

Mailing Date: November 17, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-2416
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
CLUB POLARIS CORPORATION	:	License No. R-6869
452-472 North 9th St.	:	
Philadelphia, PA 19123-3806	:	LID 52069

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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”) dismissing Count 1 of Citation No. 09-2416 (“the Citation”) issued to Club Polaris Corporation (“Licensee”).

Count 1 of the Citation alleged that, on February 28, 2009 and April 3, 4, 12, and 24, 2009, Licensee, by its servants, agents or employees, violated section 404 of the Liquor Code [47 P.S. § 4-404] by failing to adhere to the conditions of the Conditional Licensing Agreement (“CLA”), dated July 30, 2004, that its predecessor entered into with the Pennsylvania Liquor Control Board (“Board”). Count 2 of the Citation alleged that, between December 2008 and August 10, 2009, Licensee, by its servants, agents or employees, violated section 5.23(a) of the Board’s Regulations [40 Pa. Code § 5.23(a)] by failing to appoint a Board-approved full-time manager for the licensed premises. The ALJ sustained Count 2 and issued a fine of two hundred dollars (\$200.00), but dismissed Count 1. On appeal, the Bureau challenges the ALJ’s dismissal of Count 1 of the Citation.¹

The relevant facts are as follows. On July 30, 2004, Licensee’s predecessor, Starlight Ballroom Dance Club, Inc., and the Board entered into the CLA, which provides, in pertinent part, that: “Licensee will not use outside promoters such as radio stations in connection with the operation of its restaurant business at [the] location, nor will it permit the use of said

¹ Neither party takes issue with the ALJ’s disposition as to Count 2 of the Citation. Therefore, Count 2 will not be addressed any further in this opinion.

promoters by persons or entities holding events at the Licensed Premises.”
[N.T. 5-6, 13-14; Ex. B-4].

On April 24, 2009, the Bureau’s enforcement officer (“Officer”) visited the licensed premises and saw a stage crew unloading equipment from several trucks. [N.T. 5; Ex. B-3]. The Officer identified herself to Alex Chan, who is the son of Philip Chan, Licensee’s President. [Ex. B-3]. When the Officer asked to speak to someone in charge, she was put in contact with Richard Lam. [Ex. B-3]. Mr. Lam told the Officer that he was working with Philip Chan to learn the business. [Ex. B-3]. The Officer advised Mr. Lam that Licensee’s CLA prohibits the use of outside promotion companies. [Ex. B-3]. At that point, a representative of Intrepid Jam, the company hosting the event at the licensed premises, asked if the event needed to be cancelled, and the Officer advised the representative to speak with the person at the licensed premises who had hired her company. [Ex. B-3].

On May 19, 2009, the Officer spoke with Richard Lam and Philip Chan via telephone. [Ex. B-3]. During this telephone conversation, Mr. Lam stated that the premises does not solely use outside promoters, but that its employees work along with the outside promoters. [Ex. B-3]. The Officer responded that any use of an outside promotion company is a violation of the CLA. [Ex. B-3].

On June 25, 2009, the Officer had a meeting with Mr. Lam and Louis Presenza, Esquire to discuss the CLA provisions. [Ex. B-3]. According to the Officer, during this meeting, Mr. Lam identified himself as a “manager trainee” and “prospective buyer” of the licensed premises. [Ex. B-3]. Mr. Lam indicated that he does not answer to Philip Chan and receives no pay or profits from the premises. [Ex. B-3]. Mr. Lam had filed an application with the Board for transfer of the license as a buyer on January 31, 2009. [Ex. B-3]. Mr. Lam then stated that he has hired outside promoters on a “joint venture status,” and that there are no contracts between the promoters and Licensee. [Ex. B-3]. Mr. Lam also indicated that no receipts are maintained by the licensed premises. [Ex. B-3]. Outside promoters were allegedly used at the licensed premises as follows: February 28, 2009—R5 Productions; April 3, 2009—Kingpin; April 4, 2009—R5 Productions; April 12, 2009—Trinity Productions; and April 24, 2009—Intrepid Jam. [Ex. B-3].

