

Mailing Date: April 20, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-2792
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
NOSTALGIA, INC.	:	License No. R-18148
t/a The Corvette Grille	:	
202 West Main Street	:	LID 58972
Annville, PA 17003-1325	:	
	:	

Representative for Licensee:	Michael Beare, Pro Se President of Licensee
------------------------------	--

Counsel for Bureau:	Thomas M. Ballaron, Esquire Pennsylvania State Police, Bureau of Liquor Control Enforcement 3655 Vartan Way Harrisburg, PA 17110
---------------------	--

OPINION

Nostalgia, Inc., t/a The Corvette Grille (“Licensee”), appeals from the Adjudication and Order of Administrative Law Judge Daniel T. Flaherty, Jr. (“ALJ”), mailed February 1, 2011, wherein the ALJ sustained both counts of Citation No. 09-2792 (“the Citation”) issued by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), and imposed a fine of one thousand two hundred fifty dollars (\$1,250.00).

The first count of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 5101 of the Crimes Code [18 Pa. C.S. § 5101], which is incorporated by reference in Liquor Code section 471 as “other sufficient cause,” on November 28, 2008, in that Licensee, by its servants, agents or employees, interfered with police officers in the performance of their duties.

The second count of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 637.6(a)(2) of the Clean Indoor Air Act [35 P.S. § 637.6(a)(2)], which is incorporated by reference in Liquor Code section 471 as “other sufficient cause,” on May 23 and June 26, 2009, in that Licensee, by its servants, agents or employees, permitted smoking in a public place where smoking is prohibited.

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.

Licensee’s Appeal may be summarized as making three (3) distinct averments. The first is that the ALJ committed an error of law in sustaining the

Citation because it was not timely issued by the Bureau. Its second argument is that the decision of the ALJ was not based upon substantial evidence because the Bureau's witnesses were not credible and because there was insufficient evidence that Licensee knew or should have known of the illegal activity occurring on the licensed premises. Third, Licensee contends that the ALJ abused his discretion in issuing a fine of one thousand two hundred fifty dollars (\$1,250.00) because Licensee finds the penalty disproportionate to the violations.

The Board has reviewed 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 September 16, 2010, and concluded the ALJ did not commit an error of law or abuse his discretion. The ALJ's decision was supported by substantial evidence.

The record reveals that a Bureau enforcement officer, Terrance McPhillips, conducted a series of undercover visits to the licensed establishment based upon a complaint of minors being permitted on the premises. [N.T. 12]. On May 23, 2009, Officer McPhillips entered the licensed premises at approximately 12:50 a.m. and observed patrons smoking around the bar area, despite a sign posted at the entrance stating that smoking is

prohibited. [N.T. 16]. There were ashtrays on the bar, and the bartender provided ashtrays upon request. [N.T. 16]. Officer McPhillips subsequently obtained a notarized attestation from the Pennsylvania Department of Health, in which the official custodian of the Clean Indoor Air Act records attested that Licensee was not permitted to allow smoking between November 26, 2008, and August 4, 2009. [N.T. 20, Ex. C-3].

A Bureau enforcement officer, Richard Hackenberg, also testified that on June 26, 2009, he entered the licensed premises in an undercover capacity around 11:00 p.m. and observed a patron smoking while seated at the bar. [N.T. 25]. An ashtray was on the bar, and the bartender did nothing to stop the patron from smoking. [N.T. 25].

