Mailing Date: February 13, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 11-0966
v.	:	
G.W.F.B., INC. t/a Fort Brady Hotel 18-20 North Main Street Muncy, PA 17756-1098	:	License No. H-3194 LID 46796

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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 ("ALJ") Felix Thau, mailed October 12, 2012, wherein the ALJ vacated his original Adjudication of Citation No. 11-0966 ("the Citation") issued against

G.W.F.B., INC. t/a Fort Brady Hotel ("Licensee") and replaced it *sua sponte* with an adjudication of dismissal. In the original Adjudication, with a mailing date of October 1, 2012, the ALJ had sustained the charge of harassment, imposing a fine of three hundred dollars ($300.00).

On June 2, 2011, the Bureau issued the Citation to Licensee, charging it with violating section 471 of the Liquor Code [47 P.S. § 4-471] and sections 2701, 2709, and 5503 of the Crimes Code [18 Pa. C.S. §§ 2701, 2709, and 5503] in that on March 12, 2011, Licensee, by its servants, agents or employees committed simple assault, harassment, and engaged in disorderly conduct.

The hearing was held on July 25, 2012 in Mountoursville. John Pietrzak, Esquire, appeared at the hearing as counsel for the Bureau. Eugene Walburn, president of Licensee, appeared *pro se*. By Adjudication and Order mailed October 1, 2012, the ALJ sustained the harassment charge and imposed a fine of three hundred dollars ($300.00) against Licensee. On October 3, 2012, the ALJ *sua sponte* issued a Supplemental Order, vacating the prior Adjudication with a notation of a further explanation to follow. On October 10, 2012, with a mailing date of October 12, 2012, the ALJ issued an Adjudication Upon Vacating Earlier Adjudication *Sua Sponte*, concluding that the Bureau had failed to meet its burden of proof and dismissed the Citation against Licensee.

The record reveals the following. At approximately 2:30 a.m. on March 12, 2011, Officer Oeler with the Muncy Borough Police Department received a call regarding an incident at Licensee's premises. (N.T. 32). The caller was Tamika Koons. (N.T. 34-35). Officer Oeler went to the premises and found Ms. Koons sitting on a curb at the rear of the premises. (N.T. 35). She was crying and holding her mouth; her upper lip was swollen and bleeding and there was a cut and bruising in the inside of the lip. (N.T. 36). Officer Oeler spoke to Ms. Koons, her friend Jessica Steinbacher, Mr. Walburn, and another person. (N.T. 36-37, 49, 52-53). Mr. Walburn told Officer Oeler that the two (2) woman had been patronizing his establishment; when they exited, Ms. Koons left with a glass mug of beer. (N.T. 37). Mr. Walburn followed her outside to retrieve the mug, and a confrontation started. (N.T. 37). According to Mr. Walburn, Ms. Koons took a swing at him and he hit her with the beer mug which was then in his right hand. (N.T. 37-38). Officer Oeler indicated to Mr. Walburn that appropriate charges would be filed against him. (N.T. 38). A day or so later, Mr. Walburn came to the police station to show Officer Oeler a mark on his left hand, and stated that he had never struck Ms. Koons with his right hand, but had merely extended his left hand out to stop her and she ran into it, causing her teeth to leave a mark on that hand. (N.T. 39-41).

Both Ms. Steinbacher and Ms. Koons testified at the hearing. According to Ms. Steinbacher, she and Ms. Koons went to Licensee's establishment sometime prior to midnight on March 11, 2011, and left about 2:30 a.m. (N.T. 56-57). She did not recall how many drinks she had while there. (N.T. 60). When she exited, she had a full mug of beer with her. (N.T. 60-61). She admitted it was not her mug. (N.T. 61). Her intention was to drink the beer and leave the empty mug. (N.T. 69-70). She was standing by Licensee's back door when Mr. Walburn came outside and after some words were exchanged, she handed the mug of beer back to him. (N.T. 75, 85-86). A verbal exchange then ensued between Mr. Walburn and Ms. Koons, which culminated in Mr. Walburn throwing the mug of beer at Ms. Koons. (N.T. 77). The beer hit Ms. Koons, causing her to be wet, and the mug struck her in the mouth, causing her to bleed. (N.T. 77-78). After Mr. Walburn struck Ms. Koons, he went back inside. (N.T. 79).

