Mailing Date: June 4, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 13-0182C
v.	:	
MANHEIM DINER, INC. 1614 Route 61 Highway South Schuylkill Haven, PA 17972	:	License No. R-9296 LID 57961

Representative for Licensee: David S. Frew, Vice President (*pro se*)
Manheim Diner, Inc.
1614 Route 61 Highway South
Schuylkill Haven, PA 17972

Counsel for Bureau: Roy Harkavy, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
2936 Airport Road
Bethlehem, PA 18017

O P I N I O N

Manheim Diner, Inc. ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") David L. Shenkle, mailed March 14, 2014, wherein the ALJ sustained Citation No. 13-0182C.

On February 11, 2013, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee, charging it

with violating subsection 493(1) of the Liquor Code [47 P.S. § 4-493(1)], in that on December 20, 2012, Licensee, by its servants, agents, or employees, sold, furnished, and/or gave or permitted such sale, furnishing, or giving of alcoholic beverages to a minor, twenty (20) years of age. A hearing was held on October 18, 2013, in which Roy Harkavy, Esquire, appeared as counsel for the Bureau, and David S. Frew, Licensee's vice president, appeared on behalf of Licensee. By Adjudication and Order mailed March 14, 2014, the ALJ sustained the charge and ordered Licensee to pay a fine of one thousand four hundred dollars ($1,400.00) and to maintain Responsible Alcohol Management Program ("RAMP") compliance for a period of one (1) year. Licensee filed a timely appeal with the Pennsylvania Liquor Control Board ("Board") on April 6, 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 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).

Licensee raises six (6) arguments in its appeal, which will be addressed in turn. Licensee first alleges that the ALJ erred by adjudicating the case without stating, either orally at the hearing or in the text of his Adjudication, a formal ruling on Licensee's Motion to Dismiss. Licensee also contends that the ALJ erred by considering facts alleged in the Bureau's pre-hearing memorandum as evidence.[1]

Neither argument has merit. Regarding the latter assertion, there was no material disagreement of facts because Licensee stipulated to the Bureau's version of the facts which are stated in its pre-hearing memorandum [Ex. C-4].

[1] In support, Licensee provides a case citation, presumably directing the Board to the Commonwealth Court's opinion in Mellinger v. Com., Dept. of Community Affairs, 533 A.2d 1119 (Pa. Cmwlth. 1987). Although Licensee's citation omits the Atlantic Reporter volume number, references the page number of the opinion as 119 instead of 1119, and identifies the named petitioner as "Melinger," the Board considered the opinion cited herein and does not find it relevant to the matter at hand.

At the hearing, Mr. Harkavy advised the ALJ that "as far as the factual basis of this case, Your Honor, both parties will stipulate that Your Honor could base his decision on that part of the case on what has been marked C-4, which is the Bureau's prehearing memorandum." (N.T. 5). Mr. Frew did not object or contest this statement. The ALJ admitted the document[2]; the Bureau rested; and Licensee proceeded to interview its witness. Given Licensee's stipulation, it was not an error for the ALJ to base his decision on the allegations in the Bureau's pre-hearing memorandum.

Similarly, the ALJ did not err in his disposition of Licensee's Motion to Dismiss. Subsection 35.180(a) of the Administrative Code[3] authorizes, but does not require, the hearing officer to rule upon any motion not formally acted upon by the agency head prior to the commencement of the hearing. [1 Pa. Code § 35.180(a)]. There is no requirement that the ALJ issue a written or oral ruling on a motion. Nonetheless, in this case the ALJ clearly gave consideration to Licensee's request to dismiss the Citation. [See Adjudication, p. 3

[2] Licensee cites section 35.125 of the Administrative Code [1 Pa. Code § 35.125] presumably for authority that pleadings may not be considered as evidence. Notwithstanding the fact that the pre-hearing memorandum is not a pleading, it is worth noting that the same section provides an exception when such documents have been "offered and received in evidence." [1 Pa. Code § 35.125(d)(2)].

