

Mailing Date: September 1, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

|                                       |   |                      |
|---------------------------------------|---|----------------------|
| PENNSYLVANIA STATE POLICE,            | : | Citation No. 09-1876 |
| BUREAU OF LIQUOR CONTROL              | : |                      |
| ENFORCEMENT                           | : |                      |
|                                       | : |                      |
| v.                                    | : |                      |
|                                       | : |                      |
| 275 BANHAN, INC.                      | : | License No. R-8061   |
| 275-277 South 60 <sup>th</sup> Street | : |                      |
| Philadelphia, PA 19139-3846           | : | LID 50671            |
|                                       | : |                      |

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**OPINION**

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from an Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ dismissed Count One of

Citation No. 09-1876, which charged that on July 12, 2009, Licensee, by its servants, agents or employees, possessed a controlled substance on its licensed premises in violation of section 471 and 493(31) of the Liquor Code [47 P.S. §§4-471 and 4-493(31)], and section 780-101 *et seq.*, of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act [35 P.S. § 780-101 *et seq.*].<sup>1</sup>

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, the Bureau avers that the ALJ should have sustained Count One of Citation No. 09-1876 because there was substantial evidence in the

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<sup>1</sup> Citation No. 09-1876 had three (3) counts and Counts Two and Three were sustained by the ALJ and are not part of the Bureau's instant appeal. Count Two involved a violation of section 491(2) of the Liquor Code [47 P.S. § 4-491(2)], in that on July 12, 2009, Licensee unlawfully possessed liquor obtained from a source other than a Pennsylvania wine and spirits store. Count Three involved a violation of section 493(12) of the Liquor Code [47 P.S. § 4-493(12)], in that on the same date, Licensee failed to keep records on the licensed premises. Licensee was fined six hundred dollars (\$600.00) for these violations.

record that Licensee knew or should have known that controlled substances were possessed on the premises on the violation date and Licensee did not take substantial affirmative steps to prevent the possession of controlled substance on its premises.

Section 493(31) of the Liquor Code makes it unlawful:

(i) [f]or any licensee to possess, furnish, sell, offer to sell, or purchase or receive, or aid and abet in the sale or purchase of any controlled substance or drug paraphernalia, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as “The Controlled Substance, Drug, Device and Cosmetic Act,” on the licensed premises unless the actions of the licensee are authorized by law.

(ii) [f]or any servants, agents or employes of the licensee to possess, furnish, sell, offer to sell, or purchase or receive, or aid and abet in the sale or purchase of any controlled substance or drug paraphernalia, as defined in “The Controlled Substance, Drug, Device and Cosmetic Act,” on the licensed premises unless the actions of the person are authorized by law. **The licensee shall only be cited for a violation of this subclause if the licensee knew or should have known of the activity and failed to take substantial affirmative steps to prevent the activity on its premises.**

[47 P.S. § 4-493(31) (emphasis added)].

Also, the Pennsylvania Supreme Court has mandated that when a licensee is charged under section 471 of the Liquor Code for the unlawful acts of its employees or patrons, some element of scienter on the part of the licensee must be shown if the underlying acts violate the Crimes Code rather

than a standard of conduct established by the Liquor Code. In Pennsylvania Liquor Control Board v. TLK, 518 Pa. 500, 544 A.2d 931 (1988), the Pennsylvania Supreme Court directed that a licensee could not be held responsible for illegal activity on its licensed premises unless “licensee knew or should have known of illegal activities by an employee or patron.” TLK, 518 Pa. at 504-505, 544 A.2d at 933.

Pursuant to sections 471 and 493(31) of the Liquor Code, it is necessary to review the record to determine whether the ALJ’s finding that the Bureau failed to establish that Licensee knew or should have known of the illegal conduct of its bartender was erroneous.