On October 20, 2009, the Bureau issued the Citation charging Licensee with failing to adhere to the terms of the CLA in violation of section 404 of the Liquor Code [47 P.S. § 4-404]. While the Citation was pending, Licensee called and e-mailed the Board’s Office of Chief Counsel (“OCC”) on February 23, 2010, requesting clarification of the CLA with regard to a different event that it was

planning to hold at the licensed premises in the future. [Ex. L-2]. Through its communications, Licensee indicated that it was planning to hold a celebrity boxing event, but had been advised by the Bureau that the event was prohibited by the provision in the CLA prohibiting the use of outside promoters. [Ex. L-2]. Licensee wanted to know if the Bureau was correct. [Ex. L-2].

On February 25, 2010, the OCC issued Advisory Opinion No. 10-054 (“the Advisory Opinion”), in which it interpreted the restriction in the CLA regarding outside promoters as follows:

OPINION: It is the position of this office that based upon the wording of the aforementioned provision, the restriction applies only to outside promoters engaging in such promotion on site *at the licensed location*. Thus, it would not, for example, be permissible for a television or radio station to broadcast from the licensed premises in order to promote an event at the premises. Advertising and promotions that do not occur at the licensed location would be permissible.

[Ex. L-2 (emphasis in original)].²

On August 6, 2010, after having held a hearing on the matter,³ the ALJ issued his Adjudication dismissing Count 1 of the Citation. In doing so, the ALJ

² Notably, the Advisory Opinion gives no definite indication as to whether Licensee’s proposed celebrity boxing event would be permissible. It is likely that no definite indication was provided because Licensee did not give any indication in its communications as to whether it would be using outside promoters at the licensed premises in conjunction with the event.

construed the Advisory Opinion as narrowing the applicability of the CLA's prohibition concerning outside promoters to radio stations and television stations. Specifically, the ALJ offered the following explanation in his Adjudication:

[The OCC's] interpretation takes an example, "such as radio stations" and makes it the defining characteristic of the prohibition, without analyzing what purpose the provisions may have had in the first place. This is a narrowing interpretation, and one can appreciate the feeling of the Bureau expressed by counsel, that the Board had no business issuing it while an investigation on that very subject was pending.

However, [section 211.1 of the Liquor Code] 47 P.S. § 2-211.1, relating to legal opinions, provides that "Upon written request by a licensee, the board or its counsel shall issue a legal opinion regarding any subsequent matter relating to this act or any regulation promulgated pursuant to it. This legal opinion shall be binding on the enforcement bureau."

I do not construe the Board's action through [the OCC] in this case as a revision or modification of the terms of the CLA. If the Board's interpretation after the fact had been more restrictive on Licensee's freedom of action than a plain reading of the words would support, applying that interpretation to the facts of this case would be problematic. However, since the Board's interpretation is less restrictive of Licensee's conduct than the

³ No testimony was presented at the hearing by either party. The ALJ noted in his opinion that "[t]he parties stipulated to the timely service of the notice letter and [C]itation, and to a summary of facts, but they did not agree that these facts required a finding of liability." [ALJ Adjudication, Background at 1]. The summary of facts to which the ALJ refers is set forth in the Bureau's pre-hearing memorandum, which was admitted as Exhibit B-3. However, it should be noted that Licensee also submitted a pre-hearing memorandum, which was admitted as Exhibit L-1, and this pre-hearing memorandum set forth a slightly different version of the facts. Significantly, Licensee's pre-hearing memorandum indicated that if called as a witness, Mr. Lam would testify, among other things, that the licensed premises was not open on some of the dates set forth in the Bureau's pre-hearing memorandum and in the Citation. [Ex. L-1].

words themselves seem to indicate, *Licensee's* rights under the CLA have not been infringed.

The ox gored in this case belongs to the Bureau . . . , but [it was] not a party to the CLA. Because I construe the Board's pronouncement as an interpretation of the CLA and not as a modification to it, the Advisory Opinion must be given full effect. This is not an *ex post facto* law or a unilateral amendment of the CLA. The CLA means what it has always meant, and the Board's [OCC] has authoritatively told us what it is. Since there was no violation of the CLA on any date mentioned in the [C]itation in any way which breaches the Board's interpretation, the first count must be dismissed.

