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PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : : : : : :	Citation No. 10-1722
v.		
3001 CASTOR, LLC 3001 Castor Ave. Philadelphia, PA 19134-6203	: : : : :	License No. R-9527 LID 56341

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OPINION

3001 Castor, LLC ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), wherein the ALJ sustained Citation No. 10-1722 ("the Citation") issued by the Pennsylvania State

Police, Bureau of Liquor Control Enforcement ("Bureau") in all respects, and imposed a total fine of four hundred dollars ($400.00).

On August 5, 2010, the Bureau issued a Notice of Violation letter to Licensee indicating that information had been obtained during an investigation regarding certain alleged violations which could result in the issuance of a citation to show cause why Licensee's license should not be suspended or revoked or a fine imposed, or both. (N.T. 23, 25; Ex. B-1). On August 17, 2010, the Bureau issued the Citation, which set forth three (3) counts.

Count 1 of the Citation alleged that on April 29, May 29, June 25, and July 18, 2010, Licensee, by its servants, agents, or employees, permitted smoking in a public place where smoking was prohibited, in violation of section 471 of the Liquor Code [47 P.S. § 4-471] and section 637.6(a)(2) of the Clean Indoor Air Act [35 P.S. § 637.6(a)(2)].

Count 2 of the Citation alleged that on April 29, May 29, June 25, and July 18, 2010, Licensee, by its servants, agents, or employees, failed to post signage as required by the Clean Indoor Air Act, in violation of section 471 of the Liquor Code and section 637.6(a)(1) of the Clean Indoor Air Act [35 P.S. § 637.6(a)(1)].

Count 3 of the Citation alleged that on May 29, 2010, Licensee, by its servants, agents, or employees, furnished an unlimited or indefinite amount of

free alcoholic beverages for a period to two (2) hours, in violation of section 13.102 of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 13.102]. (N.T. 23, 25; Ex. B-2).

A hearing on the Citation was held before the ALJ on December 8, 2010, in Plymouth Meeting, Pennsylvania. Enforcement officers Brian Farrow and Eric Gall appeared at the hearing and testified on behalf of the Bureau. No witnesses appeared to testify on behalf of Licensee, although Licensee was represented by counsel at the hearing. Thereafter, the ALJ issued his Adjudication and Order, mailed January 28, 2011.

The record reveals that on April 29, 2010, at about 4:00 p.m., Officer Gall went to the licensed premises to investigate a complaint initiated by the City of Philadelphia, Department of Public Health. (N.T. 13). Upon entering the premises, Officer Gall observed ashtrays set up around the bar area. (N.T. 11-12). Officer Gall did not initially see anyone smoking. (N.T. 13). However, after some time had elapsed, Officer Gall observed a woman walking past him smoking a cigarette. (N.T. 13). This woman later returned and stood behind the bar smoking a cigarette. (N.T. 13). Officer Gall did not observe any "no smoking" signs posted at the licensed premises. (N.T. 13).

On May 29, 2010, Officer Gall and a second officer entered the licensed premises at approximately 7:40 p.m. (N.T. 14). The officers were asked for identification and required to pay a cover charge. (N.T. 14). Upon entering, Officer Gall observed ashtrays set up on small tables positioned around the stage. (N.T. 15). He also observed two (2) or three (3) individuals smoking cigarettes at the bar area. (N.T. 15). Officer Gall did not observe any "no smoking" signs posted at the licensed premises. (N.T. 16). At approximately 7:50 p.m., the disc jockey announced that there would be an open bar for two (2) hours on Corona and Corona Light bottled beer. (N.T. 16-17). When Officer Gall questioned the bartender about the open bar, the bartender explained that he could have as much Corona or Corona Light as he wanted for no price or zero dollars ($0.00). (N.T. 17). Officer Gall ordered and was served a bottle of Corona for no charge. (N.T. 18-20). He later ordered and was served a second bottle of Corona for no charge. (N.T. 18-20).

On June 25, 2010, Officer Gall entered the licensed premises at approximately 3:40 p.m. (N.T. 20). Upon entering, he observed several ashtrays containing cigarette butts and ashes. (N.T. 21). He also observed several patrons smoking cigarettes inside the premises. (N.T. 21). Officer Gall

did not observe any "no smoking" signs posted at the licensed premises. (N.T. 21).

