

Mailing Date: July 24, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 12-0613
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
DIPAL CORPORATION	:	License No. R-20101
t/a Gabby's	:	
2440 West Pike Street, Suite 2	:	
Houston, PA 15342-1161	:	LID 57455

Counsel for Licensee: Michael F. Fives, Esquire (on appeal)
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OPINION

Dipal Corporation, trading as Gabby's, ("Licensee") filed a timely appeal from the Order of Administrative Law Judge Roderick Frisk ("ALJ") mailed on

April 19, 2013, wherein the ALJ fined Licensee a total of seven hundred fifty dollars (\$750.00) and issued a one (1) day suspension beginning on May 24, 2013, and continuing until Licensee provides certification that it operates as a bona fide restaurant.

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).

Citation No. 12-0613 contained three (3) counts. The first count charged Licensee with a violation of section 102 of the Liquor Code [47 P.S. § 1-102] in that on February 23, 2012, its licensed premises was not a bona fide restaurant in that, by its servants, agents, or employees, it maintained insufficient food items, eating utensils and dishes. The second count charged Licensee with a

violation of section 471(d) of the Liquor Code [47 P.S. § 4-471(d)] in that during the period from December 26, 2011, through February 23, 2012, it failed to comply with the Order of the ALJ at Citation No. 11-0679C, which mandated Responsible Alcohol Management (“RAMP”) training. The third count charged Licensee with a violation of section 493(12) and 471.1(f) of the Liquor Code [47 P.S. §§ 4-493(12), 4-471.1(f)] in that Licensee, by its servants, agents, or employees, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding February 23, 2012.

On August 9, 2012, a Citation Hearing Notice was mailed by the Office of the Administrative Law Judge (“OALJ”) to the licensed premises via first-class mail and certified mail, return receipt requested. 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 October 2, 2012, at 1:30 p.m., at 2 Parkway Center, 875 Greentree Road, Room G-8, Pittsburgh, Pennsylvania. Board records indicate the certified mailing was returned on August 14, 2012, having been accepted by a “Dawn Dillier.” Subsequently, notice was sent to the licensed premises via first class mail and certified mail that the hearing was cancelled. The hearing was later

rescheduled for November 19, 2012, at 2:00 p.m., at the aforementioned location. Again, notice was sent to the licensed premises via first class mail and certified mail that the hearing was cancelled. The hearing was later rescheduled, via proper notice, for March 20, 2013, at 9:30 a.m., at the aforementioned location.

The hearing was held on March 20, 2013. Emily Gustave, Esquire, appeared at the hearing as counsel for the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”). No one appeared on behalf of Licensee. By Adjudication and Order mailed April 19, 2013, the ALJ sustained all three (3) counts of the Citation. [Adjudication and Order, mailed April 19, 2013]. For Count 1, the ALJ imposed a penalty of a fine of three hundred dollars (\$300.00) and a suspension for a period of one (1) day, May 24, 2013, and continuing thereafter until Licensee provides certification that it operates its licensed establishment as a bona fide restaurant in accordance with the provisions of section 102 of the Liquor Code. For Count 2, the ALJ imposed a penalty of a fine of three hundred dollars (\$300.00). For Count 3, the ALJ imposed a penalty of a fine of one hundred fifty dollars (\$150.00).¹

¹ As of June 14, 2013, the aggregate fine of seven hundred fifty dollars (\$750.00) remains unpaid.

In addressing this matter, the Board has reviewed the certified record provided by the OALJ, including the ALJ's Adjudication & Order mailed April 19, 2013, Licensee's Appeal, and Licensee's Application for Supersedeas,² and has concluded that, with regard to Counts 1 and 2, the ALJ's Order is without error and is supported by substantial evidence.

Count 1 charged that Licensee was in violation of section 102 of the Liquor Code [47 P.S. § 1-102] in that it was not a bona fide restaurant and failed to maintain sufficient food items, eating utensils, and dishes. Section 102 of the Liquor Code defines a restaurant as “a reputable place operated by responsible persons of good reputation and **habitually and principally used for the purpose of providing food for the public**, the place to have an area within a building of not less than four hundred square feet, equipped with tables and chairs, including bar seats, accommodating at least thirty persons at one time.” [47 P.S. § 1-102 (emphasis added)].

