

Mailing Date: July 24, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 12-1348
ENFORCEMENT	:	
	:	
v.	:	
	:	
DERRY STREET PUB, INC.	:	License No. R-12671
2312 Derry Street	:	
Harrisburg, PA 17104-2760	:	LID 59887
	:	

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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appeals from the Order of Administrative Law Judge (“ALJ”) Felix Thau, mailed April 26, 2013, in which the ALJ sustained Citation No. 12-1348

(“the Citation”) as to one (1) date but held that the Conditional Licensing Agreement (“CLA”) which had formed the basis for the underlying citation was no longer in effect as of the second date. The ALJ ordered that Licensee pay a fine of fifty dollars (\$50.00).

On September 13, 2012, the Bureau issued the Citation to Derry Street Pub, Inc. (“Licensee”), charging it with violating section 404 of the Liquor Code [47 P.S. § 4-404], in that on February 17 and July 15, 2012, Licensee, by its servants, agents, or employees, failed to adhere to the conditions of the CLA it had entered into with the Pennsylvania Liquor Control Board (“Board”).

The facts in this matter are not in dispute (N.T. 4). The Board’s Bureau of Licensing (“Licensing”) had objected to the renewal of this liquor license for the licensing term effective March 1, 2010. The Board, on July 20, 2011, voted to not renew the license. (Licensee Ex. 6). Licensee appealed that decision to the Court of Common Pleas of Dauphin County.

In order to convince the Board to renew its license, Licensee offered to enter into the CLA, which imposed additional conditions on both the license and the premises. On December 6, 2011, the three (3)-member Board approved both the license renewal and the CLA, thus resolving the objections Licensing

had had with the 2010 renewal. (N.T. 72; Bureau Ex. C-3). In return, Licensee withdrew the Common Pleas appeal it had filed. (Licensee Ex. 9).

Paragraph 8(g) of the CLA requires the Licensee to use a transaction scan device, as that term is defined in the Liquor Code, to scan the identification of all patrons purchasing alcoholic beverages, notwithstanding the fact that the patron may have had his or her identification scanned on a previous occasion. Nonetheless, it was conceded that on February 17, 2012, a Bureau officer purchased alcohol at the premises without having to produce any identification. (N.T. 14-18).

Paragraph 8(h) of the CLA requires Licensee to scan all patrons entering the premises from 9:00 p.m. to closing for weapons with a metal-detecting wand. Nonetheless, on July 15, 2012, a Bureau officer arrived at the premises after 9:00 p.m. She was allowed to enter the premises without being scanned with a metal detecting wand. She was also allowed to purchase alcohol without providing identification, in violation of paragraph 8(g) of the CLA. (N.T. 30-34, 36-38).

After reviewing the undisputed facts, the ALJ sustained the Citation as it related to the February 17, 2012 visit by a Bureau officer. However, he dismissed the Citation as it pertained to the July 15, 2012 visit because,

according to the ALJ, the CLA was no longer in effect on that date because: (1) the CLA had terminated by agreement of the parties; (2) the statutory supersedeas provided in section 464 of the Liquor Code was in effect; and/or (3) the CLA had expired at the expiration of that licensing term, which was February 29, 2012.

In its appeal, the Bureau alleges that each of the three (3) bases cited by the ALJ to find that the CLA was not in effect on July 15, 2012, is erroneous. In its response to the Bureau's appeal, Licensee argues that the subsequent renewal of the license for the subsequent licensing term by the Court of Common Pleas of Dauphin County has rendered the CLA a nullity.

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 A2d 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, discretion is abused.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 297, 602, A.2d 1300, 1305 (1992) (citations omitted).

As noted earlier, the ALJ found three (3) separate bases for finding that the CLA was not in effect on July 15, 2012. The Board will address each of these *seriatim*¹.

(1) The CLA terminated under its own terms.

First, the ALJ argues that the CLA had terminated under its own terms prior to July 15, 2012. In support for this contention, the ALJ cites various rules of contract interpretation and relies heavily on the fact that the underlying license expired on February 29, 2012. For example, the ALJ cites to the rule of contract interpretation that states that ambiguity in a contract should be construed against the party responsible for the selection of the words used. Opinion, at page 4. The ALJ also cites to the rule of contract interpretation that

¹ As an initial matter, it is perhaps telling, as noted by the Bureau in its brief, that Licensee did not advance any of the three (3) legal theories used by the ALJ in his opinion. It is perhaps even more telling that the Licensee, given the opportunity to supplement the ALJ’s argument as part of its response to the Bureau’s brief, chooses instead to argue an entirely different legal theory.

states that a contract should be read in a reasonable manner and not in a manner which leads to absurdity, injustice, or an unlawful end. Ibid.

