

Mailing Date: January 14, 2015

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, :
BUREAU OF LIQUOR CONTROL : Citation No. 12-1735C
ENFORCEMENT :

v. :

J & D'S THE BROADWAY, LLC : License No. R-660
t/a The Broadway :
25 East Broadway Avenue : LID 64438
Clifton Heights, PA 19018-2305 :

Counsel for Licensee: William B. Morrin, Esquire
1806 Callowhill Street
Philadelphia, PA 19130

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

OPINION

J & D's The Broadway, LLC ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") Tania E. Wright mailed October 10, 2014, wherein the ALJ sustained Citation No. 12-1735C and ordered Licensee to pay a fine and to obtain certification through the Pennsylvania Liquor Control Board's ("Board") Responsible Alcohol Management Program ("RAMP"), outlined in

section 471.1 of the Liquor Code [47 P.S. § 4-471.1]. Having considered Licensee's appeal, the Board affirms the decision of the ALJ.

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee on December 18, 2012, setting forth the following charge:

1. On October 24, 2012, you, by your servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, twenty (20) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1).

(Ex. B-2). A hearing was held on January 14, 2014, in which Erik S. Shmukler, Esquire, appeared as counsel for the Bureau. William B. Morrin, Esquire, appeared on behalf of Licensee. By Adjudication and Order mailed October 10, 2014, the ALJ sustained the charge and imposed a penalty of a one thousand two hundred fifty dollar (\$1,250.00) fine. The ALJ also ordered Licensee to obtain RAMP certification, as required by subsection 471(d) [47 P.S. § 4-471(d)]. Licensee filed a timely appeal with the Board on November 3, 2014.

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 if the ALJ committed an error of law or abuse of discretion, or if his/her 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 A.2d 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).

On appeal, while not disputing that the unlawful sale occurred, Licensee contends the ALJ erred in failing to be persuaded by its entrapment defense. Licensee’s argument, articulated both at the hearing and on appeal, is that a preponderance of the evidence in this case supports the elements of the common law affirmative defense of entrapment. (Licensee’s Appeal Addendum, paras. 1-2).

As an initial matter, the record is clear that Licensee’s bartender served an alcoholic beverage to a minor on October 24, 2012, in

violation of subsection 493(1) of the Liquor Code [47 P.S. § 4-493(1)]. (N.T. 10-11). While the Liquor Code enumerates affirmative defenses¹ to alleged violations of subsection 493(1), not one has been raised here by Licensee. Instead, Licensee focuses on the details surrounding the Bureau's undercover investigation, specifically its use of twenty (20)-year-old Evan Sokolove as an undercover buyer, in an attempt to prove that the sale to Mr. Sokolove should be excused as the fruit of an unlawful trap set by the Bureau.

The sale to a minor in this case arose during an "age compliance check" of Licensee that was initiated by the Bureau on October 24, 2012. (N.T. 7). As a tool for enforcing subsection 493(1), the Bureau is expressly permitted to make undercover visits to licensed establishments during which an officer, employee, or intern of the Bureau who is a minor attempts to purchase liquor or malt or brewed beverages. Section 6308 of the Crimes Code, as well as shielding undercover minors from prosecution for purchasing or attempting to purchase alcoholic beverages during a compliance check, provides certain requirements which the Bureau must follow in conducting the Age Compliance Check Program. [18 Pa. C.S.A. § 6308(e)]. The

¹ See 47 P.S. § 4-495.

regulations of the Pennsylvania State Police provide additional requirements, e.g. mandating certain prior training for underage buyers. [See 37 Pa. Code § 23.1-23.24, *et seq.*].

In this case, there is no evidence or even allegation that the Bureau failed to comply with the applicable statutory or regulatory guidelines in conducting the age compliance check of Licensee on October 24, 2012. Rather, Licensee argues that the age compliance check was an instance of entrapment because the underage buyer, Mr. Sokolove, “clearly looked older than he was” and because “Licensee in this case was not pre-disposed to committing this offense.” (Licensee’s Appeal Addendum, para. 3). Licensee had no prior record of serving minors; the selection of Licensee’s establishment for an age compliance check was purely random.

Licensee has asked, through its appeal, that the Board apply the doctrine of entrapment to an enforcement matter under the Liquor Code, which is civil rather than criminal in nature. However, the Board is unwilling to hold that the doctrine is applicable to an enforcement matter, such as the sale to a minor that occurred here. Nonetheless, assuming *arguendo* that entrapment were applicable, it would not be found in this case.

Under the common law entrapment defense, which has been argued in administrative proceedings², the accused is required to show that (1) he/she was not predisposed to commit the crime and (2) that law enforcement induced the person to commit the offense through methods of persuasion or inducement "likely to entrap the innocently disposed." Commonwealth v. Conway, 173 A.2d 776 (Pa. Super. 1961).

However, there is no entrapment where a law enforcement official merely furnishes or affords a liquor licensee an opportunity to commit an offense. In re Reiter, 98 A.2d 465, 467-68 (Pa. Super. 1953). Further, the Supreme Court has suggested it would take government conduct "so egregious as to shock men of good conscience" to rise to the level of entrapment in an administrative setting, where a mere licensing privilege, as opposed to life or liberty, is in jeopardy. Smith, 517 Pa. at 238, 535 A.2d at 598.

