

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.

Mailing Date: February 11, 2015

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, :
BUREAU OF LIQUOR CONTROL : Citation No. 13-0086
ENFORCEMENT :
 :
 :
 v. :
 :
 :
 MARCEDA, LLC : License No. R-11791
t/a East Side Bar & Restaurant :
318 West DuBois Avenue : LID 53371
DuBois, PA 15801-2711 :

Representative for : Kenneth A. Kepple, *Pro Se*
Licensee (on appeal): : Marceda, LLC
 : t/a East Side Bar & Restaurant
 : 318 West DuBois Avenue
 : DuBois, PA 15801-2711

Counsel for Bureau: : Nadia L. Vargo, Esquire
 : Pennsylvania State Police,
 : Bureau of Liquor Control Enforcement
 : 313 Mount Nebo Road
 : Pittsburgh, PA 15237

OPINION

Marceda, LLC ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") Felix Thau mailed December 12, 2014, wherein the ALJ sustained Citation No. 13-0086 and ordered Licensee to pay a fine of four thousand five hundred dollars (\$4,500.00) and to serve a three (3)-day suspension of the liquor

license, as well as a twenty-seven (27)-day suspension of the Amusement Permit. Having considered Licensee's appeal, the Pennsylvania Liquor Control Board ("Board") affirms the ALJ's decision.

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee on February 4, 2013, setting forth the following three (3) counts:

1. On August 28, September 1, 6, 7, 21, October 20, 30, November 1, 2, 8, 9, 2012, you, by your servants, agents or employees, used, or permitted to be used on the inside of your licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard beyond the licensee's property line, in violation of Section 493(34) of the Liquor Code, 47 P.S. [§] 4-493(34).
2. On September 13, 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) visibly intoxicated patron, in violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1).
3. On July 5, 2012, you, by your servants, agents or employees, sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that unlimited draft beers were served for the set price of \$5.00, in violation of Section 13.102(a)(3) of the Liquor Control Board Regulations, 40 Pa. Code §13.102(a)(3).

[Ex. J-2]. A hearing was held on November 5, 2014, in which Nadia Vargo, Esquire, appeared as counsel for the Bureau. Frank Sluzis, Esquire, appeared on behalf of Licensee. By Adjudication and Order

mailed December 12, 2014, the ALJ sustained all three (3) charges.¹ As to count one, Licensee was ordered to pay a fine of one thousand dollars (\$1,000.00) and to serve an Amusement Permit suspension of twenty-seven (27) days. With regard to count two, Licensee was ordered to pay a fine of two thousand five hundred dollars (\$2,500.00). At count three, the ALJ imposed a fine of one thousand dollars (\$1,000.00) and a liquor license suspension of three (3) days. Licensee filed a timely appeal with the Board on January 7, 2015.²

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

¹ The ALJ noted that, because the testimony of Tammy Wilson and James Marando was unclear as to the exact dates on which they heard amplified music escaping the licensed premises, count one was sustained as to September 6 and November 8, 2012, the violations observed by Office James Coble, as well as "on divers other occasions between August 8, 2012 and November 8, 2012." [Adjudication, p. 4].

² The appeal triggered an automatic supersedeas with respect to counts one and three; however, because count two involves a violation of section 493(1) as it relates to sales to a visibly intoxicated person, there is no supersedeas of the two thousand five hundred dollar (\$2,500.00) fine. [47 P.S. § 4-471(b)].

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, Licensee makes a number of broad assertions which may generally be characterized as alleging an abuse of discretion and deprivation of due process. For example, Licensee argues that the ALJ displayed a biased attitude toward Licensee’s case, a bias that allegedly manifested itself in the intimidation of Licensee’s witnesses to the point that they “could not testify or did not want to testify.” [Appeal Addendum, para. 1]. As a result, Licensee contends that it was “[o]nly able to send one witness” to the stand and that this witness was intimidated and disparaged “until the point the man was unable to testify.” [Appeal Addendum, para. 2]. Licensee also notes that the ALJ suggested to Licensee’s counsel that an unidentified line of questioning would “not make any difference” and “would be wasting

time unless [Licensee's counsel] just wants to put it on record." [Appeal Addendum, para. 3]. Licensee concludes by asking the Board to order a new hearing on the matter.

