

Mailing Date: January 16, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 12-0144
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
PROSPECT STREET CAFE, INC.	:	License No. R-10788
23 South Prospect Street	:	
Nanticoke, PA 18634-2319	:	LID 51293

Counsel for Licensee: Michael D. Yelen, Esquire  
Yelen Law Offices  
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7448 Industrial Parkway  
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**OPINION**

Prospect Street Café, Inc. (“Licensee”), appeals from the Adjudication and Order of Administrative Law Judge (“ALJ”) Felix Thau, mailed October 17, 2012, wherein the ALJ sustained three (3) of the six (6) counts of Citation No. 12-0144 (“the Citation”) and imposed a fine of one thousand seven hundred

fifty dollars (\$1,750.00), as well as mandatory Responsible Alcohol Management Program (“RAMP”) compliance for one (1) year.

On February 3, 2012, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation to Licensee, charging it with six (6) counts. The first count charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] in that on February 5 and 9, March 8, May 25, June 3, July 27, August 13, September 3 and 9, October 22 and 28, November 12 and 26, and December 4 and 20, 2011, and January 1, 2012, the licensed establishment was operated in a noisy and/or disorderly manner.<sup>1</sup> The second count charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 2701 of the Crimes Code [18 Pa. C.S. § 2701] in that on September 9, October 28, and December 4, 2011, and January 1, 2012, Licensee, by its servants, agents, or employees, committed simple assault.<sup>2</sup> The third count charged Licensee with violating section 493(14) of the Liquor Code [47 P.S. § 4-493(14)] in that on January 1, 2012, and two (2) unknown dates in the past year, Licensee, by its servants, agents, or employees, permitted one (1) minor, twenty (20) years of age, to frequent the licensed premises. The fourth

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<sup>1</sup> At the hearing, Bureau counsel withdrew the dates of February 5, 9, March 8, May 25, June 3, September 3, October 22, 28, November 12, 26, and December 4, 2011. (N.T. 6-14, 17).

<sup>2</sup> At the hearing, Bureau counsel withdrew the dates of October 28 and December 4, 2011, and January 1, 2012. (N.T. 15-17).

count charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that on January 1, 2012, and two (2) unknown dates in the past year, Licensee, by its servants, agents, or employees, furnished or gave alcoholic beverages to one (1) minor, twenty (20) years of age. The fifth count charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 5513 of the Crimes Code [18 Pa. C.S. § 5513] in that on March 3, June 14 and 15, August 7, October 19, November 2 and 3, and December 28 and 29, 2011, and January 4, 2012, Licensee, by its servants, agents, or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling, and/or bookmaking on the licensed premises.<sup>3</sup> The sixth count charged Licensee with violating section 404 of the Liquor Code [47 P.S. § 4-404] in that on December 20, 2011, and January 1, 2012, Licensee, by its servants agents or employees, failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions upon the license.

The hearing was held on July 31, 2012. Craig A. Strong, Esquire, appeared at the hearing as counsel for the Bureau. Michael D. Yelen, Esquire, appeared on behalf of Licensee. By Adjudication and Order mailed October 17, 2012, the

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<sup>3</sup> At the hearing, Bureau counsel withdrew the dates of March 3, June 14, and August 7, 2012. (N.T. 16-17).

ALJ dismissed counts one, two, and six but sustained counts three through five. Licensee filed the instant appeal to the Pennsylvania Liquor Control Board (“Board”) on November 16, 2012, raising two (2) averments, each of which will be addressed in turn.<sup>4</sup>

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,

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<sup>4</sup> Since Licensee’s appeal relates only to the three (3) counts that were sustained by the ALJ, they are the only ones that are addressed herein.

discretion is abused.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 297, 602 A.2d 1300, 1305 (1992) (citations omitted).

