

Mailing Date: May 18, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-1713
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	License No. H-6116
v.	:	
	:	
DPT PROPERTIES, LLC	:	LID 58864
t/a Econolodge	:	
5055 William Flynn Highway	:	
Gibsonia, PA 15044-8402	:	

Counsel for Licensee: Stanley J. Wolowski, Esquire (on appeal)
 Flaherty & O’Hara
 610 Smithfield Street
 Suite 300
 Pittsburgh, PA 15222

Counsel for Bureau: Emily L. Gustave, Esquire
 Pennsylvania State Police,
 Bureau of Liquor Control Enforcement
 313 Mt. Nebo Road
 Pittsburgh, PA 15237

OPINION

DPT Properties, LLC t/a Econolodge (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Robert F. Skwaryk (“ALJ”), wherein the ALJ sustained Citation No. 10-1713 (“the Citation”) issued

by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“ the Bureau”) in all respects, and revoked Licensee’s license effective March 28, 2011. On appeal, Licensee argues that the ALJ lacked jurisdiction over this matter because Licensee’s license had been cancelled and no longer existed at the time of the hearing and at the time when the ALJ issued his Adjudication and Order.

The Citation set forth two (2) counts. Count 1 of the Citation alleged that, on June 2, 2010, Licensee, by its servants, agents or employees, sold alcoholic beverages after its hotel liquor license expired on May 31, 2010, and had not been renewed and/or validated, in violation of sections 491(1), 492(2), and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2), and 4-493(16). (N.T. 5; Ex. C-4). Count 2 of the Citation alleged that, during the period of September 1, 2009 through May 31, 2010, Licensee was not the only one (1) pecuniarily interested in the operation of the licensed business, in violation of section 404 of the Liquor Code [47 P.S. § 4-404] and section 1.1 of the Board’s Regulations [40 Pa. Code § 1.1]. (N.T. 5; Ex. C-4).

The record in this case reveals the following. On December 1, 2009, Officer Rubino, an enforcement officer for the Bureau, was assigned to start

investigating Licensee after a complaint was received by the Bureau's district office. (N.T. 6, 8).

On February 22, 2010, Officer Rubino received a telephone message from an individual by the name of Richard Marlow regarding a letter that he had received from the Pennsylvania Liquor Control Board ("Board"). (N.T. 10). Officer Rubino returned Mr. Marlow's call the next day, and Mr. Marlow indicated that he was doing some contracting work at the licensed premises and had received a letter from the Board that he did not understand. (N.T. 10). When Officer Rubino questioned Mr. Marlow as to whether he was the owner of the licensed premises or a corporate officer in a corporation that owned the licensed premises, Mr. Marlow indicated that he was neither. (N.T. 10) Officer Rubino asked Mr. Marlow to send him a copy of the letter so that he could review it, and Mr. Marlow indicated that he would do so. (N.T. 10). However, Officer Rubino never received a copy of the letter. (N.T. 10).

Officer Rubino subsequently inquired with the Board regarding Mr. Marlow's involvement with the licensed premises, and the Board confirmed that Mr. Marlow was not listed as a manager or a corporate officer for the licensed premises. (N.T. 11, 13; Ex. C-8). Rather, Dr. Peter Tanzer was listed as

Licensee's sole member, and Joshua S. Tanzer was listed as the Board-approved manager. (N.T. 11, 13; Ex. C-8).

On June 2, 2010, at approximately 7:50 p.m., Officer Rubino entered the licensed premises and observed a woman serving alcohol to four (4) patrons. (N.T. 8). While at the licensed premises, Officer Rubino purchased a shot of Jack Daniels whiskey for three dollars and fifty cents (\$3.50) and a twelve ounce (12 oz.) bottle of Miller Lite for three dollars (\$3.00). (N.T. 9). Licensee's license had expired on May 31, 2010, and had not been renewed as of June 2, 2010. (N.T. 8, 13; Ex. C-7).