With regard to this charge, the record includes the testimony of Officer Bonadio, a twenty-one (21) year veteran of the Bureau, who conducted an inspection of the licensed premises on February 23, 2012 at approximately 7:00 p.m. [N.T. 7, 10]. Officer Bonadio asked to see the kitchen of the licensed

² By letter dated May 22, 2013, from Faith S. Diehl, Chief Counsel for the Board, Counsel for Licensee was

premises, to check if Licensee was maintaining any type of food, cooking utensils, eating utensils, dishes, and similar items to indicate that it was a bona fide restaurant. [N.T. 11]. Sujay Patel, the purported Board-approved manager, advised Officer Bonadio that Licensee does not have a kitchen, nor does the licensee serve any type of food. [N.T. 11, 12]. Sujay Patel advised that the only food on the premises were snacks such as potato chips or pretzels. [N.T. 12]. Based upon the uncontroverted testimony in the record, the ALJ concluded that the licensed premises was not operating as a bona fide restaurant, and assessed a fine of three hundred dollars (\$300.00) and a one (1) day suspension, to occur on May 24, 2013, and continuing until Licensee provides certification that its licensed establishment is a bona fide restaurant.

Count 2 asserted that Licensee had failed to comply with the September 26, 2011, Order of the Administrative Law Judge at Citation 11-0679C to obtain RAMP certification. Licensee was reminded of this obligation by letters from the Board's Bureau of Alcohol Education dated September 26, 2011, and November 10, 2011. [Exhibits C-5 and C-6]. In both letters, Licensee was further advised that the deadline to obtain RAMP certification was December 25, 2011. [Exhibits C-5 and C-6].

advised that the appeal in this specific case acted as an automatic supersedeas.

With regard to Count 2, Officer Bonadio asked Sujay Patel, during his investigation of the licensed premises on February 22, 2012, if Mr. Patel was able to produce any type of documentation that he had completed the mandated RAMP certification. [N.T. 12]. Mr. Patel indicated that he had recently hired two (2) new bartenders, and that one (1) of his managers had been scheduled to take RAMP training but subsequently quit. [N.T. 12] Mr. Patel was not able to provide any documentation that Licensee had obtained RAMP certification. [N.T. 13]. With regard to Count 2, the ALJ imposed a fine of three hundred dollars (\$300.00).

Count 3 of the Citation charged Licensee with a violation of section 493(12) and 471.1(f) of the Liquor Code [47 P.S. §§ 4-493(12), 4-471.1(f)], asserting that Licensee, by its servants, agents, or employees, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding February 23, 2012. Although not real clear, the basis for this charge appears to be Licensee's failure to provide proof of RAMP certification. [N.T. 13]. With regard to this count, the ALJ assessed a fine of one hundred fifty dollars (\$150.00).

On May 17, 2013, Licensee filed the instant appeal and an application for supersedeas. In its appeal, Licensee noted that the president of the corporate

Licensee, Pravin Patel, was unable to attend the hearing as a result of being hospitalized for a heart attack. With regard to the specific counts of the citation, Licensee's alleged appeal that food was provided by the adjoining store, an arrangement that had previously been approved, that Licensee's owner had completed RAMP training on February 18, 2012 and the manager completed RAMP training in April, but the bartender was a new employee who had not had an opportunity at that time to complete training, and that Licensee did have accurate books and records but at the time of the inspection, the employee did not have a key to the office that contained the records.

With regard to the failure of Licensee to have someone at the hearing to testify, the Board notes that the hospital records submitted by Licensee indicate that Pravin Patel was discharged from the hospital on March 19, 2013. It is understandable that he could not attend a hearing the day after being released from the hospital after sustaining a heart attack.

However, there is no explanation as to why his son, Sujay Patel,³ or some other person, was unable to attend the hearing on his behalf. Indeed, there is no indication in the record why Pravin Patel's testimony would even be

³ The checks submitted by Licensee's counsel for the appeal and the request for supersedeas are notated with the name "Patel, Sujay."

necessary, since the Bureau's witness, Officer Santo Bonadio, testified that it was Sujay Patel from whom he received information when he inspected the licensed premises. Finally, there is no indication in the record that anyone alerted the OALJ that Pravin Patel would not be able to testify, or that there was a request to have the hearing rescheduled to allow him to be present to testify.⁴ To the extent that Licensee's appeal could be construed as a request for a remand hearing, that request is denied.