Ms. Koons testified that she and Ms. Steinbacher were at the licensed premises for a few hours, had "quite a few" Coors Lights drafts, and left at approximately 2:30 a.m. (N.T. 100-102). They exited the back door, with Ms. Steinbacher carrying her beer in a beer mug. (N.T. 104). They were on Licensee's porch when Mr. Walburn came out and told Ms. Steinbacher that

she could not take the mug out of the bar. (N.T. 104-105). She gave it back to him right away, but then they all exchanged words. (N.T. 105). Ms. Koons characterized Mr. Walburn as "argumentative" rather than "threatening," and conceded that the alcohol may have affected the women's judgment. (N.T. 106). After exchanging words, Mr. Walburn took the beer that was in the mug and threw it in Ms. Koon's face. (N.T. 108). As soon as Ms. Koons asked him why he would do that, he hit her with the beer mug, and went back inside. (N.T. 108). Ms. Koons called the police. (N.T. 108). She went to the hospital at some point later to have her lip treated. (N.T. 139-140).

Licensee's manager, Belinda Myers, testified that Ms. Koons and Ms. Steinbacher came into the licensed premises on the night in question, were there about four (4) or five (5) hours, drinking alcohol and socializing, and left at 2:20 a.m. (N.T. 125-126). Ms. Myers saw them attempt to leave with two (2) bottles of Corona, which they put back on the table at Ms. Myers' request prior to exiting. (N.T. 129). She saw Mr. Walburn outside on the porch, and heard him asking for the beer mug back. She heard Ms. Koons comment about not wasting the beer, and then heard her say "you didn't really do that." (N.T. 132-133). Later that morning at a nearby convenience store, Ms. Myers saw Ms.

Koons' cut lip. (N.T. 136-137). Ms. Myers also saw "teeth prints" in Mr. Walburn's hand. (N.T. 143).

Finally, Mr. Walburn testified as to his version of the events. He saw Ms. Steinbacher with the beer mug in her hand and exited the back door to retrieve it. (N.T. 152-153). Ms. Steinbacher was hiding behind the porch wall. (N.T. 153). He asked Ms. Koons for the mug back, even though she did not have it. (N.T. 154). Ms. Steinbacher handed the mug to Ms. Koons. (N.T. 154). Mr. Walburn again said he wanted the mug, but Ms. Koons said they were not wasting the beer. Ms. Koons started drinking the beer, whereupon Mr. Walburn grabbed the mug from her, spilling the beer on her in the process. (N.T. 155). The mug was worth about three dollars ($3.00), and Licensee loses a number of them each month. (N.T. 159-160, 163). After the beer spilled on Ms. Koons, she was yelling and throwing her hands around, so Mr. Walburn put out his left hand to stop her and his hand hit her lip. (N.T. 165-167). Mr. Walburn had several Coors Lights that evening prior to the incident. (N.T. 178-180). Mr. Walburn wanted the police to charge the women with theft, but the police refused. (N.T. 159-160).

The Bureau filed the instant appeal to the Pennsylvania Liquor Control Board ("Board") on November 9, 2012, with three (3) averments. Specifically,

the Bureau contends that the ALJ committed an error of law in the misapplication of 18 Pa. C.S. § 507 of the Pennsylvania Crimes Code as to the use of force for the protection of property. In doing so, the ALJ erroneously concluded that Licensee's actions were justified and were without liability. Secondly, the Bureau avers that the ALJ's issuance *sua sponte* of an Adjudication vacating the original Adjudication was an error in law, contending that the original Adjudication was a final order in the absence of a motion for reconsideration. Lastly, the Bureau avers that the adjudication of the ALJ was not based upon the weight and credibility of the evidence set forth.

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 may 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, 484 A.2d 413 (Pa. Cmwlth. 1984). Furthermore, 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, 297, 602 A.2d 1300, 1305 (1992) (citations omitted).