On June 3, 2010, Officer Rubino spoke with Dr. Tanzer. (N.T. 11). At that time, Dr. Tanzer admitted that he was permitting Mr. Marlow to operate the licensed premises and retain the profits in order to recoup money owed to him for performing construction work at the premises. (N.T. 11-12). Dr. Tanzer also admitted that Mr. Marlow's son was acting as the manager of the licensed premises without Board approval. (N.T. 12). Further, Dr. Tanzer acknowledged that he had entered the premises on June 3, 2010, retrieved the license, and gave the license to attorney R.J. O'Hara to return to the Board for safekeeping. (N.T. 12-13). That same day, Officer Rubino spoke with Mr. O'Hara, who

indicated that he was planning to place Licensee's license into safekeeping so as to prevent Mr. Marlow from continuing to run the operation. (N.T. 14).

On June 30, 2010, Officer Rubino received a call from Mr. O'Hara indicating that the license was still in a non-renewed status due to tax issues. (N.T. 15). Mr. O'Hara also indicated to Officer Rubino that Dr. Tanzer had removed Mr. Marlow from the licensed premises and that the entire hotel and bar had closed. (N.T. 15).

On July 6, 2010, Officer Rubino went to the licensed premises and observed that the licensed premises was closed. (N.T. 15). At that time, there was nobody around, and the premises appeared to have been vacant for some time. (N.T. 15). Officer Rubino completed his investigation on July 26, 2010. (N.T. 6).

On August 3, 2010, the Bureau sent a notice of violation letter to Licensee via first class and certified mail; however, that letter was returned by the postal authorities with a notation indicating that Licensee had moved and left no forwarding address. (N.T. 5; Ex. C-1 – C-3). On August 20, 2010, the Bureau issued the Citation to Licensee. (N.T. 5; Ex. C-4). The Bureau sent the Citation to Licensee via certified mail on August 20, 2010. (N.T. 5; Ex. C-5). The Bureau resent the Citation via certified mail to Peter Tanzer on September 1, 2010;

however, the Citation was returned as unclaimed. (N.T. 5; Ex. C-5). The Bureau again resent the Citation via first class mail to Peter Tanzer on October 5, 2010. (N.T. 5; Ex. C-5). Thereafter, Officer Rubino verified that the address to which the notice of violation letter and Citation were mailed was Licensee's correct address. (N.T. 7; Ex. C-6).

On November 29, 2010, a citation hearing notice was sent to Licensee via first class and certified mail; however, the notice was returned as undeliverable.

A hearing on the Citation was held before the ALJ on January 13, 2011, in Pittsburgh, Pennsylvania. The Bureau, represented by counsel, presented the testimony of Officer Rubino at the hearing. Neither Licensee nor Licensee's counsel appeared at the hearing.

During the hearing, the ALJ entered into the record a copy of a letter that Licensee's counsel had submitted by mail prior to the hearing. The letter was originally sent to the Board's Director of Licensing on January 7, 2011 and provided, in pertinent part, as follows:

The hotel license expired on May 31, 2010, and it has not been renewed.

The entire hotel and bar/restaurant, for which the hotel license was issued, is closed. The property has been taken over by the bank. Thus, this licensee has no right to occupy the premises for which the license was issued.

Although the [Board], pursuant to Section 470(a) of the Liquor Code [47 P.S. § 4-470(a)] has the discretion to accept a renewal application filed within two years after the expiration date of the license, [Licensee] has no interest in re-opening a hotel at that location.

Accordingly, the licensee is relinquishing any right to renew this hotel license. As such, please accept this license for cancellation.

(N.T. 4, 17, Ex. C-10).

On January 11, 2011, the Board's Director of Regulatory Affairs sent Licensee a response letter providing as follows:

We are in receipt of your correspondence dated January 7, 2011, advising that the licensee is relinquishing any right to renew the license, and that the license should be cancelled.

Accordingly, license number H-6116 is hereby cancelled and our records have been updated.

(Admin. Notice).

By Adjudication and Order mailed February 23, 2011, the ALJ sustained both counts of the Citation and revoked Licensee's license. Licensee now appeals from the ALJ's Adjudication and Order.

Pursuant to section 471 of the Liquor Code, 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” as such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Worker’s Compensation Appeal Board (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).

