

Mailing Date: May 6, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-1248C
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
ALKI, INC.	:	License No. R-10050
t/a VICKY'S PLACE	:	
701 S. PRINCE ST.	:	
LANCASTER, PA 17603-5809	:	
LANCASTER COUNTY	:	

Counsels for Licensee: None Present

Counsel for Bureau: Andrew J. Lovette, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17110

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appeals from the Adjudication and Order of Administrative Law Judge Daniel T. Flaherty (“ALJ”), wherein the ALJ sustained the citation and imposed a fine in the amount of four thousand five hundred dollars (\$4,500.00).

The citation charged that on April 16, 2008, Alki, Inc., t/a Vicky's Place ("Licensee"), by its servants, agents or employees, violated section 493(1) of the Liquor Code by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) male minor, eighteen (18) years of age. [47 P.S. § 4-493(1)].

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. [47 P.S. § 4-471]. 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).

The sole issue raised by Bureau on appeal is whether the ALJ committed an error of law when he refused to suspend Licensee's license as required by section 471(c) of the Liquor Code.

Section 471(b) prescribes the penalties for a violation of various sections of the Liquor Code, including penalties for a violation of section 493(1), sales to minors. The ALJ may impose a fine and/or suspension or revocation of the license. Section 471(c) establishes a mandatory penalty of suspension or revocation for a licensee with a history of multiple violations.

Specifically, the section states:

If the violation in question is a *third or subsequent violation* of any offense referred to in subsection (b) or Title 18 of the Pennsylvania Consolidated Statutes (relating to crimes and offenses), occurring with a period of four years, the administrative law judge *shall* impose a suspension or revocation.

[47 P.S. § 4-471(c), emphasis added].

The record reveals that the incident in question occurred on April 16, 2008, resulting in Citation No. 08-1248C. [N.T. 8]. An evidentiary hearing was conducted on November 18, 2008. [Adjudication & Order, February 11, 2009]. Neither Licensee nor Licensee's attorney appeared at the hearing. [N.T. 4-5]. Before the hearing was closed, Bureau advised the ALJ that this was the Licensee's third citation for sales to minors and asked the ALJ to impose a fine of five thousand dollars (\$5,000.00) and a thirty (30) day license suspension, as well as a requirement to purchase a scanning

device for use in the premises. [N.T. 14]. The ALJ's Adjudication was mailed on February 11, 2009. [Adjudication & Order, February 11, 2009]. The ALJ sustained the charge in the citation and ordered Licensee to pay a fine of four thousand five hundred dollars (\$4,500.00). [Adjudication & Order, February 11, 2009]. On February 19, 2009, the Bureau filed a Motion for Reconsideration in which it argued that the statute mandated a suspension, not just a fine. The Bureau asked the ALJ to modify his order and impose a five (5) day license suspension in addition to the fine. By Supplemental Order, mailed on March 9, 2009, the ALJ denied the Motion for Reconsideration, stating that Citation No. 07-2322C was not a final adjudication in that, at the time of instant adjudication, it was not thirty (30) days past the mailing date of the Adjudication at Citation No. 07-2322C. [Supplemental Order, March 9, 2009]. The instant appeal followed.

The ALJ's focus is misplaced. The issue is not whether the citation is outside the thirty (30)-day appeal period, rather it is whether a violation exists. The Commonwealth Court addressed an argument similar to that made by the ALJ in Ball Park's Main Course, Inc. t/a Kenwood's Ball Park Tavern v. Pennsylvania Liquor Control Bd., 641 A.2d 713 (Pa. Cmwlth. 1994). Ball Park's maintained that the Pennsylvania Liquor Control Board

("Board") could not consider two (2) citations that had been adjudicated when deciding whether to renew Ball Park's liquor license, because the citations had been appealed. The court rejected that argument and found that once a citation has been adjudicated, a violation of the Code exists, and the Board may consider the violation in deciding whether to renew the license. Id. Whether the citation is on appeal is not relevant to whether a violation has been found.

Although Ball Park's is a license renewal appeal, the underlying principles can be applied to the instant case in which the ALJ, rather than the Board, is taking the action. But in both situations, the decision requires consideration of prior violations of the Code. Section 471(c) requires the finding of at least two (2) prior violations of the Liquor Code to trigger the application of the mandatory suspension. [47 P.S. § 4-471(c)]. If an adjudication of a citation equates to a finding of a violation of the Liquor Code, then the ALJ must consider all citations adjudicated prior to the adjudication of the current citation.

Board records reveal that Licensee had the following violations in the four (4) years preceding the adjudication of the instant citation:

1. Citation No. 08-0420C, Sales to a Minor. Adjudication issued by the OALJ and mailed on June 24, 2008.

2. Citation No. 07-2322, Sales to a Minor. Adjudication issued by the OALJ and mailed on January 26, 2009¹.

Therefore, at the time the Adjudication for the instant Citation (No. 08-1248C) was mailed, Licensee had two (2) prior violations for sales to minors and was subject to the mandatory license suspension or revocation provision set forth in section 471(c). [47 P.S. § 4-471(c)]. The ALJ committed an error of law by failing to consider both prior violations and impose a mandatory suspension. Thus, the Board vacates the penalty imposed and remands the case for imposition of a penalty consistent with this Opinion.

¹ It should be noted that the ALJ was aware of Citation No. 07-2322 at the hearing on Nov. 18, 2008. He referenced a letter received from Counsel for Licensee, Barry A. Solodky, which stated that Licensee would not be appearing to defend its actions in either 08-1248C or 07-2322. [N.T. 4]

ORDER

The decision of the ALJ in regard to Citation 08-1248C is reversed.

The appeal of the Bureau is affirmed.

The fine has been paid in full.

The case is hereby remanded to the ALJ for imposition of a penalty consistent with this Opinion.

Board Secretary