

Mailing Date: January 16, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, :
BUREAU OF LIQUOR CONTROL : Citation No. 11-2106
ENFORCEMENT :

v. :

LIL' BIT OF CHICAGO, INC. : License No. R-17919
t/a Lil' Bit of Chicago :
20 McKinley Avenue : LID 19013
Hanover, PA 17331 :

Representative for Licensee: Gerald J. Gesiorski, President (*pro se*)
Lil' Bit of Chicago, Inc.
20 McKinley Avenue
Hanover, PA 17331

Counsels for Bureau: John H. Pietrzak, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17110

OPINION

Lil' Bit of Chicago, Inc. ("Licensee"), appeals from the Opinion and Order upon Licensee's Application for Reconsideration of Administrative Law Judge ("ALJ") Felix Thau, mailed November 19, 2012, wherein the ALJ denied

Licensee's request for a reduction in the fine imposed in the Adjudication of Citation No. 11-2106 ("the Citation").

On December 15, 2011, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee, charging it with two (2) counts. The first count charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that on March 18, June 18, and June 29, 2011, and various dates between September 2010 and March 2011, Licensee, by its servants, agents, or employees, sold, furnished, and/or gave or permitted such sale, furnishing, or giving of alcoholic beverages to five (5) minors between eighteen (18) and twenty (20) years of age. The second count charged Licensee with violating section 493(14) of the Liquor Code [47 P.S. § 4-493(14)] in that on March 18, June 18, and June 29, 2011, and various dates between September 2010 and March 2011, Licensee, by its servants, agents, or employees, permitted five (5) minors, between eighteen (18) and twenty (20) years of age, to frequent the licensed premises.

The hearing was held on August 29, 2012. John H. Pietrzak, Esquire, appeared at the hearing as counsel for the Bureau. Gerald J. Gesiorski, Licensee's president, appeared on behalf of Licensee. By Adjudication and Order mailed October 26, 2012, the ALJ sustained both counts of the Citation as

to all dates except June 18, 2011 and imposed a fine of two thousand dollars (\$2,000.00), as well as mandatory Responsible Alcohol Management Program (“RAMP”) compliance for one (1) year.

In a timely-filed Application for Reconsideration, Licensee asked the ALJ to reduce the fine “to an amount more closely resembling and similar to the fines levied upon the convicted minors” (Application for Reconsideration, p. 3). By Opinion and Order mailed November 19, 2012, the ALJ denied Licensee’s application. Licensee filed the instant appeal to the Pennsylvania Liquor Control Board (“Board”) on November 24, 2012.

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).

Licensee raises several arguments in its appeal, which will be addressed in turn. However, it should be noted that Licensee, represented by its president, Mr. Gesiorski, failed to comply with the rules pertaining to appeals before the Board, specifically subsection 17.21(b)(4) of the Board’s Regulations [40 Pa. Code § 17.21(b)(4)], requiring a concise explanation in numbered paragraphs as to each finding of fact the appellant believes is not supported by substantial evidence. Nonetheless, the Board has attempted to extract Licensee’s arguments from its eight (8)-page Appeal. Licensee also submitted additional documents to the Board after filing its appeal on November 24, i.e. its “First Amendment to Appeal” on November 29, 2012, “Licensee’s Reply to Commonwealth’s Response to Licensee’s Appeal” on January 2, 2013, and Licensee’s letter of January 5, 2013, all containing new exhibits which Licensee

seeks to add to the record. However, pursuant to subsections 17.21(b)(2)¹, 17.21(d)², and 17.21(e)³ of the Board’s Regulations, the Board did not consider these documents in conducting its review.

Licensee first alleges due process violations. Although the specific grounds are not clearly articulated, Licensee expresses displeasure with the sufficiency of the information it received from the Bureau prior to the hearing and states that “[t]he Complainant has yet to be identified or brought to face the accused.” (Licensee’s Appeal, p. 1). Licensee also complains that it did not have enough time to locate and interview witnesses. (Licensee’s Appeal, p. 4).