As a preliminary matter, it should be noted that as fact-finder, the ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Bd. of Probation and Parole, 510 A.2d 877 (Pa. Cmwlth. 1986). It is well settled that the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 480 A.2d 1253 (Pa. Cmwlth. 1984).

With respect to allegations of impartiality, the courts have held that to disqualify an adjudicator, the party asserting bias must produce evidence demonstrating that the interest of the adjudicator in the outcome of the particular case was direct and substantial. Pre-Need Family Services Eastern Region v. Bureau of Prof'l and Occupational Affairs, 904 A.2d 996, 1003 (Pa. Cmwlth. 2006) (citations omitted). Moreover, "[a] tribunal, to be fair, is not required to be staffed by indifferent citizens with at most a tepid enthusiasm for the agency's statutory mission." Jerry v. Department of Corrections, 990 A.2d 112, 117 (Pa. Cmwlth. 2010).

Further, presiding officers in an administrative hearing are tasked with ensuring that repetitious or cumulative evidence be excluded from the record. [40 Pa. Code § 15.51; 1 Pa. Code § 35.161]. This duty includes the discretion to “limit appropriately the number of witnesses who may be heard upon an issue.” [1 Pa. Code § 35.127].

With these principles in mind, the Board has reviewed the Notes of Testimony from the hearing held on November 5, 2014, the Adjudication and Order, as well as Licensee’s appeal, and has determined that there is no evidence of an abuse of discretion by the ALJ. Licensee’s allegation of bias is not supported by the record, nor is its contention that it was somehow forced by the ALJ to present only one (1) witness.

There is no evidence that the ALJ had any interest in the outcome of the case or was biased in any way. While it is true the ALJ was, perhaps, overenthusiastic in providing unsolicited advice and expressing his personal opinions during the hearing, these asides were directed at both parties and did not show bias toward a particular outcome.³ Moreover, the ALJ’s condemnation of Licensee’s conduct,

³ However, the ALJ is urged to keep such asides to a minimum, as he must be mindful of his duty to be “patient, dignified, and courteous to litigants, . . . witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity.” [Pa. Code of Judicial Conduct Rule 2.8(B)].

which Licensee's principals have clearly taken personally, did not come until after all of the evidence had been taken.

As to Licensee's presentation of a single witness, the record shows this was a strategic decision by Licensee's counsel, not an abuse of discretion by the ALJ. At the conclusion of the Bureau's case, the ALJ gave Licensee the requisite opportunity to present its evidence, at which point the following exchange occurred:

Judge: Okay. Let's hear from your witnesses, sir.

Attorney Sluzis: Can we just take two minute[s]? I want to maybe streamline it and only have one witness.

Judge: Whatever you want to do.

Attorney Sluzis: If I can just take two minutes with the witnesses out here and determine who I'm going to use or not. Is that okay?

Judge: Yeah.

[N.T. 99-100].

Thus, it does not appear Licensee was prevented from presenting whatever testimony it desired. The Board may not agree with the manner in which the ALJ communicated his decision, but it cannot find an abuse of discretion in the record. Accordingly, for the foregoing

reasons, a new hearing is not necessary, 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 four thousand five hundred dollars (\$4,500.00).

It is hereby ordered that Licensee's Restaurant Liquor License No. R-11791, as well as all permits attendant to the license, be suspended for a period of three (3) days beginning at 7:00 a.m. on Monday, March 23, 2015 and ending at 7:00 a.m. on Thursday, March 26, 2015.

Licensee is directed on Monday, March 23, 2015 at 7:00 a.m. to place a Notice of Suspension Placard (PLCB Form 1925) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is authorized on Thursday, March 26, 2015 at 7:00 a.m. to remove the Notice of Suspension Placard and return its license to its original wall location.

It is also ordered that Licensee's Amusement Permit be suspended for twenty-seven (27) days, beginning at 7:00 a.m. on Thursday, March 26, 2015 and ending at 7:00 a.m. on Wednesday, April 22, 2015. Licensee must place the designated label (enclosed with the Adjudication and Order of December 12, 2014 or attainable from the Office of the Administrative Law

Judge) over the Amusement Permit portion of the license prior to the suspension's effective date and time. Licensee must keep the label on the license as above described, for the entire suspension period. Licensee may remove the label at 7:00 a.m. on Wednesday, April 22, 2015.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated December 12, 2014.

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



John K. Starks

Board Secretary