

Citation”) and imposed a fine of one thousand six hundred fifty dollars (\$1,650.00).

Pursuant to section 471 of the Liquor Code, an appeal must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Pennsylvania Liquor Control Board (“Board”) shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/her decision was not based upon substantial evidence. The Commonwealth Court 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).

On February 14, 2012, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), issued the Citation to Licensee. Count 1 of the Citation charged Licensee with violating section 5.32(a) of the Board Regulations [40 Pa. Code § 5.32(a)], in that on November 18 and 24 and on December 18 and 31, 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. Count 2 of the Citation charged Licensee with a

violation of sections 406(a)(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(2), 4-493(16)], in that on December 31, 2011, Licensee, by its servants, agents, or employees, sold, furnished and/or gave alcoholic beverages between 2:00 a.m. and 7:00 a.m. Count 3 of the Citation charged Licensee with a violation of section 499(a) of the Liquor Code , in that on December 31, 2011, Licensee, by its servants, agents, or employees, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

On April 19, 2012, a Citation Hearing Notice was mailed by the Office of the Administrative Law Judge (“OALJ”) to Licensee’s attorney via certified mail, return receipt requested. The return receipt card was not returned. On July 19, 2012, a Citation Hearing Notice was mailed by the OALJ to Licensee’s attorney via certified mail, return receipt requested. The return receipt card was returned, signed. Subsequent to a request for a continuance, on December 13, 2012, a Citation Hearing Notice was mailed by the OALJ to Licensee’s attorney via certified mail. The Notice advised Licensee that a hearing on the Citation, to show cause why Licensee’s liquor license should not be suspended or revoked or a fine imposed, or both, would be held on January 29, 2013, at 10:30 a.m., at

Meetinghouse Business Center, 140 West Germantown Pike, Suite 100, Plymouth Meeting, Pennsylvania.

The hearing was held on January 29, 2013. Erik S. Shmukler, Esquire, appeared at the hearing as counsel for the Bureau. John J. McCreesh, III, Esquire, appeared on behalf of Licensee. By Adjudication and Order mailed July 3, 2013, the ALJ sustained the Citation and imposed a fine of one thousand six hundred fifty dollars (\$1,650.00).

On July 18, 2013, Licensee filed the instant appeal. In its appeal, Licensee merely alleges that the ALJ's findings of fact are not supported by substantial evidence. It must be noted that section 17.21(b) of the Board's Regulations [40 Pa. Code § 17.21(b)] provides that an appeal to the Board "shall be in the form prescribed by the Board."¹ It also requires, *inter alia*, that an appeal to the Board of a decision of the ALJ "shall include a concise enumeration and explanation, in the numbered paragraphs, as to each finding of fact which the appellant believes is not supported by substantial evidence." [40 Pa. Code § 17.21(b)(4)] (emphasis added). Licensee's appeal, while concise, does not enumerate or explain a

¹ The Board directs Licensee's attention to section 7 of the Appeal Form, which requires that the appellant "specify how the Administrative Law Judge committed an error of law or abused his/her discretion or how his/her decision was not based on substantial evidence" (emphasis added).

specific finding of fact of the ALJ not supported by substantial evidence; nor does it specify how the ALJ committed an error of law.

Such failure to follow the proper appeal procedure, as prescribed by section 17.21 of the Board's Regulations [40 Pa. Code § 17.21], is grounds for dismissal at the discretion of the Board. Nonetheless, the Board has reviewed the certified record, including the ALJ's Adjudication and Order, Licensee's appeal, and the notes of testimony and exhibits from the hearing and concluded that the ALJ's decision was without error and was supported by substantial evidence.

Count 1 of the Citation charged that Licensee was in violation of section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)], in that on November 18 and 24 and on December 18 and 31, 2011, Licensee 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. Section 5.32(a) provides that:

A licensee may not use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard on the outside of the licensed premises.

[40 Pa. Code § 5.32(a)].

Count 2 of the Citation charged that Licensee was in violation of sections 406(a)(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(2), 4-493(16)], in

that on December 31, 2011, Licensee sold, furnished and/or gave alcoholic beverages between 2:00 a.m. and 7:00 a.m. Section 406(a)(2) provides that:

Hotel and restaurant liquor licensees, airport restaurant liquor licensees, municipal golf course restaurant liquor licensees and privately-owned public golf course restaurant licensees may sell liquor and malt or brewed beverages only after seven o'clock antemeridian of any day until two o'clock antemeridian of the following day, except Sunday, and except as hereinafter provided, may sell liquor and malt or brewed beverages on Sunday between the hours of twelve o'clock midnight and two o'clock antemeridian.

