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PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : : : : : :	Citation No. 10-2012
v.		
PARDNERS, LTD. t/a Westgate Restaurant & Lounge 1550M Kenneth Road York, PA 17404-2275	: : :	License No. R-20092 LID 20771

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O P I N I O N

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") appeals from the Adjudication and Order of Administrative Law Judge Felix Thau ("ALJ"), mailed November 21, 2011, wherein the ALJ dismissed Citation No. 10-2012 ("the Citation") issued by the Bureau to Pardners, Ltd.

("Licensee"). Based upon a review of the certified record, including the ALJ's Adjudication and Order, the Bureau's Appeal and supporting Brief, and the Notes of Testimony and Exhibits from the hearing held on September 7, 2011, the Board affirms the ALJ's decision to dismiss the Citation.

On September 23, 2010, the Bureau issued the Citation to Licensee, charging two (2) counts. The first count charged Licensee with violating sections 104(a) and 401 of the Liquor Code [47 P.S. §§ 1-104(a), 4-401] and section 13.102 of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 13.102] in that on February 20, 2010, Licensee, by its servants, agents or employees, furnished more than one (1) free drink per patron. The second count charged Licensee with violating section 13.102(a) of the Board's Regulations [40 Pa. Code § 13.102] in that on February 20, 2010, 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.

A hearing regarding the Citation was held on September 7, 2011. John H. Pietrzak, Esquire, appeared at the hearing as counsel for the Bureau. L.C. Heim, Esquire, appeared as counsel for Licensee. By Adjudication and Order

mailed November 21, 2011, the ALJ dismissed both counts of the Citation. On December 21, 2011, the Bureau filed the instant appeal.

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. [47 P.S. § 4-471(b)]. 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 Board of Probation and Parole, 98 Pa. Cmwlth. 28, 510 A.2d 877 (1986).

Regarding count one, alleging Licensee furnished more than one (1) free drink per patron, the ALJ dismissed the charge based on his finding that persons other than Licensee paid for all products provided to customers on the night in question. [Adjudication p. 3, Finding of Fact 9]. The ALJ noted that the

statutory references in the Citation, i.e. sections 104(a) and 401 of the Liquor Code [47 P.S. §§ 1-104(a), 4-401] and section 13.102 of the Board's Regulations [40 Pa. Code § 13.102], do not expressly proscribe the conduct alleged in count one as a violation. Instead, the ALJ applied section 13.53 of the Board's Regulations [40 Pa. Code § 13.53], and concluded, inter alia[1], that the Bureau presented insufficient evidence of a violation.

The Bureau in its appeal contends that the ALJ committed an error of law in dismissing count one. In its supporting Brief, the Bureau initially disagrees with the ALJ that the statutory provisions referenced in count one of the Citation are inapposite; however, the Bureau ultimately acknowledges that the more appropriate provision is section 13.53. [Bureau's Brief p. 4]. Nonetheless, the Bureau argues that the ALJ's decision to dismiss the charge was not based upon substantial evidence.

The Board agrees with the ALJ that section 13.53 of the Board's Regulations [40 Pa. Code § 13.53] provides the permissible boundaries pursuant

[1] Sandwiched between his conclusion that section 13.53 is the law at issue and his application of that section to the facts, the ALJ took a detour "in the direction of evaluating the legal bases for Regulations, Advisory Notices, and Advisory Opinions." [Adjudication p. 5]. Because no advisory notices or advisory opinions are involved here, the Board will address only the ALJ's dicta as it pertains to regulations. The Supreme Court has stated that "when an agency adopts a regulation pursuant to its legislative rule-making power, as opposed to its interpretive rule-making power, it is valid and binding upon courts as a statute so long as it is (a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable." Tire Jockey Service, Inc. v. Com., Dept. of Environmental Protection, 591 Pa. 73, 108, 915 A.2d 1165, 1186 (2007). Section 13.53 was promulgated pursuant to statutory authority [see 47 P.S. §§ 2-207(i), 2-208(h)] and procedure [see 45 P.S. §§ 1201 et seq., 71 P.S. § 232, 71 P.S. §§ 732-101 et seq., and 71 P.S. §§ 745.1 et seq.]. Further, the Board believes a reviewing court would find the regulation reasonable.

to which a licensee may provide a free drink to a patron.[2] Section 13.53 of the Board's Regulations states:

> Representatives of manufacturers and licensees may give or purchase an alcoholic beverage for consumers in retail licensed premises provided the giving of the alcoholic beverage is not contingent upon the purchase of any other alcoholic beverage and is limited to one standard-sized alcoholic beverage per patron in any offering. A standard-sized alcoholic beverage is 12 fluid ounces of a malt or brewed beverage, 4 fluid ounces of wine (including fortified wine) and 1 1/2 fluid ounces of liquor.

[40 Pa. Code § 13.53].

