

Mailing Date: May 6, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 07-2882
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
	:	
	:	
	:	
vs.	:	
	:	
2813 CHARLES, INC.	:	License No. R-7395
2813 W. 9 th STREET	:	
CHESTER, PA 19013-1710	:	
	:	

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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from an Adjudication and Order of Administrative Law

Judge David L. Shenkle (“ALJ”), wherein the ALJ dismissed Citation No. 07-2882.

Count One of Citation No. 07-2882 charged that on August 9, 2007, Licensee, by its servants, agents or employees, aided, abetted or engaged in the traffic in or sale of, a controlled substance on its licensed premises and/or permitted the use of the licensed premises in the furtherance of the traffic in, or use of, a controlled substance, in violation of section 471 and 493(31) of the Liquor Code, [47 P.S. §§4-471 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].

Count Two of Citation No. 07-2882 charged that prior to October 10, 2007, Licensee’s manager failed to devote full time and attention to the operation of the licensed business, in violation of section 5.16 of the Liquor Control Board Regulations [40 Pa. Code § 5.16].

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 Bureau avers that the ALJ failed to base his findings of fact on substantial evidence when he dismissed the Citation. With regard to count one (1), the Bureau contends that the ALJ ignored the direct testimony of officers. With regard to count two (2), the Bureau contends that the ALJ ignored evidence contained in the record and further imposed a burden on the Bureau to prove a defense available to Licensee.

As to the first count, 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 shown if the underlying acts violate the Crimes Code rather than a standard of conduct established by the Liquor Code. In Pennsylvania Liquor Control Board v. TLK, 518 Pa. 500, 544 A.2d 931 (1988), 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. It is, therefore, necessary to review the evidence to determine whether the ALJ's finding that the Bureau failed to establish that the Licensee knew or should have known of the illegal conduct of its patrons was erroneous.

As to that issue, the record reveals that Bureau Officer Kohler visited Licensee September 20, 2007 at 3:30 p.m. to conduct a routine investigation of the premises. (N.T. 7). The investigation was carried out along with members of the Chester Police Department and the Chester City Licenses and Inspections Department. (N.T. 7). Officer Kohler testified that there were several pieces of evidence of drug paraphernalia by the back door (N.T. 27). There were empty blunt rollers, and empty bags with what appeared to pot residue, located directly outside the rear door. (NT. 27). Officer Kohler did not take notice of the items in her report because, despite the fact that this area is only accessible through the premises, the items were technically located outside of the licensed premises, though not off of the property. (N.T. 28). In addition, Officer Kohler further stated that the Chester Police considered it to be normal practice to discover such paraphernalia. (N.T. 29).

Sergeant Blair of the City of Chester Police Department was a member of the Delaware County Drug Task Force in August 2007. (N.T. 32). Sergeant Blair

visited Licensee on August 9, 2007 during the evening along with members of Probation and Parole and the Bureau. (N.T. 33, 45). When Sergeant Blair first walked into the premises, there was an individual, Mr. Jacobs, sitting at the bar with his hands on the bar surface looking down at what appeared to be wrappers and a blunt cigar. (N.T. 34). Sergeant Blair approached to find Mr. Jacobs in the process of rolling a suspected marijuana cigarette by placing what appeared to be a greenish brown crushed up matter into the paper. (N.T. 34, 48-49). Sergeant Blair performed a field test of the material which indicated a positive presence of marijuana. (N.T. 37). The tests performed at the regional laboratory similarly identified the material as marijuana. (N.T. 38). Sergeant Blair indicated that the bartender, Antoinnete Jackson, was located behind the bar in close proximity to Mr. Jacobs. (N.T. 36). Sergeant Blair indicated that he does not know what kind of activity, if any, that Ms. Jackson may have observed. (N.T. 52-53).

As to the second count, on September 20, 2007, Officer Kohler spoke with Ms. Jackson, the bartender; she identified Mr. Potter as her boss and contacted him to come down to the bar. (N.T. 8). Mr. Potter stated that he was the manager and that he helps out his son, Charles Fowler, who owns Licensee. (N.T. 8, 10). On October 10, 2007, Officer Kohler spoke with Mr.

Fowler, who identified Russell Smith as the manager of Licensee. (N.T. 9). Mr. Fowler indicated that Mr. Smith was the Board-approved manager but that he was just learning the ropes and that Mr. Potter was helping Mr. Smith to better acquaint himself with the operation of the business. (N.T. 10). Mr. Fowler proceeded to indicate that Mr. Smith was appointed as manager in 2005. (N.T. 10).

Officer Kohler then contacted Mr. Smith, who stated that he was the sole manager and that Licensee had three (3) employees. (N.T. 11). Mr. Smith was unable to provide clear answers to Officer Kohler's questions regarding payroll and financial issues despite his assertion that he is always at the bar. (N.T. 12, 24). Mr. Smith indicated that he works for Chase Leavey, a trucking company, on an on-call basis a couple times a year. (N.T. 12). Officer Kohler ultimately received documentation from the PLCB certifying that Mr. Smith was the Board-approved manager and has been since March 12, 2003. (N.T. 14).

Licensee chose not to offer any testimonial evidence into the record. (N.T. 61).

The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. The Pennsylvania Supreme Court defined an abuse of discretion

as “not merely an error of judgment, but 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.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 602 A.2d 1300, 1305 (1992).

Based upon review of the evidence presented, the decision by the ALJ to dismiss the citation was not an abuse of discretion. There is no evidence in the record to suggest that the ALJ’s conclusion regarding Count One (1) was the result of misapplication of the law, or otherwise manifestly unreasonable. While the Board may have considered the evidence sufficient to find sufficient scienter regarding count one (1) on behalf of the Bureau on first impression, the ALJ was within permissive bounds of the law in holding that one (1) cited incident of drug use, coupled with paraphernalia outside of the premises, was insufficient evidence.

With regard to count two (2), while the fact that the Board-approved manager can not answer basic financial questions about the business he is managing, the fact that he is being taught the job of manager by a third party four (4) years after being appointed as manager, and the fact that he occasionally has outside employment would have been sufficient to establish a

violation of the Regulations, it does not compel such a conclusion. Thus, the ALJ's decision to afford it less weight than the Bureau felt was warranted, while a close case in this instance, is not reversible error.

The Board finds that the ALJ's decision was not an abuse of discretion.

The decision of the ALJ, therefore, is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Bureau is dismissed.

Board Secretary