Mailing Date: February 9, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 10-0667
v.	:	
POST 162 A.M.D.G. CATHOLIC WAR VETERANS OF PHILADELPHIA, PA 9859 Bustleton Avenue Philadelphia, Pa 19115-2611	:	License No. CC-6179 LID 2794

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O P I N I O N

Post 162 A.M.D.G. Catholic War Veterans of Philadelphia, PA ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge David Shenkle ("ALJ"), mailed December 9, 2010, wherein the ALJ sustained Citation

No. 10-0667 ("the Citation") issued by the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), and imposed a fine of three thousand fifty dollars ($3,050.00) and mandatory compliance with the Responsible Alcohol Management Program ("RAMP").

The first count of the Citation charged Licensee with violating section 13.102(a)(3) of the Pennsylvania Liquor Control Board ("Board") Regulations [40 Pa. Code § 13.102(a)(3)] on May 24, June 21 and July 18, 2009, by selling and/or serving an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited twelve (12)-ounce bottle beers and top shelf liquors were served for the set price of fifteen dollars ($15.00).

The second count of the Citation charged Licensee with violating sections 406(a)(4) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(4), 4-493(16)] on June 21, 2009, by selling, furnishing and/or giving alcoholic beverages between 3:00 a.m. and 7:00 a.m.

The third count of the Citation charged Licensee with violating section 499(a) of the Liquor Code [47 P.S. § 4-499(a)], on June 21, 2009, by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages after 3:30 a.m.

The fourth count of the Citation charged Licensee with violating section 499(a) of the Liquor Code [47 P.S. § 4-499(a)], on June 21, 2009, by permitting patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 3:30 a.m.

The fifth count of the Citation charged Licensee with violating sections 401(b) and 406(a)(1) of the Liquor Code [47 P.S. §§ 4-401(b), 406(a)(1)], on May 24, June 21, July 18, September 12, November 8, November 20, and November 21, 2009, by selling alcoholic beverages to nonmembers.

The sixth count of the Citation charged Licensee with violating section 13.102(a) of the Board Regulations [40 Pa. Code § 13.102(a)] on May 24, June 21 and July 18, 2009, by discounting the price of alcoholic beverages between midnight and 2:00 a.m.

The seventh count of the Citation charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] on November 20 and November 21, 2009, by selling, furnishing and/or giving alcoholic beverages to two (2) female minors, twenty years of age.

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 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 its Appeal, Licensee argues generally that the ALJ "abused his discretion, committed an error of law and/or made a decision not supported by substantial evidence" with respect to each of the seven (7) counts sustained in the Citation. No further basis for appeal was provided by Licensee.[1]

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 October 6, 2010, and concluded that the ALJ did not commit an error of law or abuse his discretion.

The record reveals that a Bureau enforcement officer, Sharon Rooney, testified that she conducted undercover visits to the licensed establishment on several occasions, including May 24, June 21, and July 18, 2009. [N.T. 14-19, 21-28, 28-33]. Relative to the first and sixth counts, the officer was served an

[1] 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).

indefinite amount of alcoholic beverages for the set price of fifteen dollars ($15.00) at various times between the hours of midnight and 1:30 a.m. on May 24, June 21, and July 18, 2009. [N.T. 17, 25, 32]. Officer Rooney was not a member of the club; nor was she asked to sign a guest list on May 24 and June 21, 2009, as noted in the fifth count. [N.T. 15, 23]. On June 21, 2009, the officer observed patrons being served alcoholic beverages after 3:30 a.m. inside the licensed premises, implicating the second, third and fourth counts. [N.T. 27]. Relative to the seventh count, on November 21, 2009, the officer observed alcoholic beverages being served to a group of young-looking nonmembers later determined to be minors. [N.T. 54, 90-104]. Officer Rooney testified that there was no food present on any of these occasions, including November 21, 2009, which was corroborated by the testimony of the underage patrons present on that date. [N.T. 95, 102].

As an affirmative defense to the first and sixth counts[2], Licensee presented evidence that the officer was actually in attendance during legitimate "catered events." Section 13.102(b)(1) of the Board's Regulations provides an exception to the discount pricing practices regulation for catered

[2] Because catering club licensees may serve alcoholic beverages to nonmember guests in a catered event, the "catered event" defense could potentially excuse the Licensee's sales to nonmembers as charged in the fifth count. In this case, however, there is no evidence to suggest that Officer Rooney was in fact a guest of the entertainment companies that were allegedly hosting these events; nor was she ever questioned as to her affiliation as a member or guest. Thus, Licensee's "defense" to the fifth count is meritless.

events arranged at least twenty-four (24) hours in advance. [40 Pa. Code § 13.102(b)(1)]. The definition of a catered event in section 5.83(a) of the Board's Regulations provides that:

> Catering, for the purposes of this section, means the furnishing of liquor or malt or brewed beverages, or both, to be served with food prepared on the premises or brought onto the premises already prepared, for the accommodation of groups of nonmembers who are using the facilities of the club by prior arrangement, made at least 24 hours in advance of the time for private meetings or functions, such as dances, card parties, banquets and the like; and which is paid for by the nonmembers.