Before the Board, Licensee argues that the ALJ no longer retained jurisdiction to hold a hearing on and adjudicate the Citation after it voluntarily submitted its license for cancellation and the license was accepted for cancellation by the Board. Licensee further argues that this issue is not moot because section 1.5 of the Board’s Regulations allows the Board to consider the reputation of an applicant for a new license, which includes whether any previous licenses held by the applicant have been revoked.¹

¹ Licensee does not challenge the merits of the ALJ’s Adjudication and Order, nor does Licensee argue that it failed to receive proper notice of the charges set forth in the Citation or of the time and place for the hearing.

In response, the Bureau argues that because the conduct which gave rise to the Citation occurred prior to the cancellation of the license and when the hotel was still in operation, the ALJ retained jurisdiction to hold a hearing on and adjudicate the Citation in this matter pursuant to section 471 of the Liquor Code [47 P.S. § 4-471]. The Bureau also points out that Licensee fails to cite to case law or any other authority to support its argument that the ALJ lacked jurisdiction.

After careful consideration, the Board agrees with the Bureau that the ALJ retained jurisdiction to hold a hearing on and adjudicate the Citation, even after Licensee voluntarily submitted its license for cancellation and the license was accepted for cancellation by the Board.

The jurisdiction of administrative law judges over citation matters is governed by section 471 of the Liquor Code. Section 471(a) gives the Bureau the authority to issue citations to licensees for violations of the Liquor Code, the Board's Regulations, or other laws of the Commonwealth or Federal Government. Specifically, section 471(a) provides that:

Upon learning of any violation of this act or any laws of this Commonwealth relating to liquor, alcohol or malt or brewed beverages, or of any regulations of the board adopted pursuant to such laws, or any violation of any laws of this Commonwealth or of the Federal Government relating to the payment of taxes on

liquor, alcohol or malt or brewed beverages by any licensee within the scope of this article, his officers, servants, agents or employes, or upon any other sufficient cause shown, the enforcement bureau may, within one year from the date of such violation or cause appearing, cite such licensee to appear before an administrative law judge, not less than ten nor more than sixty days from the date of sending such licensee, by registered mail, a notice addressed to him at his licensed premises, to show cause why such license should not be suspended or revoked or a fine imposed, or both. The bureau shall also send a copy of the hearing notice to the municipality in which the premises is located.

[47 P.S. 4-471(a)]. Moreover, section 471(b) gives administrative law judges the authority to hold hearings on citations and issue adjudications and orders suspending or revoking a license, or imposing a fine. Specifically, section 471(b) provides, in pertinent part, that:

Hearing[s] on . . . citations shall be held in the same manner as provided herein for hearings on applications for license. Upon such hearing, if satisfied that any such violation has occurred or for other sufficient cause, the administrative law judge shall immediately suspend or revoke the license, or impose a fine of not less than fifty dollars (\$50) nor more than one thousand dollars (\$1,000), or both, notifying the licensee by registered letter addressed to his licensed premises.

[47 P.S. § 4-471(b)].

Here, the Bureau issued the Citation to Licensee, pursuant to section 471(a), on August 20, 2010. Once the Bureau issued the Citation, the ALJ was

vested with jurisdiction, pursuant to section 471(b), to hold a hearing on and adjudicate the Citation.

Although Licensee's license was voluntarily submitted and then accepted for cancellation prior to the hearing and issuance of the Adjudication and Order in this matter, this did not divest the ALJ of jurisdiction to proceed with the hearing and adjudicate the Citation. At the time that Licensee submitted its license for cancellation, Licensee's license had already expired, and had not been renewed. However, section 470(a) of the Liquor Code [47 P.S. § 4-470(a)] gives the Board the discretion to accept a renewal application within two (2) years after the expiration date of the license. Specifically, section 470(a) provides, in pertinent part, that:

the board, in its discretion, may accept nunc pro tunc a renewal application filed less than sixty days before the expiration date of the license with the required fees, upon reasonable cause shown and the payment of an additional filing fee of one hundred dollars (\$100.00) for late filing: And provided further, That except where the failure to file a renewal application on or before the expiration date has created a license quota vacancy after said expiration date which has been filled by the issuance of a new license, after such expiration date, but before the board has received a renewal application nunc pro tunc within the time prescribed herein the board, in its discretion, may, after hearing, accept a renewal application filed within two years after the expiration date of the license with required fees upon the payment of an additional filing fee of two hundred fifty dollars (\$250.00) for late filing.

