

Mailing Date: August 12, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation Nos. 08-0646
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
BLUE RIDGE SPORTSMEN'S	:	License No. CC-6194
ASSOCIATION, INC.	:	
3009 WAYNESBORO PIKE	:	
FAIRFIELD, PA 17320-9709	:	

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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), appeals the dismissal of Count Two of Citation No. 08-0846 as set

forth in the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), dated April 15, 2009.

The citation in the present matter contained three (3) separate counts; however, Count One and Count Three were sustained by the Administrative Law Judge, were not appealed, and accordingly will not be addressed in the present Opinion. Count Two of the citation alleged that during the periods September 2 through 8, October 7 through 13, November 11 through 17, December 16 through 22, 2007, Licensee, by its servants, agents or employees, offered and/or awarded more than five thousand dollars (\$5000.00) in cash or merchandise in any seven (7)-day period, in violation of section 471 of the Liquor Code [47 P.S. § 4-471], and section 315(b) of the Local Option Small Games of Chance Act [10 P.S. § 315(b)].

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.¹ The Commonwealth Court defined "substantial evidence" to be such

¹ This standard of review in this matter is slightly broader, as will be explained later in this Opinion.

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).

The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. It is well-settled that an abuse of discretion is not merely an error of judgment; however, 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. Commonwealth v. Levanduski, 907 A.2d 3, 13-14 (Pa. Super. 2006)(*en banc*).

On appeal, the Bureau submits the following issue for the Board's review:

This appeal raises the difficult issue of when should a fact finder's determination of "credibility and weight" be reversed.²

² On or about May 29, 2009, Licensee filed a response to the Bureau's appeal. However, much of this response is devoted to the issue of admissibility. As the present appeal deals with evidentiary weight rather than admissibility, the Board will not address the substance of this response.

In addressing this matter, 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 February 26, 2009 and the ALJ's Adjudication and Order, with the Bureau's contention in mind, and has concluded that the ALJ correctly dismissed Count Two. Accordingly, we affirm.

The Bureau's evidence in the present matter established that from January 10, 2008 until February 20, 2008, Officer Jerome T. Botchie of the Bureau conducted an investigation involving the Blue Ridge Sportsmens' Association Inc. ("Licensee"). On Friday, January 18, 2008, Officer Botchie went to the licensed premises in order to conduct a routine inspection and asked to see the manager. Officer Botchie met with Mr. Staudenmier, who identified himself as the club president. After meeting with Mr. Staudenmier, Officer Botchie conducted a physical inspection of the area behind the bar and the clubhouse. As part of this routine inspection, Officer Botchie inspected the small games of chance. (N.T. 7-10).

Officer Botchie requested to see Licensee's records relating to the operation of the licensed premises. Mr. Staudenmier indicated that he did not have access to everything that Officer Botchie needed to see to complete the

investigation. Officer Botchie provided Mr. Staudenmier with a request for records and made an appointment to review those records at a later date and time. (N.T. 17-18).

Officer Staudenmier returned to the licensed establishment on January 31, 2008 at the prearranged time. During this meeting Mr. Staudenmier indicated that Licensee had held free events for club members; however, these events were not noted in the required club records. (N.T. 25-28).

Further, Officer Botchie noted that Licensee's minute book contained the names of members posted; however, no date of application was provided. Further, Licensee did not maintain an inactive membership record for a period of two (2) years and Licensee failed to keep proper records regarding catered events held on the licensed premises. Licensee also had several punchboard games that had been played but no records were kept for those games. Lastly, Officer Botchie noted that Licensee failed to maintain its payout records in a seven (7)-day interval. (N.T. 38-59).

