

Mailing Date: January 12, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-2879
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
ALPINE BEVERAGE MART, INC.	:	License No. D-3639
1422 Scalp Avenue	:	
Johnstown, PA 15904-3321	:	LID 40986
	:	

Counsel for Licensee: Myron I. Markovitz, Esquire
Gleason, Barbin & Markovitz, LLP
206 Main Street
Johnstown, PA 15901

Counsel for Bureau: Nadia L. Vargo, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
313 Mount Nebo Road
Pittsburgh, PA 15237

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from an Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ dismissed Citation No. 09-2879,

which charged that on November 5, 2009, Alpine Beverage Mart, Inc. (“Licensee”), by its servants, agents or employees, sold, furnished and/gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) male minor, eighteen (18) years of age, in violation of section 493(1) of the Liquor Code [47 P.S. § 4-493(1)].

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).

The Board has reviewed the record, including the ALJ’s Adjudication and Order, the Bureau’s Appeal of ALJ’s Adjudication, and the hearing transcript with Bureau’s contention in mind.

The record reveals the following relevant facts: On November 5, 2009, a University of Johnstown campus police officer notified the Bureau that three

(3) minors were found on campus loading a twelve (12)-pack of Olde English beer, 40-ounce bottles, and a twenty-four (24)-pack of Yuengling Lager, 12-ounce bottles, into a large duffle bag. [N.T. 8].

At the hearing, the parties agreed that if the enforcement officer were called to testify, she would testify to the following: (1) On November 5, 2009, Licensee's sales clerk did not check anyone's identification that evening and did not have anyone complete a declaration of age card; (2) the enforcement officer verified that none of the minors in question filled out declaration of age cards on November 5, 2009; (3) the enforcement officer obtained the sales receipt matching the items campus police saw the minors putting in a duffel bag; and (4) the receipt was obtained from Licensee's computer sales records. [N.T. 10-14].

At the hearing, the minor who purchased the alcohol, J.W., testified that he was born June 16, 1991, and that he was eighteen (18) years old at the time of the sale. [N.T. 23]. On November 5, 2009, J.W. went to the Licensee's distributorship with two (2) underage friends. [N.T. 23]. However, J.W. explained that he went into the licensed premises alone and was not questioned about his age. [N.T. 23-24]. J.W. purchased a twelve (12)-pack of Olde English 40s and a twenty-four (24)-pack of Yuengling Lager. [N.T. 24].

J.W. stated that he had been to the licensed premises about three (3) weeks prior to November 5, 2009, and his age was not questioned, nor did he complete a declaration of age card or any other paperwork on that occasion either. [N.T. 24-26, 37-39].

At the hearing, Licensee entered into evidence a video from October 28, 2009, depicting an individual who Licensee's employee, Tyler Williams, identified as J.W. [N.T. 92-95, 98, 115-116, 124]. Mr. Williams stated that on October 28, 2009, he scanned the minor's Virginia driver's license. [N.T. 116, 121]. When the driver's license twice failed to scan, Mr. Williams had the minor fill out a declaration of age card. [N.T. 120-121; Ex. L-1]. The card was filled out for a William Yeumans with an address in Virginia. [Ex. L-1].

Mr. Williams, however, was not the clerk on November 5, 2009. Daniel Derenzo was the clerk on November 5, 2009, but he did not testify. [N.T. 9, 125]. No declaration of age card was completed on November 5, 2009. [N.T. 23-24]. J.W. denied that he was the person depicted in the video photograph on October 28, 2009. [N.T. 49-50, 54-55]. He believed it showed a person he knew named Craig, with whom he often got confused. [N.T. 67]. J.W. denied knowing a William Yeamans, ever living in Virginia, or signing any card at the premises. [N.T. 77-79].

On appeal the Bureau avers that the ALJ should have sustained Count One of Citation No. 09-2879 because there was substantial evidence on the record that Licensee did not card the minor when the minor purchased alcoholic beverages, and therefore, the affirmative defense is not available to Licensee under the doctrine enunciated in Timmy's Corporation v. Bureau of Liquor Control Enforcement, 997 A.2d 419 (Pa. Cmwlth. 2010).

Section 493 of the Liquor Code makes it unlawful for a licensee to sell liquor, malt or brewed beverages to a minor. [47 P.S. § 4-493(1)]. There are four (4) forms of identification acceptable as proper proof of age under the Liquor Code: a valid photo driver's license or identification card issued by the Department of Transportation or by any other state, a valid armed forces of the United States identification card, or a valid photo passport or travel visa issued by the United States or a foreign country. [47 P.S. § 4-495(a)]. A minor's deception in presenting a false photo driver's license does not relieve a licensee from its obligation to require a minor to present identification and to fill in and sign a declaration of age card under subsection 495(e), or to photograph, photocopy, etc. the identification card under subsection 495(f), or use a transaction scan device under subsection 495(g). [47 P.S. § 4-495(e)-(g)]. The courts have consistently held that the Code provides only one (1) defense

against prosecution for services to minors -- compliance with section 495. 146, Inc. v. Pennsylvania Liquor Control Board, 107 Pa. Cmwlth. 79, 527 A.2d 1083, 1085 (1987). To allow a licensee to escape the consequences of the illegal sale by claiming deception would render the Liquor Code a nullity. Id. citing GTRT, Inc. Liquor License Case, 78 Pa. Cmwlth 584, 586-87, 467 A.2d 1233, 1234 (1983).

Additionally, in Timmy's Corp., the Commonwealth Court of Pennsylvania ruled that "Section 495(b) requires identification to be presented to the licensee every time an individual requests to purchase alcohol and it is not evidence that the person is of majority." Timmy's Corp., 997 at 423.

In the instant case, Licensee did not request any form of identification from the minor on November 5, 2009. Thus, Licensee did not adequately protect itself from fraud and/or present a valid defense to its actions and/or inactions. Applying the foregoing law to the facts of this case, the Board concludes that the ALJ committed an error of law or abused his discretion. Accordingly, the Board must reverse the decision of the ALJ to dismiss the Citation.

ORDER

The appeal of Bureau is granted.

The decision of the ALJ is reversed.

The case is remanded to the ALJ for the imposition of an appropriate penalty.

Board Secretary