These arguments are without merit. The citation provided sufficient notice of the type and date of the alleged violations. Pennsylvania Liquor Control Bd. v. Reda, 463 A.2d 108, 109 (Pa. Cmwlth. 1983). The Bureau complied with the procedure⁴ in an enforcement action outlined in section 471 of the Liquor Code [47 P.S. § 4-471], and the OALJ adhered to Chapter 15 of the

¹ The complete appeal must be postmarked or received within thirty (30) calendar days of the mailing of the adjudication. [40 Pa. Code § 17.21(b)(2)]. In this case, the deadline was November 26, 2012.

² The Board’s review in an appeal is limited to the record made before the ALJ. [40 Pa. Code § 17.21(d)].

³ Briefs are permitted, but they must be filed with the appeal to be considered by the Board. [40 Pa. Code § 17.21(e)].

⁴ The Bureau must cite the licensee within one (1) year of the violation occurring. [47 P.S. § 4-471(a)]. The oldest date of a violation alleged here was March 18, 2011, and the citation was issued on December 15, 2011. As for the hearing, the time limit for scheduling hearings is directory rather than mandatory with respect to the Office of the Administrative Law Judge (“OALJ”) and is subject to the OALJ’s discretion based on its caseload. Bureau of Liquor Control Enforcement v. General Davis, Inc., 537 Pa. 319, 323-324, 643 A.2d 670, 672 (1994).

Board's Regulations [40 Pa. Code §§ 15.1-15.62] in conducting the hearing. In fact, the Bureau exceeded the minimum requirements by providing Licensee with additional information in response to Licensee's repeated requests. As for the one request the Bureau did not fulfill, i.e. Licensee's request for the name of "the complainant," presumably a reference to the individual who initially contacted the Bureau regarding the presence and service of minors at Licensee's business, there is nothing in the Liquor Code or the Board's Regulations which require such information to be provided to a licensee. Licensee was afforded the opportunity to cross-examine all of the witnesses against it. Furthermore, Licensee was free to request the subpoena of any witness pursuant to section 15.48 of the Board's Regulations [40 Pa. Code § 15.48].

As a second basis for appeal, Licensee alleges an abuse of discretion by the ALJ. Licensee primarily argues that the ALJ improperly denied Licensee's request for a continuance. (Licensee's Appeal, pp. 3-4). Licensee also generally takes issue with the ALJ's conduct at the hearing, bemoaning the ALJ's interruptions and lectures regarding Mr. Gesiorski's decision to represent Licensee himself rather than hiring an attorney. (Licensee's Appeal, p. 4).

Section 15.54 of the Board's Regulations provides that no case will be continued without just cause and that only the chief ALJ or a designee may grant a continuance. [40 Pa. Code § 15.54(a)]. It also provides requirements applicable when continuance is requested because of the absence of a witness [40 Pa. Code § 15.54(c)], which Licensee did not follow in its motion.

The ALJ denied Licensee's motion because Licensee "did not specify the nature of the inconsistent statements received, when that information was received, the information's format, and its relevance to the case." (Opinion and Order upon Licensee's Motion for Continuance, p. 1). The ALJ also noted the OALJ's need to resolve cases as quickly as possible. Accordingly, the ALJ did not abuse his discretion in denying the motion.

Similarly, there was no evidence in the record that the ALJ abused his discretion in administering the hearing. On the contrary, the Notes of Testimony indicate the ALJ gave Mr. Gesiorski wide leeway in presenting Licensee's case. Moreover, the Board's Regulations provide that repetitious or cumulative evidence must be excluded from an administrative hearing. [40 Pa. Code § 15.51; 1 Pa. Code § 35.161].

Licensee's third averment may generally be characterized as a sufficiency of the evidence argument. Licensee specifically argues that the ALJ's Findings

of Fact Nos. 3, 4, 5, 7 and 8 were not supported by substantial evidence. (Licensee's Appeal, pp. 4-5). It is worth noting that Licensee concedes three (3) minors were served in the licensed establishment by Mrs. Gesiorski on June 29, 2011. (Licensee's Appeal, pp. 4, 6). Nonetheless, the Board has reviewed the record and finds substantial evidence to support the ALJ's decision.

