

Mailing Date: October 22, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-3082
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :
 :
 :
 vs. :
 :
 SEVEN SPRINGS FARM, INC. : License No. H-4587
t/a Main Lodge :
RD 1 :
Seven Springs :
Champion, PA 15622-9801 :

Counsel for Licensee: Francis X. O'Brien, Esquire (Hearing)
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OPINION

Seven Springs Farm, Inc., t/a Main Lodge (“Licensee”) appeals¹ from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ sustained the citation and imposed a fine in the amount of three thousand dollars (\$3,000.00), a one (1) day suspension and participation in the Responsible Alcohol Management Program for a period of one (1) year.

The citation charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that, on November 25, 2007, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron and one (1) visibly intoxicated female patron.

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

¹ Licensee also filed on Application for Supersedeas which was denied on September 29, 2008.

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 following four (4) allegations of error:

- (1) that the ALJ erred in sustaining the violation;
- (2) that the evidence presented did not establish that the licensee, its servants, agents or employee sold or furnished alcoholic beverages to a visibly intoxicated female and a visibly intoxicated male;
- (3) that the Findings of Fact Nos. 3-6 are not supported by substantial evidence; and
- (4) the ALJ erred in failing to make a finding that the beverage[s] served to the alleged visibly intoxicated patrons were "malt or brewed beverages" as defined in Section 102 of the Liquor Code.

In its response to the Licensee's appeal, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") assert that the present

appeal should be barred because the parties engaged in a post-hearing agreement. Specifically, the Bureau alleges that the Licensee agreed to the opportunity of selecting its date of suspension in exchange for waiving its right to appeal.

Because the Bureau's argument goes to the Board's ability to even consider the subject matter of the present appeal, this issue must be addressed first.

The Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the notes of testimony from the hearing of July 10, 2008, and has been unable to locate any information to evidence the agreement alleged by the Bureau. While such an agreement to waive appellate rights may have taken place, it is not evidenced anywhere in the certified record. "For purposes of appellate review, what is not of record does not exist." Frank v. Frank, 587 A.2d 340, 342-43 n. 5 (Pa. Super. 1991).²

² While the Board completely agrees that "oral waivers have long been accepted," there must be *some* competent evidence in the record to demonstrate that such a waiver of an important right made knowingly, intelligently and voluntarily. In order to avoid precisely this situation, it is incumbent upon the ALJ and the parties involved in such an agreement to assure that the record reflects an extraordinary step such as the waiver of appellate rights.

A waiver in law is defined as “the act of intentionally relinquishing or abandoning some known right, claim or privilege.” Brown v. City of Pittsburgh, 409 Pa. 357, 186 A.2d 399, 401 (1962). In order to demonstrate a waiver of a legal right, “there must be a clear, unequivocal and decisive act of the party who is claimed to have waived its rights, with knowledge of such right and an evident purpose to surrender it.” Wohlgemuth v. Armacost, 18 Pa.Cmwlt. 394, 336 A.2d 455 (1975). In this case, there is no evidence to demonstrate that the Licensee was advised of its right to appeal and knowing and intelligently waived those rights.

Further, while there may be some evidence present to support the contention that Licensee’s prior counsel was aware of this arrangement, there is no evidence that the Licensee itself agreed to this bargain. It is a long standing rule that a “client’s attorney has no authority to enter into agreements which involve a waiver of any substantial rights or imposition of new liabilities or burden.” Singer v. W.C.A.B. (Fruehauf and CNA Insurance Company), 90 Pa.Cmwlt. 441, 496 A.2d 67 (1985) (*citing* City of Philadelphia v. Schofield, 375 Pa. 554, 101 A.2d 625 (1954)).

As a result of the lack of *any* affirmative evidence to demonstrate that the Licensee was aware of its rights and affirmatively assented to the alleged bargain, the Board is hesitant to find a waiver of vital appellate rights.

Therefore, the Board has engaged in a review of the record, including the ALJ's Adjudication and Order, with the contentions of both the Licensee and the Bureau in mind, and has concluded that the ALJ's decision is supported by substantial evidence.

Section 493(1) of the Liquor Code provides that it shall be unlawful for any licensee to sell, furnish and/or give or permit such sale, furnishing or giving of alcoholic beverages to visibly intoxicated individuals. [47 P.S. § 4-493(1)].

