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PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 11-0070
v.	:	
OLDE CITY GROUP, LLC 132 Chestnut Street Philadelphia, PA 19106-3009	:	License No. R-13599 LID 57583

Counsel for Licensee (on appeal):	Paul L. Herron, Esquire Law Offices of Kelly & Herron, P.C. 1700 Market Street, Suite 3112 Philadelphia, PA 19103-3914
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O P I N I O N

Olde City Group, LLC ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), mailed January 20, 2012, wherein the ALJ sustained Citation No. 11-0070 ("the Citation") issued by the Pennsylvania State Police, Bureau of Liquor Control Enforcement

("Bureau"), and imposed a fine of one thousand six hundred dollars ($1,600.00).

On January 19, 2011, the Bureau issued the Citation to Licensee, charging it with two (2) counts. The first count charged Licensee with violating sections 406(a)(3) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(3), 493(16)] in that on December 12, 2010, Licensee, by its servants, agents, or employees, sold, furnished and/or gave alcoholic beverages on a Sunday between 2:00 a.m. and 11:00 a.m. The second count charged Licensee with violating section 5.32(a) of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 5.32(a)] in that on October 30, 2010, Licensee, by its servants, agents, or employees, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

A hearing regarding the Citation was scheduled for May 24, 2011. Notice of the hearing was mailed to Licensee by first-class mail and certified mail, return receipt requested, on April 6, 2011. The receipt card was signed as received on April 8, 2011. The hearing was ultimately rescheduled for December 1, 2011, and notice thereof was mailed to Licensee and its manager by first-class mail and certified mail, return receipt requested, on October 12,

2011. The notice was signed as received at the address of Licensee's manager, Darin Picorella, on October 25, 2011. No one appeared on behalf of Licensee, so the hearing was held *ex parte* on December 1, 2011. James E. Dailey, Esquire, appeared at the hearing as counsel for the Bureau.

By Adjudication and Order mailed January 20, 2012, the ALJ sustained the Citation and imposed a fine of one thousand six hundred dollars ($1,600.00). The ALJ also advised Licensee that failure to pay the fine within twenty (20) days of the mailing date of the Order would result in Licensee's license being suspended or revoked. Licensee filed the instant appeal of the ALJ's decision on February 8, 2012.

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 or her discretion, or if his or her 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).

On appeal, Licensee essentially restates the standard of review in alleging that the ALJ committed an error of law and abused his discretion in sustaining the Citation and that the ALJ's Findings of Fact are not supported by substantial evidence. Because Licensee did not provide any further explanation for the basis of its appeal, the Board has conducted a general administrative review of 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 December 1, 2011. Based upon its review, the Board has concluded the ALJ did not commit an error of law or abuse his discretion in sustaining both counts of the Citation, and further, the ALJ's Findings of Fact were supported by substantial evidence.

Licensees, and their servants, agents and employees, are prohibited from serving liquor or malt or brewed beverages during designated hours. [47 P.S. § 4-493(16)]. Restaurant liquor licensees are specifically prohibited from selling liquor or malt or brewed beverages between the hours of 2:00 a.m. and 7:00

a.m. [47 P.S. § 4-406(a)(2)]. In addition, the Board's Regulations state that a licensee may not use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard on the outside of the licensed premises. [40 Pa. Code § 5.32(a)].

The record in this case reveals, and the ALJ found, that on December 12, 2010, a pair of Bureau officers observed Licensee's bartender serve bottles of Heineken and Coors Light beer to two (2) patrons at 2:08 a.m. [Adjudication, Finding of Fact 5; N.T. 8]. The officers also witnessed a woman prepare a Sprite and Grey Goose vodka mixed drink for herself behind the bar at 2:10 a.m., and at 2:12 a.m., Licensee's bartender served a bottle of Yuengling beer to a patron and collected three dollars ($3.00) for it. [Adjudication, Finding of Fact 5; N.T. 8-9]. On October 30, 2010, a Bureau officer heard music emanating from the licensed premises at a distance of twenty-five (25) feet from the establishment. [Adjudication, Finding of Fact 4; N.T. 13]. The officer entered the licensed premises immediately thereafter and observed a disc jockey playing the music through loudspeakers on the walls of the dance floor area. [Adjudication, Finding of Fact 4; N.T. 15].

Thus, the record clearly shows Licensee committed the violations alleged in counts one and two. A Bureau officer's uncontroverted testimony established that on October 30, 2010, Licensee permitted a disc jockey to play amplified music, through its loudspeakers, that could be heard outside the licensed premises, in violation of section 5.32 of the Board's Regulations [40 Pa. Code § 5.32(a)]. Similarly, Licensee violated section 493(16) of the Liquor Code [47 P.S. § 4-493(16)] based on the Bureau officers' testimony establishing that on December 12, 2010, Licensee's bartender served beers to patrons after 2:00 a.m.

Having found no error of law and that the ALJ's decision was supported by substantial evidence, the Board turns its attention to whether the ALJ abused his discretion in sustaining the Citation and imposing a fine. The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. The Pennsylvania Supreme Court has 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). Further, the imposition of penalties is the exclusive prerogative of the ALJ; the Board may not disturb penalties which are within the parameters set forth in the Liquor Code.

In this case, there is no evidence in the record to suggest the ALJ's conclusion was the result of prejudice or bias, or that it was manifestly unreasonable. Section 471 of the Liquor Code prescribes the penalty for the type of violations sustained in the Citation. Relative to count one, it permits the ALJ to suspend or revoke the license, or impose a fine of not less than one thousand dollars ($1,000.00) nor more than five thousand dollars ($5,000.00), or both. [47 P.S. § 4-471(b)]. Relative to count two, 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). [Id.]. The ALJ imposed a fine at count one of one thousand dollars ($1,000.00) and a fine at count two of six hundred dollars ($600.00). Since the penalties are clearly within the statutory range set forth in the Liquor Code and the Board has no authority to alter the penalty imposed by the ALJ, the decision of the ALJ as to the penalty is affirmed.

For the foregoing reasons, the Adjudication and Order of the ALJ sustaining the Citation and imposing a fine of one thousand six hundred dollars ($1,600.00) is affirmed in all respects.

O R D E R

The appeal of Licensee is dismissed.

The decision of the ALJ is affirmed.

The fine of one thousand six hundred dollars ($1,600.00) has not been paid.

Licensee is hereby ordered to pay the fine in the amount of one thousand six hundred dollars ($1,600.00). Failure to pay the fine within twenty (20) days of the mailing date of this Order will result in license suspension and/or revocation.

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

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Board Secretary