Counts one and two of the Citation alleged violations of subsections 493(1) and 493(14) of the Liquor Code [47 P.S. §§ 493(1), 493(14)], respectively. Subsection 493(1) provides that it is unlawful for any licensee, or licensees' servants, agents, or employees, to sell, furnish, or give any liquor or malt or brewed beverages, or to permit liquor or malt or brewed beverages to be sold, furnished, or given, to any minor. [47 P.S. § 4-493(1)]. Section 495 of the Liquor Code [47 P.S. § 4-495] provides affirmative defenses to a *prima facie* showing of service to minors, none of which is at issue here.

Additionally, subsection 493(14) provides that minors, i.e. persons under twenty-one (21) years of age⁵, generally are prohibited from frequenting a premises licensed to sell alcoholic beverages. The term "frequent," as used in subsection 493(14), has been interpreted as meaning "to visit often or to resort to habitually or to recur again and again, or more than one or two visits."

⁵ See 1 Pa. C.S. § 1991.

Appeal of Speranza, 416 Pa. 348, 352, 206 A.2d 292, 294 (1965). The statute provides five (5) exceptions, which when met, allow a minor to lawfully be present on the premises; however, none of these exceptions were raised by Licensee in this case. As always, the burden was on the Bureau to prove to the ALJ by a preponderance of the evidence⁶ that the licensee committed the violations charged.

In the instant matter, with respect to both counts the ALJ found the following facts:

3. On March 18, 2011, a twenty year old (born April 28, 1990) purchased a six-pack of beer without question as to age. He frequented the premises on two prior occasions during which he was also served alcoholic beverages either by Mr. Gesiorski, Sole Corporate Officer, or his wife. (N.T. 110-120)[.]

4. On June 29, 2011, a Bureau Enforcement Officer conducted an outside surveillance of the premises beginning at 7:20 p.m. At 7:40 p.m. a vehicle pulled into the parking lot. The Officer saw two youthful appearing persons exit the vehicle and enter the premises. The Officer entered the premises in an undercover capacity about ten minutes later. The Officer saw the two youthful appearing patrons seated at a booth with a third customer. All three were drinking beer. The Officer walked over to the three and displayed his credentials. (N.T. 52-56)[.]

5. After processing the three and releasing them outside the premises at his vehicle, the Officer reentered the premises at approximately 8:30 p.m. He displayed his credentials. He notified the bartender, Mr. Gesiorski's wife, that she had served beer to

⁶ See In re Omicron Enterprises, 449 A.2d 857, 859 (Pa. Cmwlth. 1982).

three minors. Ms. Gesiorski responded that the three produced identification showing them to be of age. The Officer explained that he had extensive conversations with the three; they all denied showing Ms. Gesiorski any identification. Ms. Gesiorski then remarked that the three had been there before and that she thought they were of age. Ms. Gesiorski admitted that she served the three beer. (N.T. 57-59)[.]

6. One of the three was eighteen years old (born September 29, 1992). He arrived at the premises at approximately 7:30 p.m. He ordered a bottle of beer from Ms. Gesiorski without question. (N.T. 138-150)[.]

7. The second minor was eighteen years old on June 29, 2011 (born August 10, 1992). He arrived at the premises somewhere between 6:00 to 7:00 p.m. Ms. Gesiorski served him beer without question. He frequented the premises three to four times prior to June 29, 2011. On all visits, he was served alcoholic beverages without question. (N.T. 152-158)[.]

8. The third minor was twenty years old on June 29, 2011 (born July 7, 1991). He purchased several containers of beer from Ms. Gesiorski without question. He frequented the premises nearly twenty times prior to June 29, 2011. On every occasion he was served without question either by Mr. or Ms. Gesiorski. (N.T. 166-171)[.]

(Findings of Fact Nos. 3-8).

As fact-finder, the ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. See 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).