Licensee’s first averment on appeal alleges that the ALJ’s decision to sustain counts three and four was not supported by substantial evidence. Licensee notes that the only evidence presented by the Bureau in support of the alleged violations involving a minor was the testimony of the alleged minor, Melanie Figueroa. Licensee argues that Ms. Figueroa’s testimony that she ordered and was served a drink known as a “cherry bomb” at the licensed establishment was insufficient to prove a violation of subsection 493(1) because the Bureau failed to prove that the beverage contained alcohol. Licensee further argues that because Ms. Figueroa testified that she was turned away by Licensee on two (2) prior occasions for lack of identification, it was an error of law for the ALJ to find a violation of subsection 493(14) based on only one (1) instance of minors frequenting the premises. Finally, Licensee contends that it was deprived of due process in that the ALJ precluded Licensee from fully cross-examining Ms. Figueroa and attacking her credibility in light of possible criminal charges being pursued against her.

Counts three and four alleged violations of subsections 493(14) and 493(1) of the Liquor Code [47 P.S. §§ 493(14), 493(1)], respectively. Subsection

493(14) provides that minors, i.e. persons under twenty-one (21) years of age<sup>5</sup>, 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.” 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.

Additionally, 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)]. A licensee “permits” alcoholic beverages to be sold, furnished, or given when it “acquiesces by failing to prevent” such service. Banks Liquor License Case, 467 A.2d 85, 88 (Pa. Cmwlth. 1983). Thus, a licensee has a duty to see that adult patrons do not furnish alcohol to minors. Pennsylvania Liquor Control Bd. v. Grand Marcus One, Inc., 451 A.2d 810 (Pa. Cmwlth. 1982). Section 495 of the Liquor Code [47 P.S. § 4-495] provides affirmative defenses to a *prima facie*

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<sup>5</sup> See 1 Pa. C.S. § 1991.

showing of service to minors, none of which is at issue here. As always, the burden was on the Bureau to prove to the ALJ by a preponderance of the evidence<sup>6</sup> that the licensee committed the violations charged.

In the instant matter, with respect to counts three and four the ALJ found as follows:

[On December 31, 2011, a] twenty year old (born September 13, 1991), Ms. F., entered the licensed premises with a group of friends a few minutes before midnight. She was served alcoholic beverages. She was not required to show any identification. She drank alcoholic beverages at the premises on two prior occasions within a year of December 31, 2011. (N.T. 221-227).

(Finding of Fact No. 17). Based on these facts, the ALJ concluded that Licensee violated subsections 493(1) and 493(14) of the Liquor Code [47 P.S. §§ 493(1), 493(14)] by serving alcohol to a minor and permitting a minor to frequent the licensed premises, respectively.

The record supports this conclusion with respect to count four, involving a sale to a minor. Ms. Figueroa testified that shortly before midnight on December 31, 2011, when she was twenty (20) years of age, she entered the licensed establishment without being asked to provide identification. (N.T. 221, 225). Ms. Figueroa stated that while she was on the premises, she consumed an alcoholic drink called a “cherry bomb,” although she was not aware of the

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<sup>6</sup> See *In re Omicron Enterprises*, 449 A.2d 857, 859 (Pa. Cmwlth. 1982).

exact contents of the beverage. (N.T. 222-224). This testimony was not controverted by Licensee, and the ALJ found it to be credible.

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 evidence was at least minimally sufficient here, and, thus, the Board will not overturn the ALJ's credibility determinations.

As for Licensee's alleged inability to attack the witness' credibility, although the ALJ stated he would limit the scope of Licensee's cross-examination of Ms. Figueroa due to perceived Fifth Amendment concerns<sup>7</sup>, Licensee was free to cross-examine the witness on all matters relevant to counts three and four. Moreover, the witness had already admitted to a violation of the Crimes Code [see 18 Pa. C.S. § 6308], and thus it is unlikely that further admissions to an irrelevant criminal incident would have seriously impacted the witness' credibility as to this incident. Therefore, Licensee's arguments with respect to count four are without merit.

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<sup>7</sup> On the night in question, Ms. Figueroa was allegedly involved in another criminal incident at the licensed premises, which was relevant to count one but is not at issue in this appeal.

