Mailing Date: June 1, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-2699
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
BIJOU, LLC	:	License No. R-15561
927-939 North Delaware Ave.	:	
Philadelphia, PA 19123-3110	:	LID 47478

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O P I N I O N

Bijou, LLC ("Licensee"), appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), mailed March 15, 2011, wherein the ALJ sustained Citation No. 09-2699 ("the Citation") issued by the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), and imposed a fine of nine hundred dollars ($900.00).

The Citation charged Licensee with violating section 5.32(a) of the Liquor Control Board's ("Board") Regulations [40 Pa. Code § 5.32(a)] on May 15, 22, 24, 29, 30, 31, June 5, 7, 12, 14, July 19, 25, 26, 31, August 1, 8, 16, 20, 22, 23, 28, 29, 30, September 4, 12, 17, 18, 19, 20, 23, 24, 25, October 4 and 5, 2009, by permitting the use on the inside of the licensed premises of a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

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. [47 P.S. § 4-471(b)].

On appeal, Licensee argues generally that the ALJ "abused his discretion, committed an error of law and/or made a decision not supported by substantial evidence" in sustaining the Citation. Because Licensee did not provide any further explanation for the basis of its appeal, the Board will conduct a general administrative review of the certified record, including the ALJ's Adjudication and Order, Licensee's Appeal, and the Notes of Testimony and Exhibits from the hearing held on January 25, 2011.

The record reveals that a Bureau enforcement officer, Christopher McGrath, began investigating Licensee on June 30, 2009, based upon a complaint of loudspeaker violations. [N.T. 6]. Officer McGrath made two (2) visits to the licensed premises and then met with the complainants. [N.T. 6].

On August 16, 2009, at approximately 12:05 a.m., Officer McGrath parked his vehicle at the corner of North Delaware Avenue and Frankford Avenue, which he estimated to be four hundred fifty (450) feet away from the licensed premises. [N.T. 7]. From outside of his vehicle, Officer McGrath could hear dance or hip-hop music coming from the establishment. [N.T. 7]. Officer McGrath, along with another Bureau enforcement officer, entered the establishment and immediately determined that the music being played inside the licensed premises was the same music he had heard near his vehicle. [N.T. 7]. During his visit, Officer McGrath observed that the premises contains a large, open-air venue with an elevated stage and several speakers. [N.T. 8]. The music was being played by a DJ from the main stage area. [N.T. 8]. Officer McGrath also observed three (3) high-rise apartment buildings directly adjacent to the establishment. [N.T. 8]. After departing at approximately 1:35 a.m., Officer McGrath drove to the parking lot surrounding the nearby apartment buildings, in which he knew the complainants lived. [N.T. 9]. From the most

distant area of the parking lot, which he estimated to be around three hundred (300) feet from the licensed premises, Officer McGrath could hear music coming from the establishment. [N.T. 9].

On August 30, 2009, Officer McGrath made another visit to the licensed premises at approximately 1:10 a.m. [N.T. 10]. He parked at the same location as he had previously and could again hear music coming from the establishment. [N.T. 10]. Officer McGrath entered the licensed premises and observed that the music was being played by a DJ and was coming from two (2) large speakers on the stage as well as several other speakers throughout the venue. [N.T. 10]. Approximately one hundred (100) patrons were present on this visit, and Officer McGrath estimated there were about two hundred (200) patrons inside the establishment on his prior visit. [N.T. 10].

On September 19, 2009, Officer McGrath met with one of the complainants, Joshua Zissman, at his residence on the eleventh (11th) floor of the Peninsula building at 901 North Penn Street, which is an apartment complex adjacent to the licensed premises. [N.T 11, 58]. Standing on Mr. Zissman's balcony at approximately 10:00 p.m., Officer McGrath could clearly hear music coming from the licensed premises as well as the DJ speaking. [N.T. 11-12]. Bass sounds could still be heard from inside the apartment with the

doors and windows closed. [N.T. 11]. From the balcony, Officer McGrath observed patrons dancing to the music in the outdoor bar area of the licensed premises. [N.T. 12-13].

Officer McGrath instructed the two (2) complainants to maintain records of the noise activity, and he incorporated the dates of those alleged violations in the Citation, along with the dates of the three (3) violations he observed directly. [N.T. 13-14; Ex. B-3]. The investigation concluded on October 19, 2009, and the Citation was issued on November 24, 2009. [N.T. 14; Ex. B-2].

