

Mailed August 28, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 11-1942
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
ROMAN’S LOUNGE &	:	License No. R-16295
CATERING, INC.	:	
101-103 South Broad Mountain	:	
Avenue	:	
Frackville, PA 17931	:	LID 32066

Counsel for Licensee: James G. Conville, Esquire
Zane, Rossi & Conville
38 Saint John Street
P.O. Box 96
Schuylkill Haven, PA 17972

Counsel for Bureau: Roy Harkavy, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Park Way
Macungie, PA 18062

OPINION

Roman’s Lounge & Catering, Inc. (“Licensee”) filed an appeal from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”),

wherein the ALJ assessed a fine of five hundred dollars (\$500.00) against Licensee as the result of Citation No. 11-1942 (“the Citation”).

The Citation charged that on August 26, 27, and September 25, 2011, 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, in violation of section 5.32(a) of the Regulations of the Pennsylvania Liquor Control Board (“Board”). [40 Pa. Code § 5.32(a)].

On May 2, 2013,¹ the ALJ held a hearing for the purpose of taking evidence relating to the charges asserted in the citation. Testimony was presented by Licensee and by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”).

A review of the record reveals that on August 26, 2011, at 11:45 p.m., Bureau Officers Dan Wentsler and Jessica Zangla² arrived at the licensed premises. [N.T. 6, 14-15]. When the officers arrived, they were able to hear music emanating from the licensed premises. [N.T. 7, 15]. The officers entered the licensed premises and stayed until 1:30 a.m. on August 27, 2011. [N.T. 8, 15].

¹ The hearing was originally scheduled to occur on May 11, 2012, at 3:00 p.m., but was continued at least twice and was ultimately held on May 2, 2013.

² Officer Zangla is now a Pennsylvania State Trooper, but for purposes of this opinion, shall be referred to as Officer Zangla, as that was her status at the time of the incidents that led to the Citation. [N.T. 14].

After the officers left the licensed premises, they could hear the music emanating from the licensed premises until they reached approximately fifty (50) to three hundred (300) feet away from the licensed premises. [N.T. 9, 16].

On September 25, 2011, at 1:55 a.m., Officer Wentsler and Officer Zengla arrived in the vicinity of the licensed premises. [N.T. 9, 17]. Again, when the officers arrived, they were able to hear music emanating from the licensed premises. [N.T. 9, 17]. When Officer Wentsler entered the licensed premises, he saw that the music was being electronically amplified through at least four (4) speakers. [N.T. 10]. After the officers left the licensed premises at approximately 2:00 a.m., they continued to hear music emanating from the licensed premises until they reached approximately seventy-five (75) to two hundred twenty-five (225) feet away. [N.T. 10, 18].

On June 21, 2013, the ALJ issued his Adjudication and Order sustaining the Citation. As a penalty, the ALJ assessed a fine of five hundred dollars (\$500.00) against Licensee.

In its Appeal, Licensee argues that the ALJ's ruling was "contrary to the evidence" and that the "Pa. Liquor Control Board did not meet their burden of proof."³ Because Licensee did not provide any further explanation for the basis of its appeal, the Board has reviewed the certified record provided by the

³ It is assumed that Licensee meant that the Bureau did not meet its burden of proof, not the Board.

Office of the Administrative Law Judge, including the ALJ's Adjudication and Order mailed June 21, 2013, Licensee's Appeal, and the Notes of Testimony and Exhibits from the hearing held on May 2, 2013, and has concluded that the ALJ's ruling is without error and is supported by substantial evidence.

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). 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).

The ALJ concluded that on August 26, 27, and September 25, 2011, the Licensee violated the Board's Regulation pertaining to the use of loudspeakers. Based on the first-hand testimony provided by the Bureau Officers, the Board finds sufficient evidence in the record to support this conclusion.

Having found 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 of five hundred dollars (\$500.00). 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 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).

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. 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. 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). 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.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee shall pay a fine of five hundred dollars (\$500.00) within twenty (20) days of the mailing date of this Order. Failure to pay the fine within twenty (20) days of the mailing date of this Order will result in a license suspension and/or revocation.

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

Board Secretary