

Mailing Date: January 11, 2012

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 11-0956
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
OLDE CITY GROUP LLC	:	License No. R-13599
132 Chestnut Street	:	
Philadelphia, PA 19106-3009	:	LID 57583

Representative for
Licensee (on appeal):

Darin Picorella, Member
Olde City Group LLC
132 Chestnut Street
Philadelphia, PA 17124

Counsel for Bureau:

Erik Shmukler, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

OPINION

Olde City Group LLC (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), mailed November 18, 2011, wherein the ALJ sustained Citation No. 11-0956 (“the Citation”) issued by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), and imposed a fine of five hundred dollars (\$500.00).

On May 31, 2011, the Bureau issued the Citation to Licensee, charging it with violating section 404 of the Liquor Code [47 P.S. § 4-404] in that on May 1, 2011, Licensee failed to adhere to the conditions of a Conditional Licensing Agreement (“CLA”) with the Pennsylvania Liquor Control Board (“Board”) putting additional restrictions on the license. The Citation was mailed via first-class mail and certified mail, return receipt requested. The receipt card was signed as received on June 10, 2011.

A hearing regarding the Citation was scheduled for October 4, 2011. Notice of the hearing was mailed to Licensee by first-class mail and certified mail, return receipt requested, on August 16, 2011. The receipt card was not returned. A hearing regarding the Citation was held *ex parte* on October 4, 2011. Erik Shmukler, Esquire, appeared at the hearing as counsel for the Bureau.

By Adjudication and Order mailed November 18, 2011, the ALJ sustained the Citation and imposed a fine of five hundred dollars (\$500.00). 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. In an envelope postmarked December 17, 2011, Licensee appealed the

decision of the ALJ. Such appeal acts as an automatic supersedeas. [47 P.S. § 4-471(b)].

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 states that it failed to send a representative to the hearing because it was “in the process of converting from a lounge to a restaurant and missed the hearing date.” Because Licensee did not provide any further explanation for the basis of its appeal, the Board 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 October 4, 2011. Based upon its review, the Board has concluded that the ALJ did not commit an error of law or abuse his discretion, and further that his decision was supported by substantial evidence.

Section 404 of the Liquor Code provides, in pertinent part, that the Board may enter into an agreement with applicants for a license transfer placing additional restrictions on the license in question. [47 P.S. § 4-404]. Such agreements are binding on the applicant, and failure by the applicant to adhere to the agreement is sufficient cause to form the basis for a citation under section 471 and for nonrenewal of the license under section 470.

The record in this case reveals and the ALJ found that on February 22, 2007, two (2) of Licensee's members signed a CLA with the Board in which Licensee agreed to accept additional conditions on the license in order to address the concerns of the Old City Civic Association and a former senator. The CLA contained, *inter alia*, a pair of provisions in which Licensee agreed that, for one, it would neither permit amplified music on the licensed premises nor permit or allow a disc jockey to play recorded music of any sort on the licensed premises. [Ex. B-3]. In the other relevant provision, Licensee agreed that it will

“close at 1:30 a.m. from Sunday to Wednesday” and “make a ‘last call’ for drinks at 1:30 a.m. and close at 2:00 a.m. on Thursday, Friday and Saturday.”

[Ex. B-3].

Based on a tip that Licensee was violating the CLA, Ryan Rutter, a Bureau enforcement officer, visited the licensed premises on May 1, 2011, while it was open for business. [N.T. 5-6]. Upon entry, Officer Rutter observed a disc jockey performing in the rear of the premises and heard recorded music coming from speakers approximately four (4) feet high and two (2) to three (3) feet wide. [N.T. 8]. At approximately 1:37 a.m., Officer Rutter purchased a beer from Licensee’s bartender. [N.T. 8]. At some time between 1:45 a.m. and 1:50 a.m., Officer Rutter heard the bartender announce “last call” to the patrons seated at the bar.

Thus, the record shows Licensee clearly violated the CLA. Officer Rutter’s testimony, which was uncontroverted, established a violation of the CLA, and consequently section 471 of the Liquor Code [47 P.S. § 4-471], in that Licensee permitted a disc jockey to play recorded music on the licensed

premises. The failure of Licensee's bartender to announce "last call" by 1:30 a.m. on May 1, 2011, which was a Sunday morning, also violated the agreement.¹

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.

¹ The ALJ agreed with Officer Rutter's interpretation of the CLA, which is that, at the time of his visit during the early morning of Sunday, May 1, 2011, it was actually the Saturday business day. Therefore, the ALJ inferred from the CLA that Licensee was required to announce "last call" at 1:30 a.m. On the other hand, if the visit was considered to have occurred on a Sunday business day, Licensee would be required to close by 1:30 a.m., pursuant to the CLA. However, regardless of whether the time of Officer Rutter's visit is interpreted under the CLA as a Saturday business day or a Sunday business day, Licensee's failure to either close or announce last call by 1:30 a.m. was in violation of the agreement.

In this case, there is no evidence in the record to suggest that 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 violation sustained in the Citation, and permits the ALJ to 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). [47 P.S. § 4-471]. The ALJ imposed a fine of five hundred dollars (\$500.00) based upon his conclusion that Licensee violated the CLA into which it entered with the Board. Since the penalty is 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 five hundred dollars (\$500.00) is affirmed in all respects.

ORDER

The appeal of Licensee is dismissed.

The decision of the ALJ is affirmed.

The fine of five hundred dollars (\$500.00) has not been paid.

Licensee is hereby ordered to pay the fine in the amount of five hundred dollars (\$500.00). 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.

Board Secretary