Mailing Date: May 4, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-2840
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	License No. R-5705
v.	:	
	:	
LEE'S LOUNGE, INC.	:	LID 11966
625 Brushton Avenue	:	
Pittsburgh, PA 15208-2059	:	

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OPINION

Lee's Lounge, Inc. ("Licensee") appealed from an Adjudication and Order of Administrative Law Judge Roderick Frisk ("ALJ"), wherein the ALJ sustained Citation No. 09-2840 ("Citation"), and imposed a fine of one thousand dollars

($1,000.00) and a suspension of Licensee's liquor license for a period of sixty (60) days. The suspension period was deferred pending transfer or other disposition of the license consistent with the terms and conditions set forth in the Conditional Licensing Agreement ("CLA") with Licensee and approved by the Pennsylvania Liquor Control Board ("Board") on September 22, 2010. The ALJ further ordered that if Licensee breaches any portion of the CLA, then the license shall be revoked.

The Citation charged that on March 3, 2009, Licensee, by its servants, agents or employees, supplied false information on its application for a restaurant liquor license for the term expiring May 31, 2011, in violation of Sections 403(h) and 471 of the Liquor Code. [47 P.S. §§ 4-403(h), 4-471].

On appeal, Licensee avers that the ALJ abused his discretion in imposing a penalty of a one thousand dollar ($1,000.00) fine and a suspension of Licensee's liquor license for a period of sixty (60) days. Licensee argues that the penalty is manifestly unreasonable because the practical effect of the CLA was to divest Licensee of any interest in the license, meaning the penalty will penalize and impact innocent third parties, such as the Pennsylvania Department of Revenue, the Pennsylvania Department of Labor & Industry, Allegheny County, and Licensee's creditors. Licensee also avers that the

decision of the ALJ was not based on substantial evidence and requests that a modest fine with no suspension be imposed.

The Board has reviewed the record, including the ALJ's Adjudication and Order, Licensee's Appeal, the Bureau's Response, and the transcript and exhibits presented during the hearing held in this matter on December 7, 2010, with Licensee's contentions in mind, and has concluded that the ALJ did not abuse his discretion in sustaining the charges set forth in the Citation. Furthermore, the Board concludes that the decision of the ALJ was based on substantial evidence.

During the hearing held in this matter, counsel for Licensee and the Bureau stipulated to the Bureau's pre-hearing memorandum. [N.T. 4-5]. William Perry McClelland is Licensee's sole corporate officer. [Ex. C-5]. After a review of Mr. McClelland's criminal history records, driver's license records, and parole information, it was uncovered that he was arrested several times for selling cocaine in Mississippi under the name of Perry Toole. [Ex. C-5]. The arrests occurred during the period from December 22, 1989 to July 13, 1995, and resulted in felony convictions. [Ex. C-5]. On November 29, 1994, the Chancery Court of Lauderdale County, State of Mississippi, issued a judgment authorizing a modification of birth certificate to change the name of Perry

Toole to William Perry McClelland. [Ex. C-5]. Mr. McClelland was on parole in the State of Mississippi until March 14, 2011, and had no authority to reside or work in the Commonwealth of Pennsylvania. [Ex. C-5].

On March 28, 2005, Licensee signed and submitted form PLCB-2010, Application Addendum for Renewal of License/Permit, amending the ownership of Restaurant Liquor License R-5705 to reflect Mr. McClelland as the new owner. [Ex. C-5]. Licensee failed to disclose on that form, and subsequent forms[1], any felony or misdemeanor convictions for Mr. McMelland. [Ex. C-5]. Further, on September 18, 2009, Mr. McClelland was arrested and charged with five (5) counts of unsworn falsification to authorities. [Ex. C-5].

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

[1] The subsequent forms are: PLCB-866, Notice of Change in the Officers, Directors, Stockholders, or Managers of Licensed Corporations, Except Clubs, signed 05/26/05; PLCB-E-1472, Renewal Application, signed 04/21/07; PLCB-E-1472, Renewal Application, signed 03/03/09; and PLCB-706, Application for Approval of Appointment of Manager, signed 06/04/09. [Ex. C-5].

(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).

On appeal, Licensee first argues that the ALJ abused his discretion in imposing a penalty of a one thousand dollar ($1,000.00) fine and a suspension of Licensee's liquor license for a period of sixty (60) days. 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). Licensee contends that the penalty imposed by the ALJ in this case is "manifestly unreasonable" because the practical effect of the CLA was to divest the Licensee of any interest in the license, meaning the penalty will penalize and impact innocent third parties, such as the Pennsylvania Department of Revenue, the Pennsylvania Department of Labor & Industry, Allegheny County, and Licensee's creditors. The Board does not agree.

Section 471 of the Liquor Code prescribes a penalty of license suspension or revocation or a fine of not less than fifty dollars ($50.00) or more than one thousand dollars ($1,000.00) or both for violations of the type found in this

case. [47 P.S. § 4-471]. The ALJ stated that "Licensee's failure to disclose a criminal record involving several felony convictions including the sale of cocaine constitutes a significant offense and goes to the very essence of the entire licensing process." [Adjudication 4]. The ALJ further stated that he would generally order license revocation based on these circumstances. [Adjudication 3]. However, in consideration of the outstanding tax liabilities and other creditors against the license, the ALJ accepted the Bureau's recommendation of a one thousand dollar ($1,000.00) fine and a suspension of Licensee's liquor license for a period of sixty (60) days. [N.T. 25]. Therefore, the practical effect of the CLA and the impact on innocent third parties were considered in the fashioning of the penalty.

The Board recognizes that the imposition of penalties is the exclusive prerogative of the ALJ. The Board may not disturb penalties imposed by the ALJ if they are within the parameters set forth in section 471 of the Liquor Code [47 P.S. § 4-471].

Given these circumstances, the Board concludes that the ALJ did not abuse his discretion in imposing a penalty of a one thousand dollar ($1,000.00) fine and a suspension of Licensee's liquor license for a period of sixty (60) days.

Licensee next argues that the decision of the ALJ was not based on substantial evidence. At the hearing held on December 7, 2010, counsel for Licensee stipulated to the Bureau's pre-hearing memorandum, which set forth that Licensee failed to disclose any felony or misdemeanor convictions on form PLCB-2010, Application Addendum for Renewal of License/Permit. The Bureau's pre-hearing memorandum also set forth that Mr. McClelland was arrested and charged with five (5) counts of Unsworn Falsification to Authorities. At the hearing, Licensee's counsel stated that "Licensee does not contest the charge today." [N.T. 5]. Licensee's counsel also stated that he was present to offer evidence and testimony only on the penalty. [N.T. 5]. Thus, there is clearly substantial and uncontested evidence to support the ALJ's decision to sustain the citation.

For the foregoing reasons, the Adjudication and Order of the ALJ is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of one thousand dollars ($1,000.00) remains unpaid.

It is further ordered that Licensee's Restaurant Liquor License No. R-5705 be suspended for a period of sixty (60) days. The suspension period is deferred pending transfer or other disposition of this license consistent with the terms and conditions set forth in the CLA.

Licensee must adhere to all other conditions set forth in the ALJ's Order mailed January 3, 2011.

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BOARD SECRETARY