On November 28, 2008, an officer with the Annville Township Police Department, Daryle Heisey, responded to a call at around 1:46 a.m. of an assault in progress outside the licensed premises. [N.T. 27]. Officer Heisey arrived within a minute or less in a marked police cruiser with lights flashing and in full uniform. [N.T. 29]. Upon arrival he found a “chaotic” scene, with people scattering in all directions, and at least three (3) persons bleeding from the face. [N.T. 29-33]. Officer Heisey called for backup and told two (2) of the injured individuals to sit and wait; he saw the third injured person walk inside

the licensed premises. [N.T. 32]. Concerned that the person could pose a danger to others or need medical attention, Officer Heisey attempted to enter the licensed premises but was impeded at the front door by April Devoy, who identified herself as the bartender. [N.T. 35]. According to Officer Heisey, after he explained to Ms. Devoy that he needed to speak with the injured individual, Ms. Devoy stated that the individual was not involved in what had just occurred. [N.T. 35]. In response to Officer Heisey's repeated request to enter, Ms. Devoy used a profanity in a loud voice. [N.T. 35-36]. Believing her behavior could possibly incite a hostile environment among the surrounding crowd, Officer Heisey escorted Ms. Devoy to his police cruiser and detained her in the back seat. [N.T. 36]. While being escorted, Ms. Devoy continued yelling and inciting the crowd. [N.T. 36]. Officer Heisey subsequently entered the licensed premises but was unable to locate the injured person he had seen enter. [N.T. 39]. While Officer Heisey was there, approximately six (6) police units, including State Police troopers, arrived on the scene. [N.T. 39-40]. Ms. Devoy was charged with disorderly conduct and found guilty. [N.T. 43-44].

Licensee's president, manager, and sole shareholder, Michael Beare, testified that he left the licensed premises at around 12:30 a.m. on November 28, 2008, and was thus not present for any of the events testified to by Officer

Heisey. [N.T. 50]. During that time, Mr. Beare was in his office on the third floor of the same building as the licensed premises, which occupies the first floor. [N.T. 52]. Thus, the bartender April Devoy, who was twenty (20) years old at the time, was the only employee present at the time the events described by Officer Heisey occurred. [N.T. 53]. Prior to his departure, Mr. Beare testified that he told Ms. Devoy to call him if he was needed. [N.T. 50].

The Board will first briefly address Licensee's assertion that the ALJ committed an error of law in sustaining the Citation because it was allegedly untimely issued by the Bureau. Section 471 of the Liquor Code provides in pertinent part that:

Upon learning of any violation of this act or any laws of this Commonwealth relating to liquor, alcohol or malt or brewed beverages . . . or upon any other sufficient cause shown, the enforcement bureau may, within one year from the date of such violation or cause appearing, cite such licensee to appear before an administrative law judge . . . to show cause why such license should not be suspended or revoked or a fine imposed, or both. . . .

[47 P.S. § 4-471(a)]. Section 471 also states that no penalty shall be imposed for any violations unless the Bureau notifies the licensee of its nature within thirty (30) days of the completion of the investigation. [47 P.S. § 4-471(b)]. Therefore, the Bureau may issue a citation within one (1) year from the date of

a violation and must notify the licensee of the nature of any violations within thirty (30) days of the completion of the investigation.

In this case, the Bureau completed its investigation on September 10, 2009, and within thirty (30) days issued a Notice of Violation letter by certified mail on September 23, 2009, which Licensee stipulated to having received. The Bureau subsequently issued the Citation on November 25, 2009, less than a year from the date of the oldest violation alleged therein, which occurred on November 28, 2008. Thus, both the Notice of Violation and the Citation were timely received.

Having found no error on the issue of timeliness, the Board turns to whether the ALJ's decision was supported by 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 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).

In the present case, there was substantial evidence for the ALJ to sustain both counts of the Citation. Regarding the first count, the courts have consistently held that violations of criminal laws other than the Liquor Code

may constitute “other sufficient cause” for the imposition of penalties, pursuant to section 471 [47 P.S. § 4-471], when reasonably related to the sale and use of alcoholic beverages. Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988). In such cases, the Pennsylvania Supreme Court has held that the Bureau must prove an element of scienter, in that the licensee knew or should have known of illegal activities by an employee or patron, for the licensee to be liable. TLK, Inc., 518 Pa. at 504, 544 A.2d at 933. However, the licensee may defend its license by demonstrating substantial affirmative steps to guard against a pattern of known illegal activities. Id. at 504-505. Before the ALJ, the burden is on the Bureau to prove its case by a clear preponderance of the evidence. Omicron Enterprises, 449 A.2d 857 (Pa. Cmwlth. 1982).

