

Mailing Date: November 3, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 07-3061
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
BIG FACES, INC.	:	License No. R-13497
800 WEST VENANGO STREET	:	
PHILADELPHIA, PA 19140-4425	:	LID 46943
	:	

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OPINION

Big Faces, Inc. (“Licensee”) appealed from an Adjudication and Order of Administrative Law Judge Tania E. Wright (“ALJ”), wherein the ALJ sustained both counts of Citation No. 07-3061, and imposed a fine of two thousand

dollars (\$2,000.00) and a suspension of Licensee's liquor license for a period of sixty (60) days.

Count One of the Citation charged that on September 25, 26 and 27, 2007, Licensee, by its servants, agents or employees, aided, abetted or engaged in the traffic in, 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 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 *et seq.*].

Count Two of the Citation charged that on September 25, 26 and 27, 2007, Licensee, by its servants, agents or employees, possessed and/or sold a controlled substance on the licensed premises or on premises contiguous or adjacent thereto or used in connection therewith 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 *et seq.*].

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 avers that the ALJ abused her discretion, committed an error of law and/or made a decision that was not supported by substantial evidence in her decision to sustain Count One and Count Two of Citation No. 07-3061; Licensee provides no other arguments to reinforce its averment that the ALJ's decision should be reversed.

The record reveals that Officer Thomas Liciardello has been a police officer with the Philadelphia Police Department approximately fifteen (15) years, and the officer has been assigned to the narcotics field unit for approximately ten (10) of the fifteen (15) years. (N.T. 6). Officer Liciardello has been trained on the identification of narcotics, police surveillances and the preparation of search and seizure warrants. (N.T. 7). Officer Liciardello has utilized the NIK test system for drugs since 1998, and in that time, the officer

has not had a situation where the lab had a different result than the officer's NIK test. (N.T. 8).

Officer Jeffrey Walker has been an officer with the Philadelphia Police Department for twenty (20) years and the officer has been in the plain-clothed unit for approximately twelve (12) years. (N.T. 38). Officer Walker has participated in over one thousand two hundred (1,200) narcotics investigations. (N.T. 39).

Officer Perry Betts has been an officer with the Philadelphia Police Department for fifteen (15) years and the officer has been with the narcotics field unit for eleven (11) of the fifteen (15) years. (N.T. 51-52). Officer Betts has participated in thousands of narcotics investigations. (N.T. 52).

Officer Liciardello conducted a drug investigation at the licensed premises that focused on Licensee's owner, Clayton Adams, in September 2007. (N.T. 8). Pursuant to detailed information from a confidential informant, Officer Liciardello initiated surveillances at different locations on September 11, 12 and 25, 2007. (N.T. 10). Officer Liciardello, along with four (4) other officers, Officer Walker, Officer Reynolds, Officer Betts, and Officer Spicer, participated in the September 25, 2007 surveillance. (N.T. 10-11, 37-38). At approximately 8:00 p.m. on September 25, 2007, Officer Liciardello observed numerous

individuals conversing with Mr. Adams outside the licensed premises. (N.T. 10-12). The officer observed that during the conversation, Mr. Adams would point to another individual, John James, and the individuals talking to Mr. Adams would then approach Mr. James and give Mr. James money in exchange for small items. (N.T. 12, 27). The officer then observed that after the individuals had left the area, Mr. James handed a large amount of money to Mr. Adams, who then drove to 3618 North 16th Street and entered the building with a key. (N.T. 12). The officer observed that approximately thirty (30) seconds after Mr. Adams had entered the building a light on the third floor of the building turned on, and approximately one (1) or two (2) minutes after that, Mr. Adams exited the building with a bag in his hand, which he placed in his car trunk. (N.T. 12). Mr. Adams then returned to the licensed premises, and handed the bag to Mr. James. (N.T. 12).

Officer Liciardello then instructed Officer Walker to send the confidential informant to make a controlled narcotics purchase. (N.T. 12). Officer Walker had previously searched the informant for money, drugs and paraphernalia, and provided the informant with twenty dollars (\$20.00). (N.T. 39-40). At approximately 9:00 p.m., Officer Walker observed the informant approach the front of the licensed establishment and meet with Mr. Adams. (N.T. 40). After

a brief discussion, the officer observed the informant give Mr. Adams twenty dollars (\$20.00) and the officer heard Mr. Adams yell into the establishment for “Johnny”, at which time Mr. James exited the establishment, and the officer heard Mr. Adams tell Mr. James to take care of the informant.¹ (N.T. 40-41). The officer observed Mr. James pull a plastic bag from his pocket and provide a blue heat-sealed packet to Mr. Adams, who in turn provided the object to the informant. (N.T. 42-43). The informant provided the packet to Officer Walker, who in turn provided the packet containing a white powdery substance to Officer Liciardello, who conducted a NIK test G on the substance, which showed the substance was cocaine. (N.T. 14-15, 43).

