

Mailing Date: May 6, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-0818
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
KATHY J. WHITEMAN, t/a	:	License No. R-11776
THE BEAR'S DEN	:	
144-144 ½ VALLEY ST.	:	
LEWISTOWN, PA 17044	:	

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**OPINION**

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), appeals the dismissal of Count Two of Citation No. 08-0818 as set

forth in the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), dated October 16, 2008.

The citation in the present matter contained two (2) separate counts; however, Count One was sustained by the Administrative Law Judge, was not appealed, and accordingly will not be addressed in the present Opinion. Count Two of the citation alleged that on March 5, 2008, Licensee failed to adhere to the conditions of a Conditional Licensing Agreement (“CLA”) entered into with the Pennsylvania Liquor Control Board (“Board”), placing additional restrictions upon the subject license, in violation of section 404 of the Liquor Code. [47 P.S. § 4-404].

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).

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:

The specific issue presented for review is whether Licensee failed to adhere to the conditions of an agreement entered into with the Board placing additional restrictions upon the subject license when Licensee did not scan the ID's of any of the patrons present on the date of violation though Licensee was required to scan the ID's of all patrons entering the licensed premises.<sup>1</sup>

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<sup>1</sup> On or about November 17, 2008, Licensee filed a response to the Bureau's appeal. Licensee's response poses two (2) issues: (1) whether the CLA should be construed against Licensee to include language that is missing from the agreement; and (2) whether the Board has the authority to instruct the ALJ on penalty. Each of these issues will be addressed during the course of the Board's analysis.

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 September 23, 2008 and the ALJ's Adjudication and Order, with the Bureau's contention in mind, and has concluded that the ALJ incorrectly dismissed Count Two. Accordingly, we reverse.

In February 2007, Licensee entered into a CLA with the Board, which required, among other things, that Licensee install and utilize a transaction scan device to scan the identifications of all patrons entering the licensed premises. (N.T. at 15-16; Ex. L-1<sup>2</sup>). On March 5, 2008, Liquor Control Enforcement Officer Earl Killion ("Officer Killion") entered Licensee's establishment as part of compliance check and found the bartender, identified as Shawn Kurtz ("Kurtz"), as well as seven (7) patrons, inside the bar. (N.T. at 30-31, 33). Shortly after entering the establishment Officer Killion learned that the Licensee, Kathy Whiteman ("Whiteman"), was not available. (N.T. at 30). Whiteman was subsequently contacted by telephone and arrived approximately fifteen (15) minutes later. (N.T. at 30).

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<sup>2</sup> While both the Notes of Testimony and the Index to Exhibits suggest that the CLA in this matter is marked as Exhibit C-3, a true and correct copy of the CLA was actually marked as Exhibit L-1.

While awaiting Whiteman's arrival, Officer Killion asked Kurtz if he was familiar with the operation of the handheld scanning device. In response to this question, Kurtz indicated that he was familiar with the operation of the device. (N.T. at 37). Officer Killion then asked if Kurtz could bring up the last entry on the device, which he did. (Id.). Officer Killion looked at the readout on the device and observed the last entry. (N.T. at 37-38)<sup>3</sup>.

The Bureau additionally presented the testimony of two (2) individuals who had patronized the Licensee's establishment on March 5, 2008. Russell Lawrence Smith ("Smith") testified that he was a patron on March 5, 2008, and that on that date his ID was not scanned upon his entry into the bar. (N.T. at 53-54). Dora Rogers similarly stated that she was a patron of Licensee's establishment on March 5, 2008 and was also not subjected to an ID scan upon entering the Licensee's establishment. (N.T. at 68).

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<sup>3</sup> It should be noted that the Bureau was precluded by the ALJ's evidentiary ruling from presenting the testimony of Officer Killion regarding what he actually observed on the device. The Board must again remind the ALJ that 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. Our Supreme Court has interpreted this language as providing that "hearsay evidence may generally be received and considered during an administrative proceeding." D'Alessandro v. Pennsylvania State Police, 594 Pa. 500, 512, 937 A.2d 404, 411 (2007). Ultimately, the issue is moot because the Board agrees with the ALJ's Finding of Fact No. 5, that Licensee did not engage in the use of a transaction scan device for any patron present during Officer Killion's visit.