[ALJ Adjudication, Discussion at 3-4 (emphasis in original)]. The Bureau now appeals from the ALJ's Adjudication and Order.⁴

As an initial matter, the Bureau requests that the Board certify its appeal directly to the Court of Common Pleas of Philadelphia County ("trial court") without conducting further appellate review. The Bureau advances three (3) arguments in support of this request. First, the Bureau asserts that because the terms of the CLA are central to the Bureau's appeal, and because the Board was involved in the negotiation and subsequent unilateral modification of the CLA through the issuance of the Advisory Opinion, the Board's appellate

⁴ 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 has 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 Board (Hogue)*, 876 A.2d 1098 (Pa. Cmwlth. 2005); *Chapman v. Pennsylvania Board of Probation and Parole*, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

review of the instant appeal would violate the fundamental tenet of contract law providing that a party to a contract has no standing to interpret its own contract. Second, relying on Stone and Edwards Insurance Agency, Inc. v. Department of Insurance, 538 Pa. 276, 648 A.2d 304 (1994), and Lyness v. State Board of Medical Examiners, 529 Pa. 535, 605 A.2d 1204 (1992), the Bureau argues that the Board’s appellate review would constitute an improper commingling of the Board’s licensing and appellate functions and would, thus, violate due process. Finally, the Bureau contends that by issuing the Advisory Opinion while the proceedings on the Citation were pending, the Board effectively usurped the ALJ’s authority, thereby denying the Bureau due process.

After consideration, the Board rejects the Bureau’s request to certify the instant appeal directly to the trial court. Section 404 of the Liquor Code expressly grants authority to the Board to enter into agreements conditionally approving the issuance, transfer, or extension of a retail liquor license. [47 P.S. § 4-404]. Section 404 also expressly states that: “Failure by the applicant to adhere to the agreement will be sufficient cause to form the basis for a citation under section 471 [of the Liquor Code, 47 P.S. § 4-471].” [Id.]. In turn, section 471 grants authority to the Bureau to issue citations and grants authority to

administrative law judges to adjudicate those citations. [47 P.S. § 4-471].

Section 471 also sets forth the procedures for taking an appeal from an ALJ's decision in a citation matter, providing as follows:

In the event the bureau or the person who was fined or whose license was suspended or revoked shall feel aggrieved by the adjudication of the administrative law judge, there shall be a right to appeal to the board. The appeal shall be based solely on the record before the administrative law judge. The board shall only reverse the decision of the administrative law judge if the administrative law judge committed an error of law, abused its discretion or if its decision is not based on substantial evidence. In the event the bureau or the person who was fined or whose license was suspended or revoked shall feel aggrieved by the board, there shall be a right to appeal to the court of common pleas in the same manner as herein provided for appeals from refusals to grant licenses.

[47 P.S. § 4-471]. Importantly, neither section 471, nor any other section of the Liquor Code, sets forth a different appeal procedure that is to be followed when a citation matter involves the violation of a CLA. Thus, the Board believes that it was the intent of the Legislature for the Board to conduct appellate review of all appeals from ALJ's decisions in citation matters, including those which involve the violation of a CLA, before those matters are reviewed by a court of common pleas.

Moreover, the Board finds the Bureau's arguments in support of its request unpersuasive. The Bureau's arguments are largely based on its

assertions that the Board somehow unilaterally modified the terms of the CLA and usurped the authority of the ALJ through the OCC's issuance of the Advisory Opinion. However, these assertions are unfounded for several reasons.

First and foremost, the Advisory Opinion was issued in the context of a different factual scenario unrelated to the Citation and contained a disclaimer provision which expressly provided as follows:

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE LIQUOR CONTROL BOARD.

