

Mailing Date: May 6, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 08-0350
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

JENNY’S TAVERN, INC. : License No. R-13156
1 W. Oak Street :
Tresckow, PA 18254 :
:

Counsel for Licensee: Mary McAloose
Pro Se (On Appeal)

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Drums, PA 18222

Counsel for Bureau: Craig A. Strong, Esquire
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OPINION

Jenny’s Tavern, Inc. (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ sustained the citation and imposed a four hundred dollar (\$400.00) fine.

The citation charged that, on January 26, 2008, Licensee, by its servants, agents or employees violated section 5.32(a) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code § 5.32(a)] by using, or permitting to be used on the inside of its licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

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 discretion, or if his 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 the ALJ abused his discretion in finding credible the testimony of the sole witness of the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") and in determining that there was sufficient evidence to support the citation. Licensee also contends that the ALJ

abused his discretion and erred as a matter of law by suggesting that the ALJ conducted the hearing in a biased manner and went beyond his right and duty to cross-examine Licensee's witnesses, thus prejudicing Licensee. Licensee further contends that the ALJ abused his discretion and/or erred as a matter of law in that the Bureau's sole witness was permitted to read directly from his report while on the witness stand, whereas License and Licensee's witnesses were precluded from referring to any writings while testifying. Licensee also contends the ALJ's abused its discretion and/or erred as a matter of law in that Licensee was deprived of the opportunity to effectively cross examine the Bureau's sole witness and when the ALJ determined that Pennsylvania law does not require evidence that the alleged amplified sound emanated from the premises on a routine basis and/or on more than one (1) occasion in order, to sustain the citation.

The record reveals that on January 25, 2008, William Rosenstock, a Bureau Enforcement Officer, arrived the licensed premises at about 10:00 p.m. (N.T. 10). After remaining on the premises for one (1) hour and observing no violations, Officer Rosenstock left the premises. (N.T. 10-11).

The officer returned to the premises on January 26, 2008 at 9:20 p.m. (N.T. 12). He heard the bass sound of music emanating from the premises while outside.

He heard the bass sound as far away as one hundred twenty (120) feet. (N.T. 13). Officer Rosenstock entered the premises at about 9:25 p.m. and determined the source of the music was karaoke entertainment with amplified music. (N.T. 14). The officer departed the premises at 10:00 p.m. (N.T. 15).

Mary McAloose, Licensee's owner, was at the licensed premises on the evening of January 26, 2008. (N.T. 28). On the evening in question Licensee hired "Courage Karaoke" to provide entertainment at the licensed premises. (N.T. 37-38). Before the karaoke began, Mrs. McAloose told Jerry Breck, the karaoke provider, to keep the sound down because of previous citations she had received. (N.T. 32). Mrs. McAloose stated that she and some of the patrons were aware of Officer's Rosenstock's presence and that they thought he might be an enforcement officer. (N.T. 33).

Jerry Breck, owner of Courage Karaoke, was hired to provide entertainment at the licensed premises on January 26, 2008. (N.T. 37-28). Mr. Breck sets up his equipment with a gauge. (N.T. 38). He then goes outside to make a sound check to make sure the music is not heard outside. (N.T. 38). On January 26, 2008, Mrs. McAloose advised Mr. Breck that she had some previous violations and that "someone was in the house" and therefore she wanted to make sure that he kept the music low. (N.T. 38). Mr. Breck stated that he conducted his sound check at

about 9:30 p.m. and did not begin with the performance until 9:35 p.m. (N.T. 39). On January 26, 2008, Mr. Breck received complaints from patrons because Mrs. McAloose had requested Mr. Breck to keep it low. (N. T. 39).

Andrew McAloose, Licensee's husband, was in the upstairs portion of the building on the evening of January 26, 2008. (N. T. 49). After being informed that Officer Rosenstock had come to the licensed establishment, Mr. McAloose went downstairs to the premises at about 9:45 p.m. (N.T. 49). Mr. McAloose generally walks up the street at the start of the karaoke to monitor any sound of music and if it is detected he tells whoever is playing to lower the sound level. (N.T. 53-54). Mr. McAloose walked outside on the evening of January 26, 2008 and saw Officer Rosenstock driving away. (N.T. 55).

Based upon a review of the evidence, the ALJ determined that the testimony offered by Officer Rosenstock was most credible regarding the January 26, 2008 visit to the licensed premises and, accordingly the ALJ found that the sound of amplified music was emanating from the premises on January 26, 2008. The ALJ chose to resolve the obvious discrepancies between the testimony of the Bureau's witness and Licensee's witnesses in favor of the Bureau. In reaching this conclusion, the ALJ relied on his judgment of the demeanor of the witnesses.

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 the enforcement officer to be more credible and adequate to support the charge in question.