[47 P.S. § 4-470(a) (emphasis added)]. Notably, there is no language in the Liquor Code or the Board's Regulations that gives the Board the authority to accept a license for immediate cancellation so as to divest the licensee of the right to seek renewal of the license prior to the expiration of the two (2)-year period provided for in section 470(a). This means that even where a licensee has indicated to the Board that it has no intention of renewing a license, the licensee, or a creditor of the licensee, could later come back and seek to renew the license, so long as the two (2)-year period has not elapsed. Therefore, contrary to what Licensee's argument seems to imply, Licensee's license did not immediately cease to exist at the time when it was accepted for cancellation by the Board. Rather, had Licensee's license not been revoked by the ALJ, the license would have remained in existence and could have been renewed, upon payment of the applicable late fees, up until May 31, 2012.

Because Licensee's license remained in existence and could have been renewed even after the license was voluntarily submitted for cancellation and then accepted by the Board, the ALJ retained jurisdiction to hold a hearing on and adjudicate the Citation pursuant to section 471(b). The ALJ also retained the authority, pursuant to section 471(b), to impose the penalty of revocation,

the effect of which is to preclude Licensee from renewing the license, with regard to the Citation.

Furthermore, even assuming that Licensee's license did cease to exist upon being accepted for cancellation by the Board, the Board does not believe that the result in this case would change. Section 471(b) does not expressly resolve the issue of whether an administrative law judge retains jurisdiction to hold a hearing and adjudicate a citation issued to a licensee when the licensee's license no longer exists; however, there is language in section 471(b) as well as other portions of the Liquor Code from which it can easily be inferred that the General Assembly intended for administrative law judges to retain jurisdiction in such situations.

Section 471(b) of the Liquor provides, in pertinent part, that:

Any licensee whose license is revoked shall be ineligible to have a license under this act until the expiration of three years from the date such license was revoked. In the event a license is revoked, no license shall be granted for the premises or transferred to the premises in which the said license was conducted for a period of at least one year after the date of the revocation of the license conducted in the said premises, except in cases where the licensee or a member of his immediate family is not the owner of the premises, in which case the board may, in its discretion, issue or transfer a license within the said year.

[47 P.S. § 4-471(b)]. Moreover, section 404 of the Liquor Code [47 P.S. § 4-404] requires that an applicant for a new hotel, restaurant, or club liquor license, or the transfer of such a license, be a person of good repute. Further, pursuant to section 1.5 of the Board's Regulations [40 Pa. Code § 1.5], the Board may consider the citation history of an applicant with regard to other licenses issued by the Board when determining whether the applicant is a person of good repute.

The General Assembly has, thus, created a statutory scheme whereby a licensee's violations of the Liquor Code, the Board's Regulations, or other laws of the Commonwealth or Federal Government not only affect the ability of the person or entity to continue holding and operating under its existing license, but also affect the ability of the person or entity to obtain another license in the future. If the Board were to adopt Licensee's argument and conclude that administrative law judges are without jurisdiction under section 471(b) to hold a hearing and adjudicate a citation once a licensee's license ceases to exist, this would allow licensees to avoid the consequences of their actions as licensees merely by submitting their licenses for cancellation, knowing that such requests can be reversed as long as the two (2)-year window has not expired, and render the provisions discussed above meaningless. However, it is a basic

principle of statutory construction that a statute must be construed, if possible, to give meaning to all of its terms. [1 Pa. C.S. § 1921(a)]; Pennsylvania Liquor Control Board v. Pittsburgh Public Theater Corp., 459 A.2d 65, 66 (Pa. Cmwlth. 1983). Therefore, the Board must reject Licensee's argument. Where a licensee voluntarily submits its license for cancellation in the face of a pending citation, this does not preclude an administrative law judge from holding the licensee accountable for conduct that occurred prior to when the license was submitted for cancellation.

For the foregoing reasons, the Board concludes that the ALJ retained jurisdiction to hold a hearing on the Citation in the present matter and issue his Adjudication and Order revoking Licensee's license.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is denied.

Licensee's license is revoked effective March 28, 2011.

Board Secretary