The error of law[1] averred by the Bureau challenges the ALJ's issuance *sua sponte* of an Adjudication vacating the original Adjudication. The Bureau asserts that the original Adjudication was/is a final order in the absence of a motion for reconsideration. The Bureau supports its position by relying upon the Pennsylvania Code as to administrative practice and procedure, and upon the legislatively set parameters of the authority given to administrative agencies. Assuming that the first adjudication was final in nature, it follows that the ALJ improperly vacated it and replaced it with another, and that the ALJ acted outside of the authority given to him by statute.

The reasoning offered by the ALJ in vacating the Adjudication and replacing it *sua sponte* is set forth in the Supplemental Order mailed October 12, 2012:

[1] The Board will address the Bureau's second averment as to the propriety of a *sua sponte* action on the part of the ALJ, then proceed to the first error alleged in the application of the Crimes Code, and lastly, to the averment as to insufficiency of evidence.

> "After the original Adjudication was issued, I happened to be researching the law regarding the crime of assault in preparation for issuing an Adjudication in another matter. In the process, I quickly learned I was palpably unfamiliar with the pertinent law. This realization spilled over to the instant matter….. Thankfully, the original Adjudication was still not final in the sense that the parties could still apply for reconsideration or appeal. Consequently, I regarded it my duty to vacate the original Adjudication, *sua sponte*, to respond to the call of getting it right."

(Adjudication upon Vacating, p. 2).

The ALJ provided no regulations, case law, or precedent upon which his action was based; he simply, *sua sponte*, issued a new Adjudication, this time dismissing the Citation. The propriety as to such an action can only be evaluated by reviewing the pertinent regulations.

The Board acknowledges, as the Bureau has set forth, that according to the Board's Regulations, an adjudication by an ALJ is deemed a final order, except for re-hearing or reconsideration. [40 Pa. Code § 15.55]. The Bureau further underscores the significance of the mailing date of an adjudication as found in section 17.21(b)(2) of the Regulations [40 Pa. Code § 17.21(b)(2)], specifying that appeals shall be filed or postmarked within thirty (30) calendar days of the mailing date of the opinion and adjudication; in section 471(a) of the Liquor Code [47 P.S. § 4-471(a)] requiring the payment of fines by a licensee within twenty (20) days of the mailing date; and in sections 471(a) and 481(c) of

the Liquor Code [47 P.S. § 4-471(a), 4-481(c)] triggering, respectively, the suspension and revocation of a license from the mailing date of an adjudication.

Further, it is well established that an administrative agency, after having provided proper notice and explanation, may on its own motion, correct only obvious errors supported by the record, inclusive of mechanical errors, undisputed factual errors, and factual misconceptions. Due process considerations preclude revisions on substantive issues in the absence of a petition for reconsideration or granting a hearing. When an administrative agency changes its position on its own motion, parties must at least be given the opportunity to be heard by way of oral argument or brief, and if deemed necessary, there can be the introduction of additional evidence or rehearing. The rudimentary principles of due process, which apply to proceedings before administrative tribunals and judicial bodies, preclude a reversal of a previous order without notice and the opportunity to be heard. Kentucky Fried Chicken of Altoona v. Unemployment Compensation Bd. of Review, 10 Pa. Cmwlth. 90, 309 A.2d 165 (1971).

Additionally, the process for reconsideration is strictly governed by regulation as it applies to parties, and requires the filing of a timely petition by

a party, including a statement of the grounds and of the alleged errors upon which the request is based. [1 Pa. Code § 35.214]. The reopening of a case by a presiding officer is strictly limited time-wise by § 35.232, stating that:

> Prior to the filing of his proposed report a presiding officer, after notice to the participants, may reopen the proceeding for the reception of further evidence on his own motion, if he has reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

Only if the proposed report contains no recommended resolution to the matter, but contains only orders as to additional hearings, is it proper to return the matter to the administrative law judge with the direction to conduct further hearings, if necessary, or to resolve the issues and to present them for final determination. Hillman Coal & Coke Co. v. Pennsylvania Public Utility Comm'n, 433 A.2d 634 (Pa. Cmwlth. 1981).