Mr. Zissman testified that his apartment building is between four hundred fifty (450) and six hundred (600) feet from the licensed premises. [N.T. 45]. At Officer McGrath's direction, Mr. Zissman maintained a log of incidents when he could hear noise from the licensed premises inside his apartment. [N.T. 47]. The log contains twenty-seven (27) dates between May 12, 2009, and September 25, 2009, including Officer McGrath's visit to the apartment on September 19, 2009. [Ex. B-3]. Mr. Zissman testified that each night he heard noise coming from the establishment, he would write down the date and time and the type of noise; he later transferred his notes to a spreadsheet. [N.T. 48]. The licensed premises is visible from Mr. Zissman's balcony, so he is able to observe when it is open and operating. [N.T. 57]. Mr.

Zissman met with a Mr. Stelatto, Licensee's manager, on various occasions about the noise and potential solutions. [N.T. 63]. However, the noise problem has yet to be resolved to Mr. Zissman's satisfaction. [N.T. 73].

Based on these facts, the Board finds sufficient evidence to support the ALJ's conclusion that Licensee violated section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)]. 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 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 ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Bd. of Probation and Parole, 510 A.2d 877 (Pa. Cmwlth. 1986). It is well settled that the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 480 A.2d 1253 (Pa. Cmwlth. 1984).

The Bureau presented uncontroverted evidence in the form of testimony by Officer McGrath demonstrating three (3) violations of section 5.32(a) of the

Board's Regulations [40 Pa. Code § 5.32(a)].[1] The officer twice heard music coming from the licensed premises in the street where he parked his vehicle, at an approximate distance of four hundred fifty (450) feet from the establishment, and he heard music coming from the licensed premises while standing on Mr. Zissman's balcony. [N.T. 7, 11]. Officer McGrath was able to enter the licensed premises to verify the source of the music during his two (2) visits. [N.T. 8, 10].

Licensee argued at the hearing that the officer and Mr. Zissman failed to rule out other potential sources of noise. The ALJ, however, found that the weight of the evidence supported the conclusion that Licensee was the source of the violations on the dates in question. In so finding, the ALJ deemed credible the testimony of both Officer McGrath and Mr. Zissman. The Board will not overturn the ALJ's credibility determination. Furthermore, the Board finds no error of law in the ALJ's application of section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)] to the evidence at hand.

Having found that the ALJ's decision was supported by substantial evidence, the Board turns its attention to whether the ALJ abused his

[1] Section 5.32(a) prohibits a licensee from permitting the use on the inside of the licensed premises of a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard outside. [40 Pa. Code § 5.32(a)].

discretion in sustaining the Citation and imposing a fine of nine hundred dollars ($900.00). 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).

In this case, there is no evidence in the record to suggest that the ALJ's conclusion was the result of prejudice or bias, or that it was manifestly unreasonable. The imposition of penalties is the exclusive prerogative of the ALJ; the Board may not disturb penalties which are within the parameters set forth in the Liquor Code. Section 471 of the Liquor Code prescribes the penalty for the type of violation sustained in the Citation, and permits the ALJ to impose a license suspension or revocation and/or a fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00). [47 P.S. § 4-471]. The ALJ imposed a fine of nine hundred dollars ($900.00) based upon his

conclusion that Licensee permitted loudspeaker violations on twenty-nine (29)[2] occasions and consideration of Licensee's record of three (3) prior citations for noise on one (1) occasion in 2004, two (2) occasions in 2005, and twenty-one (21) occasions in 2008. Since the penalty is clearly within the statutory ranges set forth in the Liquor Code, and the Board has no authority to alter the penalty imposed by the ALJ, the decision of the ALJ as to the penalty is affirmed.

For the foregoing reasons, the Adjudication and Order of the ALJ sustaining the Citation and imposing a fine of nine hundred dollars ($900.00) is affirmed in all respects.

[2] Despite being alleged in the Citation, no evidence was presented with respect to the alleged loudspeaker violations on September 17, 20, 24, October 4 and 5, 2009. With the exception of September 20, the ALJ properly excluded these dates from the dates of violations listed in his conclusion of law. The Board finds the inclusion of September 20 to be a harmless error because the ALJ also left out August 30, the date of Officer McGrath's second visit to the licensed premises and a clear violation. The total of twenty-nine (29) loudspeaker violations thus includes Mr. Zissman's twenty-seven (27) notations in the noise log [Ex. B-3] and Officer McGrath's two (2) visits to the licensed premises.

O R D E R

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of nine hundred dollars ($900.00) has been paid in full.

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Board Secretary