

Mailing Date: December 15, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-0428
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	License No. R-764
v.	:	
	:	
C & D TRIANGLE TAVERN, INC.	:	LID 55391
T/A TRIANGLE TAVERN	:	
1338-40 SOUTH 10 <sup>TH</sup> STREET	:	
PHILADELPHIA, PA 19147-5619	:	

Counsel for Licensee: James D’Achino, Pro Se (before ALJ)

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OPINION

C & D Triangle Tavern, Inc. t/a Triangle Tavern (“Licensee”) appealed from an Adjudication and Order of Administrative Law Judge Tania E. Wright

(“ALJ”), wherein the ALJ sustained Citation No. 09-0428, and imposed a fine of one thousand dollars (\$1,000.00) and a suspension of Licensee’s liquor license for a period of one (1) day and continuing until James D’Achino, Licensee’s sole corporate owner, divests himself of his interest in License No. R-764.

The Citation charged that on May 23, 2008, Licensee, by its servants, agents or employees, committed simple assault in violation of section 471 of the Liquor Code [47 P.S. § 4-471], and section 2701 of the Crimes Code [18 Pa. C.S. § 2701].

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).

On appeal, Licensee avers that the ALJ abused her discretion, committed an error of law and/or made a decision that was not supported by substantial

evidence when she sustained Citation No. 09-0428. Specifically, Licensee argues the ALJ made Conclusions of Law that were not alleged in the original citation; the ALJ received into evidence and considered hearsay evidence as contained in Exhibits B-3, B-4, B-5 and B-6; the ALJ exceeded her authority in issuing divestiture of the license; and there was a lack of evidence on the record to conclude that James D'Achino committed a simple assault.

The record reveals that on March 23, 2008, David Nestor and Melanie Chongolola entered Licensee's premises at approximately 11:30 p.m., sat at the bar and ordered drinks. [N.T. 40, 42-43]. Mr. D'Achino, Licensee's owner, was seated near Mr. Nestor and Ms. Chongolola. [N.T. 41-42]. Mr. Nestor and Ms. Chongolola overheard Mr. D'Achino say to the only other customer in the bar, "You're okay, but this --- excuse me, sh-- right here I can't stand. This sh-- right here, I hate this sh--." [N.T. 44]. Mr. Nestor and Ms. Chongolola overheard the bartender tell Mr. D'Achino, "Everything's cool, you know be cool, everything's fine." [N.T. 50]. Mr. Nestor and Ms. Chongolola saw Mr. D'Achino consuming what they believed to be an alcoholic beverage. [N.T. 51]. Ms. Chongolola concluded that Mr. D'Achino was intoxicated because of his very red face and slurred speech. [N.T. 51].

Ms. Chongolola decided to put music on the jukebox and as she walked towards the jukebox, Mr. D’Achino said “Look at that f---ing monkey.” [N.T. 44-45]. Mr. Nestor turned in his barstool, stood up and asked Mr. D’Achino if he was talking to Ms. Chongolola. [N.T. 45]. Mr. D’Achino answered, “You’re damn right I was talking to you. This is my f---ing place and I’ll do whatever the f--k I want.” [N.T. 45]. Mr. D’Achino then lunged at Mr. Nestor and put his hands around Mr. Nestor’s throat. [N.T. 45]. Ms. Chongolola took a swing at Mr. D’Achino and scratched his face. [N.T. 45]. Mr. D’Achino, calling out racial slurs, then lunged at Ms. Chongolola. [N.T. 45-46]. The bartender came from behind the bar and attempted to push Mr. Nestor towards the entrance. [N.T. 46]. Mr. Nestor pushed past the bartender, telling the bartender that he and Ms. Chongolola just wanted to get their stuff and leave. [N.T. 46]. As Ms. Chongolola was attempting to retrieve her jacket and purse, Mr. D’Achino lunged at her a second time. [N.T. 46]. Ms. Chongolola pushed Mr. D’Achino away from her, knocking both of them to the floor. [N.T. 46-47]. The bartender then restrained Mr. D’Achino, allowing Mr. Nestor and Ms. Chongolola to walk outside. [N.T. 48].

Once outside, Mr. Nestor and Ms. Chongolola called 911. [N.T. 48-49]. Mr. D’Achino left the premises before Officer Cannon arrived from the

Philadelphia Police Department. [N.T. 48-49]. Mr. Nestor and Ms. Chongolola alleged that Mr. D’Achino verbally abused them and physically assaulted them because they are an interracial couple. [N.T. 10].

Detective Gibson, of the Philadelphia Police Department, interviewed Mr. Nestor, Ms. Chongolola, and Mr. D’Achino. [N.T. 23-24]. Detective Gibson also spoke with the bartender, who was working at the time of the incident, but did not conduct an official interview with the bartender or any other witnesses. [N.T. 25]. Detective Gibson advised Mr. Nestor and Ms. Chongolola to file a private criminal complaint with the District Attorney’s office. [N.T. 26]. Later, Detective Gibson was advised by his superior to complete an arrest warrant affidavit for Mr. D’Achino. [N.T. 30, 53]. The District Attorney’s charging unit charged Mr. D’Achino with criminal assault. [N.T. 31]. Mr. D’Achino was found guilty of simple assault and racial intimidation and placed on probation for eighteen (18) months. [N.T. 62].

