

Mailing Date: July 20, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-0921
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
WYCOMBE VINEYARDS, INC.	:	License No. LK-197
T/A WYCOMBE VINEYARDS &	:	
WINERY	:	
1391 FOREST GROVE ROAD	:	
FURLONG, PA 18925-1367	:	

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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), appeals the dismissal of Counts Two and Three of Citation No. 10-

0921 as set forth in the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), dated November 1, 2010.

The citation in the present matter contained three (3) separate counts; however, Count One was not appealed, and accordingly will not be addressed in the present Opinion. Count Two of the citation alleged that Licensee violated section 505.2(a)(6.1) of the Liquor Code [47 P.S. § 505.2(a)(6.1)] on August 27 and September 4, 2009, by furnishing and/or giving food for consumption off premises at a place other than its primary limited winery location.

Count Three of the citation alleged that Licensee violated section 505.2(a)(6.1) of the Liquor Code [47 P.S. § 505.2(a)(6.1)] on August 27, September 4, October 1, and October 31, 2009, by selling wine for consumption by the glass at a place other than its primary limited winery location.

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, 484 A.2d 413 (Pa. Cmwlth. 1984).

The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. It is well-settled that an abuse of discretion is 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. Sitoski v. Com., Dept. of Transp., Bureau of Driver Licensing, 11 A.3d 12 (Pa. Cmwlth. 2010).

On appeal, the Bureau submits the following two (2) issues for the Board's review:

- (1) Did the ALJ commit an error of law when he concluded that the law does not confine a limited winery's sales of food for on-premises consumption to its primary location?
- (2) Did the ALJ commit an error of law when he concluded that the law does not confine a limited winery's sales of wine by the glass to its primary location?

As an initial matter, on or about January 11, 2011, Licensee filed a response to the Bureau's appeal. In its response, Licensee argued that the ALJ committed no legal error and that the decision was supported by substantial evidence. Licensee further suggests that the Bureau's appeal is untimely because a copy of the Bureau's appeal was not mailed to the Licensee until December 27, 2010. Section 17.21(b)(2) of the Board's Regulations mandate that appeals shall be filed or postmarked within thirty (30) calendar days of the mailing date of the opinion and adjudication of the ALJ; failure to file or have the appeal postmarked within thirty (30) calendar days will result in dismissal of the appeal. [40 Pa. Code § 17.21(b)(2)]. In this matter, while the Bureau's appeal was not received by the Board until December 27, 2010, the envelope containing the appeal documents was postmarked on December 23, 2010. Accordingly, the present appeal is timely.

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the Notes of Testimony from the hearing of September 8, 2010 and the ALJ's Adjudication and Order, with the Bureau's contention in mind, and has concluded that the ALJ correctly dismissed Counts Two and Three. Accordingly, we affirm.

The burden of proof in a citation proceeding involving a violation of the Liquor Code is upon the Bureau and the Bureau must prove its case by a clear preponderance of the evidence. Omicron Enterprises, 68 Pa. Comwlth. 568, 449 A.2d 857 (1982). On appeal, the Bureau does not dispute any of the ALJ's factual findings.¹ Further, because this appeal involves a question of law the facts of the case are largely irrelevant to the Board's affirmance of the ALJ's decision; however the relevant undisputed facts of this case are as follows:

On August 27, 2009, Liquor Enforcement Officer Derrick Devaney ("Officer Devaney") conducted an undercover investigation of the Licensee's additional Board-approved location, situated at 22 Main Street in Doylestown (N.T. at 8). At that time Officer Devaney was served wine by the glass and observed other patrons receiving wine by the glass and consuming food. (N.T. at 12). Officer Devaney observed this same behavior on September 4, 2009 and October 1, 2009. (N.T. at 12-17). Licensee does not dispute that food was served to patrons, as well as wine by the glass.

¹ It should be noted that Licensee's response suggests that the Bureau's failure to delineate the Findings of Fact which the Bureau allege are not supported by substantial evidence violates the Board's Regulations and is grounds for dismissal. While this assertion would be true if the Bureau's appeal involved a factual dispute, this argument must be disregarded in circumstances such as this where the appeal concerns a pure question of law.

Licensee holds Limited Winery License No. LK-197 covering a primary location at 1391 Forest Grove Road, Furlong, Pennsylvania and an additional Board-approved location at 22 South Main Street #4, Doylestown, Pennsylvania. (Admin. Notice, N.T. 27). On or about November 3, 2009, Licensee submitted an e-mail request to the Board's Office of Chief Counsel seeking an Advisory Opinion. (N.T. 48-49). In this request, Licensee noted that it held a limited winery license covering a primary location and one (1) satellite location and asked for clarification regarding the permissible hours of operation for the primary and satellite locations. (N.T. 49, Exhibit L-10).