Conversely, the ALJ erred in sustaining count three, involving permitting minors to frequent the licensed premises. Relevant to that charge, the ALJ found that Ms. Figueroa was admitted to the licensed premises on one (1) occasion, December 31, 2011, for which there was substantial evidence. However, the ALJ's finding that Ms. Figueroa "drank alcoholic beverages at the premises on two prior occasions within a year of December 31, 2011," was not supported by substantial evidence of record. Ms. Figueroa testified that she had previously been at the licensed establishment "like two times" to "take [her] boyfriend out of there," but she went on to state that she had "never been in there to drink or anything," that December 31, 2011, was "the first time [she] was ever in there." (N.T. 223-224). Ms. Figueroa further testified that on those prior occasions she was asked to provide identification and was told to leave because she was under twenty-one (21) years of age and did not have identification. (N.T. 224-225, 232). As discussed earlier, the Bureau was required to show that Licensee permitted a minor to be on the premises "habitually" or "on more than one or two visits." In this case, the Bureau presented evidence of only one (1) instance of Licensee improperly permitting a minor to enter the licensed premises. The decision of the ALJ to sustain count three was, therefore, an error.

In its second averment on appeal, Licensee argues the ALJ's decision to sustain count five was not supported by substantial evidence. With respect to the sustained violation occurring on June 15, 2011, Licensee argues that the Bureau officer's testimony, which indicated that the officer received a payout for credits accumulated on a video poker machine, failed to establish the "reward" element of unlawful gambling. Relative to the violation occurring on January 4, 2012, Licensee contends that Licensee's employee's admission regarding payouts was "improperly elicited after the alleged gambling machines were confiscated without proper basis on that date." (Licensee's Appeal, para. 2(b)).

With regard to gambling devices, the Pennsylvania Supreme Court has stated that "the inquiry must be whether the machine is 'so intrinsically connected with gambling' as to constitute a gambling device *per se*." Commonwealth v. Two Electronic Poker Game Machines, 502 Pa. 186, 194, 465 A.2d 973, 977 (1983) (citing Nu-Ken Novelty, Inc. v. Heller, 288 A.2d 919, 920 (Pa. Super. 1972)). This determination depends on the characteristics of the machine in relation to the three (3) elements necessary to gambling: consideration, a result determined by chance rather than skill, and a reward. Two Electronic Poker Game Machines, 502 Pa., at 194, 465 A.2d, at 977. If the

machine displays all three (3) qualities, it will then be “so intrinsically connected with gambling” as to be a gambling device *per se*. Id.

In this case, the ALJ found violations on two (2) of the dates charged.<sup>8</sup>

Based on the testimony of Bureau Officer Caroline Rayeski, the ALJ found that on June 15, 2011:

A Bureau Enforcement Officer conducted an undercover visit of the licensed premises, arriving at 2:30 p.m. The Officer noticed three gaming devices. The Officer placed \$40 into a video poker machine. After accumulating 100 credits, the Officer requested payment for those credits from the bartender. The bartender paid the Officer \$25. The Officer marked the machine for future identification. (N.T. 189-192).

(Finding of Fact No. 18). The ALJ also found, based on the testimony of Bureau Officer Terrance Higgs, that on January 4, 2012:

A Bureau Enforcement Officer conducted an administrative inspection of the premises at a time when it was open and in operation selling alcoholic beverages. The Officer noticed one video gaming device and two pinball machines. An employee advised the Officer that payouts were made for credits accumulated on all three. The Officer seized the three machines. (N.T. 81-89).

(Finding of Fact No. 22) (footnote omitted). Officer Higgs, whom the ALJ found qualified as an expert in gaming devices, testified that he inspected the

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<sup>8</sup> At the hearing, the Bureau withdrew the alleged violations on the dates March 3, June 14, and August 7, 2011, which left at issue only June 15, 2011 and January 4, 2012. (N.T. 16).

three (3) machines seized January 4, 2012, and found evidence that they were gambling devices. (Finding of Fact Nos. 23-26).