On July 18, 2010, Officer Farrow and a second officer entered the licensed premises. (N.T. 5-6). Upon entering, Officer Farrow smelled tobacco smoke. (N.T. 6). He looked around and saw several ashtrays containing discarded cigarettes and cigars. (N.T. 6). He also observed some patrons seated around the bar area smoking cigarettes. (N.T. 6). He did not observe any "no smoking" signs posted at the licensed premises. (N.T. 7).

Licensee presented evidence indicating that it submitted an "Application for Exception for Cigar Bar, Drinking Establishment, or Tobacco Shop" under the Clean Indoor Air Act, which was received by the Pennsylvania Department of Health on November 30, 2009. (N.T. 40, 42; Ex. L-1). Licensee also presented evidence indicating that, on December 16, 2009, the Department of Health sent a letter returning Licensee's application, advising Licensee that the Clean Indoor Air Act does not apply to the City of Philadelphia, and advising Licensee that the City of Philadelphia enacted its own Clean Indoor Air ordinance, the Clean Indoor Air Worker Protection Law [Philadelphia Code §§ 10-602 – 10-606, as amended], which became effective on September 14, 2006. (N.T. 41-42; Ex. L-2). Licensee's counsel indicated that Licensee subsequently applied for a

waiver with the City of Philadelphia, Department of Public Health, but that the application was returned with a letter stating that no more applications were being accepted for smoking waivers. (N.T. 41).

The Bureau presented an attestation from the City of Philadelphia, Department of Public Health, indicating that Licensee did not possess a valid waiver from the City's Clean Indoor Air Worker Protection Law on April 29, May 29, June 25, or July 18, 2010. (N.T. 22-23; Ex. B-3).

Based on the record, the ALJ concluded that Licensee violated section 471 of the Liquor Code by permitting smoking in a public place where smoking is prohibited and by failing to post signage as required on April 29, May 29, June 25, and July 18, 2010. The ALJ also concluded that Licensee violated section 13.102 of the Board's Regulations by furnishing unlimited free alcoholic beverages on May 29, 2010. Accordingly, the ALJ sustained all three (3) counts set forth in the Citation. The ALJ imposed a fine of three hundred dollars ($300.00) as to Counts 1 and 2, and a fine of one hundred dollars ($100.00) as to Count 3. 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). Furthermore, the ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Board of Probation and Parole, 510 A.2d 877 (Pa. Cmwlth. 1986).

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 regard to each of the conclusions of law reached in the Adjudication. Although Licensee did not provide any further explanation for the basis of its appeal, the Board will conduct a general administrative review of the ALJ's Adjudication and Order.

The Board has reviewed the ALJ's Adjudication and Order, the Notes of Testimony and Exhibits presented during the hearing held in this matter, and Licensee's appeal, with Licensee's contentions in mind, and has concluded that

the ALJ did commit an error of law by sustaining some of the counts set forth in the Citation.

Licensee first challenges the ALJ's Adjudication and Order to the extent that it sustained Counts 1 and 2 of the Citation. Through the charges set forth in Counts 1 and 2 of the Citation, the Bureau alleged that Licensee violated section 637.6(a)(1) and (2) of the Clean Indoor Air Act and that such violations provided "other sufficient cause" for issuing a citation pursuant to section 471 of the Liquor Code.

Section 471 of the Liquor Code states, in part, that the Bureau may issue a citation and order a licensee to appear before an administrative law judge "upon any other sufficient cause shown." [47 P.S. § 4-471(a)]. This catch-all phrase was specifically included in the Liquor Code to provide the ample powers of enforcement needed to ensure the protection of the public welfare, health, peace and morals of the people of the Commonwealth. Such a broad provision is required because "it is almost impossible to anticipate all of the actions that may justify enforcement." In Re Quaker City Development Co., 365 A.2d 683 (Pa. Cmwlth. 1976). Consequently, the Bureau has been assigned the task of monitoring all conduct reasonably related to the sale and use of

alcoholic beverages, not just enforcing the laws directly related to the sales of liquor and malt or brewed beverages.