What the ALJ does not do, however, is point to any provision of the CLA which supports his contention that the CLA expired on February 29, 2012. Indeed, there is only one provision of the CLA, paragraph 10, which speaks as to when the CLA expires. That provision is unambiguous:

These terms shall remain in effect both on the license and on the premises unless and until a subsequent agreement is reached with the Board rescinding these restrictions.

CLA at paragraph 10. As described by the ALJ at the hearing, “paragraph ten (10) essentially says this agreement’s going to stay in place until it’s changed by another agreement, and another agreement is one that’s signed by the parties.” (N.T. 107)

It is hard to fathom how an impartial arbitrator² could subsequently construe the above-cited language as ambiguous or for the proposition that the CLA expired under its own terms. Indeed, as noted earlier, the ALJ clearly

² The ALJ has made clear, in this and numerous earlier opinions, his disdain for CLAs in general:

I promise you, someday an Appellate Court in the right case...it has to be a compelling case. Okay? An Appellate Court is going to understand how this process offends so many, quote, principles, that we learn about in law school and it’s going to (make noise) just wipe it off the books. Okay? (N.T. 69).

While the ALJ is certainly entitled to his own opinion, he ought not let it affect his performance of his duties. He is entirely free to let his elected officials know of his opinion, in case they wish to modify the Liquor Code accordingly.

understood the significance of paragraph 10 during the hearing. However, while the ALJ states in his Opinion that he has “not forgotten about Paragraph 10 of the CLA” (Opinion at page 6), he nonetheless chooses to ignore it and instead creates a termination date for the CLA out of whole cloth. That he cannot do. Therefore, his decision to do so was an error of law, an abuse of discretion, and not supported by substantial evidence.

(2) The CLA is subject to the supersedeas in section 464 of the Liquor Code.

The ALJ next argues that the CLA was not in effect on July 15, 2012 because of section 464 of the Liquor Code [47 P.S. § 4-464]. Section 464 of the Liquor Code provides that an appeal to a court of common pleas of a Board decision, by someone entitled to appeal to the court of common pleas under section 464, acts as a supersedeas or stay of the Board’s decision.

The effect of such a stay on a Licensee’s ability to sell alcohol varies. Sometimes, such as when a licensee who was granted operating authority while its renewal application was being considered, it means the licensee can still sell alcohol. Sometimes, as when a church appeals a Board decision to grant a license, it means that a licensee must stop operating. Sometimes, as when an applicant has a license in safekeeping or is not otherwise operating immediately prior to the Board’s decision, it means nothing as a practical

matter. The effect of the stay depends completely upon the operating status of the licensee immediately prior to the Board's decision since the effect of the stay is to place the parties back into the position they were in immediately prior to the Board's decision.

In this case, the June 15, 2012 appeal was of the Board's decision on June 13, 2012, to refuse to renew the license for the licensing term effective March 1, 2012. This was the licensing term that went into effect after the licensing term that was at issue when the parties entered into the CLA. Immediately prior to the Board's decision on the renewal application, Licensee was operating subject to the CLA. When the Board rendered its decision, Licensee lost its authority to operate altogether. The stay authorized by section 464 only places Licensee in the same position it would have been prior to the Board's refusal of its license; it does not place Licensee in a better position than it was in prior to the Board's decision.

Put another way, the stay authorized by section 464 of the Liquor Code does not affect the viability of the CLA because the Board did not render a decision on the CLA on June 13, 2012; its decision of that date pertained only to the subsequent renewal. Thus, the ALJ's second basis for finding that the CLA

was not in effect on July 15, 2012 is an error of law, an abuse of discretion, and not supported by substantial facts.

(3) The CLA expired at the end of the licensing term by operation of law.

The ALJ's final argument is that the rules of statutory construction mandate that a CLA entered into as part of a license renewal expires at the end of the licensing term for the term in which it was issued. In support of this argument, the ALJ cites familiar rules of statutory construction, such as the presumption against an absurd result, and that clear and unambiguous language cannot be ignored in pursuant of a statute's spirit.³ The ALJ then concludes that the difference in the language between section 470 of the Liquor Code [47 P.S. § 4-470] and sections 404, 431, and 432 of the Liquor Code [47 P.S. §§ 4-404, 4-431, 4-432], when combined with the earlier cited rules of statutory construction and principals of due process, compels a conclusion that the CLA must expire at the end of the underlying licensing term. Finally, the ALJ notes that nothing prevents the Board from entering into a new CLA with Licensee when each new licensing term begins.