The record reveals that a team of law enforcement personnel entered the licensed premises on July 12, 2009 at approximately 12:05 a.m. to conduct an investigation of the licensed premises. (N.T. 7). The licensed establishment was open for business and there were approximately seventy-five (75) patrons inside the establishment. (N.T. 8). During a routine inspection behind the bar, Officer Justin Clark noticed two (2) bags located on the bottom shelf of the bar, behind Licensee’s bartender, Errol Smith. (N.T. 9-10, 28). Mr. Smith told Officer Clark the two (2) bags were his personal bags. (N.T.10, 28). Mr. Smith told Officer Clark that he did not mind if the officer looked at the bags. (N.T.

10). One (1) of the bags contained a PlayStation 3 and a couple of games. (N.T. 9-11). The other bag appeared to be a backpack and when Officer Clark opened this bag, the officer immediately smelled what the officer believed to be marijuana. (N.T. 9-11). Officer Clark observed two (2) large freezer bags inside the backpack, which each contained approximately one (1) pound of what appeared to be marijuana. (N.T. 13). During the search of Mr. Smith, a clear glass jar was also found in Mr. Smith's pants pocket, which contained what appeared to be marijuana. (N.T. 21). Mr. Smith was arrested and charged with possession with intent to deliver, which is a felony. (N.T. 25).

Licensee's secretary, treasurer, director and stockholder, Sheldon Banhan, indicated that Licensee's policy is that no illegal drugs are permitted on the licensed premises and this has been communicated to its employees, as well as posted on the licensed premises since 2003. (N.T. 30-33). Officer Libby Hess did not recall seeing the drug signage the night of the investigation, but the officer indicated the signage could have been there because the officer was not focusing on signage during the investigation. (N.T. 47). Mr. Banhan indicated that Licensee's officers or manager were never arrested as a result of the investigation. (N.T. 33-34). Mr. Banhan indicated that he was not aware of

Mr. Smith's involvement with illegal drugs until after the July 12, 2009 investigation. (N.T. 34).

The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. The Pennsylvania Supreme Court defined an abuse of discretion as "not merely an error of judgment, but 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." Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 602 A.2d 1300, 1305 (1992).

Based upon a review of the evidence presented, the decision by the ALJ to dismiss Count One of the citation was not an abuse of discretion. There is no evidence in the record to suggest that the ALJ's conclusion regarding Count One was the result of misapplication of the law, or otherwise manifestly unreasonable. The Board concurs with the ALJ's finding that there was insufficient evidence presented at the hearing to show Licensee knew or should have known what was in its bartender's backpack, as well as there was no evidence presented of sales, solicitations or transfers of illegal drugs at the

licensed premises, which was reinforced by Licensee not having any prior citations involving illegal drug activity at its licensed premises.

While the Bureau argues that the instant matter is similar to a prior ALJ hearing, Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Brass Rail No. 1, Inc. (“Brass Rail”), Citation No. 01-2565, September 26, 2002, where the ALJ held a licensee liable for violation of the Liquor Code based on a bartender being in possession of and engaging in the traffic of a controlled substance. The Board, however, finds the fact pattern in Brass Rail is not analogous to the instant fact pattern. In Brass Rail, the officer observed a strong odor of marijuana in an upstairs room, as well as the ladies room and subsequently found cocaine in the licensee’s unlocked drawer behind the cash register. In the instant matter, the officer did not observe any indication of illegal drugs at the licensed premises, until after the officer opened the bartender’s personal backpack, which was not Licensee’s property, as was the case in Brass Rail.

Therefore, the Board finds there was not substantial evidence in the record that Licensee knew or should have known that controlled substances were possessed on the licensed premises during the July 12, 2009 investigation. Whether Licensee took the appropriate affirmative steps to prevent illegal

drug activity at the licensed premises is deemed moot in the instant matter, given the Board's decision above. Therefore, the Board finds that the ALJ's decision was not an abuse of discretion and therefore, the decision of the ALJ is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Bureau is dismissed.

The fine of six hundred dollars (\$600.00) for Counts Two and Three has been paid in full.

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Board Secretary