Officer Kohler, formerly of the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), conducted an investigation of Licensee, as a result of the incident on March 23, 2008. [N.T. 7, 8]. Officer Kohler made undercover visits to the premises in September and October of 2008, but found no violations. [N.T. 8-9]. Officer Kohler took written

statements from Mr. Nestor and Ms. Chongolola and interviewed Mr. D'Achino. [N.T. 8, 10-11]. Officer Kohler also received information from Officer Cannon and Detective Gibson. [N.T. 9, 11]. Officer Kohler did not interview others who may have been present during the incident, nor did she interview the bartender or other employees. [N.T. 15-16]. Following the investigation and Mr. D'Achino's arrest, Citation No. 09-0428 was issued. [N.T. 12].

Mr. Nestor and Ms. Chongolola also contacted the Human Relations Commission. [N.T. 53, 54-58]. Mr. D'Achino took several witnesses to the Human Relations Commission to speak on his behalf. [N.T. 56]. The Human Relations Commission ultimately determined that Mr. Nestor and Ms. Chongolola's charge was not substantiated. [N.T. 56].

In his appeal, Licensee first contends that the ALJ made conclusions of law that were not alleged in the original citation. The Board agrees. The Citation charged that on May 23, 2008, Licensee, by its servants, agents or employees committed simple assault in violation of section 471 of the Liquor Code [47 P.S. § 4-471], and section 2701 of the Crimes Code [18 Pa. C.S. § 2701]. The ALJ concluded that Licensee committed simple assault, along with ethnic intimidation and recklessly endangering another person. The Citation did not allege that Licensee committed ethnic intimidation or recklessly endangering

another person. In the Crimes Code, ethnic intimidation and recklessly endangering another person are crimes separate from simple assault [18 Pa. C.S. §§§ 2701, 2705, 2710] and must be specifically included in the citation for the ALJ to consider them in the proceeding. Although Mr. D’Achino was found guilty of multiple crimes in the Municipal Court of the Court of Philadelphia, the proceeding in the Municipal Court is separate from the proceeding before the ALJ.

Licensee next contends that the ALJ impermissibly considered hearsay evidence as contained in Exhibits B-3, B-4, B-5, and B-6. The Board does not agree. Exhibit B-3 is the Philadelphia Police Department Complaint or Incident Report prepared by Officer Cannon in response to the May 24, 2008 incident. Exhibit B-4 is the first Philadelphia Police Department Investigation Report prepared by Detective Gibson in response to the May 24, 2008 incident. Exhibit B-5 is the second Philadelphia Police Department Investigation Report prepared by Detective Gibson in response to the May 24, 2008 incident. Exhibit B-6 is a letter, dated December 19, 2008, from the Philadelphia Commission on Human Relations to James D’Achino.

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 held that police reports are admissible in administrative proceedings, unless there is some indication that they are untrustworthy. D’Alessandro v. Pennsylvania State Police, 594 Pa. 500, 937 A.2d 404 (2007), as cited in I.B.P.O.E. of West Mount Vernon Lodge 151 v. Pennsylvania Liquor Control Bd., 969 A.2d 642 (Pa. Cmwlth. 2009).

Licensee also contends that the ALJ exceeded her authority in issuing divestiture of the license. The Board recognizes divestiture as an appropriate penalty. The Board also recognizes that the imposition of penalties is the exclusive prerogative of the ALJ. The Board may not disturb penalties imposed by the ALJ if they are within the parameters set forth in section 471 of the Liquor Code [47 P.S. § 4-471]. However, in this case, the ALJ may have taken into account violations outside of the citation when fashioning the penalty.

Finally, Licensee contends that there was a lack of evidence on the record to conclude that Mr. D’Achino committed a simple assault. The Board does not agree. Section 2701 of the Pennsylvania Crimes Code [18 Pa. C.S. § 2701] provides that a person is guilty of assault if he/she:

- (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
- (2) negligently causes bodily injury to another with a deadly weapon;
- (3) attempts by physical menace to put another in fear of imminent serious bodily injury; or
- (4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person.

There is sufficient evidence in the record to support the conclusion that Mr. D'Achino committed a simple assault. He lunged at Mr. Nestor, placing his hands around Mr. Nestor's throat. He also lunged at Ms. Chongolola twice and had to be pulled away from her by the bartender after he and Ms. Chongolola fell to the floor. Mr. D'Achino, appearing pro se before the ALJ, did not contradict this account of the incident. These facts constitute sufficient substantial evidence to establish that the criminal act of simple assault was committed by Licensee's sole corporate officer, Mr. D'Achino, on March 23, 2008 and March 24, 2008.

While there is sufficient evidence in the record to support the conclusion that Mr. D'Achino committed a simple assault, the Board has no way of knowing whether the improper consideration of the additional violations

influenced the ALJ's decision of what penalty was appropriate. This case is remanded to the ALJ for imposition of a penalty without consideration of the additional violations.

ORDER

The decision of the ALJ is affirmed in part, and reversed in part.

The appeal of Licensee is affirmed in part, and reversed in part.

The fine of one thousand dollars (\$1,000.00) has not been paid.

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

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Board Secretary