[40 Pa. Code § 5.83(a)].

In order to succeed on an affirmative defense, the licensee has the burden to prove each element of the defense. Pennsylvania Liquor Control Bd. v. T.J.J.R., Inc., 548 A.2d 390 (Pa. Cmwlth. 1988). Thus, in order to avoid violating the Board's discount pricing practices, the licensee must prove the following to establish that a catered event occurred:

1. Food was provided as part of the event;
2. The event was arranged at least twenty-four (24) hours in advance of its occurrence;
3. The event was organized and paid for by someone other than the licensee; and
4. The agreement identified the approximate number of attendees.

Licensee submitted uncontroverted evidence to show all but the first element, that food was provided. To demonstrate the presence of food, Licensee provided weekly receipts for lo mein and pizza and offered the testimony of its commander, Gino Tripodi. Mr. Tripodi testified that he typically places a platter of lo mein on a table during the catered events. [N.T. 112].

Regarding the second, third and fourth counts, Licensee relied on the testimony of Mr. Tripodi and its vice commander in charge of security, Steve Blaker. Both witnesses rebutted Officer Rooney's testimony that she observed Licensee's bartender serving patrons alcoholic beverages as late as 3:55 a.m. Mr. Tripodi testified that Licensee's staff typically announces "last call" five (5) to fifteen (15) minutes before 3:00 a.m., at which time Mr. Tripodi collects the cash from the registers at the bar. [N.T. 140-141]. Mr. Tripodi's security employee then asks patrons to leave. [N.T. 141].

The Board will first address Licensee's basic assertion that the ALJ's decision was not based on substantial evidence. 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).

Clearly there is substantial evidence to support the ALJ's decision to sustain each count of the citation. In weighing the testimony of the enforcement officer and two (2) underage patrons against that of Licensee's witnesses, including the commander and vice commander of the club, the ALJ found the Bureau's witnesses to be more credible on the disputed issues of whether alcoholic beverages were served after 3:00 a.m. (applicable to the second count), whether patrons were allowed to possess alcoholic beverages on the licensed premises after 3:30 a.m. (applicable to the third and fourth counts), and whether food was served during the purported "catered events" (applicable to the first and sixth counts).[3] The Board will not overturn the ALJ's credibility determination.

Having found that the ALJ's decision was supported by substantial evidence, the Board turns its attention to whether the ALJ committed an error of law or abused his discretion. The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the

[3] The Bureau's evidence relative to the fifth and seventh counts was uncontroverted in the record.

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. Section 471 of the Liquor Code prescribes the penalty for violations of the type found in the first, third, fourth, fifth, and sixth counts of the Citation. The ALJ may 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]. For the second and seventh counts, section 471 provides for the imposition of a penalty consisting of license suspension or revocation and/or a fine of not less than one thousand dollars ($1,000.00) nor more than five thousand dollars ($5,000.00); however, the penalty relative to the seventh count is reduced, under mitigating circumstances which are applicable here, to 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). Id.

The ALJ in the instant case imposed the following fines: Count 1 - $350.00; Count 2 - $1,000.00; Count 3 - $250.00; Count 4 - $250.00; Count 5 - $250.00; Count 6 - $450.00; and Count 7 - $500.00 and RAMP compliance for one (1) year. The penalty relative to each of the seven (7) counts fell within the statutory guidelines under section 471 of the Liquor Code. [47 P.S. § 4-471]. Further contravening an abuse of discretion, the penalties were closer to the statutory minimum than the maximum, despite the presence of some aggravating circumstances that may have warranted more severe treatment.[4]

For the foregoing reasons, the Adjudication and Order of the ALJ sustaining the Citation and imposing a fine of three thousand fifty dollars ($3,050.00) and RAMP compliance for one (1) year is affirmed in all respects.

[4] Reaffirming the Board's observation in Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Post 162 A.M.D.G. Catholic War Veterans of Philadelphia, PA, Citation No. 05-1692 (July 5, 2007), Licensee should be advised that its actions may not conform to the "spirit" of section 5.83(a) of the Board's Regulations.

O R D E R

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of three thousand fifty dollars ($3,050.00) remains unpaid.

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

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Board Secretary