[3] Section 15.53 of the Board's Regulations [40 Pa. Code § 15.53] provides that motions before the Office of Administrative Law Judge ("OALJ") shall be in accordance with 1 Pa. Code Chapter 35, Subchapter D.

("Licensee's president [sic] argued that this citation must be dismissed because . . .")]. The Adjudication goes on to thoroughly discuss Licensee's argument. By ultimately sustaining the charge, the ALJ, by implication, denied Licensee's Motion to Dismiss. Licensee's first argument is thus without legal or factual basis and must be dismissed.

Licensee's second argument on appeal pertains to the ALJ's interpretation of sections 6308 and 6310 of the Crimes Code [18 Pa. C.S. §§ 6308, 6310], which Licensee believes have relevance to this case. Specifically, Licensee argues that the ALJ committed an error of law in concluding that the status of Licensee's witness, Hilary Faust, as it relates to the Bureau, is irrelevant to the issue of whether Licensee violated subsection 493(1) of the Liquor Code [47 P.S. § 4-493(1)]. Ms. Faust was participating in a compliance check as an undercover minor when she purchased alcoholic beverages from Licensee, which formed the basis for the Citation. [Adjudication, Finding of Fact No. 1]. The crux of Licensee's defense appears to be its belief that sections 6308 and 6310 require the Bureau to use only officers, employees, or interns when conducting age compliance checks and that Ms. Faust held none of those positions with the Bureau. As a result, Licensee contends, the evidence from this alleged "illegal investigation" should not be admissible.

Licensee's focus on sections 6308 and 6310 of the Crimes Code is misplaced. The references in sections 6308 and 6310 to an "officer, employee or intern of the Bureau" are made in the context of shielding minors who participate in the Bureau's compliance checks from prosecution for purchasing or attempting to purchase alcohol. [18 Pa. C.S. §§ 6308(e), 6310(c)]. The Crimes Code does not place an affirmative burden on the Bureau to limit its enforcement tactics to using only certain types of agents for compliance checks.

Moreover, the issue of whether Ms. Faust was an "intern" or a "volunteer" with the Bureau is not relevant to the matter before the ALJ, which was an alleged violation of subsection 493(1) for a sale to a minor. Subsection 493(1) prohibits an employee, servant, or agent of a licensee from selling, furnishing, or giving an alcoholic beverage to *any* minor. [47 P.S. § 493(1)]. Licensees are strictly liable for violations of the Liquor Code that occur on the licensed premises. Commonwealth v. Koczwara, 397 Pa. 575, 583, 155 A.2d 825, 829 (1959). Thus, if a minor purchases alcoholic beverages in a licensed establishment, the licensee is in violation of the Liquor Code, regardless of how the minor got there and regardless of whether the minor was an "intern" or a "volunteer" with the Bureau. Compliance with subsection

6308(e) of the Crimes Code provides that a minor who purchases alcoholic beverages at the direction of the Bureau will not be committing a crime, but it does not in any way impact a licensee's absolute responsibility to prevent minors from accessing alcohol while on the licensee's premises.

Therefore, the ALJ did not commit an error of law by ruling that Ms. Faust's employment status is irrelevant. Licensee stipulated that Ms. Faust purchased alcohol on Licensee's premises on December 20, 2012, while she was under twenty-one (21) years of age, in violation of subsection 493(1). The ALJ properly held Licensee strictly liable for this infraction.

Similarly, Licensee's third issue on appeal alleges an abuse of discretion in that the ALJ disregarded sections 6308 and 6310 of the Crimes Code in rendering his decision. For the same reasons stated above, the Board concurs with the ALJ's analysis and does not find an abuse of discretion. Licensee's third argument is therefore dismissed.

As a fourth basis for appeal, Licensee asserts that the decision of the ALJ was not supported by substantial evidence. Despite previously stating, in relation to its first argument, that there was "no material disagreement of facts" and that "the ALJ had no basis or authority to rule in a manner contrary to the stipulated facts," Licensee now for the first time argues that "the parties

only stipulated to the notification process, but not the alleged assertions." As a result, Licensee insists, the Bureau failed to establish a *prima facie* case.