On December 24, 2009, the Board's Office of Chief Counsel rendered Advisory Opinion 09-491, which addressed Licensee's inquiry. In addition to providing clarification regarding the permissible hours of operation, the Advisory Opinion addressed the "possibility" of patrons consuming food at the satellite location raised by Licensee in its request. (N.T. 49-50, Exhibit C-4). The Opinion noted the general rule that sale of food for on-premises consumption, as well as wine sales by the glass, may only be conducted at the limited winery's primary location and that sales for consumption at satellite locations are prohibited. (Id.).

Licensee, via letter dated December 30, 2009, asked that the Board's Chief Counsel reconsider Advisory Opinion 09-491. (N.T. 17-18, Exhibit C-5). Specifically, Licensee asked the Board to reconsider its response concerning the need to vacate the premises after "sales hours." (Exhibit C-5). Licensee further asserted that the Board was incorrect when it noted, "Sales of food for on-premises consumption, as well as wine sales by the glass, may only be conducted at the limited winery's primary location; sales for consumption at satellite locations are prohibited." (Id.). Licensee argued that there is no authority for limiting the sale of food and wine by the glass to the primary location, and not permitting such sales to occur at the satellite location(s). (Id.).

On or about February 19, 2010, the Board's Chief Counsel issued Advisory Opinion 10-037 re-affirming its previously issued opinion. (Id.). This revised Advisory Opinion articulated that Chief Counsel's position was grounded in interpretation of the statute and not reliance on Board Regulations concerning sales on premises. (Id.).

In making its decision in this matter, the ALJ determined that Counts Two and Three of the citation did not state a cause of action because the law does

not confine a limited winery's sales of food for on-premises consumption and sales of wine by the glass to its primary location. In making this determination, the ALJ summarily ignored Advisory Opinions 09-491 and 10-037. The practice of disregarding a published Advisory Opinion is improper and cannot be condoned. Indeed, the Board vociferously reminds the ALJ that the section 211.1 of the Liquor Code [47 P.S. § 2-211.1] empowers the Board or its legal counsel to interpret the provisions of the Liquor Code. Under typical circumstances, such complete disregard for the Board's interpretation of the Liquor Code would be viewed as a clear error of law and an express abuse of discretion. However, under the unique circumstances of the present case, any such error is harmless because after careful review and thoughtful deliberation of the statutory provision at issue, the Board has reconsidered its prior interpretation and is constrained to agree with the ALJ's reading of section 505.2 of the Liquor Code. [47 P.S. §5-505.2].

In both Advisory Opinions 09-491 and 10-037 the Board determined that wine by the glass and the service of food were not permitted on the premises of a limited wineries satellite location based on the fact that, while sections 505.2(a)(6.1) and 505.2(a)(4) of the Liquor Code specifically mention sales by

the glass when discussing wine sales at the main winery and when the winery is selling under the authority of a wine exposition permit, section 505.2(a)(3) does not mention sales of wine by the glass when discussing sales at satellite locations. This had been the Board's position since shortly after limited wineries were given the ability to sell wine by the glass at their primary location by Act 239 of 2004. However, upon further review, the Board has determined that section 505.2(6.1), which allows for the sale of "food for consumption on or off the licensed premises and sell by the glass only wine and alcoholic ciders" does not make any distinction between a limited winery's primary location and an additional Board approved location.

The Board recognizes that this shift in interpretation alters a previously defined landscape. However, as with any precedent, interpretations are subject to change over time. As Chief Justice Benjamin Cardozo observed:

We tend sometimes, in determining the growth of a principle or a precedent, to treat it as if it represented the outcome of a quest for certainty. That is to mistake its origin. Only in the rarest instances, if ever, was certainty either possible or expected. The principle or the precedent was the outcome of a quest for probabilities. Principles and precedents, thus generated, carry throughout their lives the birthmarks of their origin. They are in truth provisional hypotheses, born in doubt and travail, expressing the adjustment which commended itself at the moment between competing possibilities.

Cardozo, *The Growth of the Law* at 69-70 (1924).

It should be noted that the Board's modified interpretation is prompted and supported by the recent enactment of Act 11 of 2011, which explicitly articulated the intent of the Pennsylvania General Assembly to permit service of food and wine by the glass at a limited winery's board approved locations.

Accordingly, the decision of the ALJ is affirmed.

ORDER

The decision of the ALJ in regard to Counts Two and Three is affirmed.

The appeal of Bureau is dismissed.

Board Secretary