Mailing Date: July 22, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

| | | |
|---|---|---|
| PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT | : | Citation No. 09-2781 |
| v. | : | |
| ECKHOFF BEVERAGE, INC. t/a Brewers Outlet Bear Swamp Beverage 100 West Main Street Macungie, PA 18062-1107 | : | License No. D-3081<br>LID 29152 |

Counsel for Licensee: Louis F. Caputo, Esquire (on appeal)
Caputo & Caputo, P.C.
The Pitt Building
213 Smithfield Street, Suite 303
Pittsburgh, PA 15222

Counsel for Bureau: Roy Harkavy, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Park Way
Macungie, PA 18062

**OPINION**

Eckhoff Beverage, Inc. t/a Brewers Outlet Bear Swamp Beverage ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), wherein the ALJ sustained Citation No. 09-

2781, imposed a fine in the amount of nine hundred dollars ($900.00), and suspended the liquor license for a period of three (3) days.

The citation in the present matter, charged Licensee with violating section 471 of the Liquor Code in that on November 6, 2009, Licensee's corporate president/secretary/director, was visibly intoxicated on the licensed premises. [47 P.S. § 4-471].

On December 16, 2009, Licensee submitted an Admission, Waiver and Authorization ("Waiver") to the Office of the Administrative Law Judge ("OALJ"), in which Licensee admitted to the violation charged in the citation and waived a right to appeal the adjudication. [Adjudication p. 1]. The Waiver was signed by Daniel C. Eckhoff, Licensee's corporate officer, on December 11, 2009.

On March 17, 2010, Louis F. Caputo, Esquire, filed a timely appeal to the ALJ's Order and Adjudication of February 18, 2010 on behalf of Licensee.

Based solely on the Waiver executed by Mr. Eckhoff, this appeal must be dismissed. Licensee's right to appeal the substance of the violation and the penalty imposed were expressly waived. Therefore, the appeal must be dismissed. Pennsylvania State Police, Bureau of Liquor Control Enforcement v.

Wilner, 687 A.2d 1216 (Pa. Cmwlth. 1997); Pennsylvania Liquor Control Bd. v. Dentici, 117 Pa. Cmwlth. 70, 542 A.2d 229 (1988).

Even if Licensee's right to file an appeal was not waived, and the Pennsylvania Liquor Control Board ("Board") considered the appeal, the appeal would be dismissed.

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 four (4) issues in its appeal. First, Licensee claims that the evidence submitted before the ALJ does not support the findings and conclusions reached by the ALJ. Second, Licensee argues that the ALJ abused his discretion in refusing the recommendation of the parties and imposing a much harsher penalty. Third, Licensee contends the decision of the ALJ was

not based upon substantial evidence. Finally, Licensee believes the facts provided do not support a finding of violation under section 471 of the Liquor Code.

The Board has reviewed the record, including the ALJ's Adjudication and Order, Licensee's Waiver and Licensee's letter, dated December 12, 2009, 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 471 of the Liquor Code and fined Licensee nine hundred dollars ($900.00) along with a three (3)-day license suspension. Furthermore, the ALJ's decision is supported by substantial evidence.

The record reveals the following facts relevant to the citation. After a complaint was filed that Licensee's corporate officer, Daniel C. Eckhoff, was intoxicated in the premises, on November 6, 2009, a Bureau enforcement officer ("Officer") entered the licensed premises during Licensee's regular hours of operation. [Adjudication p. 1]. Upon entering the licensed premises, the Officer saw an open case of beer and six (6) to eight (8) empty beer cans in the trash. [Adjudication p. 1]. Mr. Eckhoff was standing near the checkout counter. [Adjudication p. 1]. The Officer identified himself to Mr. Eckhoff and Mr. Eckhoff told the Officer that he was not working, but immediately spoke to

an employee about allowing a customer to return an empty keg early. [Adjudication p. 1]. Mr. Eckhoff had a strong odor of alcohol on his breath, his eyes were glassy, his speech was slurred, and he staggered when he walked, swayed when he stood still and was argumentative and often repeated himself. [Adjudication p. 1].