Moreover, licensees are strictly liable for violations of the Liquor Code and the Board's Regulations. Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 504, 544 A.2d 931, 933 (1988). Due to the

² See Smith v. Pennsylvania State Horse Racing Com'n, 517 Pa. 233, 238, 535 A.2d 596, 598 (Pa. 1988) ("Because instances may arise in the administrative setting, where, in order to prompt otherwise innocent licensees to violate laws and thereby lose their licenses, officials employ investigative techniques which are so egregious as to shock men of good conscience, we will not announce a rule which would preclude a tribunal so disposed from frustrating the intent of the overreaching officials by preserving the status of the licensee.").

“peculiar” and “highly dangerous” nature of the business of selling liquor, licensees of the Board must “assume the highest degree of responsibility to [their] fellow citizens.” Commonwealth v. Koczwara, 397 Pa. 575, 581, 155 A.2d 825, 828 (1959).

In the instant matter, the Adjudication shows a thorough consideration of the evidence, as well as the above precedent, in assessing whether Licensee proved its allegation of entrapment. Although the ALJ agreed that the underage buyer, Mr. Sokolove, appeared older than his actual age, she ultimately concluded that he did not appear so old such that his use as an underage buyer rose to the level of entrapment. This decision was based on both the Bureau’s and Licensee’s evidence, including a photograph of Mr. Sokolove taken on October 24, 2012. (Ex. L-1). In her discussion, the ALJ explained that random investigations are not unlawful and that merely providing an opportunity for the commission of an offense does not amount to entrapment. (Adjudication, p. 7). Further, she concluded with the practical assessment that, because a licensee inevitably “will encounter individuals who appear younger or older than their stated ages, . . . prudence requires that licensees check for valid identification before rendering service of alcoholic beverages.” [Id.].

As fact-finder, the ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. See McCauley v. Pennsylvania Bd. of Probation and Parole, 510 A.2d 877 (Pa. Cmwlth. 1986). The Board cannot overturn the ALJ's credibility determinations or conclusions regarding conflicting evidence. Here, the ALJ found based on uncontroverted testimony that Licensee's employee sold an alcoholic beverage to a minor, and she was not persuaded by Licensee's entrapment defense. Therefore, the Board must affirm.

Accordingly, for the foregoing reasons, the Adjudication and Order is affirmed, and the appeal of Licensee is dismissed.

ORDER

The appeal of Licensee is dismissed.

The decision of the ALJ is affirmed.

Licensee has paid the fine of one thousand two hundred fifty dollars (\$1,250.00).

The requirement that Licensee comply with the requirements of section 471.1 of the Liquor Code, pertaining to the Responsible Alcohol Management Program, remains in effect. As there was no supersedeas in this case, Licensee shall receive RAMP certification within ninety (90) days of October 10, 2014, the mailing date of the Adjudication.

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

Board Secretary

NOTICE OF RIGHT TO APPEAL

In the event the Bureau of Liquor Control Enforcement or the licensee shall feel aggrieved by the decision of the Board, there shall be a right to appeal to the Court of Common Pleas in the same manner provided by the Liquor Code for appeals from refusals to grant licenses. Section 471 of the Liquor Code, which sets forth the provisions for appeal from refusal to grant licenses, permits an appeal within thirty (30) days of the Mailing Date of the Board's decision to the Court of Common Pleas of the county in which the premises is located.

If you file a timely appeal to the Common Pleas Court, you may be entitled automatically to a supersedeas (or stay) of the Order of suspension, revocation or fine which has been issued in connection with your case. If the appeal to Common Pleas Court would not operate as an automatic supersedeas, you may appeal to the Court for a stay.

Section 471 of the Liquor Code sets forth the circumstances under which an appeal to the Court of Common Pleas (as reviewing authority) shall not act as a supersedeas, for example:

. if the license has been cited and found to have violated section 493(1) insofar as it relates to sales to minors or sales to a visibly intoxicated person, section 493(10) insofar as it relates to lewd, immoral or improper entertainment or section 493(14), (16) or (21), or has been found to be a public nuisance pursuant to section 611, or if the owner or operator of the licensed premises or any authorized agent of the owner or operator has been convicted of any violation of "The Controlled Substance, Drug, Device and Cosmetic Act," or of 18 Pa. C.S. §§ 5902 or 6301, at or relating to the licensed premises, its appeal shall not act as a supersedeas unless the reviewing authority determines otherwise upon sufficient cause shown

Notice of the Board's Order has been sent to the Bureau of Liquor Control Enforcement of the Pennsylvania State Police and the licensee.

If a licensee files an appeal, it is the licensee's responsibility to make certain that the Bureau of Liquor Control Enforcement of the Pennsylvania State Police, 3655 Vartan Way, Harrisburg, PA 17110-9758; the Liquor Control Board, Office of Chief Counsel, 401 Northwest Office Building, Capital and Forster Streets, Harrisburg, PA 17124-0001 and the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pa 17110-9661, receive notice of the filing of a timely appeal.