

Mailing Date: August 4, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 09-2121  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

v. :

EJM SCRANTON PUB, LLC : License No. R-2686  
1024 JACKSON STREET :  
SCRANTON, PA 18504 : LID 59839  
:

Counsel for Licensee: Jason May, Pro Se (on appeal)

Counsel for Bureau: Craig A. Strong, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
7448 Industrial Park Way  
Macungie, PA 18062

**OPINION**

EJM Scranton Pub, LLC (“Licensee”) timely appeals from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ sustained Citation No. 09-2121 and imposed a one thousand dollar (\$1,000.00) fine.

The citation charged Licensee with violating section 491(10) of the Liquor Code [47 P.S. § 4-491(10)] in that on July 31, 2009, Licensee, by its servants, agents or employees, fortified, adulterated and/or contaminated liquor.

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).

Licensee raises two (2) issues in its appeal. First, Licensee claims it never received notice of the citation or hearing date. Second, Licensee contends that the fine was too severe given this was its first offense.

The Pennsylvania Liquor Control Board (“Board”) has reviewed the record, including the ALJ’s Adjudication and Order, evidentiary hearing transcript from February 17, 2010, and Licensee’s appeal, with Licensee’s contentions in mind, and has concluded that the ALJ did not commit an error of

law when he found that Licensee violated section 4-491(10) of the Liquor Code and fined Licensee one thousand dollars (\$1,000.00). Furthermore, the ALJ's decision is supported by substantial evidence.

The record reveals the following facts relevant to the citation. On July 31, 2009, Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") Enforcement Officer James G. Ricci ("Officer Ricci"), conducted an administrative inspection of the licensed premises at 11:50 p.m., at a time the premises was open and in operation. [N.T. 8-9]. Officer Ricci inspected thirty-five (35) bottles of liquor that were open behind the bar. [N.T. 9]. Five (5) of these bottles were contaminated with insects. [N.T. 10]. These five (5) contaminated bottles were sealed and removed from the licensed premises and presented to Judge Thau at the February 17, 2010 hearing, at which time he confirmed the contamination. [N.T. 11-15]. Officer Ricci's investigation ended on August 1, 2009. [N.T. 6].

On August 25, 2009, a notice of violation was sent to the licensed premises via certified receipt-return mail and was returned to the Bureau as "unavailable to forward." [N.T. 7; Ex. C-17]. Another notice was sent first class mail, certified, on September 8, 2009. [N.T. 7; Ex. C-1]. On December 31, 2009, a citation hearing notification was mailed to Licensee, by both certified receipt-

return mail and first class mail. [N.T. 4-5]. The notification sent by certified mail was returned to sender as “unclaimed.” [Id.] On February 17, 2010, no one for Licensee appeared for the hearing despite Bureau Attorney Strong’s and Judge Thau’s attempts to call the licensed premises. [N.T. 4-5, 16].

Section 15.44 of the Board’s Regulations [40 Pa. Code § 15.44] states that service shall be as required by statute and as supplemented by 1 Pa. Code §§ 33.31-33.36.

According to section 33.31 of the Pennsylvania Code,

[N]otices . . . shall be served by the office of the agency by mail . . . by mailing a copy thereof to the person to be served, addressed to the person designated in the initial pleading or submittal at his principal office or place of business. If service is not accomplished by mail; it may be effected by anyone authorized by the agency in the manner provided in 231 Pa. Code Rules 400-441. . . .

[1 Pa. Code § 33.31].

If the mail is returned with notation by the postal authorities that it was unclaimed, the [agency] shall make service by another means, such as mailing a copy at the same address by ordinary mail with the return address of the sender appearing thereon. [231 Pa. Code. § 403].

In the instant case, the notice of violation and hearing notification sent by certified return-receipt mail were returned but they were also sent first class

mail. Licensee admits that he shares a mailbox with an upstairs' tenant and subsequent to the adjudication opened a P.O. box to ensure that mail is properly received. Given that Licensee's mail service was unreliable, by no fault of the ALJ or Bureau, the notice requirements have been satisfied.

Applying the foregoing case law to the facts in the instant case, the Board concludes that there was such relevant evidence as a reasonable person might accept as adequate to support a conclusion that Licensee had five (5) contaminated bottles of alcohol on its premises in violation of section 4-491(10) of the Liquor Code. The aforementioned facts amounted to enough substantial evidence and therefore "sufficient cause" to initiate disciplinary actions against Licensee and notice requirements was satisfied. Furthermore, section 4-471 of the Liquor Code prescribes a penalty of license suspension or revocation or a fine in the amount of fifty dollar (\$50.00) to one thousand dollar (\$1,000.00), or both, for violations of this type, the ALJ's Order requiring Licensee to pay a fine of one thousand dollars (\$1,000.00), is within the realm of penalties permitted by the Liquor Code. [47 P.S. § 4-471].

## **ORDER**

The decision of the ALJ is affirmed.

The appeal of the Licensee is dismissed.

Licensee has paid five hundred dollars (\$500.00) of the one thousand dollar (\$1,000.00) fine. Licensee is hereby ordered to pay the remainder of the fine within twenty (20) days of the mailing date of this Order. Failure to do so will result in a license suspension and/or revocation.

Licensee must adhere to all other conditions set forth in the ALJ's Order mailed April 14, 2010. The case is hereby remanded to the ALJ to ensure compliance with this Order.

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Board Secretary