While the ALJ ultimately found that the Licensee did not utilize the transaction scan device for any patron on March 5, 2008, it nonetheless concluded that the Bureau failed to prove that on March 5, 2008, Licensee, by its servants, agents or employees, failed to adhere to the conditions of the agreement entered into with the Board, placing additional restrictions upon the subject license. In reaching this conclusion, the ALJ engaged in tenuous contract law analysis to support a position that the word “all,” as used in the CLA, did not, in fact, mean “all.”

In reversing this erroneous decision, the Board is compelled to address the nature and purpose of CLAs and also articulate why the ALJ’s reading of the CLA is simply incorrect.

Section 470(a) of the Liquor Code [47 P.S. § 4-470(a)], provides that:

The board may enter into an agreement with the applicant concerning additional restrictions on the license in question. If the board and the applicant enter into such an agreement, such agreement shall be binding on the applicant. Failure by the applicant to adhere to the agreement will be sufficient cause to form the basis for a citation under section 471 and for the nonrenewal of the license under this section.

Pursuant to this authority, conferred upon it by the Legislature, the Board entered into a CLA with the Licensee. Such agreements are voluntary and

entered into by a licensee by choice after reasonable negotiation and not through any force or coercion. In the present matter, the parties entered into a CLA that contained the following provisions:

Whiteman shall install and shall utilize a transaction scan device to scan the identification of all patrons entering the licensed premises.<sup>4</sup>

All parties agree that a CLA is a contract between the Board and Licensee. The question of whether a contract is ambiguous is a question of law. Easton v. Washington County Ins. Co., 391 Pa. 28, 137 A.2d 332 (1957). The standard of review over questions of law is *de novo* and to the extent necessary, the scope of review is plenary as an appellate body may review the entire record in making its decision. See Buffalo Township v. Jones, 571 Pa. 637, 813 A.2d 659, 664 n. 4 (2002). When construing a contract that involves clear and unambiguous terms, a court need only examine the writing itself to give effect to the parties' understanding. Vaccarello v. Vaccarello, 563 Pa. 93, 101-102, 757 A.2d 909, 913-914 (2000). A court may not modify the plain meaning of the

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<sup>4</sup> Ball Park's Main Course, Inc. v. Pennsylvania Liquor Control Bd., 163 Pa. Cmwlt. 636, 641 A.2d 713 (1994) and Atiyeh v. Pennsylvania Liquor Control Bd., 157 Pa. Cmwlt. 28, 629 A.2d 182 (1993) continue to be controlling law in the Commonwealth of Pennsylvania. It is the height of arrogance for an Administrative Law Judge to conclude existing law is no longer applicable. The Board must remind the ALJ of the Superior Court's admonition that a "trial judge's disagreement with a particular rule of law, or belief that a decision which is currently the law of Pennsylvania might be reversed, is no reason for disregarding a clearly controlling precedent." Commonwealth v. Ewansik, 360 Pa. Super. 476, 520 A.2d 1189 (1987).

words under the guise of interpretation. Crispo v. Crispo, 909 A.2d 308 (Pa. Super. 2006). In addition, a reviewing court must consider such contracts without reference to matters outside of the document, and must ascertain the parties' intentions when entering into the contract from the entire instrument. Purdy v. Purdy, 715 A.2d 473, 475 (Pa. Super. 1998).

In the present case, the language utilized by the CLA is clear and unambiguous.<sup>5</sup> The CLA requires that Licensee scan the ID of “all patrons entering the licensed premises.” The word “all” has long been viewed as an unambiguous word with a plain and common meaning. See Colonial Trust Co. v. Harmon Creek Coal Co., 287 Pa. 284, 135 A. 134 (1926). The word “all” is defined as: “every; any whatsoever; each and every one.” Webster’s II New College Dictionary 29 (1999).<sup>6</sup> Clearly, all means all.