47 P.S. § 4-406(a)(2).

Section 493 (16) provides that it is unlawful:

for any licensee, his servants, agents or employes, to give, furnish, trade, barter, serve or deliver any liquor or malt or brewed beverages to any person during hours or on days when the licensee is prohibited by this act from selling liquor or malt or brewed beverages.

47 P.S. § 4-493(16).

Count 3 of the Citation charged that Licensee violated section 499(a) of the Liquor Code, in that on December 31, 2011, Licensee, by its servants, agents, or employees, permitted patrons to possess and /or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m. Section 499(a) provides that:

Except as provided for elsewhere in this section, all patrons of a licensee shall be required to leave that part of the premises habitually used for the serving of liquor or malt or brewed beverages to guests

or patrons not later than one-half hour after the time the licensee is required by this act to cease serving liquor or malt or brewed beverages and shall not be permitted to have any previously served liquor or malt or brewed beverages in their possession, nor shall they be permitted to remove any previously served liquor or malt or brewed beverages from that part of the premises. Patrons of a licensee shall not be permitted to reenter that portion of the premises habitually used for the serving of liquor or malt or brewed beverages between the time designated by this act for patrons to vacate the licensed premises and the time designated by this act when the serving of liquor or malt or brewed beverages is allowed to begin unless the licensee has been granted a permit for extended hours food service.

47 P.S. § 4-499(a).

The record includes the testimony of Bureau Officer McKoy, who conducted an investigation of the licensed premises. The officer arrived at the premises at 12:10 a.m. on November 18, 2011, and heard loud music emanating from the premises. [N.T. 8-9]. Upon entering the premises, the officer observed a DJ and several speakers that amplified the music. [N.T. 9-10]. Upon exiting forty (40) minutes later, the officer was able to hear the music as she approached the residential area of Howland Street. [N.T. 10]. The officer again visited the premises on November 24, 2011, heard loud music as she exited her vehicle and approached the premises. [N.T. 11]. Upon entering, she observed a DJ behind the bar and four (4) more speakers than on her first visit. [N.T. 12]. As she exited an

hour later, the officer was able to hear the music as she proceeded fifty-five (55) paces onto Howland Street. [N.T. 12].

On Officer McKoy's third visit to the premises on December 17, 2011, she arrived at 11:45 p.m. but was unable to hear music as she approached. [N.T.13-14]. She remained inside the premises for forty (40) minutes and upon exiting, heard loud music from approximately seventy-five (75) paces onto Howland Street and another thirty (30) paces onto Mayfair Avenue. [N.T.15]. During her fourth visit, on December 31, 2011 at 1:35 a.m., the officer heard loud music as she exited her vehicle and upon entering, observed a DJ and amplifying speakers. [N.T.15-16]. At 2:30 a.m., Officer McKoy ordered, paid for, and received a shot of tequila. [N.T.16]. The bartender charged her six dollars (\$6.00), took the twenty dollar (\$20.00) bill, placed it in the cash register, and handed the officer her change. [N.T.17]. The officer observed patrons still being served. [N.T.17]. At the time of her exit at 2:45 a.m., the officer observed that fifteen (15) patrons remained and that no employees were taking alcohol from them. [N.T.18]. She was able to hear the loud music as she proceeded to Howland Street. [N.T.19].

Licensee's sole evidence offered was its testimony that sound proofing covers on the front door had been installed on March 19, 2012. Accordingly,

based upon the uncontroverted testimony in the record, the ALJ sustained the Citation.

Based on the foregoing review, the Board finds the ALJ's conclusion to be amply supported by the record and within the defined parameters as to penalties. The Bureau's evidence established that Licensee had several noise violations, sold alcohol after 2:00 a.m., and permitted patrons to possess alcohol after 2:30 a.m., in violation of the sections of the Liquor Code/Board Regulations listed in the Citation. Moreover, Licensee provided no arguments for the Board to consider at the hearing or on appeal. Therefore, having found substantial evidence to support the decision and no error of law, the Adjudication and Order of the ALJ is affirmed.

ORDER

The appeal of Licensee is denied.

The Order of the ALJ is affirmed.

The fine of one thousand six hundred fifty dollars (\$1,650.00) has been paid in full.

Board Secretary