

Mailing Date: August 18, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-2102
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
1125 MADISON, INC.	:	License No. R-8441
1125 Madison St.	:	
Chester, PA 19013-5924	:	LID 49081
	:	

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**OPINION**

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), appeals the dismissal of Count One of Citation No. 09-2102 as set forth in the Adjudication and Order of Administrative Law Judge David Shenkle (“ALJ”), mailed April 14, 2010.

The citation in the present matter contained two (2) counts; however, Count Two, which involved a violation of section 102 of the Liquor Code [47 P.S. § 1-102], and was sustained by the ALJ, who ordered Licensee to pay a fine of one hundred fifty dollars (\$150.00), was not appealed, and, accordingly, will not be addressed further in the present Opinion. Count One of the citation alleged violation of section 404 of the Liquor Code [47 P.S. § 4-404], in that on March 5 and April 30, 2009, Licensee failed to adhere to the conditions of a Conditional Licensing Agreement (“CLA”) entered into with the Pennsylvania Liquor Control Board (“Board”), placing additional restrictions upon the subject license.

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).

The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. It is well-settled that an abuse of discretion is not merely an error of judgment; however, 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. Commonwealth v. Levanduski, 907 A.2d 3, 13-14 (Pa. Super. 2006) (*en banc*).

On appeal, the Bureau contends that the ALJ committed an error of law and abused his discretion by not finding that Licensee failed to adhere to the conditions of the CLA. In addition, the Bureau further contends that the decision of the ALJ was not based upon the substantial evidence contained in the record, which demonstrated that Licensee failed to adhere to the CLA.

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the Notes of Testimony from the hearing of February 25, 2010 and the ALJ's Adjudication and Order, with the Bureau's contention in mind, and has concluded that the ALJ incorrectly dismissed Count One. Accordingly, we reverse the decision of the ALJ.

In December 2008, Licensee entered into a CLA with the Board, which required, among other things, that Licensee shall employ at least one (1) additional person, Pennsylvania Act 235-certified, whose sole duty will be to act as security and who will be attired to make his status as security readily apparent, and who will check identification of entering patrons and maintain order on and immediately outside the licensed premises.

At the hearing before the ALJ on February 25, 2010, the parties stipulated to a summary of the testimony of proposed witnesses, had they been called. [N.T. 4-5]. The parties did not, however, stipulate to the truth of any proffered testimony. [N.T. 4]. The parties also agreed to the submission of the CLA, which was identified as the Bureau's Exhibit B-4. [N.T. 5]. A review of the stipulation reveals that the parties agreed that on March 5, 2009, there was no armed uniformed security guard present at the licensed premises during a visit by Bureau Enforcement Officer Andre Brown, and that there was no armed uniformed security guard present at the licensed premises on April 30, 2009, during a visit by Chester Police Officer Steven Sheppleman. [N.T. 7].

The parties further agreed that, had Licensee's principal been called to testify, she would have stated that she did not employ armed security guards because she was not required to do so. [N.T. 8]. She would testify that

Licensee was only required to employ guards who were qualified to be armed under Act 235, which she did, and that the CLA does not set forth that a guard must be at the premises at all times or any specified time when the guard must be present. [N.T. 8-9, 11].

In reviewing the evidence, the ALJ construed the terms of the CLA according to its express terms and concluded that Licensee, by having hired an Act 235-certified security guard, was in compliance with the terms of the CLA.

The Bureau contends in its argument that the terms of the CLA language are not ambiguous as to the specifics of when Act 235 certified security guards should be on duty. The Bureau further submits that the language is clear that Licensee “shall employ” an Act 235 security guard when the premises is open and operating, otherwise the term would be meaningless.

As the ALJ noted, Pennsylvania Act 235 refers to Act 235 of 1974, 22 P.S. § 41, *et seq*, the Lethal Weapons Training Act, a firearm safety measure which requires all persons who carry lethal weapons as an incident of employment to obtain safety training, submit identity information and fingerprints to prove eligibility, and carry certification while armed.

The ALJ held that, because the CLA was not so specific in the use of direct language as to require Licensee to “at all times employ uniformed armed

guards to check identification of patrons . . .,” Licensee was in technical compliance with the terms of the agreement. The Board, however, disagrees with the ALJ’s reading of the term “employ.” While the language of the CLA provision in question could have been more detailed, the intention was clearly to require the presence of an Act 235-certified, i.e. armed, security person to provide security when Licensee was open and operating, in the hopes of preventing some of the problems that gave rise to the CLA in the first place. Thus, the use of the term “employ” was not just meant in the narrow sense of hiring an Act 235-certified security person, which presumably Licensee did, but in the broader sense of having an armed Act 235-certified security person present on the premises during operating hours to prevent problems from arising. Any other interpretation would be manifestly unreasonable, since the mere hiring of an Act 235-certified guard, without having that person actually working on the premises, would clearly violate the intent of the CLA. Thus, the Board finds that the ALJ committed an error of law and/or abused his discretion. Accordingly, the Board must reverse the decision of the ALJ to dismiss Count One of the citation.

**ORDER**

The appeal of the Bureau is granted.

The decision of the ALJ with regard to Count One of the Citation is reversed.

The case is remanded to the ALJ for imposition of an appropriate penalty.

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Board Secretary