substances and send them to the PSP Crimes Lab for final analysis, or if it was substance that could not be field tested (such as prescription pills), it would be given directly to the PSP Crimes Lab for analysis along with a request/submittal sheet. All the substances field tested by Sergeant Rockenbach, were found to be illegal controlled substances. All substances tested at the PSP Crimes Lab were found to be illegal controlled substances.

Any inconsistencies or gaps in testimony with respect to the exact time of night the substances were turned over to Sergeant Rockenbach, which defendant gave the officers the illegal controlled substance, or any questions as to whether these illegal controlled substances were purchased inside the premises, were reconciled by the fact that arrest warrants were executed on Anthony Zecca, Matthew Hartnet, Robert Williams, Williams Strause and Kelly Fries for sale of illegal controlled substances at the premises on the aforementioned violation dates. Each lab report entered into evidence collectively as Exhibit B-3 lists at least one (1) of the aforementioned individuals as a suspect for the violation dates.

Licensee further argues that the chain of custody is an issue because no property records were maintained by the police. Sergeant Rockenbach explained that due to the sensitivity of the investigation, the lab submittal sheets were used in lieu of property records in order not to compromise the investigation. With regard to incidents where Officer McKnight did not witness the exchange done by Officer McGee, she was with Officer McGee prior to the exchange and following the exchange and she witnessed Officer McGee submit the drug(s) he received at the licensed premises to Sergeant Rockenbach. Further, Licensee attempts to discredit Officer McKnight for

forgetting some details of the investigation due to passage of time, during the hearing. This is also rebutted by Officer McKnight's police report, as well as the PSP Crimes Lab reports/ submittal sheets submitted during the hearing.

The testimony of Officer McKnight, Sergeant Rockenbach, the laboratory submittal sheets, and laboratory reports, viewed together in their entirety, clearly demonstrate that there is no chain of custody issue. Illegal drug trafficking occurred in the premises on the violation dates and these eight (8) incidents, in such a short time span, constitute a pattern of illegal activity about which Licensee should have known. In fact, in its appeal, Licensee admits that upon taking over the licensed premises, he was aware of possible drug activity.

The defense offered by Licensee is devoid of evidence of any of the substantial affirmative steps taken by Licensee to deter the drug activity when it was occurring. A licensee's duty to act arises when the illegal activity is evident and constituted a discernible pattern. Bureau of Liquor Control Enforcement v. Can Inc., 651 A.2d 1160 (Pa. Cmwlth. 1994). Otherwise, the licensee is deemed to have permitted or acquiesced to it, and the defense of taking affirmative steps is unavailable. TLK, Inc., 544 at 934. Licensee's principal explained that he spoke with the Chief of Police, once he was made aware of the drug activity and/or investigation, but the Chief of Police was not

called as a witness by Licensee. Furthermore, Licensee did not upgrade its camera surveillance until October, 2007, after the investigation had been completed and warrants issued. Licensee also did not become fully RAMP-certified until January, 2010, over two (2) years after the violation dates.

It is difficult to conclude that Licensee was taking substantial steps to prevent a known pattern of drug trafficking when there were so many illegal controlled substances exchanges by numerous individuals inside the licensed premises. Any initial efforts, if any, done by Licensee were wholly ineffective. The record even reflects that a doorman/bouncer only warned a patron when he overheard his drug discussions, but ultimately allowed the patron to remain in the premises.² This does not constitute substantial steps. Although Licensee did step up its security, it appears these efforts were as a result of the police investigation.

Applying the foregoing law to the facts of this case, the Board concludes that the ALJ did not commit an error of law or abuse her discretion, and her decision was based upon substantial evidence.

² On one occasion, Officer McGee was having a drug-related conversation with a patron, Shaun Thomas, and one (1) of the bouncers, who overheard the conversation, came over and asked to speak with Mr. Thomas. Mr. Thomas went to the door with the bouncer and talked with him. Ultimately, the bouncer allowed Mr. Thomas to stay, but removed another person from the premises. [N.T. 141].

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

A fine of one thousand dollars (\$1,000.00) has been paid.

The case is hereby remanded for imposition of the forty-five (45) day suspension in accordance with this Opinion.

Board Secretary