On September 26, 2007 at approximately 9:25 p.m., Officer Liciardello observed Mr. Adams arriving outside the licensed premises in a blue Chevy, and he remained inside the vehicle. (N.T. 15). Officer Liciardello then observed Mr. James exiting the licensed establishment and approach Mr. Adams, at which time Mr. James had a conversation with Mr. Adams and then handed Mr. Adams a large amount of money. (N.T. 15). Mr. Adams then entered the licensed establishment, while Mr. James remained outside. (N.T. 15). At 9:40

¹ During his testimony, Officer Liciardello referred to an individual who assisted Mr. Adams as John Robinson, but he later corrected the name to John James. (N.T. 27). Officer Walker also made reference to a John

p.m., the officer observed Mr. Adams exit the licensed establishment and hand Mr. James a clear plastic bag. (N.T. 15-16). Officer Liciardello subsequently directed that the confidential informant make a controlled narcotics purchase. (N.T. 16). Officer Walker was in control of the confidential informant, and the officer thoroughly searched the informant for money, drugs, and paraphernalia, and provided the informant three hundred dollars (\$300.00) prior to the controlled purchase. (N.T. 43-44). Officer Walker observed the informant approach the licensed establishment, where Officer Betts then observed the informant. (N.T. 44). Officer Betts observed the informant approach Mr. Adams outside the licensed establishment, and Mr. Adams gave the informant a hand signal to wait a minute, at which time Mr. Adams entered the front door of the establishment. (N.T. 54, 57). After approximately two (2) to three (3) minutes, Mr. Adams returned to the informant, and the informant gave Mr. Adams the “buy money” and Mr. Adams in turn gave the informant a clear plastic bag. (N.T. 54). The informant then left the bar and returned to Officer Walker with one (1) clear baggie containing what the officer believed to be bulk powder cocaine. (N.T. 44-45, 54). Officer Liciardello conducted a NIK test G on the contents of bag, and the bag contained cocaine. (N.T. 17).

Robinson in his testimony. (N.T. 40-41). After reviewing the testimony, however, the Board assumes in its

Based on the drug activity observations of September 25 and 26, 2007, search and seizure warrants for the licensed premises and 316 North 16th Street were prepared and approved by the appropriate legal authority. (N.T. 17-18, 22). On September 27, 2007 the warrants were executed at the licensed premises by Officer Liciardello and approximately five (5) or six (6) other police officers. (N.T. 18-19). The officers recovered a Smith and Wesson 357 loaded revolver and two hundred and nineteen dollars (\$219.00) from behind Licensee's bar on the first floor. (N.T. 19). The officers also recovered a book that contained white residue from a safe in a room on the second floor, which was accessed via an interior connection in the back of the first floor of the licensed premises, and the white residue in the book was later identified as cocaine via NIK test G. (N.T. 19-21). The officers also recovered on the second floor one (1) box of sandwich bags and one (1) clear Ziploc bag containing numerous new and unused yellow, red and clear packets, which from the officer's experience were the type of packets used for packaging cocaine or marijuana. (N.T. 22).

While executing the search warrant for the third floor of 316 North 16th Street, which was the area that Officer Liciardello had observed Mr. Adams

Opinion that Officer Walker's reference to John Robinson should have been John James. (N.T. 27).

previously, the officers recovered a plate with cocaine residue; one (1) clear Ziploc bag containing marijuana; one (1) amber pill bottle, which contained fifty-one (51) Xanax pills; a knotted bag containing crack cocaine; and one (1) clear Ziploc bag, which contained eight (8) clear and nine (9) green packets of crack cocaine, and three (3) red heat-sealed packets of powder cocaine. (N.T. 22-25).

The officers, with the assistance of the Delaware State Police, executed the search warrant for Mr. Adams' residence at 214 Tinzlet Court in Newark, Delaware, and recovered one hundred fifty thousand and nine hundred dollars (\$150,900.00). Most of the money was recovered in a freezer in the garage. (N.T. 25-26). The officers also recovered two (2) handguns, one (1) shotgun and numerous forms of identification and proof of residency with the Delaware address with Mr. Adams' name. (N. T. 26). Officer Liciardello was not aware of any criminal action against Mr. Adams in Delaware pursuant to this search of Mr. Adams' residence. (N.T. 35).

Mr. Adams was subsequently charged in Pennsylvania with possession with the intent to deliver, possession, and conspiracy, but there had not been a conviction as of the date of the hearing. (N.T. 27, 33).

Mr. Adams, who is Licensee's secretary, manager, treasurer and stockholder, indicated that Licensee has a policy of not allowing drugs or weapons on its premises, and it has two (2) signs posted in the establishment with numerous house rules. (N.T. 59-60). Mr. Adams indicated that he has never been convicted of any drug-related controlled substance crimes in Pennsylvania or anywhere else. (N.T. 60-61). According to Mr. Adams, his tenant, Ronald Wilson, had an apartment on the third floor of 3618 North 16th Street and Mr. Wilson had died in August 2007. (N.T. 61-63). Mr. Adams indicated that an individual had approached him outside the licensed establishment on September 25, 2007, about purchasing "powder" for twenty dollars (\$20.00), and Mr. Adams told the individual that he does not sell or allow drugs on the licensed premises. (N.T. 66-67). Mr. Adams indicated that the same individual approached him on September 26, 2007 outside the licensed establishment and followed Mr. Adams inside the establishment, where the individual inquired into where he could purchase a half an ounce of powder. (N.T. 66-67). Mr. Adams indicated that he told the individual "listen, I told you yesterday we don't sell drugs around here, I don't know who's sending you around here, you have to leave" and he escorted the individual to the door. (N.T. 67). Mr. Adams indicated that John James was a tenant on the