With regard to the specific charges in the Citation, for Count 1 Licensee asserts in its appeal that "food was ordered cooked and provided by the adjoining store owned by the principals of the Licensee, an arrangement which had previously been approved." To the contrary, Officer Bonadio testified that Sujay Patel advised him that nothing but chips and pretzels were available. [N.T. 12].

With regard to Count 2, Licensee asserts in its appeal that the "owner," presumably Parvin Patel, completed RAMP training on February 18, 2012 and the "manager," presumably Sujay Patel, completed RAMP training in April 2012. The ALJ's decision notes that Licensee was RAMP-certified on April 9, 2012. However, the ALJ's September 26, 2011 Order required Licensee to obtain

⁴ Furthermore, months before Mr. Patel's heart attack, Licensee failed to comply with the 2012 Order requiring

RAMP certification by December 25, 2011. Even by its own admission, Licensee failed to meet the deadline imposed by the Order.

With regard to Count 3, Licensee asserts that there is no finding of fact in the ALJ's decision with regard to the Count. Licensee notes in its appeal that it did have accurate books and records and that the Bureau Officer was so advised. A careful reading of the transcript compels the conclusion that this Count was assessed against Licensee because it was unable to produce RAMP certification. [N.T. 13]. There is nothing to indicate that Licensee's records were incomplete for some other reason. And if the reference to incomplete records refers to RAMP, the records were not incomplete because they did not contain certification for something – RAMP certification – that had not yet been attained. Therefore, the record does not contain substantial evidence to support Count 3.

The imposition of penalties is the exclusive prerogative of the administrative law judge. The Board may not disturb penalties imposed by an administrative law judge if they are within the parameters set forth in section 471 of the Liquor Code [47 P.S. § 4-471].

the submission of a pretrial memorandum, in which Licensee might have indicated any defense to the charges.

Section 471(b) of the Liquor Code addresses the circumstances under which an ALJ may revoke a license and provides the following guidance:

The administrative law judge shall notify the licensee by registered mail, addressed to the licensed premises, of such suspension, revocation or fine. In the event the fine is not paid within twenty days of the adjudication, the administrative law judge shall suspend or revoke the license, notifying the licensee by registered mail addressed to the licensed premises. Suspensions and revocations shall not go into effect until thirty days have elapsed from the date of the adjudication during which time the licensee may take an appeal as provided for in this act The appeal [to the Board] shall be based solely on the record before the administrative law judge. The board shall only reverse the decision of the administrative law judge if the administrative law judge committed an error of law, abused its discretion or if its decision is not based on substantial evidence.

[47 P.S. § 4-471(b)].

A review of the record indicates that, with regard to Counts 1 and 2, the ALJ adhered to the provisions of section 471 of the Liquor Code. However, Count 3 is not supported by substantial evidence, and, therefore, the Board reverses the ALJ's decision on Count 3.

Further, for Counts 1 and 2, the Board does not consider the ALJ's determination to be an abuse of discretion. 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, 602 A.2d 1300, 1305 (1992). See also Commonwealth v. Levanduski, 907 A.2d 3, 13-14 (Pa. Super. 2006)(*en banc*). Abuse of discretion is an extremely high standard of review, and the Board does not find that it has occurred in the instant matter.

For the reasons set forth above, the Board affirms the decision of the ALJ with regard to Counts 1 and 2, but reverses the decision regarding Count 3.

ORDER

As to Counts 1 and 2 of the Citation, the appeal of Licensee is denied.

As to Count 3 of the Citation, the appeal of Licensee is granted.

The Order of the ALJ in regard to Citation 12-0613 is affirmed with regard to Counts 1 and 2, but reversed with regard to Count 3.

It is hereby ordered that Licensee shall pay a fine of six hundred dollars (\$600.00) 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 an additional license suspension and/or revocation.

Further, Licensee shall serve a one (1) day suspension that shall continue thereafter until Licensee provides certification that it operates as a bona fide restaurant. This matter is remanded to the Office of the ALJ for the issuance of an order setting forth the beginning date of the one (1) day suspension that Licensee shall serve.

Board Secretary