

Mailing Date: October 7, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-2963
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
#1 SOUTH STREET CORPORATION	:	License No. R-1252
T/A DOWNEY'S RESTAURANT	:	
526 S. FRONT STREET	:	
105-111 SOUTH STREET	:	
PHILADELPHIA, PA 19147-2416	:	

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Counsel for Bureau: James Dailey, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
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OPINION

#1 South Street Corporation, t/a Downey's Restaurant ("Licensee")
appealed from the Adjudication and Order of Administrative Law Judge David
L. Shenkle ("ALJ"), wherein the ALJ sustained the citation and imposed a one
thousand four hundred dollar (\$1,400.00) fine.

The first count of the citation charged that, on September 12, 2008, Licensee, by its servants, agents or employees violated section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code § 5.32(a)] by permitting the use on the inside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The second count of the citation charged that, on September 12, 2008, Licensee, by its servants, agents or employees, violated sections 406(a)(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(2) and 4-493(16)] by selling, furnishing and/or giving alcohol between 2:00 a.m. and 7:00 a.m.

The third count of the citation charged that, on September 12, 2008, Licensee, by its servants, agents or employees, violated section 499(a) of the Liquor Code [47 P.S. § 4-499(a)] by permitting patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

The fourth count of the citation charged that Licensee, by its servants, agents or employees violated section 493(26) of the Liquor Code [47 P.S. 4-493(26)] by issuing checks or drafts dated May 19, 2008, in payment for purchases of malt or brewed beverages, when there were insufficient funds in,

or credit with, the institution upon which drawn for the payment of such checks.¹

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 decision of the ALJ was not based upon substantial evidence. Specifically, as to counts two and three, Licensee contends that because its sole corporate officer testified that all sales of alcoholic beverages ceased at 2:00 a.m. and further testified that all patrons vacated the premises, there was a lack of substantial evidence for the ALJ to find otherwise.

¹ The Pennsylvania State Police, Bureau of Liquor Control Enforcement withdrew count four (4) of the citation at hearing before the ALJ. (N.T. 4-5).

As to count one, Licensee contents the ALJ's finding that amplified music could be heard outside the licensed premises was not based upon substantial evidence, when the Licensee, through its corporate officer, testified that no amplified music could be heard emanating from the premises.

An examination of the record reveals that on September 12, 2008, at approximately 1:20 a.m., Christopher McGrath, an officer with the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") visited the licensed premises and heard rock band music while sitting inside his vehicle parked approximately fifty (50) feet from the licensed premises. (N.T. 6-7). After exiting his vehicle, the officer continued to hear music and noise emanating from the premises as he walked approximately seventy (70) paces from the corners of South and Front Streets. (N.T. 7). At that point, the officer could still hear music emanating from the front entrance of the premises. (N.T. 7-8). Upon entering the licensed premises Officer McGrath observed a white, non-Hispanic male emceeing karaoke using two (2) large speakers set up near the front entrance of the premises. (N.T. 8). Officer McGrath testified that the music he heard inside the premises was the same as the music he heard outside the premises. (N.T. 8-9).

After taking a seat at the bar, Officer McGrath ordered and was served a “Twisted Tea” alcoholic beverage at approximately 1:25 a.m. and a second Twisted Tea was served to the officer at 2:10 a.m. (N.T. 9-10). The officer gave the bartender four dollars (\$4.00) for the second beverage which was then placed in the cash register. (N.T. 10). Beyond 2:10 a.m. the sale of alcohol never really ceased until 2:25 a.m. when the bar lights came up. (N.T. 10). One (1) patron was seen entering the licensed premises after 2:10 a.m., sitting at the rear of the premises and seen purchasing a Coors Light Beer. (N.T. 11). At that time, there were eleven (11) patrons left with drinks in front of them. (N.T. 11).

In its defense, Licensee presented the testimony of Dominic Centofanti, the Licensee’s sole corporate officer. Mr. Centofanti was at the licensed premises on the evening of September 12, 2008. (N.T. 16). Mr. Centofanti is familiar with Licensee’s policy that at approximately 1:50 a.m. last call is given so patrons can finish their drinks and leave by 2:30 a.m. (N.T. 16-17). The door is closed at 2:30 a.m. (N.T. 17). Mr. Centofanti did not witness any sales of alcoholic beverages conducted after 2:00 a.m. on September 12, 2008. (N.T. 17). Mr. Centofanti acknowledged that generally Licensee closes the door and gets everybody out by 2:30 a.m. (N.T. 17). Mr. Centofanti did not recall hearing

any loud music emanating from the premises on the morning of September 12, 2008. (N.T. 18).

As the trier of fact, the ALJ determines the credibility of witnesses and their testimony. Based upon review of the evidence presented, the ALJ determined the testimony of the Bureau officer to be credible.

It is well-settled law that matters of witness credibility are the sole prerogative of the ALJ and the ALJ's finding 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 matter, notwithstanding the fact that Licensee's witness testified that the events testified to by Officer McGrath did not occur, the ALJ resolved the credibility issue in the Bureau's favor. Since credibility determinations are the province of the ALJ and not the Board, the Board finds that the ALJ's findings are based upon substantial evidence.

Based upon the foregoing, the decision of the ALJ is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee is hereby ordered to pay the fine in the amount of one thousand four hundred dollars (\$1,400.00). Failure to pay the fine within twenty (20) days of the mailing date of this Order will result in license suspension and/or revocation.

Licensee must adhere to all conditions set forth in the ALJ's Orders in this matter.

Board Secretary