The courts have held that "other sufficient cause shown" includes a variety of conduct not expressly prohibited by the statute but related to the sale and use of alcoholic beverages. Examples of prohibited conduct include drug trafficking, prostitution, gambling and disorderly conduct. Pennsylvania Liquor Control Board v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988) (drug trafficking); V.J.R. Bar Corp. v. Pennsylvania Liquor Control Board, 480 Pa. 322, 390 A.2d 163 (1978) (gambling); Tahiti Bar, Inc. Liquor License Case, 395 Pa. 355, 150 A.2d 112 (1959) (prohibiting association between entertainers and patrons); In re Ciro's Lounge, Inc., 358 A.2d 141 (Pa. Cmwlth. 1976) (noisy and disorderly conduct); Reiter Liquor License Case, 98 A.2d 465 (Pa. Super. 1953) (presence of prostitutes, lewd acts, obscene language, and noisy and disorderly conditions on premises). Each of these activities, when conducted in a licensed establishment, disrupts the orderly and peaceful sales and use of alcoholic beverages. Thus, because the troublesome conduct occurs at a licensed premises, the Bureau has the authority to take action.

For "other sufficient cause" cases, the Bureau must prove by a preponderance of the evidence, in addition to the elements of the underlying

offense, that the licensee knew or should have know about the activity on or about its licensed premises, and failed to take substantial affirmative steps to curb the activity. [See TLK, supra].

Section 637.6(a)(2) of the Clean Indoor Air Act provides that it is a violation of that Act to "[p]ermit smoking in a public place where smoking is prohibited." [35 P.S. § 637.6(a)(2)]. Moreover, section 637.6(a)(1) of the Clean Indoor Air Act provides that it is a violation of that Act to "[f]ail to post a sign as required" by section 637.4 of the Act [35 P.S. § 637.4].[1] [35 P.S. § 637.6(a)(1)].

If the Bureau had proven that Licensee violated the above sections of the Clean Indoor Air Act, the Board would have been inclined to agree that such violations constitute "other sufficient cause" under section 471 of the Liquor Code. However, section 637.11(b) of the Clean Indoor Air Act [35 P.S. § 637.11] specifically states that the Act does not apply to "a city of the first class." Because the licensed premises is located in the City of Philadelphia, which is a

[1] Section 637.4 of the Clean Indoor Air Act provides, in pertinent part, that "'Smoking' or 'No Smoking' signs or the international 'No Smoking' symbol, which consists of a pictorial representation of a burning cigarette in a circle with a bar across it, shall be prominently posted and properly maintained where smoking is regulated by this act by the owner, operator, manager or other person having control of the area." [35 P.S. § 637.4].

city of the first class, the Clean Indoor Air Act does not apply to Licensee. Therefore, Licensee could not have violated the Clean Indoor Air Act.

The Board recognizes that evidence was presented at the hearing establishing that the Clean Indoor Air Worker Protection Law, which was enacted by the City of Philadelphia and which contains prohibitions and requirements similar to the Clean Indoor Air Act,[2] applies to Licensee. Significantly, however, the Bureau never amended the Citation, prior to or at the hearing, to charge Licensee with violating the Clean Indoor Air Worker Protection Law instead of the Clean Indoor Air Act. Therefore, the Bureau failed to prove the charges actually set forth in Counts 1 and 2 of the Citation. Accordingly, the Board concludes that the ALJ erred in sustaining Counts 1 and 2 of the Citation.

Licensee also challenges the ALJ's Adjudication and Order to the extent that it sustained Count 3 of the Citation. Count 3 of the Citation charged

[2] The Clean Indoor Air Worker Protection Law prohibits smoking in "any Enclosed Area to which the general public is invited or in which the general public is routinely permitted, including but not limited to: . . . Food or Beverage Establishments."[2] [Philadelphia Code § 10-602(3)(a.1)(iv)]. However, it does create an exception whereby a "Drinking Establishment" can obtain a waiver from the prohibition on smoking. In order to obtain such a waiver, the "Drinking Establishment" must satisfy certain conditions, including, among others, "appl[ying] for a waiver from the Health Department within ninety (90) days of the effective date of the Ordinance." [Philadelphia Code § 10-602(3)(b.5)]. The Clean Indoor Air Worker Protection Law also requires "the owner, operator, manager, employer or other person in control in every place where smoking is regulated" to take certain actions, including "[p]ost[ing] 'No Smoking' signs and other signs relating to smoking on the premises in compliance with regulations to be promulgated by the Health Department." [Philadelphia Code § 10-602(5)(a.1)].

Licensee with furnishing an unlimited or indefinite amount of free alcoholic beverages for a period to two (2) hours on May 29, 2010, in violation of section 13.102 of the Board's Regulations.

