

Mailing Date: August 28, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

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| PENNSYLVANIA STATE POLICE, | : | |
| BUREAU OF LIQUOR CONTROL | : | Citation No. 12-0825 |
| ENFORCEMENT | : | |
| | : | |
| | : | |
| v. | : | |
| | : | |
| LA TAMBORA CAFÉ RESTAURANT, INC. | : | License No. R-6312 |
| 738-740 Adams Avenue | : | |
| Philadelphia, PA 19124 | : | LID 61439 |

Counsel for Licensee: John J. McCreesh, III, Esquire
 McCreesh, McCreesh, McCreesh & Cannon
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 Upper Darby, PA 19082

Counsel for Bureau: Erik S. Shmukler, Esquire
 Pennsylvania State Police,
 Bureau of Liquor Control Enforcement
 6901 Woodland Avenue
 Philadelphia, PA 19142

OPINION

La Tambora Café Restaurant (“Licensee”) filed a timely appeal from the Order of Administrative Law Judge Tania E. Wright (“ALJ”) mailed on June 26, 2013, wherein the ALJ sustained Citation No. 12-0825 (“the Citation) and issued a

two (2) day suspension beginning on September 30, 2013, and ending October 2, 2013.

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. 12-0825 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 March 31, 2012, Licensee, by its servants, agents, or employees, sold, furnished and/or gave alcoholic beverages between 2:00 a.m. and 7:00 a.m.

On October 3, 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 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 November 15, 2012, at 9:30 a.m., at Meetinghouse Business Center, 140 West Germantown Pike, Suite 100, Plymouth Meeting, Pennsylvania. OALJ records indicate the certified mailing was returned as undeliverable on October 4, 2012.

The hearing was held on November 15, 2012. Erik S. Shmukler, Esquire, appeared at the hearing as counsel for the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”). John J. McCreesh, III, Esquire, appeared on behalf of Licensee. By Adjudication and Order mailed June 26, 2013, the ALJ sustained the Citation. [Adjudication and Order, mailed June 26, 2013]. The ALJ imposed a penalty of a two (2) day suspension beginning on September 30, 2013, and ending October 2, 2013.

On July 1, 2013, Licensee filed the instant appeal and an application for supersedeas on July 2, 2013. 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

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).

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 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.

The Citation charged that on March 31, 2012, Licensee was in violation of sections 406(a)(2) and 493(16) of the Liquor Code in that, it 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 employees, 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).

The record includes the testimony of Bureau Officer Suppin, who conducted an investigation of the licensed premises pursuant to complaints of noise. [N.T. 6-7]. He visited the premises on February 19, 2012, but observed no violations. [N.T. 7]. He visited the premises again with Bureau Officer Rudder on March 31, 2012 at approximately 1:45 a.m. [N.T. 8]. At that time, Officer Suppin observed a doorman, approximately fifteen (15) patrons, and three (3) bartenders. Officer Suppin purchased alcohol at approximately 2:12 a.m. [N.T. 8], ordering a Coors Light, paying the bartender with a five dollar (\$5.00) bill, and thereafter receiving one dollar (\$1.00) in change. [N.T. 8-10]. The bartender looked at the clock and saw the time, but served him anyway. [N.T.9]. Approximately one minute later, the officer observed three (3) men enter and

order alcoholic beverages, which they received. [N.T. 10]. The officers left the premises at 2:20 a.m. [N.T. 10]. Licensee offered no evidence and 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. The Bureau's evidence established that Licensee sold alcohol after 2:00 a.m. in violation of the sections of the Liquor Code 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.

It is hereby ordered that Licensee shall serve a two (2) day suspension beginning at 7:00 a.m. on Monday, September 30, 2013, and ending at 7:00 a.m. on Wednesday, October 2, 1013.

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

Board Secretary