Thus, to prove a violation of the first count, the Bureau needed to demonstrate to the ALJ by a clear preponderance of the evidence that Ms. Devoy violated section 5101 of the Crimes Code [18 Pa. C.S. § 5101]¹ and that Licensee knew or should have known of the misconduct and failed to take

¹ Section 5101 of the Crimes Code provides:

A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

[18 Pa. C.S. § 5101].

substantial steps to prevent it. The Board finds there was substantial evidence for the ALJ to conclude that the Bureau met its burden.

Based on the testimony of Officer Heisey and Mr. Beare, Licensee at the very least should have known of the illegal conduct of its employee. While Mr. Beare was apparently upstairs, Ms. Devoy intentionally impeded a law enforcement officer in the performance of his duties in violation of section 5101 of the Crimes Code [18 Pa. C.S. § 5101]. She did so by standing in the doorway of the licensed premises and blocking Officer Heisey as he pursued a person of interest. There was evidence to suggest that Mr. Beare should have been aware of the chaotic scene unfolding in front of the building while he was in his third-floor office, such as the flashing lights of Officer Heisey's police cruiser and the other six (6) units that arrived, as well as Ms. Devoy's shouting. The only indication of an attempt by Licensee to prevent the misconduct was Mr. Beare's testimony that he told Ms. Devoy to call him if needed, which the ALJ did not find significant and/or credible.

Furthermore, Ms. Devoy was the only employee of Licensee present in the establishment while it was open for business and clearly busy. Licensee cannot be permitted to avoid liability for violations of the Liquor Code merely

by placing a twenty (20)-year-old bartender in charge and turning a blind eye when she responds poorly.

As for the second count, section 637.6(a)(2) of the Clean Indoor Air Act provides that it is unlawful to “[p]ermit smoking in a public place where smoking is prohibited.” [35 P.S. § 637.6(a)(2)]. The testimony of Officers McPhillips and Hackenberg, the admissions of Mr. Beare, and the attestation from the Pennsylvania Department of Health clearly demonstrate that Licensee allowed smoking in a public place where smoking is prohibited by law on May 23 and June 26, 2009. These violations of the Clean Indoor Air Act [35 P.S. § 637.6(a)(2)] constitute “other sufficient cause” to justify finding Licensee in violation of section 471 of the Liquor Code [47 P.S. § 4-471].

It must also be noted that Licensee’s assertion that the Bureau’s witnesses were not credible is similarly without merit. 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). Based on the foregoing discussion, the Board finds sufficient

evidence to sustain both counts and will not overturn the ALJ's credibility determinations.

Having found that the ALJ's decision was supported by substantial evidence, the Board turns its attention to whether the ALJ abused his discretion in imposing a fine of one thousand two hundred fifty dollars (\$1,250.00). 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. Section 471 of the Liquor Code prescribes the penalty for violations of the type found in both counts of 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 in the instant case imposed a fine of one thousand dollars (\$1,000.00) for the violation in the first count and two hundred fifty dollars (\$250.00) for the violation in the second count. The penalty relative to both counts fell within the statutory guidelines under section 471 of the Liquor Code. [47 P.S. § 4-471]. Although no explanation was provided by the ALJ in assessing the maximum statutory fine for the violation in the first count, the penalty is reasonable considering the gravity of the offense. The obstruction of a law enforcement officer in the performance of his/her duties significantly imperils public safety. As Officer Heisey testified, the person he was pursuing had visible injuries and potentially posed a threat to himself or others.

For the foregoing reasons, the Adjudication and Order of the ALJ sustaining both counts of the Citation and imposing a fine of one thousand two hundred fifty dollars (\$1,250.00) is affirmed in all respects.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of one thousand two hundred fifty dollars (\$1,250.00) remains unpaid.

The case is hereby remanded to the ALJ to ensure compliance with this Opinion.

Board Secretary