Section 13.102 of the Board Regulations governs discount pricing practices and provides as follows:

> (a) *General*. Retail licensees may discount the price of alcoholic beverages for a consecutive period of time not to exceed 2 hours in a business day, but may not engage in discount pricing practices between 12 midnight and the legal closing hour. ***Retail licensees may not engage in the following discount pricing practices unless specifically excepted in subsection (b)***:
>
> (1) The sale or serving, or both, of more than one drink of liquor, wine, or malt or brewed beverages at any one time to any one person, for the price of one drink.
>
> (2) The sale or serving, or both, of an increased volume of one drink of liquor, wine, or malt or brewed beverages without a corresponding and proportionate increase in the price for the drink.
>
> ***(3) The sale or serving, or both, of an unlimited or indefinite amount of liquor, wine, or malt or brewed beverages for a set price.***
>
> (4) The pricing of alcoholic beverages in a manner which permits the price to change within the 2-hour period.
>
> (b) *Exceptions*. Nothing in subsection (a) prohibits:

(1) The sale or serving, or both, of an unlimited or indefinite amount of liquor, wine or malt or brewed beverages for a fixed price for catered events which have been arranged at least 24 hours in advance.

(2) The offering for sale of one specific type of alcoholic beverage or drink per day or 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 (emphasis added)].

Here, Officer Gall testified as to the following. He and a second officer entered the licensed premises at approximately 7:40 p.m., on May 29, 2010. They were asked for identification and required to pay a cover charge. Around approximately 7:50 p.m., the disc jockey announced that there would be an open bar for two (2) hours on Corona and Corona Light bottled beer. Upon questioning, the bartender explained to Officer Gall that he could have as much Corona or Corona Light bottled beer as he wanted for no price or zero dollars ($0.00). Officer Gall ordered and was served a bottle of Corona for no charge, and he later ordered and was served a second bottle of Corona for no charge.

Officer Gall's testimony constitutes substantial evidence establishing that Licensee sold and served an unlimited or indefinite amount of alcohol for a set price on May 29, 2010, in violation of section 13.102 of the Board's Regulations. In other words, the officers were required to pay a set price as a cover charge when they entered the licensed premises, and, in exchange for that cover charge, Licensee provided them with an unlimited or indefinite amount of Corona or Corona Light bottled beer for a period of two (2) hours at no additional cost.

Licensee argued before the ALJ that the Corona and Corona Light bottled beer being furnished on May 29, 2010 did not violate section 13.102 because it would be lawful, according to Board Advisory Opinion No. 03-353, for a non-licensed, unrelated business to sponsor a "free drink" promotion at premises licensed by the Board. To the extent that a non-licensed, unrelated business may sponsor a "free drink" promotion at premises licensed by the Board, the promotion would need fall within the exception set forth in section 13.102(b)(1). That exception allows for "[t]he sale or serving, or both, of an unlimited or indefinite amount of liquor, wine or malt or brewed beverages for a fixed price for catered events which have been arranged at least 24 hours in advance." [40 Pa. Code § 13.102(b)(1)]. In a "free drink" promotion conducted

pursuant to this exception, although the drinks would be free to the persons attending the catered event, in actuality, the drinks would be paid for by the unrelated business sponsoring the catered event. However, as the ALJ aptly pointed out, Licensee did not present any evidence establishing that a non-licensed, unrelated business was sponsoring a catered event arranged at least twenty-four (24) hours in advance on May 29, 2010. Therefore, the Board concludes that the ALJ did not commit an error of law, abuse his discretion or render a decision unsupported by substantial evidence in sustaining Count 3 of the Citation.[3]

For the foregoing reasons, the ALJ's Adjudication and Order is reversed as to Counts 1 and 2 of the Citation, and affirmed as to Count 3 of the Citation.

[3] The Board notes that the Bureau could have perhaps instead cited Licensee for violating section 13.53 of the Board's Regulations, which prohibits representatives of manufacturers and licensees from giving more than one (1) free standard-sized alcoholic beverage per patron in any offering. Nonetheless, based on the record, Count 3 of the Citation is sustainable as drafted.

O R D E R

The appeal of Licensee is granted in part and denied in part.

The ALJ's decision is reversed as to Counts 1 and 2, and the fine imposed with regard to those counts is vacated.

The ALJ's decision is affirmed as to Count 3.

Since Licensee already paid all of the fines involved, this matter is remanded to the ALJ to return the monies already paid with regard to Counts 1 and 2.

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Board Secretary