

Mailing Date: November 4, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-2234
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
REALE' RESTAURANT &	:	
LOUNGE, INC.	:	License No. R-13581
7233-35 Frankford Avenue	:	
Philadelphia, PA 19135-1010	:	
	:	

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OPINION

Reale' Restaurant & Lounge, Inc. ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), filed on August 14, 2009, wherein the ALJ sustained the citation, imposed a fine in the amount of one thousand dollars (\$1,000.00), and ordered Licensee to obtain certification from the Responsible Alcohol Management Program pursuant to section 471.1 of the Liquor Code. The instant appeal and an accompanying Application for Supersedeas were filed on September 11, 2009.

The citation filed by the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") charged Licensee with violating section 493(1) of the Liquor Code in that, on April 1, 2008, 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) female minor, nineteen (19) 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 Pennsylvania Liquor Control Board ("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, 484 A.2d 413 (Pa. Cmwlth. 1984).

Licensee's first two arguments are essentially the same. Licensee claims that evidence was insufficient to sustain the citation because the ALJ explicitly stated that he did not find the Bureau's witnesses to be credible. Licensee's third argument challenges the ALJ's finding that there was insufficient evidence to support Licensee's affirmative defense that the minor presented valid government-issued identification to the Licensee. Each argument will be addressed in the order presented.

The uncontradicted evidence in the present matter established the following facts. On April 1, 2008, D.P. ("Minor") was nineteen (19) years of age with a date of birth of October 14, 1988. [N.T. 12]. Late in the evening the Minor, accompanied by her step-father Louis Verruni, arrived at Licensee's establishment. [N.T. 12, 36, 37]. Minor and her step-father, Louis Verruni, sat at the bar and Mr. Verruni ordered food and drinks. [N.T. 14, 22, 39, 76, 77]. The

Minor was served a mixed drink comprised of Grey Goose¹ vodka and pineapple juice. [N.T. 15, 76]. Licensee's own witnesses confirmed that the minor was at the premises on April 1, 2008 and that she ordered and was served an alcoholic beverage. [N.T. 66, 67, 70, 71, 75, 76].

Section 493(1) of the Liquor Code provides that it shall be unlawful “[f]or any licensee or the board or any employe, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given,... to any minor....” [47 P.S. § 4-493(1)].

In its appeal, Licensee asserts that no credible evidence was provided by the Bureau in support of the citation.² Since the ALJ explicitly found the Bureau's witnesses incredible, to the extent that this appeal expresses dissatisfaction with how the ALJ accorded evidentiary weight, it is well-settled that matters of witness credibility are the sole prerogative of the ALJ. The ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility

¹ The ALJ notes in the Adjudication and Order that the phrase “Grey Goose” was improperly transcribed as “grape juice.”

² Licensee asserts that the ALJ rejected *all* of the testimony from *all* of the Bureau's witnesses. This is an incorrect statement. The ALJ stated that he found the story incredible, but found that even the Minor admitted she was served an alcoholic beverage. [Adjudication & Order, Aug. 14, 2009]. He also relied on the testimony regarding the Minor's age and date of birth.

Comm'n, 480 A.2d 1253 (Pa. Cmwlth. 1984). In the instant case, the ALJ found sufficient credible evidence in the record to support the citation and did so by relying on Licensee's witnesses who acknowledge that the minor was at the premises on the night in question and was served alcoholic beverages.

The Board will now turn its attention to Licensee's third argument. Licensee contends that the ALJ failed to credit the testimony of Licensee's witnesses in support of its affirmative defense that it checked the identification of the Minor and relied on that information before serving the minor. However, assuming arguendo that the ALJ found the witnesses credible, there is still insufficient evidence to support the affirmative defense set forth in section 495 of the Liquor Code. [47 P.S. § 4-495(e-g)].

In Pennsylvania Liquor Control Board v. TJJR, 548 A.2d 390, 392 (Pa. Cmwlth. 1988), the Pennsylvania Commonwealth Court clearly noted that:

When a statute defines the factual basis of an offense or entitlement, and then states a further factual element as a basis for an exception, the Pennsylvania Supreme Court has treated the exceptional element as a matter for affirmative defense, placing the burden on the defending party to show the affirmative, rather than subjecting the other party to proof of a negative proposition.

As a result, proof of an affirmative defense rests with the licensee. A licensee is only assured a defense to a citation issued under section 493(1) of

the Liquor Code if while acting in good faith, it required execution of a declaration of age card, retained a photocopy or video presentation of the valid identification upon which they have relied, or used a card scanning device to test the validity of the identification presented. [47 P.S. §§ 4-493(1); 4-495].

In the present matter, Licensee failed to satisfy its burden of proof and, accordingly, its affirmative defense was properly rejected. No evidence was presented that Licensee utilized an Age Declaration Card, photocopied or otherwise recorded the identification, or used a card scanning device. To the contrary, Licensee's own witnesses testified that none of those steps were taken in this case. [N.T. 70, 71, 83-85]. A minor's use of a convincing false identification card does not afford Licensee the protection it desires.

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.³

³ Since the Board has decided the underlying appeal, the issue of whether to grant a supersedeas has been rendered moot.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine has been paid.

Licensee must adhere to all other conditions set forth in the ALJ's Order issued August 14, 2009.

Board Secretary