second floor above the licensed premises, but he is not longer a tenant. (N.T. 72). Mr. Adams did not know who owned the items found on the second floor above the licensed establishment during the execution of the search warrants on September 27, 2007. (N.T. 74). Mr. Adams indicated the gun recovered behind the bar was registered to the licensed establishment. (N.T. 73).

Mangu Sanchez has known Mr. Adams for approximately eight (8) or nine (9) years and Mr. Sanchez has frequented the licensed premises. (N.T. 78-80). Mr. Sanchez indicated that Mr. Adams has a zero tolerance policy with regard to drugs on the licensed premises and he has never witnessed Mr. Adams being involved with drug trafficking, sales, or use at the licensed premises. (N.T. 79-80). Mr. Sanchez also indicated that Mr. Adams is an honest person. (N.T. 80). Mr. Sanchez was not on the licensed premises on September 25, 26, and 27, 2007. (N.T. 80). James Johnson and James Adams attended the hearing and corroborated Mr. Sanchez's testimony. (N.T. 80-83). Further, Sherika Craig is employed by Licensee and indicated that Licensee has a zero tolerance policy with regard to drugs. (N.T. 83-84). Ms. Craig also indicated that she has not seen Mr. Adams engaged in any drug activity on the premises. (N.T. 84).

The Bureau has the burden of proof in a citation proceeding and it must prove its case by a clear preponderance of the evidence. Omicron Enterprises, 449 A.2d 857 (Pa. Cmwlth. 1982). The preponderance of the evidence standard requires the bearer of the burden to show that it is “more likely than not” that the alleged event occurred. Agostino v. Township of Collier, 968 A.2d 258 (Pa. Cmwlth. 2009).

Section 471(a) of the Liquor Code provides in pertinent part that “[u]pon learning of any violation of this act . . . or any violation of any laws of this Commonwealth . . . the enforcement bureau may, within one year from the date of such violation or cause appearing, cite such licensee to appear before an administrative law judge . . . to show cause why such license should not be suspended or revoked or a fine imposed, or both” [47 P.S. § 4-471(a)]. Also, 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 when violations of the Liquor Code and its attendant laws and Board Regulations are not the conduct under review. Therefore, in order to meet its burden, the Bureau must prove it is more likely than not that that Mr. Adams knew or should have known of the illegal drug activity at the licensed premises and that for Count One, Licensee, by its

servants, agents or employees, aided, abetted or engaged in the traffic in, 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 in violation of section 780-101 *et seq.*, of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act [35 P.S. § 780-101 *et seq.*] and for Count Two, Licensee, by its servants, agents or employees, possessed and/or sold a controlled substance on the licensed premises or on premises contiguous or adjacent thereto or used in connection therewith in violation of section 780-101 *et seq.*, of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act [35 P.S. § 780-101 *et seq.*].

In the instant case, Mr. Adams testified that the licensed establishment has a no drug policy, and also has signage posted of such policy. Mr. Adams also testified that an individual attempted to purchase drugs from him on September 25 and 26, 2007, but he iterated to the individual that the premises has a no drug policy and he did not sell drugs to the individual. However, three (3) police officers testified regarding the observance of drug activity occurring immediately outside the licensed establishment by Mr. Adams on September 25 and 26, 2007, and the record shows the police utilized the services of a confidential informant on both days to purchase drugs from Mr. Adams

immediately outside the licensed premises. Also, the record shows that police officers testified that during the execution of search warrants on September 27, 2007, the police retrieved drug paraphernalia and a book with cocaine residue at an apartment above the licensed premises and drugs and drug paraphernalia from the third floor apartment located at 316 North 16th Street, which is the same location that the police had previously observed Mr. Adams frequent during its drug surveillance.

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, 480 A.2d 1253 (Pa. Cmwlth. 1984). In the instant case, the ALJ found the testimony of the police officers to be more credible than Mr. Adams and adequate to support the charges in the citation, and the Board finds there is clearly substantial evidence to support the ALJ's decision to sustain both counts of the citation.

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).

The Board finds in reaching her conclusion to sustain the two (2) counts for Citation No. 07-3061, the ALJ applied the applicable law in a reasonable manner to the facts in the record, and did not abuse her discretion.

Therefore, based upon a review of the evidence presented, 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.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

A fine of two thousand dollars (\$2,000.00) has been paid.

Licensee's Restaurant Liquor License No. R-113497 is suspended for a period of sixty (60) days beginning at 7:00 a.m. on Monday, December 6, 2010 and ending at 7:00 a.m. on Friday, February 4, 2011 in accordance with the Administrative Law Judge's Order dated August 30, 2010.

Board Secretary