Here, based on the above-cited facts, the ALJ sustained both counts of the Citation, although he dismissed the charges as to June 18, 2011.⁷ The ALJ thus concluded that Licensee served minors and permitted minors to frequent the licensed premises on March 18 and June 18, 2011, as well as divers other occasions within a year of June 29, 2011. This conclusion was based on the testimony of Bureau Officer Terence McPhillips, as well as the testimony of the minor involved in the March 18, 2011 incident and the three (3) minors involved in the June 29, 2011 incident.

The Board finds the ALJ's conclusion to be amply supported by the testimony, and it will not overturn the ALJ's credibility determinations or his resolution of conflicting evidence. Clearly the ALJ carefully weighed the testimony, as evidenced by his consideration and rejection of testimony of the minor involved in the June 18, 2011 incident. (Adjudication, p. 4, n. 1). The ALJ's conclusion is additionally supported by the admissions of Mr. and Mrs. Gesiorski that the minors were served without being asked for identification on

⁷ Licensee's Appeal makes several arguments regarding the sufficiency of the evidence relevant to June 18, 2011. Because that date was dismissed and thus did not factor into the ALJ's assessment of the penalty, the evidence pertaining to June 18, 2011, will not be discussed.

June 29, 2011, apparently because Mrs. Gesiorski believed the individuals had previously been patrons at the establishment, corroborating the minors' testimony. (N.T. 212-215, 277). Aside from Mrs. Gesiorski's testimony, Licensee presented its business records, which the ALJ found unreliable and insufficient to rebut the Bureau's testimony. Furthermore, Licensee presented no evidence establishing any of the defenses in section 495 of the Liquor Code [47 P.S. § 4-495].

Licensee's final averment focuses on the penalty assessed by the ALJ. Licensee characterizes the two thousand dollar (\$2,000.00) fine as "excess [sic] and punitive" compared to the fines imposed on the three (3) minors for summary offenses [18 Pa. C.S. 6308] stemming from the incident June 29, 2011. (Licensee's Appeal, p. 6-7, Ex. 11).

Licensee's sense of fairness notwithstanding, nothing in the Liquor Code or the Board's Regulations requires a licensee's penalty to be comparable to criminal fines. Enforcement actions under the Liquor Code are administrative, not criminal, matters. Licensee is reminded that, as stated by the Pennsylvania Supreme Court, "There is perhaps no other area of permissible state action within which the exercise of the police powers of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages." In re

Tahiti Bar, Inc. Liquor License Case, 395 Pa. 355, 360, 150 A.2d 112, 115 (1959). It is within the discretion of the ALJ, once satisfied that a licensee committed the violation or violations charged, to determine an appropriate penalty within the statutory parameters.

Section 471 prescribes the penalty for the type of violations sustained in the Citation. Heightened penalties are required for violations of sections 493(1) and 493(14), as the ALJ is permitted at both counts to impose a license suspension or revocation and/or a fine of not less than one thousand dollars (\$1,000.00) nor more than five thousand dollars (\$5,000.00). [47 P.S. § 4-471(b)]. In addition to present facts, an ALJ may consider a licensee's prior citation history when imposing a penalty. [47 P.S. § 4-471(c)].

In this case, the ALJ merged counts one and two and imposed a fine of two thousand dollars (\$2,000.00) in addition to mandating RAMP compliance. Thus the fine is actually the statutory minimum for the two (2) violations sustained in the Citation. Since the fine is within the statutory guidelines set forth in the Liquor Code, the Board will not alter the penalty imposed by the ALJ.

For the foregoing reasons, the Adjudication and Order of the ALJ is affirmed.

ORDER

The appeal of Licensee is denied.

The decision of the ALJ is affirmed.

The fine of two thousand dollars (\$2,000.00) has been paid.

Licensee shall comply with section 471.1 of the Liquor Code [47 P.S. 4-471.1] pertaining to responsible alcohol management for a period of one (1)

year. Certification from the Bureau of Alcohol Education must be obtained within ninety (90) days of the mailing date of this Order.

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

Board Secretary