In addition to finding ambiguity where none exists, the ALJ ignored the context in which the word “all” is used. The CLA requires Licensee to scan the ID of “all patrons entering the licensed premises.” Indeed, not only does the CLA clearly provide that all patrons must be scanned, but it further directs that

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<sup>5</sup> Because the clear language of the CLA controls, the Board will not accept Licensee’s invitation to construe the agreement against the drafter. Banks Engineering Co., Inc. v. Polons, 697 A.2d 1020 (Pa. Super. 1997).

<sup>6</sup> “Every member of individual component of; each one of – used with a plural noun.” Black’s Law Dictionary 68 (5<sup>th</sup> ed. 1979).

they must be scanned as they enter the licensed premises. The contested CLA provision is clear; mandating that the Licensee scan the ID of all [each and every] patron when they enter the premises.

Yet contrary to this plain meaning, the ALJ has employed the “interpretational imperative of reasonableness,” to conclude that the CLA was not intended to require Licensee use a transaction scan device on every patron’s visit. The ALJ’s heavily foot-noted opinion merely highlights the unnecessary confusion infused in this matter by the ALJ’s introduction of collateral issues *sua sponte*. By engaging in a labored contract analysis, never raised by either the Bureau or Licensee, the ALJ has required the Bureau, an agency that is not even a party to the CLA, to demonstrate the lawfulness of a contract provision.

The evidence presented at the hearing in this matter demonstrated that the Licensee failed to adhere to the terms of the CLA it freely entered into with the Board. The ALJ’s application of unnecessary and flawed interpretation of the CLA to the uncontested facts of record constitutes reversible legal error. Accordingly, the decision of the ALJ to dismiss Count 2 of the citation is reversed.

As a concluding matter, the Board can no longer ignore the ALJ's preconceived notions regarding the Board's use of CLA. Once more, the Board has before it a record replete with statements from a supposedly impartial ALJ expressing his own personal opinions regarding the Board's use of CLAs in licensing matters.<sup>7</sup> While an ALJ is free to hold its own beliefs, such beliefs

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<sup>7</sup> For example, the ALJ made the following statements on the record:

"Another problem. They should paginate them and they should require the Licensee to sign every page." (N.T. at 14).

"Okay. And that's another problem with these things is [sic], what's the effective date? You've got all these crazy dates running around. It's no way to run a business, you know. You should have an effective date, effective regardless of when it was signed... It has multiple pages that are unpaginated, no page numbers. It doesn't require a signature on every page. It's just really not a great way to run it in my opinion. Okay. And again, that's not your fault. Go ahead." (N.T. at 57).

"Hey, they've got a lot of --- how many lawyers do they have up there, 12? They have a lot of talents. You want me to think that all of the lawyers up there are incapable? I'm not going to do that. I'm sure they have a lot of bright, talented, experienced attorneys that know how to write things." (N.T. at 62).

"And the interesting thing is, you know, guess who's going to decide the case on appeal? If I go that direction, guess who's going to get the opportunity to decision [sic] their own --- the very contract that they wrote? Wouldn't you love to be in that position that you can decide on -- as a question of law, the contract that you wrote? That would be great. Am I wrong about that? That's where the appeal goes." (N.T. at 64).

"Okay. A large number of lawyers there that are quite capable, I'm sure, that ought to be able to frame language that covers exactly what the Liquor Control Board wants. And contracts are construed against the maker and it's a good rule because rule implies that if you're writing the thing, you're going to cover everything you want. And I'm not going to read something in there by implication. It says all. It doesn't say every time, and that's where I'm going to read it. Okay. Having said that, I'm not convinced the transaction scan device is even useful..." (N.T. at 83).

"I did want to say things about with respect to count number two. I'm not the only ALJ that thinks this. Okay. I have discussed issues with other ALJs and there's been an ongoing thought process about these conditional licensing agreements, and what I want to say really is in the nature of understanding what my role is as an Administrative Law Judge. I'm not really on the government's side and I'm not really on the Licensee's side. I essentially have to see to it that justice is done, whatever that means. Okay. And in doing that, it's not in my opinion really about the tilting and the swaying of lawyers, so I have to draw a fine line between being an advocate for

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the case and seeing to it that justice is being done. So what I say here now is more in the nature of seeing to it that justice is done.