Based on this this evidence, the ALJ appears to have found that the video gaming machine was a gambling device *per se*, with Licensee's employee's admission of payouts providing evidence of a "reward;" however, due to the lack of an "accounting method," the ALJ did not find the two (2) pinball machines to be gambling devices, despite the employee's admission of payouts. (Adjudication, "Discussion" at 14). The ALJ thus concluded that Licensee violated section 471 of the Liquor Code [47 P.S. § 4-471] and section 5513 of the Crimes Code [18 Pa. C.S. § 5513] by maintaining the video poker machine on the licensed premises on June 15, 2011, and January 4, 2012.

A review of the record reveals that the ALJ's decision was supported by substantial evidence. Officer Rayeski testified that on June 15, 2011, she put forty dollars (\$40.00) into a video poker machine at the licensed establishment. (N.T. 189-190). After playing for a short time, the officer informed Licensee's bartender that she had one hundred (100) credits and requested her payout. (N.T. 190). In response, the bartender retrieved twenty-five dollars (\$25.00) from the cash register and placed it in front of the officer. (N.T. 191).

Additionally, Officer Higgs testified that during a routine inspection on January 4, 2012, he spoke with Licensee's bartender "Barbara." (N.T. 66, 79). Barbara stated that all three (3) machines on the premises, including the video poker machine, were equipped with "knock-off" devices that would instantly reduce the credits to zero, and she told Officer Higgs she made payouts for credits accumulated on the machines. (N.T. 81). She further stated that the payout policy on the video poker machine was twenty-five dollars (\$25.00) for one hundred (100) credits, and the knock-off procedure was to press the numbers "one, three, and seven." (N.T. 81, 144). By operating the video poker device, Officer Higgs determined that the outcome of the game was based on chance, as "[y]ou could win a hand or lose a hand without getting input from the player." (N.T. 100).

Considering these admissions and the officers' observations, Licensee's video poker machine clearly meets the elements of a gambling device *per se*. Like the "Electronic Draw Poker" machine in Commonwealth v. 9 Mills Mechanical Slot Machines, 437 A.2d 67 (Pa. Cmwlth. 1981) and the "Electro-Sport" machine in Two Electronic Poker Game Machines, *supra*, which were gambling devices *per se*, Licensee's video poker machine required the insertion of money to play, depended primarily on chance for its outcomes, and offered

the ability to knock-off credits. These facts satisfy the required elements of consideration, chance, and a reward, respectively. 9 Mills Mechanical Slot Machines, 437 A.2d at 71; Two Electronic Poker Game Machines, 502 Pa. at 196-197, 465 A.2d at 978-979. Furthermore, Licensee made cash payouts on the device. The finding of the ALJ that Licensee maintained a gambling device on June 15, 2011, and January 4, 2012, was therefore supported by substantial evidence.

Finally, Licensee's contention that the machines were unlawfully seized may be quickly dismissed. Section 5513 of the Crimes Code specifically authorizes the Commonwealth to seize gambling devices found on a licensee's premises. [18 Pa. C.S. 5513(b)]. Law enforcement officers have probable cause to seize gambling devices pursuant to section 5513 when they observe such devices while lawfully present. See 9 Mills Mechanical Slot Machines, supra. Even if seized machines do not turn out to be gambling devices *per se*, the fact that "actual cash pay-offs were made on the outcome of [the] machines" renders the devices subject to confiscation and forfeiture under section 5513(b). 9 Mills Mechanical Slot Machines, 437 A.2d at 71. Licensee's averment regarding count five is therefore without merit, and the ALJ did not err in sustaining the charge.

For the foregoing reasons, the Adjudication and Order of the ALJ is reversed as to count three; it is affirmed as to all remaining counts.

**ORDER**

The appeal of Licensee is granted in part and denied in part.

The decision of the ALJ is reversed as to count three, and the charge is dismissed. The ALJ's decision dismissing counts one, two, and six and sustaining counts four and five is affirmed.

The penalty imposed by the ALJ of a fine of one thousand seven hundred fifty dollars (\$1,750.00), as well as mandatory Responsible Alcohol Management Program ("RAMP") compliance for one (1) year, shall be amended in accordance with this order. The original fine of fine of one thousand seven hundred fifty dollars (\$1,750.00) remains unpaid.

The case is hereby remanded to the ALJ for the imposition of an appropriate penalty.

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Board Secretary