

Mailing Date: November 19, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-2881
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :
 :
 :
vs. :
 :
 :
LA MOLINA, INC., : License No. R-9212
57-59 LONG LANE :
UPPER DARBY, PA 19082-2507 :

Counsels for Licensee: John J. McCreesh, Esquire
7053 Terminal Square
Upper Darby, PA 19082

Counsel for Bureau: Erik S. Shmukler, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue, Third Floor
Philadelphia, PA 19142

OPINION

La Molina, Inc. (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge David L Shenkle (“ALJ”), wherein the ALJ sustained the citation and imposed an aggregate fine in the amount of one thousand three hundred dollars (\$1,300.00), a fourteen (14) day

suspension and a verification that the premises now has sufficient food to qualify as a *bona fide* restaurant. Contemporaneous with its appeal, Licensee filed an Application for Supersedeas.

The citation in the present matter contained two (2) separate counts. The first count charged Licensee with violating sections 471 and 493(31) of the Liquor Code [47 P.S. §§ 4-471 and 4-493(31)] in that, on August 15, August 17, and August 23, 2007 Licensee, aided or abetted in the trafficking in, or sale of, a controlled substance on the licensed premises and/or permitted the use of the licensed premises in the furtherance of the trafficking in, or use of, a controlled substance.

The second count of the citation further charged Licensee with violating Section 102 of the Liquor Code [47 P.S. § 1-102], in that, on August 23, 2007, the licensed premises was not a *bona fide* restaurant because there was insufficient food items.

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).

On appeal, the Licensee presents the bare assertion that the ALJ's Findings of Fact one (1) through seventeen (17) are not supported by substantial evidence.¹

In its response to the Licensee's appeal, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") asserts that sufficient evidence was presented by the Bureau to demonstrate that Licensee knew or should have known of the drug sales occurring at the Licensee's premises.

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

¹ It should be noted that while Licensee has specifically challenged the ALJ's Findings of Fact, it has failed to present any challenge the ALJ's Conclusions of Law. In addressing this matter, this distinction is important. Because no evidence was presented to rebut, discredit or contradict the testimony of the Bureau's witnesses a challenge focused solely on the ALJ's Findings of Fact is tantamount to an argument regarding credibility and weight of the evidence, whereas a challenge to the ALJ's Conclusions of Law is more akin to an argument regarding the sufficiency of the evidence.

hearing of July 10, 2008 and the ALJ's Adjudication and Order, with Licensee's contention in mind, and has concluded that the ALJ's Findings of Fact and Conclusions of Law are supported by substantial evidence.

Taken together, sections 471 and 493(31) of the Liquor Code allow the Bureau to seek suspension or revocation of a liquor license if it can establish that any licensee or its servants, agents or employees engaged in or aided and abetted in the sale or purchase of any controlled substance or drug paraphernalia. [47 P.S. §§ 4-471 and 4-493(31)].

In its present appeal, Licensee specifically presents a challenge to the sufficiency of the ALJ's Findings of Fact. However, such an argument in the present case must fail. It is undisputed that drug sales occurred on the licensed premises and the Board will not engage in a reevaluation of witness credibility on a cold record. Such an invitation has been previously rejected by the Commonwealth Court, and is similarly rejected by the Board in regard to this case. See Thorpe v. Pub. Sch. Employee's Ret. Bd., 879 A.2d 341 (Pa. Cmwlth. 2005). It is well-settled that matters of witness credibility are the sole prerogative of the ALJ, and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway

v. Pennsylvania Public Utility Comm'n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984). In the instant case, the ALJ found the testimony of several police officers to be credible and adequate to support the charges in the citation. The Board will not overturn the ALJ's well-reasoned opinion without any evidence to contradict or cast doubt on the accuracy of the officers' testimony.²

