

Mailing Date: December 3, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-2934
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

RISTORANTE PAPARAZZI, INC. : License No. R-17815
47-49 Lehigh Avenue :
Frackville, PA 17931-1423 :

Counsel for Licensee: Stephen P. Elwood, Esquire
400 North 2nd Street
Pottsville, PA 17901

Counsel for Bureau: Craig Strong, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Parkway
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OPINION

Ristorante Paparazzi, Inc. (“Licensee”), appealed from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ sustained Citation No. 07-2934 (“citation”), and imposed a fine of four hundred dollars (\$400.00).

Citation No. 07-2934 charged that on November 10, and 11, 2007, Licensee, by its servants, agents, or employees violated section 5.32(a) of the Liquor Control Board Regulations, [40 Pa. Code § 5.32(a)], by permitting a loudspeaker or similar device to be heard outside the premises.

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, Licensee contends that there is insufficient evidence to support the ALJ's findings and conclusions. Licensee contends that the ALJ had no basis upon which to completely discount Licensee's testimony while crediting that of the enforcement officers. Licensee further contends that the

ALJ had no basis upon which to conclude that the officers' unaided ears were more reliable than the audio recording produced by Licensee.¹

As to the citation, the evidence revealed that on November 9, and 10, 2007, Bureau Officer, Robert Coyne, made an undercover visit to the licensed premises at approximately 11:30 p.m. (N.T. 5-6). Upon arrival, Officer Coyne could hear a strong bass beat and other noise approximately one hundred fifty feet (150') from the premises. (N.T. 6). Officer Coyne proceeded to the premises, showed his identification, paid the cover charge to Licensee's owner, Sandra Burns, and entered the premises. (N.T. 6-7). At the rear of the premises, a three (3)-person band was performing. (N.T. 7). The music was electronically amplified through speakers located on the left and right side of the band. (N.T. 7). The speakers were approximately three feet (3') wide by four feet (4') high and they were on top of two (2) black boxes approximately three feet (3') off of the ground. (N.T. 7).

Officer Coyne consumed one (1) beverage, a twelve ounce (12 oz.) Miller Lite, prior to his departure at approximately 12:15 a.m. (N.T. 7, 10). Upon exiting the establishment, Officer Coyne performed a sound

¹ The ALJ incorporated, by reference, evidence previously received concerning a citation case originating at No. 06-1312. At the prior hearing, Licensee's husband produced a tape recording made on September 7, 2007. This recording only captured the sound of cars driving by and was intended to demonstrate that there was no sound escaping from the premises.

check by walking thirty (30) paces or approximately fifty feet (50') towards another building. (N.T. 8). At this point, Officer Coyne could clearly hear drumming, mumbled voices and mumbled sound similar to a base beat. (N.T. 8). Officer Coyne returned to the side of the subject premises, and then took a diagonal course of approximately eighty (80) paces or one-hundred fifty feet (150') to the corner of Lehigh Avenue and Spring Street. (N.T. 8). From this location, the music could clearly be heard. (N.T. 8). Officer Coyne then returned to across the street from the location where he could hear the same muffled sounds. (N.T. 9).

Licensee's owner, Sandra Burns, testified that she did recognize Officer Coyne, and that she was unsure as to whether or not he only had one (1) twelve ounce (12 oz.) bottle of beer on that occasion. (N.T. 12). She further clarified across the street from her premises is a barber shop and a bar that has a juke box and, on occasion, karaoke. (N.T. 12). The ALJ incorporated, by reference, all of the evidence received in the prior hearing regarding Licensee's 2006 citations. (N.T. 11).

Licensee contends that the ALJ abused its discretion, in that the Findings of Fact were against the weight of credible evidence, and in that, although the testimony of the Commonwealth's witnesses and Licensee's were

diametrically opposed, the ALJ failed to consider the fact that the Commonwealth's witness was were under the influence of alcohol at the time of the alleged incident.

The Pennsylvania Supreme Court in Hainsey v. Pennsylvania Liquor Control Bd. 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 ALJ did not give credit to the tape recording provided in the earlier hearing because he did not believe that a mass market portable tape recorder has the capability of discerning sound more accurately than the unaided human ear. The ALJ reasoned that there are too many variables, on technical grounds alone, to give weight to the fact that no music could be heard on the tape. The ALJ further discounted the other testimony presented on behalf of Licensee based on self-interest. In reaching this conclusion, the ALJ relied on his judgment regarding the demeanor of the witnesses.

It is well-settled law 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 the enforcement officer to be more credible and adequate to support the charges in question.

As the ALJ based his decision of the credibility of the testimony of the enforcement officer, those findings shall not be disturbed.

The Board finds that the ALJ's decision is supported by substantial evidence and is without error of law.

The decision of the ALJ, therefore, is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee must pay the fine in the amount of four hundred dollars (\$400.00) within twenty (20) days of the mailing date of this Order.

Licensee must adhere to all other conditions set forth in the ALJ's Order with mailing date September 23, 2008.

Board Secretary