As part of his investigation, Officer Botchie reviewed the jurisdictional tip jar report to determine if Licensee had paid over five thousand dollars (\$5,000.00) in payout during a seven (7)-day period. Officer Botchie reviewed

the jurisdictional tip jar report and picked one (1) operating week in September 2007, October 2007, November 2007 and December 2007. The specific operating weeks examined by Officer Botchie were September 2 through September 8, 2007, October 7 through October 13, 2007, November 11 through November 17, 2007, and December 16 through December 22, 2007. (N.T. 56-62).³ Officer Botchie based his conclusions solely upon information obtained from the jurisdictional tip jar. During the course of the hearing, the ALJ repeatedly noted his concerns regarding the document proffered by the Bureau and questioned its evidentiary value.⁴ (N.T. 66-70; 74-79; 83-86; 89-90).

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. Comwlth. 568, 449 A.2d 857 (1982). As prosecutor, the Bureau is free to use any proper evidence to prove its case. During its case in chief, the Bureau presented a

³ For September 2 through September 8, 2007, Officer Botchie testified that he had calculated the prize payout to be twenty four thousand nine hundred-sixty eight dollars (\$24,968.00). (N.T. 82). For October 7 through October 13, 2007, Officer Botchie determined the payout to be nineteen thousand three hundred eighty-eight dollars (\$19,388.00). (N.T. 83). For November 11 through November 17, 2007, Officer Botchie determined the payout to be twenty-nine thousand eight hundred sixty dollars (\$29,860.00). (N.T. 83). For December 16 through December 22, 2007, Officer Botchie determined the payout to be twenty-eight thousand one hundred seven dollars (\$28,107.00). (N.T. 83).

⁴ It cannot be ignored that the Bureau chose to utilize Exhibit C-3 as its sole manner of proving its charge. However, even after hearing the ALJ's repeated concerns regarding the modified document, the Bureau never attempted to introduce a clean copy, or complete and unmarked version of the records provided by Licensee.

series of printed pages, identified by Officer Botchie as Licensee's jurisdictional tip jar report. (N.T. 43, Ex. C-3).⁵

These documents were properly admitted into evidence over objection of Licensee's counsel. Section 505 of Administrative Agency law provides that: "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted." 2 Pa.C.S.A. § 505. However, a decision regarding the admissibility of evidence is separate and distinct from consideration of the weight of the evidence.

In dismissing Count Two of the citation, the ALJ found that the altered documents provided by the Bureau lacked sufficient trustworthiness and therefore afforded these documents little or no evidentiary weight. The ALJ noted that "the document lacks the sufficient level of trustworthiness as it contains notations. Other pages contain cross-outs. Most significant to concluding the Exhibit is suspect is the fact that [the ALJ] is not presented with

⁵ The Board agrees with the Bureau that Licensee neither argued that the documents were not what they purported to be, nor did Licensee suggest that the information contained in the document was inaccurate. However, it is also clear that the exhibit proffered by the Bureau has been altered.

a full set of documents.” As this exhibit was the Bureau’s sole means of proving its case, the ALJ dismissed the charge.

The Bureau argues that the ALJ abused his discretion because he ignored uncontradicted evidence.⁶ While not specifically termed as such, the argument put forth by the Bureau is similar to the concept of capricious disregard. Capricious disregard has been described by the Pennsylvania Supreme Court as the deliberate disregard of competent evidence which one of ordinary intelligence could not possibly have avoided in reaching a result. Arena v. Packaging Sys. Corp., 510 Pa. 34, 38, 507 A.2d 18, 20 (1986).

As noted above, section 471(b) of the Liquor Code provides that “the board shall only reverse the decision of the administrative law judge if the administrative law judge committed an error of law, abused its discretion or if its decision is not based on substantial evidence.” [47 §4-471(b)]. However, as the Pennsylvania Commonwealth Court has noted: “where the burdened party is the only party to present evidence and does not prevail before the agency, the ‘substantial evidence’ test falters.” Russell v. W.C.A.B. (Volkswagen of

⁶ It is well accepted general proposition that it is “an abuse of discretion for the [fact finder] to ignore the substantial, uncontradicted evidence in the record, and the strong inferences drawn from it...” Commonwealth Dept. of Transp. v. Mazzarini, 919 A.2d 295, 302 (Pa. Cmwlth. 2007); see also Philly International Bar, Inc. v. Pennsylvania Liquor Control Bd., 2009 WL 529574 (Pa. Cmwlth. 2008).