As always, the burden is on the Bureau to prove its case before the ALJ by a clear preponderance of the evidence. In re Omicron Enterprises, 68 Pa. Cmwlth. 568, 571, 449 A.2d 857, 859 (1982). Thus, to establish that a licensee violated section 13.53, in that it exceeded the permissible quantity of an alcoholic beverage given free of charge, the Bureau must prove that the licensee purchased or gave a consumer an amount greater than the standard-sized alcoholic beverage in any offering. Of course, a licensee may defend itself by satisfying the ALJ that the beverages alleged to be purchased or given free of charge by the licensee were, in fact, purchased by other persons.

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[2] The Commonwealth Court has held that where a citation informs the licensee of the "type and date of the alleged violation," it satisfies the due process notice requirement. Pennsylvania Liquor Control Bd. v. Reda, 463 A.2d 108, 109 (Pa. Cmwlth. 1983). Count one of the Citation closely tracks the language of section 13.53 of the Board's Regulations and refers to February 20, 2010. Licensee thus received sufficient notice of the type and date of the alleged violation.

Here, there was conflicting evidence as to the source of the alcoholic beverages alleged to have been given free of charge. A Bureau officer testified that on February 20, 2010, he received a total of three (3) beers from Licensee's bartender without being charged. [N.T. 55, 57, 81]. The officer noted that the bartender was not keeping a tally of the number of beers being handed out, nor did the bartender explain why the beers were being provided free of charge. [N.T. 58]. On the other hand, Licensee's president, Diane Shearer, who was present that night, testified that Licensee's policy is to never provide patrons with free drinks. [N.T. 95]. Ms. Shearer further stated that it was Licensee's twenty-fifth (25th) anniversary celebration and that, in connection therewith, two (2) representatives from importing distributors were present and purchasing beers for patrons. [N.T. 102]. Ms. Shearer's contention was supported by testimony from the two (2) distributor representatives, who indicated that they each paid the bill for a round of beers for the bar. [N.T. 153-158]. In addition, Licensee's bartender testified that at least five (5) patrons bought rounds of drinks "for the whole bar" between the hours of 5:00 p.m. and 10:30 p.m. that evening. [N.T. 115].[3]

[3] It should be noted that, although a licensee is not limited by section 13.53 when providing patrons with drinks purchased by other persons, a licensee must always be mindful of its obligations under the Liquor Code and the Board's Regulations, such as the duty not to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly

The Board will not overturn credibility determinations of the ALJ. In this case the ALJ found that the testimony of Licensee's witnesses credibly established that the beers given by Licensee's bartenders to the Bureau officer were purchased by other persons, namely the two (2) distributor representatives and other benevolent patrons. Although the Board is not persuaded by some of the ALJ's reasoning[4], the decision of the ALJ to dismiss count one was not an error of law and was supported by substantial evidence. It is therefore affirmed.

As for count two, alleging Licensee engaged in an unlawful discount pricing practice, the ALJ found that, at 6:05 p.m., the officer purchased a twelve (12)-ounce bottle of Yuengling Bock, for which he paid two dollars and twenty-five cents ($2.25), and at 7:10 p.m., the officer purchased the same item and paid two dollars and seventy-five cents ($2.75) for it. [Adjudication p. 3, Finding of Fact 10]. At 6:35 p.m., the officer ordered a Coors Light draft, for which he paid two dollars and seventy-five cents ($2.75), and at 7:40 p.m., the officer paid two dollars and twenty-five cents ($2.25) for the same item.

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intoxicated or to any minor. [47 P.S. § 4-493(1)]. The disposition of count one notwithstanding, the picture of the night in question, as painted by the witnesses' testimony, is concerning to the Board.

[4] The record indicates the Bureau officer received three (3) servings of beer without charge, and there was evidence establishing the brand of two (2) of the beers. There was no evidence, however, to demonstrate the brand of the third beer. According to the ALJ, "without that information, the Bureau cannot establish that Licensee exceeded the permitted amount." [Adjudication p. 8]. The Board is not aware of any legal authority for this statement.

[Adjudication p. 3, Finding of Fact 11]. The ALJ further found that Licensee's happy-hour promotion that night ran from 5:00 p.m. until 7:00 p.m. [Adjudication p. 3, Finding of Fact 12]. Despite the fact that the price of Coors Light apparently decreased after the happy-hour promotion had ended at 7:00 p.m., the ALJ dismissed the charge based upon his conclusion that the transaction at issue "was no more than a one-time pricing error rather than a sale in furtherance of a discount pricing practice." [Adjudication p. 9].

On appeal, the Bureau contends that the ALJ committed an error of law in dismissing count two and that his decision was unsupported by substantial evidence. The Bureau is particularly concerned, as it explains in its brief, with the ALJ's inference drawn from word "practice" as used in section 13.102. Focusing on that word, the ALJ noted, "[i]t is impossible to engage in a discount pricing promotion without intending to do so. Therefore, the Bureau must establish that the service of beer at a reduced price was intended to be part of a discount pricing promotion." [Adjudication p. 9]. The Bureau disagrees, arguing that the regulation does not require the Bureau to prove intent of the licensee, and instead that it merely requires the Bureau to show a discounted transaction occurring outside the permissible time period.