However, as discussed above, Licensee stipulated to the Bureau's alleged facts as stated in the pre-hearing memorandum, which was admitted into the record. At the hearing, Mr. Frew voiced no disagreement with Mr. Harkavy's representation that the parties had stipulated the ALJ could base his decision on the version of events recounted in Exhibit C-4. The Bureau thus met its burden by establishing that during a compliance check on December 20, 2012, a minor purchased a six (6)-pack of beer from Licensee's bartender and removed it from the premises. [Ex. C-4].

The ALJ based his decision on Exhibit C-4 as well as the testimony of Ms. Faust offered by Licensee. Since the ALJ considered all relevant evidence of record and there was substantial evidence to support his decision, Licensee's fourth argument is without merit.

In a fifth argument, Licensee revisits the relationship between Ms. Faust and the Bureau in support of Licensee's general position that the compliance check of December 20, 2012, was unlawful. As this distinction between interns and volunteers has no bearing on the matter at hand, Licensee's fifth argument may be quickly dismissed for the same reasons stated above.

Licensee's final argument alleges an error of law in that the ALJ failed to exclude the Bureau's evidence. Because the Bureau put forth an "illegal investigation," according to Licensee, the resulting evidence is inadmissible because it is "fruit from a poisonous tree." However, as discussed, the Board does not find the employment status of Ms. Faust in any way relevant to the legality of the Bureau's investigation, which revealed Licensee selling alcohol to a minor.

Even assuming, *arguendo*, that the Bureau did somehow violate Pennsylvania State Police policy by deploying Ms. Faust in a compliance check, the exclusionary rule does not apply in this case. The Liquor Code is remedial civil legislation which is liberally construed, and enforcement matters before the OALJ are not criminal in nature. Slovak-American Citizens Club of Oakview v. Pennsylvania Liquor Control Bd., 549 A.2d 251, 254 (Pa. Cmwlth. 1988). Like the United States Supreme Court, Pennsylvania courts generally limit application of the exclusionary rule of evidence to criminal proceedings. Kerr v. Pennsylvania Bd. of Dentistry, 599 Pa. 107, 117-118, 60 A.2d 427, 433 (2008). Because of the significant detriment in excluding probative evidence, its application is limited to only cases in which the deterrent benefit outweighs the substantial social cost of its application. Id.

In this case, Mr. Frew faces no criminal charges but, rather, Licensee faces a civil penalty in the amount of one thousand four hundred dollars ($1,400.00)[4] as well as mandatory RAMP compliance. As was the case in Kerr, applying the exclusionary rule in this administrative matter would have minimal deterrent effect on police misconduct, assuming any even occurred. On the other hand, excluding evidence of Ms. Faust's purchase merely because she was a "volunteer" rather than an "intern" would allow Licensee to escape the consequences of selling alcohol to a minor and would substantially hinder the Board's and Bureau's efforts to protect the public health, welfare, peace, and morals of the citizenry.

Licensee clearly seeks a "technicality" upon which it can avoid liability for selling alcohol to a minor. While Licensee's efforts are somewhat unique, it is suggested that this time and energy would be better spent on taking remedial measures to ensure that minors are not able to again access alcohol at the licensed premises in the future.

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[4] It is worth noting that violations of subsection 493(1) carry a heightened penalty, as the ALJ is permitted to impose a license suspension or revocation and/or a fine of not less than one thousand dollars ($1,000.00) nor more than five thousand dollars ($5,000.00). [47 P.S. § 4-471(b)]. Here, the ALJ chose to impose a fine of only four hundred dollars ($400.00) above the minimum statutory penalty and did not order a license suspension.

For the foregoing reasons, the Adjudication and Order of the ALJ is affirmed.

ORDER

The appeal of Licensee is denied.

The decision of the ALJ is affirmed.

The fine of one thousand four hundred dollars ($1,400.00) has been paid.

Licensee received notice of RAMP Certification from the Bureau of Alcohol Education on April 8, 2014.

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Board Secretary