Upon receiving the citation, Mr. Eckhoff wrote a letter to the OALJ at the time the waiver of hearing was submitted. Mr. Eckhoff wrote an explanation for this case, as well as the two previous cases involving similar facts.[1] Mr. Eckhoff writes that, in 2005, he was going through personal problems involving a divorce. [Eckhoff Letter, December 12, 2009, p.1]. In 2007, Mr. Eckhoff's explanation was that a customer alleged that a case of beer was sour, so Mr. Eckhoff had to taste it to support the claim for reimbursement from the supplier. [Eckhoff Letter, December 12, 2009, p.1]. However, there were two (2) open cans of beer on Licensee's premises. [Adjudication p. 2]. For the current citation, Mr. Eckhoff claimed there was a sampling at his store and he was not working, so he sampled the beer as well. [Eckhoff Letter, December 12, 2009, p.1]. He tried to justify this behavior by writing that a breathalyzer was

[1] Licensee had two (2) similar violations in the past, resulting in adjudicated citations. Citation No. 05-0940, was issued for Licensee' corporate president being visibly intoxicated on the licensed premises ($300.00 fine). Citation No. 07-0465, was issued for permitting malt or brewed beverages to be consumed in the licensed

not used to determine the accusation that he was visibly intoxicated. [Eckhoff Letter, December 12, 2009, p.1].

Section 471 of the Liquor Code [47 P.S. § 4-471] provides the Bureau with the authority to initiate administrative prosecutions against a licensee, "upon any other sufficient cause shown." The Superior Court has held that violations of the liquor laws, on or off the premises, were not the only grounds upon which disciplinary action could be initiated. Commonwealth v. Lyons, 15 A.2d 851 (Pa. Super. 1940); see also, V.J.R. Bar Corp. v. Pennsylvania Liquor Control Board, 390 A.2d 163 (Pa. 1978). Additionally, a liquor license may be revoked or suspended for acts of licensee's employees in violation of the Liquor Code, regardless of whether the licensee knew or should have known of the misconduct. Pennsylvania Liquor Control Board v. T.L.K, 544 A.2d 931 (Pa. 1988). Under V.J.R., the Supreme Court gave the Office of Administrative Law Judge broad authority to view the conduct of a licensee to determine whether disciplinary action is warranted against the licensee when dealing with "other sufficient cause." This is because it "is almost impossible to anticipate all of the actions that may justify enforcement." In re Quaker City Development Co., 365 A.2d 683 (Pa. Cmwlth. 1976).

---

premises, and Licensee's corporate officer consuming alcoholic beverages while serving alcoholic beverages

Behavior by a licensee which constitutes a violation of the Crimes Code would clearly provide "other sufficient cause." Section 5505 of the Crimes Code [18 Pa. C.S. § 5505] provides that "[a] person is guilty of a summary offense if he appears in any public place manifestly under the influence of alcohol…to a degree that he may endanger himself or other persons or property, or annoy persons in his vicinity." Mr. Eckhoff demonstrated such behavior herein.

Applying the foregoing 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 Mr. Eckhoff, Licensee's corporate officer, was on the Licensee's premises, consuming alcohol and exhibited signs of visible intoxication, during normal business hours. Mr. Eckhoff even admitted to consuming alcohol on the Licensee's premises, in both his letter and to the Officer, who conducted the investigation upon receiving a customer's complaint. The aforementioned facts amounted to enough substantial evidence and therefore "sufficient cause" to initiate disciplinary actions against Licensee. Furthermore, as section 471 of the Liquor Code prescribes a penalty of license suspension or revocation or a fine in the

---

($800.00 fine).

amount of fifty dollars ($50.00) to one thousand dollars ($1,000.00), or both, for violations of this type, the ALJ's Order requiring Licensee to pay a fine of nine hundred dollars ($900.00) and a license suspension of three (3) days is well within the realm of penalties permitted by the Liquor Code. [47 P.S. § 4-471]. Regardless, based on the Waiver executed by Mr. Eckhoff, this appeal must be dismissed.

## **O R D E R**

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

A fine of nine hundred dollars ($900.00) has not been paid.

The case is hereby remanded for imposition of the three (3) day suspension in accordance with this Opinion.

_____
Board Secretary