While the Licensee does not explicitly challenge the ALJ's Conclusions of Law in the present appeal, the Board must, nonetheless, specifically address whether the evidence presented by the Bureau can establish the quantum of guilty knowledge or intent that is necessary to justify proceedings against a liquor license. Pennsylvania Liquor Control Board v. TLK, 518 Pa. 500, 544 A.2d 931 (1988). As the ALJ aptly recognized in his opinion, the Pennsylvania Supreme Court has mandated that when a licensee is charged under section 471 of the Liquor Code for the unlawful acts of its employees or patrons, some element of scienter on the part of the licensee must be

² The Board specifically finds the competent testimony from Liquor Enforcement Officer Justin Suppin established that Licensee violated § 102 of the Liquor Code [47 P.S. § 1-102], on August 23, 2007, in that the licensed premises was not a *bona fide* restaurant because it had no food.

shown to endanger the license, if the underlying acts violate the Crimes Code rather than a standard of conduct established by the Liquor Code.

In TLK, the Pennsylvania Supreme Court directed that a licensee could not be held responsible for illegal activity on its licensed premises unless: “licensee knew or should have known of illegal activities by an employee or patron.” TLK, 518 Pa. at 504-505, 544 A.2d at 933. The Court went on to note that if evidence is presented to demonstrate the licensee knew or should have known of illegal conduct, “a licensee may defend his license by demonstrating that he took substantial affirmative steps to guard against a known pattern of illegal activities.” Id., see also Bates v. Commonwealth, 40 Pa.Cmwlth. 426, 397 A.2d 851 (1979) (holding that absent proof of substantial affirmative measures taken by a licensee to eliminate a known pattern of use of and traffic in controlled substances on his premises, Board was justified in revoking or suspending a license). It is, therefore, necessary to review the evidence to determine whether the Licensee knew or should have known of the illegal conduct of its patrons.

In the present matter, Officer Phillips Lydon (“Officer Lydon”) of the Upper Darby Township Police Department’s Narcotics Unit testified that he

became familiar with the licensed premises located at 57-59 Long Lane, Upper Darby, Pennsylvania, through the course of drug investigation in August 2007. (N.T. 5-6). On August 15, 2007, Officer Lydon, working in an undercover capacity, met with and purchased a quantity of cocaine from an individual identified as Tyreek Walker (“Walker”). This initial transaction took place in Officer Lydon’s vehicle parked in the area of 69th Street and Marshall Road. (N.T. 5-7, 21-22). After the transaction was completed, Walker asked Officer Lydon to drive him to the licensed establishment located at 57-59 Long Lane, Upper Darby, which was known to Office Lydon as La Molina or the Brandon House. (N.T. 5-6). While being dropped off at the licensed premises, Walker indicated that if Officer Lydon needed to get a hold of him, he should come to the Brandon House because Walker was normally there. (N.T. 7).

Later that same day, Officer Lydon had a telephone conversation with Walker in which the officer requested to purchase two (2) bags of cocaine in exchange for forty dollars (\$40) United States currency. (N.T. 8). Officer Lydon subsequently returned to the licensed premises in order to consummate the deal. When Officer Lydon returned, the licensed

establishment was still open and operating, with both employees and patrons inside the bar. (N.T. 10-11). Shortly after returning to the licensed premises, Officer Lydon was directed by Walker into the bathroom where Walker sold cocaine to Officer Lydon. (N.T. 7-8).³

On August 17, 2007, a similar incident occurred when Officer Lydon was again directed by Walker to meet him at the licensed premises in order to complete the sale of controlled substances. On this occasion, when Officer Lydon entered the establishment, Walker was seated at the end of the bar. Walker motioned for Officer Lydon to follow him into the bathroom, where Walker poured a quantity of cocaine onto a dollar bill in exchange for forty dollars (\$40.00). (N.T. 10).