At the time of the alleged violation, section 13.102 of the Board's regulations permitted licensees to discount the price of alcoholic beverages for a period of time not to exceed two (2) hours in a business day.[5] [40 Pa. Code § 13.102]. Discount pricing that extended beyond two (2) hours was thus prohibited. An exception in section 13.102(b) provided, and still does, 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 but not "all draft" or "all bottled beer." [See Advisory Notice No. 16]. Regarding spirits or mixed drinks, a permissible

[5] The happy hour rules for all retail licensees were amended in 2011. As of December 22, 2011, licensees may hold happy hours for up to four (4) consecutive or nonconsecutive hours per day, and up to fourteen (14) hours per week. [47 P.S. § 4-406(g)]. Discount pricing practices conducted pursuant to section 13.102 of the Board's Regulations, including offering a daily drink special and hosting a catered event (during which an unlimited or indefinite amount of alcohol is offered for a fixed price), are not counted against the happy hour limits. [47 P.S. §§ 4-406(g); 40 Pa. Code § 13.102].

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 13.102(a) is "discount pricing practices." [40 Pa. Code 40 § 13.102(a)]. Therefore, to sustain a charge under section 13.102, the Bureau must put forth evidence to establish a discount pricing practice not meeting the permissible standards outlined in the regulation.

Here, there was substantial evidence of a discounted sale not meeting the requirements of section 13.102. The officer purchased the same item both during and after the happy hour promotion, and the price of that item decreased after the happy hour promotion had ended. The ALJ found the testimony of the officer credible. [Adjudication p. 9]. There was no evidence indicating that the brand of beer in question was involved in a "daily drink special."

Nonetheless, there was also substantial evidence indicating that the officer's purchase of a Coors Light at 6:35 p.m. for two dollars and seventy-five cents ($2.75) was a mistake. Weighing the officer's testimony with the with the testimony of Licensee's witnesses, the ALJ concluded that Licensee's

bartender made a mistake and that Licensee was not engaging in an unlawful discount pricing practice. As such, the ALJ dismissed count two of the Citation.

Implicitly, then, the ALJ found the testimony of Licensee's bartender to be credible as well. Licensee's bartender testified and provided the details of Licensee's happy-hour promotion that night, which offered consumers "fifty cents ($0.50) off a drink, a draft, a bottle and a mixed drink." [N.T. 123]. The bartender further explained that the regular price for a Coors Light draft was two dollars and twenty-five cents ($2.25), so that during a happy-hour promotion, the price is one dollar and seventy-five cents ($1.75). [N.T. 123-124]. Clearly, this testimony is inconsistent with the officer's statement that he purchased a Coors Light draft during the happy-hour promotion for two dollars and seventy-five cents ($2.75). [N.T. 31].

The Board will not overturn the credibility determinations of the ALJ. If the officer's testimony is to be reconciled with the testimony of Licensee's bartender, then Licensee's bartender apparently made a mistake in charging two dollars and seventy-five cents ($2.75) for the Coors Light during the happy-hour promotion.[6] This apparent overcharge, when paired with the sale of a

[6] It must be noted that the ALJ seems to suggest that the Coors Light purchase *after* the happy-hour promotion ended was the mistaken pricing [Adjudication p. 9]; however, that conclusion is not supported by substantial evidence. The only testimony relating to regular pricing came from Licensee's witnesses, who were

Coors Light after the happy hour for the regular price of two dollars and twenty-five cents ($2.25), led the officer to believe he had received a discount after the permissible two (2)-hour happy hour had ended, and thus the Bureau charged Licensee with engaging in an unlawful discount pricing practice.

Although the Board again does not agree with the ALJ's reasoning, his decision to dismiss the charge was not an error of law, and it was supported by substantial evidence. The ALJ's focus on "intent" as a required element in section 13.102 is misplaced. Rather, as discussed, to prove a violation, the Bureau must show that Licensee engaged in an unlawful "discount pricing practice."

Here, the Bureau relied on Licensee's witnesses to explain the establishment's pricing scheme on the night in question, rather than offer its own evidence of a promotion. Licensee's witnesses ultimately testified credibly, according to the ALJ, that the happy-hour promotion lasted from 5:00 p.m. until 7:00 p.m. and that the Coors Light purchased by the officer at 7:05 p.m. for two dollars and twenty-five cents ($2.25) was not a discount. The dismissal of count two is therefore affirmed.

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consistent in contending that two dollars and twenty-five cents ($2.25), which was what the officer was charged at 7:05 p.m., was the regular price for a Coors Light draft.

For the foregoing reasons, the Adjudication and Order of the ALJ dismissing the Citation is affirmed in all respects.

O R D E R

The appeal of the Bureau is dismissed.

The decision of the ALJ is affirmed.

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Board Secretary