

Mailing Date: March 16, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-0163
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
KILDARE’S WEST CHESTER, INC.	:	License No. R-9557
18-22 West Gay Street	:	
West Chester, PA 19380-3011	:	LID 50713
	:	
	:	

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**OPINION**

Kildare’s West Chester, Inc. (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Tania Wright (“ALJ”), mailed January 7, 2011, wherein the ALJ sustained Citation No. 10-0163 (“the Citation”) issued by

the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), and imposed a fine of three hundred dollars (\$300.00).

The Citation charged Licensee with violating section 13.102(a) of the Pennsylvania Liquor Control Board (“Board”) Regulations [40 Pa. Code § 13.102(a)] on January 6 and January 13, 2010, in that Licensee, by its servants, agents or employees, discounted the price of alcoholic beverages for a period or periods other than a consecutive period of time not to exceed two (2) hours in a business day.

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 her discretion, or if her decision was not based upon substantial evidence.

In its Appeal, Licensee essentially restates the standard of review in alleging that the ALJ “abused her discretion, committed an error of law and/or made a decision not supported by substantial evidence” in sustaining the Citation. No further basis for appeal was provided by Licensee.

It must be noted that section 17.21(b) of the Board’s Regulations [40 Pa. Code § 17.21(b)] provides that an appeal to the Board “shall be in the form

prescribed by the Board.”<sup>1</sup> It also requires, *inter alia*, that an appeal to the Board of a decision of the ALJ “shall include a concise enumeration and explanation, in the numbered paragraphs, as to each finding of fact which the appellant believes is not supported by substantial evidence” (emphasis added). [40 Pa. Code § 17.21(b)(4)]. Licensee’s Appeal, while concise, does not enumerate or explain a specific finding of fact of the ALJ not supported by substantial evidence; nor does it specify how the ALJ committed an error of law or abused her discretion. Such failure to follow the proper appeal procedures, as prescribed by section 17.21 of the Board’s Regulations [40 Pa. Code § 17.21], is grounds for dismissal at the discretion of the Board.

Nonetheless, 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 July 13, 2010, and concluded that the ALJ did not commit an error of law or abuse her discretion. The ALJ’s decision was supported by substantial evidence.

The record reveals that a Bureau enforcement officer, Christopher Keisling, testified that he conducted a series of undercover visits to the licensed establishment based upon a complaint of happy hour violations. [N.T.

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<sup>1</sup> The Board points Licensee’s attention to section 7 of the Appeal Form, which requires that the appellant “specify how the Administrative Law Judge committed an error of law or abused his/her discretion or how his/her decision was not based on substantial evidence” (emphasis added).

7-8]. On January 6, 2010, Officer Keisling arrived at the licensed premises at approximately 6:00 p.m. and observed a handwritten sign that advertised three (3) drink specials, which were in effect until midnight. [N.T. 9]. “Blue Moon” beer was three dollars (\$3.00); “Three Olives” vodka drinks were three dollars (\$3.00); and “Dirty Hoes,” a mixture of two (2) types of beer, were five dollars (\$5.00). [N.T. 9-10]. Upon entering, the officer ordered a “Blue Moon” from the bartender and paid three dollars (\$3.00) for it. [N.T. 11]. The officer departed the establishment around 7:00 p.m. [N.T. 11].

On January 13, 2010, Officer Keisling visited the licensed premises at approximately 6:30 p.m. and observed the same sign from the week prior advertising the same drinks specials. [N.T. 11, 13]. He stayed until 7:40 p.m. [N.T. 14]. During the course of his visit the officer purchased a “Blue Moon” for three dollars (\$3.00) and a “Dirty Hoe” for five dollars (\$5.00). [N.T. 12, 14]. The officer also spoke to a woman, Melissa, who was rendering service to patrons from behind the bar. [N.T. 12]. The officer asked about the normal pricing of the drinks being advertised, and Melissa informed him that a “Blue Moon” is typically four dollars and fifty cents (\$4.50); pricing of “Three Olives” drinks depends on the mixture; and a “Dirty Hoe” is normally eight dollars and

fifty cents (\$8.50). [N.T. 12]. Melissa also confirmed to the officer that the discounted drink prices were in effect until midnight. [N.T. 13].