On August 23, 2007, law enforcement planned to arrest Mr. Walker after Officer Lydon had made another controlled drug purchase, as a result there were a number of undercover officers on the licensed premises when Officer Lydon entered the licensed premises. As on the previous occasions, Officer Lydon sat for a couple of minutes before Walker signaled the officer

³ A number of Forensic Laboratory Reports prepared by Henry C. Go, Forensic Scientist 2 of the Pennsylvania State Police Lima Regional Crime Laboratory were entered into evidence without objection as Commonwealth Exhibit 3. Accordingly, there is no dispute that the white-powdery substance purchased through the course of this investigation was in fact the Schedule II controlled substance cocaine.

to meet him in the bathroom. Once inside the bathroom Walker provided two (2) small glassine packets of cocaine in exchange for forty dollars (\$40.00). (N.T. 12-13).

After making the purchase, Officer Lydon sat at the bar, drinking beer and playing video games. At about 9:30 p.m. Officer Lydon went to the bathroom and encountered another patron, later identified as Ramon Douglas. Douglas asked the officer if he needed anything. Officer Lydon told Douglas that he did not want to upset "his guy," meaning Walker. Douglas responded that "no that's cool; we're cool like that, it doesn't matter..." Officer Lydon indicated that he wanted to purchase "twenty." Douglas replied that "we only have twenty-fives" and the officer agreed to the exchange. Douglas stated that he had to go talk to his boy and that he would be right back. (N.T. 15). Officer Lydon then observed Douglas leave the men's room and proceed directly to an individual later identified as Sungsun Ratanaburi, who had been seated with Douglas earlier in the evening. Ratanaburi reached into his pocket, withdrew a white packet and provided it to Douglas. (N.T. 16). When Ratanaburi passed the packet to Douglas, Ratanaburi put the cocaine on top of the bar and slid it toward Douglas, who

picked it up off of the bar. (N.T. 27-28). One of the Licensee's bartenders was standing directly next to Douglas when he was provided the cocaine. (N.T. 28). Douglas then brought the packet of cocaine back to Officer Lydon who provided twenty-five dollars (\$25.00). (N.T. 14-16).

Later that same night, Officer Lydon was again in the bathroom and observed Douglas sell a small bag containing white powder to another patron in exchange for United States currency. (N.T. 17). The licensed premises was open and operating during all of these activities. (N.T. 18).

The Bureau further presented the testimony of Detective Marlow Freeman of the Chester Police Department and the Delaware County Drug Task Force. Detective Freeman testified that during his time inside the licensed premises on August 23, 2007, he observed Walker make two (2) drug sales inside the bathroom. These transactions included the sale of two (2) bags of marijuana to another patron. Detective Freeman additionally observed a drug transaction near the bar itself at a time when the establishment was operating and open to the public. (N.T. 37).

In reviewing the evidence presented at the July 10, 2008, it is clear that members of the Delaware County Drug Task Force each testified

regarding a number of separate and distinct drug transactions occurring within the licensed premises on three (3) occasions: August 15, August 17 and August 23, 2007. Officer Lydon testified that he was able to purchase drugs from a patron of the establishment, and that he observed drug sales between patrons, the sale of drugs in the bathroom, and drugs transferred in the presence of the bartender. Just as in TLK, the illegal activities in this matter were pervasive in nature, taking place on multiple occasions in various public areas of this establishment. Accordingly, it is reasonable to conclude that the Licensee knew or should have known of this illicit conduct. TLK, 518 Pa. at 506, 544 A.2d at 934.

In the present matter, Licensee presented no evidence that any substantial affirmative measures were taken to prevent this pervasive illicit activity. As a result, the Board finds that the ALJ's decision is supported by substantial evidence and shall not be disturbed. Accordingly, the decision of the ALJ is, therefore, affirmed.⁴

⁴ Having decided to appeal on the merits, the Licensee's request for supersedeas is moot.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine has been paid.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-9212 be suspended for a period of fourteen (14) days beginning at 7:00 a.m., Monday, December 1, 2008 and ending at 7:00 a.m. on Monday, December 15, 2008.

Licensee must adhere to all other conditions set forth in the ALJ's Order issued October 20, 2008.

Board Secretary