The Licensee's first three (3) assertions on appeal involve challenges to the sufficiency of the evidence. Review of the transcript in this matters reveals that in the present case, two Bureau Enforcement Officer entered the Licensee's establishment on November 24, 2007 in an undercover capacity. (N.T. 17). The Officers split up in order to observe any apparent violations. (N.T. 18). One Officer observed a customer with bloodshot and glassy eyes, his mouth open, swaying back and forth and walking on the balls of his feet.

The Officer engaged the patron in conversation and noticed that his speech was extremely unintelligible and very slurred. The Officer asked the customer if he was in line to get another beer. After numerous attempts, the Officer finally understood the customer to say, “yes even though I don’t need any more.” The customer then went through the crowd to the bar and was served a sixteen (16) ounce Coors Light draft beer by the bartender. (N.T. 20).

While following the first customer, the Officer noticed another customer, a woman. The Officer listened to her carrying on a conversation with her friends. The woman’s speech was very labored, she had bloodshot eyes and the strong odor of alcohol emanating from her. The female customer was unsteady and held onto some her friends for balance. (N.T. 21). The female customer walked up to the secondary service area and was served a sixteen (16) ounce Coors Light draft by a male bartender. (N.T. 22).

These two Enforcement Officers described the licensed premises; they described the people inside at the time of their investigation; and they described the conduct of individuals to whom intoxicating beverages were

served by the Licensee or its employees. It has long been held that such direct evidence is sufficient to prove a charge of serving visibly intoxicated patrons. Turner v. Pennsylvania Liquor Control Bd., 161 Pa.Super. 16, 53 A.2d 849 (1947).

Given the evidence presented, the Licensee's challenge ultimately amounts to nothing more than dissatisfaction with how the ALJ accorded evidentiary weight. Licensee invites the Board to 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. Cmwlt. 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. Cmwlt. 379, 480 A.2d 1253 (1984). In the instant case, the ALJ found the testimony of the Enforcement Officers to be credible and adequate to support the charge in the citation. The Board will not overturn the ALJ's opinion on

nothing more than mere speculation and a suggestion that these officers were not credible.

The Licensee's final assertion of error contends that the ALJ erred in failing to make a finding that the beverage[s] served to the alleged visibly intoxicated patrons were "malt or brewed beverages" as defined in Section 102 of the Liquor Code. The burden of proof in a citation proceeding involving a violation of the Liquor Code is upon the Bureau and the Bureau must prove its case by a clear preponderance of the evidence. Omicron Enterprises, 68 Pa.Commonwealth Ct. 568, 449 A.2d 857 (1982).

The Licensee asserts that the testimony of the agents was insufficient to prove that the beer which the agents said the patrons consumed was a malt or brewed beverage as defined by the Liquor Code. The Board finds this argument unpersuasive. First, such an argument goes merely to the weight of the testimony and not the competency of the agents' testimony regarding their observations. As the Commonwealth Court has directed, chemical analysis of substances believed to be alcohol is not required under the Liquor Code. In re Steerman's Liquor License, 185 Pa.Super. 214, 138 A.2d 292 (1958); P.L.C.B. v. K.V.M., Inc., 119 Pa.Cmwlt. 458, 547 A.2d 517

(1988); General Davis, Inc. v. Pennsylvania State Police, B.L.C.E., 141 Pa.Cmwlth. 278, 595 A.2d 710 (1991). Second, the testimony presented at the hearing was clear that these two patrons were each served sixteen (16) ounce Coors Light draft beers. There is nothing in the record that disputes these statements and, therefore, the ALJ was justified in concluding that malt or brewed beverages were served.

Based upon the foregoing, the Board finds that the ALJ's decision is supported by substantial evidence and shall not be disturbed. The decision of the ALJ is, therefore, affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of three thousand dollars (\$3,000.00) on October 9, 2008.

It is hereby ordered that Licensee's Hotel Liquor License No. H-4587 be suspended for a period of one (1) day beginning at 7:00 a.m., Friday, October 24, 2008 and ending at 7:00 a.m. on Saturday, October 25, 2008.

Licensee must adhere to all other conditions set forth in the ALJ's Order issued August 29, 2008.

Board Secretary