The Board will first address Licensee's assertion that the ALJ committed an error of law and abused her discretion. Presumably Licensee means to argue on appeal, as it did at the hearing, that the only conduct prohibited by section 13.102 of the Board's Regulations [40 Pa. Code § 13.102] is the sale or service of alcoholic beverages at an unlawfully discounted price. In other words, Licensee interprets section 13.102(a) to require the Bureau to prove that a licensee actually sold discounted alcoholic beverages more than two (2) hours apart in a business day in order to establish a violation of the discount pricing practices.

Section 13.102 of the Board's regulations permits licensees to discount the price of alcoholic beverages for a period of time not to exceed two (2) hours in a business day. [40 Pa. Code § 13.102(a)]. Discount pricing that extends beyond two (2) hours is thus prohibited. An exception in section 13.102(b) provides that nothing in subsection (a) prohibits:

The offering for sale of one specific type of alcoholic beverage or drink per day or a portion thereof at a reduced price, if the offering does not violate subsection (a). For purposes of this section, a specific type of alcoholic beverage means either a specific registered brand of malt or brewed beverages, a type of wine, a

type of distilled spirits or a mixed drink. Examples of permissible drink discounts are found in Board Advisory Notice 16.

[40 Pa. Code § 13.102(b)(2)]. As further explained in Board Advisory Notice No. 16, which section 13.102 incorporates by reference, in addition to the “happy hour” discount pricing allowed for a two (2)-hour period in a business day, licensees may offer one (1) “daily drink special,” which is limited to a specific brand of malt or brewed beverage, such as “Blue Hound Pilsner,” but not “all draft” or “all bottled beer.” See Advisory Notice No. 16. Regarding spirits or mixed drinks, a permissible daily special would be “rum and cola” or “all brandy drinks,” but not “all Jackson’s products.” Id.

As is clear from a careful reading of the regulation, the conduct being proscribed by subsection (a) is “discount pricing practices.” [40 Pa. Code 40 § 13.102(a)]. Contrary to Licensee’s interpretation, the words “sale” and “serving” are not found in the general prohibition under subsection (a), although they are used in three (3) of the specific prohibitions under subdivisions (a)(1)-(4), as well as in the exception in subdivision (b)(1). In that context, “sale or serving, or both” is used to refer to a specific discount pricing practice, but is not the only prohibited act. Other conduct covered by the term “discount pricing practices” is identified in the exception in subdivision (b)(2) [40 Pa. Code § 13.102(b)(2)]. Subdivision (b)(2) allows “the offering for sale. . .”

of one daily drink special, as outlined in Advisory Notice No. 16, “if the offering does not violate subsection (a).” [40 Pa. Code § 13.102(b)(2)]. Therefore, implicit in subsection (b) is that an offer for sale can constitute a violation of subsection (a).

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 misapplication of the law, prejudice or bias, or that it was manifestly unreasonable. The ALJ correctly concluded that the Bureau did not have to prove discounted sales more than two (2) hours apart to establish a violation of section 13.102(a) of the Board’s Regulations [40 Pa. Code § 13.102(a)]. Rather, the uncontroverted evidence that the specials were offered was sufficient.

Having found no error of law or abuse of discretion, 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). Furthermore, 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).

In the present case, there was substantial evidence for the ALJ to sustain the Citation for a discount pricing practices violation. The testimony of Officer Keisling showed that Licensee advertised three (3) separate all-day drink specials via a sign on the exterior of the premises. The offer contained on the sign was corroborated by Officer Keisling's conversation with Licensee's bartender, who provided the regular pricing for the advertised beverages and

confirmed that the special prices were in effect until midnight. Even assuming the drink specials had just started upon the officer's arrival (6:00 p.m. on January 6 and 6:30 p.m. on January 13), the bartender's stated deadline of midnight was clearly more than two (2) hours away. Licensee offered no evidence to rebut the Bureau's evidence, which clearly established the offering of multiple drink specials for a period of time exceeding two (2) hours.

For the foregoing reasons, the Adjudication and Order of the ALJ sustaining the Citation and imposing a fine of three hundred dollars (\$300.00) is affirmed in all respects.

**ORDER**

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of three hundred dollars (\$300.00) has been paid.

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Board Secretary