

Mailing Date: July 24, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 12-0888
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 one thousand, eight hundred dollars (\$1,800.00) and issued a one (1) day suspension.

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. 12-0888 charged Licensee with a violation of section 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2), 4-493(16)] in that on May 8, 2012, Licensee, by its servants, agents or employees, sold, furnished and/or gave alcoholic beverages during a time when its restaurant liquor license was suspended pursuant to Citation No. 11-1948C.

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, via proper notice, for March 20, 2013, at 9:30 a.m., at the aforementioned location.

The hearing was held on March 20, 2013. Michael Nickles, 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 the Citation. [Adjudication and Order, mailed April 19, 2013]. The ALJ imposed a penalty of a fine of one thousand, eight hundred dollars (\$1,800.00) and a suspension for a period of one (1) day, from May 23, 2013 to May 24, 2013.¹

¹ Licensee paid the fine on June 14, 2013.

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 the ALJ's Order is without error and is supported by substantial evidence.

The facts of the instant matter are borne out of the adjudication of an earlier citation. In February 2012, the ALJ issued an Order in Citation No. 11-1948C which included a fine of one thousand, eight hundred dollar (\$1,800.00) and a one (1) day suspension against Licensee for violations of the Liquor Code. (N.T. 8; Admin. Notice). Licensee did not pay the fine, and thereafter, the ALJ issued a Supplemental Order on March 28, 2012, commencing the suspension at 7:00 a.m. on May 7, 2012, and continuing thereafter until Licensee paid the fine imposed in February 2012. (N.T. 8-9; Admin. Notice).

The record includes the testimony of Officer Khalil, a twenty-six (26) year veteran of the Bureau, who conducted an investigation of the licensed premises from March 29, 2012, to May 9, 2012. [N.T. 6-7]. Licensee's establishment was closed on May 7, 2012, in accordance with the Supplemental

² On May 23, 2013, the Board issued an Order granting Licensee's supersedeas request and postponing the one (1) day suspension until the Board renders a determination of Licensee's appeal on the merits.

Order for Citation No. 11-1948C. [N.T. 9]. However, after Officer Khalil learned that Licensee had not paid its fine, he visited the premises on May 8, 2012. [N.T. 10]. Officer Khalil found the premises to be open for business, with approximately fourteen (14) patrons on the premises. [N.T. 10]. He ordered, paid for, and was served a bottle of Coors Light beer. [N.T. 10]. Subsequently, Officer Khalil identified himself to the bartender and Sujay Patel. [N.T. 10]. Officer Khalil informed Mr. Patel that the licensed premises had to be closed for the sale of alcohol until the one thousand, eight hundred dollar (\$1,800.00) was paid. Although Mr. Patel could have kept the business open and simply not served alcohol, instead he closed the business entirely and asked the patrons to leave. [N.T. 11]. The fine was paid on May 9, 2012, and the ALJ allowed Licensee to open for the sale of alcohol later that same day. [N.T. 9].

Based upon the uncontroverted testimony in the record, the ALJ concluded that on May 8, 2012, Licensee, by its servants, agents or employees, sold, furnished and/or gave alcoholic beverages during a time when its restaurant liquor license was suspended pursuant to Citation No. 11-1948C, in violation of sections 491(1), 492(2), and 493(16) of the Liquor Code. [47 P.S. § 4-491(1), 4-492(2), 4-493(16)].

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 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 necessary, since the Bureau's witness, Officer Khalil, testified that he spoke with Sujay Patel on May 8, 2012. 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. To the extent

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

that Licensee's appeal could be construed as a request for a remand hearing, that request is denied.⁴

Licensee asserts in its appeal that it misunderstood that the suspension would continue until the fine had been paid, despite the clear language of the Supplemental Order. The original fine was assessed by the Adjudication mailed February 8, 2012. Three (3) months later, it remained unpaid until Officer Khalil advised Sujay Patel that the suspension was continuing until the fine was paid. The very next day, Licensee paid its fine.

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].

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

⁴ Furthermore, months before Mr. Patel's heart attack, Licensee failed to comply with the 2012 Order requiring the submission of a pretrial memorandum, in which it might have indicated any defense to the charge.

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 the ALJ adhered to the provisions of section 471 of the Liquor Code. The license was suspended because Licensee had not paid the fine assessed at Citation 11-1948C. Licensee's failure to understand that the suspension was ongoing, and not for one (1) day only, does not excuse the fact that it served alcohol while its license was suspended.

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.

ORDER

The appeal of Licensee is denied.

The Order of the ALJ is affirmed.

Inasmuch as Licensee has already paid the one thousand eight hundred dollar (\$1,800.00) fine assessed by the ALJ, this matter is remanded to the Office of the ALJ for the issuance of an Order setting forth the date of the one (1) day suspension that Licensee must serve.

Board Secretary