[Ex. L-2]. Thus, as this disclaimer provision makes clear, the Advisory Opinion, which involved a proposed celebrity boxing event, was not binding on the Bureau with regard to the factual situation presented in this Citation matter. Furthermore, contrary to the Bureau's assertion, the Advisory Opinion does not modify the terms of the CLA, but, instead, merely interprets the CLA as it was written to prohibit any use of outside promoters *at the licensed premises*, and points out that the CLA, as written, does not contain any language that

prohibits the use of outside promoters *off the licensed premises*. Consequently, the OCC's issuance of the Advisory Opinion did not modify the terms of the CLA or usurp the ALJ's authority to resolve the pending Citation matter.

Additionally, while the Bureau relies on Stone and Edwards and Lyness, such reliance is misplaced. In those cases, the focus was on whether there was an improper commingling of prosecutorial and adjudicatory functions. Stone and Edwards, 538 Pa. at 283, 648 A.2d at 308; Lyness, 529 Pa. at 547, 605 A.2d at 1210. Here, the Board did not play any part in prosecuting the Citation issue. Instead, the Bureau was responsible for issuing and prosecuting the Citation. Thus, the Board's appellate review of the instant appeal would not violate the due process principles at issue in Stone and Edwards and Lyness. Accordingly, the Board will conduct appellate review of the instant appeal.⁵

Turning now to the merits of the Bureau's appeal, the Bureau argues that the ALJ committed an error of law in four (4) respects. First, the Bureau contends that the ALJ erred by relying on the Advisory Opinion and calling it an interpretation of the CLA that absolves Licensee of any violation of section 404

⁵ While the Bureau takes issue with the Board conducting appellate review in this case because the Board is a party to the CLA, the Board wishes to point out that the CLA is different from other contracts. That is, the CLA is more regulatory in nature because it sets forth specific conditions to which Licensee must adhere in order to maintain the license issued by the Board, which is the government entity charged with licensing responsibilities. Given the regulatory nature of the CLA, the Board's authority to interpret the CLA while conducting appellate review of the present Citation matter should be no different than the Board's authority to interpret its own lawfully promulgated regulations while conducting appellate review of other matters.

of the Liquor Code. According to the Bureau, the Advisory Opinion modifies, rather than interprets, the terms of the CLA and, thus, constitutes an improper unilateral revision of the CLA. Second, the Bureau asserts that even if the ALJ is correct that the Advisory Opinion merely interprets the CLA, the Board's interpretation of the CLA is incorrect. The Bureau contends that there is no language in the CLA that limits the applicability of the provision regarding outside promoters to radio or television broadcasts from the licensed premises. The Bureau asserts that the Board's interpretation ignores the CLA's use of the words "such as," which signifies that radio stations were only being offered as an example. Third, the Bureau contends that section 211.1 of the Liquor Code does not provide the Board with the authority to interpret a CLA. Finally, the Bureau argues that the Advisory Opinion should have no bearing on the Citation because the Citation had already been issued on October 20, 2009, and pertained to conduct occurring in February and April of 2009. Based on these arguments, the Bureau asks that the Board reverse the ALJ's dismissal of Count 1 of the Citation and remand the matter for the imposition of a penalty.

After reviewing the record, the Board agrees with the Bureau that the ALJ erred in his Adjudication. In dismissing Count 1 of the Citation, the ALJ relied heavily on the Advisory Opinion. However, as discussed above, the

Advisory Opinion contained a disclaimer provision warning that it only applied to the factual situation discussed in the opinion (i.e., the celebrity boxing event that Licensee was planning to hold at the licensed premises), and did not serve as a defense to protect against violations occurring prior its issuance. [Ex. L-2]. Given the presence of this disclaimer provision, the ALJ erred in relying on the Advisory Opinion to resolve Count 1 of the Citation, which pertained to alleged violations occurring well before the issuance of the Advisory Opinion.⁶

Moreover, even assuming that the ALJ did not err in looking to the Advisory Opinion for guidance in interpreting the CLA, the ALJ misreads the Advisory Opinion as narrowing the applicability of the prohibition on outside promoters set forth in the CLA. The CLA provides that “Licensee will not use outside promoters such as radio stations in connection with the operation of its restaurant business at [the] location, nor will it permit the use of said promoters by persons or entities holding events at the Licensed Premises.” [Ex. B-4]. Thus, by its plain language, the CLA prohibits Licensee and other persons or entities holding events at the licensed premises from using outside