It is also notable that the parameters of authority of administrative agencies are conferred by the legislature and that their powers are contained within the language of statute. Commonwealth, Dep't of Environmental Resources v. Butler County Mushroom Farm, 454 A.2d. 1 (Pa. 1982); Mazza v. Commonwealth, Dep't of Transportation, 692 A.2d. 251 (Pa. Cmwlth. 1997). Any exercise of authority must be explicitly set forth. *Sua sponte*

reconsideration by an ALJ, in the absence of requisite notice and the opportunity to be heard, is a violation of due process and an improper extension of authority that cannot be sustained.

In consideration of the aforementioned, the Board must concur with the Bureau that the ALJ erroneously labeled the Adjudication as "not final," vacated the same in conflict with the regulations set forth in the Code, and, *sua sponte*, exerted authority in violation of due process. This is an error of law.

Even assuming arguendo, that the ALJ's action to issue the original Order, take it back, and reverse himself had been proper, the Bureau alleges another error of law. Specifically, the Bureau argues that the ALJ misapplied the affirmative defense set forth in the section 507 of the Pennsylvania Crimes Code as to the use of force for the protection of property and, in that misapplication, erroneously dismissed the Citation. Section 507 states:

> (a) Use of force justifiable for protection of property.--The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:
>
> (1) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible movable property, if such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; or
>
> (2) to effect an entry or reentry upon land or to retake

> tangible movable property, if:
>
> (i). the actor believes that he or the person by whose authority he acts or a person from whom he or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession; and
>
> (ii). (A) the force is used immediately or on fresh pursuit after such dispossession; or
> (B) the actor believes that the person against whom he uses force has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or reentry until a court order is obtained.

[18 Pa. C.S § 507].

The Bureau opines that the ALJ's erroneous interpretation and application of this section presents a matter of first impression. The Bureau correctly states that this affirmative defense is applicable only when each relevant provision is satisfied. If Licensee engaged in conduct that did not comply with each element, but exceeded the provision of the statute, the use of force defense is precluded. The Bureau contends that, although Licensee had been deprived of its property, a beer mug, and had a right to regain it, Licensee's owner, Mr. Walburn, was not justified in the use of force after having acquired possession of the property.

In his discussion of Licensee's defense in the Adjudication vacating the original, the ALJ stated that he based his findings of fact entirely upon the testimony of Mr. Walburn, and thereafter, applied them to his newly found knowledge of section 507 of the Crimes Code. The ALJ describes the acts of the patron as thievery, removing a mug containing beer from the premises, and, along with another patron, refusing to return it to Licensee. The ALJ characterized the acts of Mr. Walburn as "self-help when he grabbed the mug from the patron's hand," opining that he heard no description of force in excess of that required to reclaim the property. Further that, if in the process of reclamation, those who stole it were injured, that would be a "foreseeable consequence when one gets boozed up and decides to steal another's property." (Adjudication upon Vacating, p. 4).

The Board's ruling as to the application of section 507 of the Crimes Code to the Liquor Code appears to be, as the Bureau has stated, one of first impression. The defense within section 507 is an affirmative defense applicable to criminal liability, as cited in Commonwealth v. Emler, 903 A.2d 1273 (Pa. Super. 2006). The Board, in response to the ALJ's reliance on section 507 of the Crimes Code in rendering the second Adjudication and vacating the first, is compelled to take notice of its language and its limitations, adding specifically:

(c) Limitations on justifiable use of force.

> (1) The use of force is justifiable under this section only if the actor first requests the person against whom such force is used to desist from his interference with the property, unless the actor believes that:
> (i) such request would be useless;
>
> (ii) it would be dangerous to himself or another person to make the request; or
>
> (iii) substantial harm will be done to the physical condition of the property which is sought to be protected before the request can effectively be made.

[18 Pa. C.S. § 507].

With the application of an affirmative defense, each element must be satisfied. Commonwealth, Pennsylvania Liquor Control Bd. v. T.J.J.R., Inc., 548 A.2d 390 (Pa. Cmwlth. 1988). In applying the language of the section entitled "Use of Force for the Protection of Property" to the facts herein, Licensee must have suffered a loss of tangible property and thereafter attempted to regain it by the use of force. Mr. Walburn's actions, in order to qualify for the defense, must have included a request for his property, and then a retrieval of the property with force when such force is immediately necessary.