³ The ALJ also cites to Velocity Express v. Pennsylvania Human Relations Comm'n., 853 A.2d 1182 (Pa. Cmwlth. 2004) for the proposition that a court does not need to defer to an agency's construction of a statute if it frustrates legislative intent. Opinion at page 7. While the ALJ is certainly a court in the sense that it is rendering an adjudication, it is not one for purposes of availing itself of the above proposition. Further, while the Director of Licensing and Licensee agreed to the underlying CLA and that agreement was adopted by the Board, this citation represents that first time the three (currently two)-member Board has been asked to interpret this particular provision of Section 470 of the Liquor Code. Thus, the ALJ's reference to Velocity is a bit puzzling.

To be succinct, the rules and language cited do not support his conclusion. Preliminary, the Board notes two (2) additional rules of statutory construction: that statutes are to be read to favor the public interest as against any private interest [1 Pa. C.S. § 1922(5)] and that the Liquor Code is to be read to restrain, not promote, the sale of alcohol. In re Application of El Rancho Grande, Inc. 496 Pa. 496, 437 A.2d 1150 (1981).

Since the CLA by its own terms continues until a subsequent agreement is entered into, it only terminated on February 29, 2012 if the Liquor Code required it to. It does not. First, there is no such termination language in the Liquor Code, even though there is language throughout the Liquor Code specifying particular circumstances under which a CLA terminates, such as when the parties enter into a subsequent agreement. The ALJ does not claim that such language exists in the Liquor Code but rather asserts that the use of less expansive language in section 470 is proof of this unreferenced “termination clause”.⁴

⁴ The “missing” language in section 470 pertains to circumstances when a license is being transferred to a location that is already subject to a CLA or when the license is being transferred to a new owner. Suffice to say, the fact that those circumstances are relevant when discussing sections 404, 431, and 432 of the Liquor Code, and not relevant when discussing the renewal of a license for use by the existing owner at the existing location, would be the only logical reason why the sections are written differently.

If the Legislative intent was to limit a CLA's applicability to a particular licensing term, then there would have been language in section 470 to that effect.⁵ To the contrary, the language in section 470 is quite broad and has to be read in *pari materia* with sections 404, 431, and 432. Roberts v. Commonwealth, Pennsylvania Liquor Control Bd., 604 A.2d 1152 (Pa. Cmwlth. 1992). Under the ALJ's theory, this CLA, imposed because of Licensee's inappropriate behavior, could not be enforced against Licensee after February 29, 2012. However, this same CLA would be enforceable against either another owner of this license or to another licensee using the premises until a subsequent agreement is entered into. The ALJ apparently and illogically believes that the legislation gave the Board more authority to regulate the behavior of applicants it knows little about than those actual licensees whose history it does know. The ALJ believes that this is the only possible conclusion that can be drawn from the provisions of section 470, which on their face give the Board open-ended authority to enter into agreements, agreements which parenthetically, the ALJ believes are unlawful *per se*. The ALJ is simply incorrect.

⁵ As an aside, the proposition that a licensee cannot be held accountable for activity that occurred during a previous licensing term has been rejected by our appellate courts. See St. Nicholas Greek Catholic Russian Aid Society v. Pa. Liquor Control Board, 41 A.3d. 953 (Pa. Cmwlth. 2012). It is thus unclear why the ALJ presumes it in this case.

Finally, Licensee's contention that the Court of Common Pleas' decision has voided the CLA is also without merit. The Court of Common Pleas was not asked to invalidate the CLA, nor is there any language in its opinion indicating that it was invalidating the CLA. (N.T. 99). Therefore, its decision to renew the license cannot be "deemed" to have done so.

For all the foregoing reasons, the decision of the ALJ is an error of law, an abuse of discretion, and not supported by substantial evidence. It is therefore reversed. This matter will be remanded to the ALJ in order to allow him to impose the appropriate additional penalty if he believes such is warranted.

ORDER

The appeal of the Bureau is sustained as to the date of July 15, 2012.

The fine of fifty dollars (\$50.00) as to the February 17, 2012 incident has been paid in full.

This matter is remanded to the ALJ to impose an additional penalty for the July 15, 2012 incident if he believes such is warranted.

Board Secretary