⁶ However, the Board notes that, pursuant to section 211.1 of the Liquor Code, [47 P.S. § 2-211.1], the Advisory Opinion would be binding on the Bureau with regard to any citations occurring subsequent to the issuance of such opinion. Further, notwithstanding the Bureau’s statement in its appeal to the contrary, it is binding on the Bureau regardless of whether the Bureau agrees with the Advisory Opinion. The Board also wishes to emphasize that it was never the intention of the Board here, and would not be the intention of the Board in any case, to interfere with the Bureau’s prosecution of a pending citation matter. That is why the disclaimer provision referred to herein was included in the Advisory Opinion, and is included in all advisory opinions that are issued by the OCC.

promoters *at the licensed premises*. The CLA does not limit the meaning of the term “outside promoters” to include only radio stations. Rather, as evidenced by the use of the words “such as,” the CLA merely identifies radio stations as one possible type of outside promoter.

Contrary to the ALJ’s reading, the Advisory Opinion does not attempt to limit the applicability of the CLA’s prohibition on outside promoters. Instead, the Advisory Opinion interprets the CLA exactly as it is written, which is to prohibit any use of outside promoters *at the licensed premises*. The Advisory Opinion also points out that the CLA does not contain any language prohibiting the use of outside promoters *off the licensed premises*. While the Advisory Opinion does refer to radio stations and television stations, it does so only to offer examples of outside promoters. This is evidenced by the use of the words “for example,” which is very similar to the qualifying language that was used in the CLA itself. The important point that the Advisory Opinion attempts to make, which seems to have been misconstrued by the ALJ, is that the CLA, as written, prohibits the use of outside promoters *at the licensed premises*, but does not prohibit the use of outside promoters *off the licensed premises*. Therefore, the ALJ erred in interpreting the Advisory Opinion as narrowing the

applicability of the CLA's prohibition on outside promoters to radio stations and televisions stations.

As established by the plain language of the CLA, a violation of the CLA's provision prohibiting outside promoters would have occurred if Licensee or persons or entities hosting events at the licensed premises used *any* outside promoters *at the licensed* premises after the CLA became effective. However, the Board is unable to determine if, in fact, such a violation occurred based on the existing record. That is, while the ALJ indicated that the parties stipulated to a summary of facts, and the ALJ's findings of fact adopt the version of the facts set forth in the Bureau's pre-hearing memorandum, the Board's review of the record reveals that Licensee's counsel also submitted a pre-hearing memorandum and expressed his belief that a question of fact exists as to whether Licensee actually engaged in the conduct set forth in the Citation. [N.T. 6-7]. Notably, the Bureau's pre-hearing memorandum indicates that if called as a witness, the Officer would testify that Mr. Lam acknowledged that outside promoters were used at the licensed premises on the dates set forth in the Citation, but Licensee's pre-hearing memorandum indicates that if called as a witness, Mr. Lam would testify that the licensed premises was closed on some of the dates set forth in the Citation. [Exs. B-3, L-1]. Given this factual

discrepancy, the ALJ should have taken testimony on the disputed factual issue and made a credibility determination to resolve the conflicting evidence; however, the ALJ failed to do so. Because a factual issue remains as to whether Licensee actually used outside promoters at the licensed premises on the dates set forth in the Citation, the Board cannot agree with the Bureau that a reversal of the ALJ's Adjudication is warranted at this time. Accordingly, the ALJ's Adjudication is vacated, and the matter is remanded to the ALJ to hold an evidentiary hearing on the disputed issue of fact and to issue a new adjudication in light of the foregoing opinion.

ORDER

The Bureau's request to certify its appeal directly to the Court of Common Pleas of Philadelphia County is denied.

Count 2 of the Citation is affirmed.

The ALJ's Adjudication as to Count 1 of the Citation is vacated, and the matter is remanded to the ALJ to hold an evidentiary hearing on the disputed factual issue of whether Licensee used outside promoters at the licensed premises on the dates set forth in the Citation, and to issue a new adjudication in light of the foregoing opinion.

Board Secretary