Mailing Date: December 21, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 11-0096
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
MARMARI, INC.	:	License No. R-18863
125 South Centerville Road	:	
Lancaster, PA 17603-4007	:	LID 40524

Counsel for Licensee: James F. Heinly, Esquire
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Lancaster, PA 17601

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OPINION

Marmari, Inc. ("Licensee") timely appealed from the Adjudication and Order of Administrative Law Judge Daniel T. Flaherty, Jr., ("ALJ") mailed on October 17, 2011, wherein the ALJ imposed a fine of two hundred fifty dollars ($250.00) on Citation No. 11-0096.

Pursuant to section 471 of the Liquor Code, an appeal must be based solely on the record before the ALJ. [47 P.S. § 4-471]. 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. [Id.]. 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, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

The Citation charged that on December 31, 2010, Licensee, by its servants, agents or employees, used or permitted to be used on the inside/outside 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, in violation of section 5.32(a) of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 5.32(a)].

In response to the Citation, Licensee attended a hearing held before the ALJ on July 14, 2011. After the hearing, the ALJ sustained the Citation. [Adjudication & Order, mailed October 17, 2011].

In its Appeal, Licensee first claims that the ALJ did not address the constitutional issues raised by Licensee's counsel at the hearing. Licensee next argues that the ALJ failed to place appropriate weight on the testimony of Licensee's corporate officer and former employee. Lastly, Licensee argues that the ALJ committed an error of law when he failed to dismiss the citation as a *de minimus* violation of the Liquor Code and the Board's Regulations.

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge ("OALJ"), including the ALJ's Adjudication and Order mailed October 17, 2011, Licensee's Appeal, the Bureau's Response to the Appeal, and the Notes of Testimony and Exhibits from the hearing held on July 14, 2011, and has concluded that the ALJ's ruling is without error and is supported by substantial evidence.

Section 5.32(a) of the Board's Regulations provides 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 ALJ found that on December 31, 2010, at 10:30 p.m., Bureau Enforcement Officer Kemmerling ("Officer") arrived at the licensed premises.

[FF No. 1; N.T. 8-10]. Upon exiting his vehicle, the Officer heard music and bass noise. [FF No. 2; N.T. 10]. The Officer approached the main entrance of the licensed premises and verified that the music was coming from within the licensed premises. [FF No. 2; N.T. 10]. The Officer then conducted a sound check and could hear music emanating from the licensed premises at distances up to three hundred (300) feet. [FF No. 3; N.T. 10]. The Officer could hear the music despite the doors being closed. [N.T. 48-49]. Upon completing his sound check, the Officer entered the licensed premises where he observed three (3) female bartenders and a male bartender tending bar and rendering service to approximately ninety (90) patrons). [FF No. 4; N.T. 10]. The Officer determined that the source of the music he had heard outside was a five (5)-member band. The music provided by this band was amplified through two (2) loudspeakers. [FF No. 5; N.T. 10-11]. The Officer departed the licensed premises at 10:40 p.m. and returned to his vehicle. He drove to the location where he had checked the music before entering and determined that the music could still be heard at this location. [FF No. 6; N.T. 10-11].

Licensee offered testimony from its former bar manager/bartender, Barbara Peterson, who stated that she checked outside prior to the band's sets, that she told the band to turn down the volume prior to the first set, and

that patrons who wanted to smoke were entering and exiting through the front door near the band. [N.T. 28-37]. Licensee's president, Nickiforos Grigoriades, testified that Licensee has never had a noise complaint. [N.T. 38-43]. Licensee also offered a copy of the municipal noise ordinance and Licensee's deed. [N.T. 43-48; Exs. L-2, L-3].

On appeal, Licensee first argues that 40 Pa. Code § 5.32(a) is unconstitutional, and towards that end, presented three (3) arguments at the administrative hearing as to the constitutionality of the Citation. First, Licensee argued that music is protected speech, and any restriction upon protected speech must be based on a reasonable standard. [N.T. 61]. Licensee argued that there is no reasonable standard by which noise can be measured. Second, Licensee argued that the enforcement of the regulation must be with respect to a legitimate concern, which Licensee argued did not exist since there were no complaints about noise against Licensee that evening. [N.T. 61]. Third, Licensee argued that a violation of the regulation would occur if noise could be heard off the licensed premises, even if the hearer is still on Licensee's property. [N.T. 61]. The ALJ did not address the constitutionality of the Board's Regulation.

Section 471 of the Liquor Code provides that "The board shall only reverse the decision of the administrative law judge if the administrative law judge committed an error of law, abused its discretion or if its decision is not based on substantial evidence." [47 P.S. § 4-471]. Therefore, because the statutory authority does not give the Board the authority to address Licensee's arguments regarding the constitutionality of the Board's Regulation, the Board declines to do so. However, the Board notes that similar arguments were raised – and rejected – in the case of Hude v. Commonwealth:

> The regulation in question is a reasonable means of limiting -- not prohibiting -- the sound of music and other entertainment, to hold it to a level that will not disturb people outside the premises. Protection from such "noise pollution" is a lawful object of Section 5.32(a). *See* Smart, Inc. v. Pennsylvania Liquor Control Board, 70 D. & C.2d 535 (1974), where the regulation, challenged as unreasonable, was upheld.
>
> Section 5.32(a) does not constitute an unnecessary or arbitrary interference with licensee's business. We hold that it is reasonably related to the accomplishment of a specific valid state interest: protecting persons outside liquor establishments from interference with a peaceable environment.

Hude v. Commonwealth, 55 Pa. Cmwlth. 1, 4, 423 A.2d 15, 17 (1980). *See also* Appeal of Two-O-Two Tavern, Inc., 492 A.2d 502 (Pa. Cmwlth. 1985).

Licensee's second argument concerns the ALJ's determination as to the credibility of the witnesses. However, 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). It is well settled that the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 480 A.2d 1253 (Pa. Cmwlth. 1984). The ALJ found the officer to be a credible witness and accepted his testimony as support for the findings of fact. The Board will not disturb the ALJ's credibility determination on appeal.

Licensee's third and final argument on appeal is that the determination should be overturned because the citation was based on a single violation of section 5.32(a) of the Board's Regulations. The Board, however, has no authority to overturn an ALJ's determination on the basis that the violation was *de minimus*:

> However justified … criticism might be as a matter of a concerned personal view, the legislature nevertheless has mandated that certain minor matters, as well as major breaches of law, be treated as statutory violations. A court cannot reverse Liquor Code charges by declaring the violations to be *de minimis*. Pennsylvania Liquor Control Board v. Johnstown Turn-Verein, 71 Pa. Cmwlth. 451, 454 A.2d 1195 (1983). Nor is proof of intent to violate required under the Liquor Code. Allegheny Beverage Co. v. Pennsylvania Liquor Control Board, 67 Pa. Cmwlth. 487, 492, 447 A.2d 725, 727 (1982).

Commonwealth v. Dobrinoff, 80 Pa. Cmwlth. 453, 457, 471 A.2d 941, 943 (1984). Licensee's argument that the violation was *de minimus* is meritless and insufficient to overturn the ALJ's determination.

In conclusion, for the reasons set forth above, the Board affirms the decision of the ALJ.

O R D E R

The decision of the ALJ in regard to Citation 11-0096 is affirmed.

The appeal of Licensee is denied.

The fine of two hundred fifty dollars ($250.00) has been paid by Licensee.

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Board Secretary