Licensee further contends that the ALJ abused his discretion and/or erred as a matter of law in that the Bureau's sole witness was permitted to read directly from his report while on the witness stand, whereas Licensee's witnesses were precluded from referring to any writings while testifying. A review of the record reveals that when Licensee's husband, Mr. Andrew McAloose was called to testify, he took some documents with him to the stand. (N.T. 45-46). Upon questioning by the ALJ, Mr. McAloose stated that he saw Officer Rosenstock on the stand with some documents and he thought it would be okay to do the same. (N.T. 46). Upon learning that the only documents in Officer Rosenstock's possession when he was on the witness stand were the Bureau's certified documents, Mr. McAloose advised the ALJ that the only reason he had documents was to use them to refresh his memory in the event he needed to do so. (N.T. 47). At that point, the ALJ advised Mr. McAloose, "if you need it to refresh your memory on something, you can do

that at the appropriate time...if you don't remember and you have some notes that were made contemporaneously you can [use them]." (N.T. 47). At no time thereafter did Mr. McAloose suggest that he needed to refresh his memory as to the events of January 26, 2008 and at no time thereafter, did the ALJ preclude Mr. McAloose from referring to notes or documents for the purpose of refreshing his recollection. Accordingly, the Board finds that the ALJ did not abuse his discretion or erred as a matter of law.

On appeal, Licensee also contends the ALJ abused his discretion and/or committed an error of law in that Licensee was deprived of the opportunity to effectively cross examine the Bureau's sole witness and that the ALJ further erred when he determined that Pennsylvania law does not require evidence that the alleged amplified sound emanated from the premises on a routine basis and/or on more than one (1) occasion in order to sustain the citation, and that the ALJ erred by conducting the hearing in a biased manner.

A further review of the record reveals that at no time during Licensee's cross examination of the Bureau's witness did Licensee's counsel raise even a single objection to the questions being raised by the ALJ or to the rulings of the ALJ as to the relevance of Licensee's counsel's questions. In one instance, where the ALJ offered an explanation as to the nonrelevance of a decibel reader in relation to the

Board Regulation at issue, Licensee's counsel thanked the ALJ for the explanation that was given. (N.T. 18-19, 21). The Board finds that there is no evidence of record which even remotely suggests that the ALJ was in any way conducting the hearing in a biased manner.

Licensee also contends that the ALJ abused his discretion and erred as a matter of law in determining that Pennsylvania law, including but not limited to the Commonwealth Court case of "Matter of Banks" precludes a finding of violation where the Bureau did not offer evidence that the alleged sound emanated from the premises on a routine basis and/or on more than one (1) occasion. If Licensee is referring to In RE Banks, 59 Pa. Cmwlth. 443, 429 A.2d 1279 (1981), Licensee's assertions are indeed misdirected. The court in the Banks case stated that to be in violation of the Liquor Code, under § 4-471 of the Liquor Code, a licensed premises must be operated in a noisy and disorderly fashion on a routine basis. The Court went on to find that two (2) occasions of noisy operation warrant a fine.

In the instant case, Licensee was not cited for operating its premises in a noisy and disorderly manner. Rather, Licensee was cited for a violation of section 5.32(a) of the Pennsylvania Liquor Control Board Regulations pursuant to 40 Pa. Code § 5.32(a), which provides that:

[a] licensee may not use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby

the sound of music or other entertainment, or the advertisement thereof, can be heard on the outside of the licensed premises.

Accordingly, based upon a review of the record, the ALJ's findings of fact relative to the loudspeaker charge is clearly supported by undisputed testimony. Given the nature of the charge, the Bureau was not required to offer any evidence relative to whether or not the sound emanated from the premises on a routine basis and/or on more than one (1) occasion at issue.

While the fact that the Bureau enforcement officer did not observe any violations during his visit to the premises on January 25, 2008 may have affected the penalty assessed by the ALJ, that factor does not change the fact that Licensee is strictly liable for a violation of the Liquor Code on January 26, 2008. In the absence of evidence to refute the charge set forth in the citation, the Board finds that the ALJ's findings and conclusions relevant thereto are based upon substantial evidence.

With regard to Licensee's argument that the Bureau's policy of permitting an officer to consume alcoholic beverages while conducting an investigation and to have more than one (1) investigation open at any given time is a violation of Licensee's due process rights, Licensee has not cited to any case law to support its assertion. The essential requirements of due process are notice and opportunity to be heard. Licensee's counsel duly accepted the Bureau's exhibits C-1 and C-2

representing the notice of violation letter and the citation, respectively. (N.T. 7-8). Licensee's counsel conducted a full cross examination of Officer Rosenstock, including questions regarding whether the officer is permitted to consume alcohol while on duty, and whether he consumed alcohol during any other investigation on the same evening. (N.T. 16-18). Licensee has failed to establish that the Bureau's witness recollection of events was negatively impaired by the consumption of one (1) or two (2) beers on the evening in question or by his visit to another licensed premises on the same date. Accordingly, Licensee's assertion of any violation of its due process rights are not supported by any evidence of record.

Based on the forgoing the decision of the ALJ, therefore, is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee pay the fine of four hundred (\$400.00) dollars within twenty (20) days of the mailing date of this Order. Failure to do so will result in license suspension and/or revocation.

Licensee must adhere to all conditions set forth in the ALJ's Order dated September 9, 2008.

Board Secretary