America, 550 A.2d 1364, 1365 (Pa. Cmwlth. 1988). The Court went on to state that:

If no evidence was presented to support the prevailing party, there is no evidence upon which to apply the “substantial evidence” test; i.e., it is impossible to find substantial evidence to support a position for which no evidence was introduced. In such cases, therefore, the appropriate scope of review,... is whether the [fact-finder] erred as a matter of law or capriciously disregarded competent evidence.

[Id.].

In the present matter, Licensee presented no evidence regarding Count Two and, yet, the Bureau did not prevail. Further, the Bureau has substantially raised this issue for Board review.⁷ Accordingly, the Board has examined this appeal with the capricious disregard standard in mind.

A capricious disregard of evidence exists only “when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result.” Station Square Gaming L.P. v. Pennsylvania Gaming Control Bd., 592 Pa. 664, 673, 927 A.2d 232, 237 (2007) (quoting Arena v. Packaging Systems Corporation,

⁷ The Supreme Court has embraced this test and has held that: “review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court.” Leon E. Wintermyer, Inc. v. W.C.A.B. (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002).

510 Pa. 34, 38, 507 A.2d 18, 20 (1986)). However, the fundamental flaw in the Bureau's assertion is that in the present matter, the ALJ did not ignore the evidence presented; much to the contrary, the ALJ examined the evidence and found that it lacked sufficient weight to support the charges. As the Commonwealth Court has noted the "express consideration and rejection of evidence... does not constitute capricious disregard of evidence." Nelson v. State Bd. of Veterinary Medicine, 938 A.2d 1163, 1170 n. 13 (Pa. Cmwlth. 2007); In re Nevling, 907 A.2d 672, 675 n. 4 (Pa. Cmwlth. 2006).

Further, the Bureau seemingly invites the Board to reevaluate the ALJ's determination regarding the weight that is to be afforded to the evidence submitted by the Bureau. Such an invitation has been previously rejected by appellate courts in this Commonwealth, and is similarly rejected by the Board in regard to this case. The Board may not substitute its own judgment for the ALJ's, as it is the fact-finder's province to weigh the evidence, determine the credibility of witnesses, and believe all, part, or none of the evidence submitted. Commonwealth v. Cooper, 596 Pa. 119, 941 A.2d 655 (Pa. 2007); Commonwealth v. West, 937 A.2d 516 (Pa. Super. 2007); Swift v. Dept. of Transportation, 937 A.2d 1162 (Pa. Cmwlth. 2007).

It is of no concern that the Board may not agree with the ALJ's determination regarding the weight to be afforded Exhibit C-3, or that the Board may have reached a different decision. Indeed, a fact-finder is free to disbelieve even uncontradicted evidence. Commonwealth v. Podrasky, 378 A.2d 450 (Pa. Super. 1977). The mere lack of contradiction does not compel the fact-finder to accept the evidence as true. Appeal of Pesante, 476 A.2d 474 (Pa. Cmwlth. 1984). The ALJ was permitted to disregard evidence so long as his or her decision is not arbitrary. McElwee v. Southeastern Pennsylvania Transportation Authority, 596 Pa. 654 n. 10, 948 A.2d 762 n. 10 (2008). Because the ALJ specifically articulated his reasons for disregarding the Bureau's evidence, the Board cannot determine that the ALJ's decision was arbitrary.

Accordingly, the decision of the ALJ is affirmed.

ORDER

The decision of the ALJ in regard to Count Two is affirmed.

The appeal of Bureau is dismissed.

Licensee must adhere to all conditions set forth in the ALJ's Order issued

April 15, 2009 .

Board Secretary