I want to say some things about these agreements. There is a concept called unconscionability in contracts that provisions may be unconscionable. Now, there are a couple of cases --- well, there are ---. I had a couple of cases that --- and I'll probably find them when I get back to my office. They predate these conditional licensing agreements, and they really are very favorable in terms of this process with respect to what the Pennsylvania Liquor Control Board is doing. All of those cases predate the existence of the conditional licensing agreement.

One of the big issues for me is now with the conditional licensing agreement and with the Liquor Control Board's review on appeal, there is such intertwining, such immersion, such an --- it's almost you can't separate the Liquor Control Board's function in the adjudicatory process. The review no is plenary; correct? It's essentially the Liquor Control Board's review is plenary. Questions of law and discretion and that's plenary to me that if you look at anything, they have this plenary review of what we do, which I accept as an ALJ but I believe there's some really very fundamental due process issues when the agency that has the review writes the agreement and then gets an opportunity to review it. So there's --- there are due process issues that I have --- that I'm concerned about as an ALJ. And as an ALJ who respects the process and who really has a concern that it be clean and fair. I didn't write this stuff and neither did you. So there is an issue of fundamental unfairness when the agency writes the agreement and then does the adjudication and then takes adjudications and uses it for the agreement, it's really so enmeshed that there's a problem there. (N.T. at 90-92).

“So having said all of that, what I want to tell you is that I don't think you've made your case in any event because of the reading of the agreement. And I will consistently read these agreements as narrowly as possible, recognizing that the person who puts this together is an agency with much legal expertise and has the opportunity to fill in every possible hole of the law. And I appreciate you all listening, okay, but I do want to put that on the record. I will probably put some of those comments --- and I wanted it to be clear that I'm not agency bashing here because I know what's going to happen. Some people are going to think that I'm out to bash some agency. I'm not going to do that. I'm concerned as an ALJ who's watched this process grow and change, that there are some really serious issues here.

In 1987, when the transfer of the enforcement function was taken from the Liquor Control Board, the purpose was to separate, obviously separate the adjudicatory process from those that are from the agency heads. And now over this slow transition, the slow history of the expansion of the licensing renewal --- and I'm not ---. No personal judgment, it's just the reality. It's a legal reality over the expansion of the licensing authority with its refusal to renew and the hearings and all of these things. You, know that's --- the agency that was separated from the adjudicatory process now is intricately involved in it, and sometimes that causes a due process issue of co-mingling. We know the term, the magic words are co-mingling.

And there's also an element of double dipping here, double dipping in a sense. It's not double jeopardy, but there is an element of double dipping. You get the licensee once in adjudication and then you do them again. And you use the adjudication and that's not really double dipping, that's really --- and it's not really issue preclusion and it's not really a claim preclusion. It's kind of like it's just not fair. And when we talk that kind of language, we're talking about fundamental due process. It's not really for your [sic] to comment about. I just wanted to share that with you. And it's been brewing for some time in my head as these cases begin to come up, and I want to assure you I am not the only one that feels that way in terms of the ALJs.” (N.T. at 97-99).

should never be expressed on the bench when it involves an issue essential to the case before it. As the Pennsylvania Supreme Court has warned “[p]ersonal opinions concerning the adequacy or propriety of the law pertaining to a given situation have no place on the trial bench.” Commonwealth v. White, 589 Pa. 642, 659, 910 A.2d 648, 658 (2006).

If any ALJ has a substantial doubt regarding his/her ability to perform his/her duties because of bias, prejudice to any party, he/she is obligated to remove himself/herself from the matter. The Board strongly suggests that the ALJ consider whether his continued involvement in adjudication cases involving violations of CLAs creates an appearance of impropriety and/or would tend to undermine public confidence in his office. See Overland Enterprise, Inc. v. Gladstone Partners, LP, 950 A.2d 1015 (Pa. Super. 2008).

**ORDER**

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

The appeal of Bureau is sustained.

This matter is remanded to the ALJ for implementation of an Order consistent with the Board's decision.<sup>8</sup>

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Board Secretary

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<sup>8</sup> The Board will not entertain the Bureau's suggestion regarding the Board's invocation of a penalty in this matter. Imposition of penalty is prerogative of the ALJ. [47 P.S. § 4-471].