In its review of the Notes of Testimony, the Board acknowledges that Licensee had been deprived of personal property, a beer mug, that Mr.

Walburn proceeded outside the premises, and demanded its return. In his testimony, Mr. Walburn clearly stated that "I reached out and grabbed the mug." (N.T.155). It is after Mr. Walburn had regained possession of the mug that he describes the actions of the patron as "yelling, carrying on and throwing her hands around." (N.T. 166). As a result, his use of force, whether it is deemed a push or a hit by use of the mug, in which Mr. Walburn injured the patron's lip, was neither "immediately necessary" nor timely, having occurred after he had regained his property.

The chronology of events is further supported by the testimony of patrons Koons and Steinbacher, who indicated that the mug was returned at the request of Mr. Walburn and prior to any physical acts on his part. (N.T. 75, 105). Officer Anthony Oeler's immediate observations of the injury sustained by Ms. Koons and Mr. Walburn's admission to him further substantiate the fact that he acted after he had regained his property.

Accordingly, the defense set forth in section 507 is inapplicable to Mr. Walburn's actions. As a result, the reliance upon section 507 by the ALJ to find Licensee's act as justified and to dismiss the citation is misplaced. This is clearly an error of law.

The Bureau's last assertion of error is based upon a challenge to the ALJ's determination of "weight and credibility" of the testimony at the hearing. With admittedly sole reliance upon the testimony of Licensee's owner, the ALJ disregarded and omitted from the finding of fact, the testimony of the two (2) patrons, one (1) of whom had sustained injuries, and the testimony of the police officer, as well as his reports. The Bureau asserts that the ALJ chose to find only Mr. Walburn as credible, despite his initial statement, an admission against penal interest, that he had hit Ms. Koons with the beer mug held in his right hand. This was corroborated by the statements given by both patrons and comported with the observations of the officer regarding the injury sustained by Ms. Koons. Three (3) days later, Mr. Walburn altered his "version" of the incident, stating that Ms. Koons sustained her injury while running into him. The Bureau has also referenced, in its brief, the elements as set forth in the Crimes Code of the offenses of simple assault, harassment, and disorderly conduct, and has concluded that the actions of Licensee fulfill each of these.

The ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Bd. of Probation and Parole, 510 A.2d 877 (Pa. Cmwlth. 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).

With these principles in mind, the Board has reviewed the Notes of Testimony from the hearing held on July 25, 2012, as well as the original Adjudication and the Bureau's brief, and has determined that the initial decision of the ALJ, i.e. that the Licensee had committed harassment, was supported by sufficient evidence of record. The record shows the Bureau in fact met its burden in demonstrating that Mr. Walburn, with the intent to harass, annoy, or alarm the patron, did strike or minimally subject her to physical contact. This was the conclusion issued by the ALJ in the first Adjudication.

Thus the Board, in its consideration of the evidentiary challenge to the Adjudication vacating the original, not only finds procedural error rendering it invalid, but also evidentiary insufficiency. The ALJ's exercise of judicial discretion neither conformed to law, nor was it based upon fact and circumstances judicially before the court.

There was no evidence or testimony presented that Licensee had acted in defense of his property. The mere inclusion and conclusion by the ALJ of the

affirmative defense of the use of force for the protection of property without any substantiation are improperly based. Not only did the ALJ apply an affirmative defense that had not been raised or supported by evidence, he chose to capriciously disregard, without mention or consideration, the testimony of the officer, and to cast disparaging remarks as to the patrons and to the Bureau's investigation. In assessing the totality of the circumstances of the hearing, the Board must conclude that there was an abuse of discretion in the ALJ's misapplication of law, and rendering of judgment tainted by ill will. An adjudication upon which there was no substantiating evidence and in contradiction to the evidence that was presented cannot stand.

For the foregoing reasons, the Adjudication and Order Vacating the Adjudication of the ALJ is vacated; the Adjudication of October 1, 2012 is reinstated.

ORDER

The appeal of the Bureau is granted.

The October 12, 2012 Adjudication of the ALJ is vacated.

The Adjudication of October 1, 2012 is reinstated.

Jurisdiction is remanded to the ALJ.

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Board Secretary