Mailing Date: September 11, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 13-0313
v.	:	
LAURA L. CONKLIN 548 Main Street Honesdale, PA 18431-1841	:	License No. R-13619 LID 63664

Representative for Licensee: Laura L. Conklin, *Pro Se*

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O P I N I O N

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") filed a timely appeal from the Order of Administrative Law Judge ("ALJ") Felix Thau, mailed May 22, 2013, in which the ALJ dismissed Citation No. 13-0313 ("the Citation").

On February 22, 2013, the Bureau issued the Citation to Laura L. Conklin ("Licensee"), charging her with violating section 404 of the Liquor Code [47 P.S. § 4-404], in that on October 18, 2012, Licensee, by its servants, agents, or employees, failed to adhere to the conditions of a conditional licensing agreement ("CLA") applicable to the licensed premises that had been entered into between the Pennsylvania Liquor Control Board ("Board") and the previous licensee.

The facts in this matter are not in dispute. On October 18, 2012, an undercover Bureau officer purchased a beer at the licensed premises, which was served to him by James L. Brennan, Jr. [Ex. C-1]. Mr. Brennan had been the previous licensee of the licensed establishment at issue.

While Mr. Brennan was still the licensee, he filed an application to renew his liquor license for the period effective October 1, 2009. [FOF 1.a.]. The Board's Bureau of Licensing ("Licensing") objected to the renewal of this liquor license. [Ex. C-2]. The objection was based on the fact that the license had received seven (7) citations, one (1) incident of a disturbance involving sales of alcohol to a minor on the premises, a misdemeanor conviction against Mr. Brennan, and the fact that Mr. Brennan did not disclose the misdemeanor conviction on his renewal application. [Ex. C-2]. The Board, by Order dated

April 28, 2010, voted to not renew the license. [Ex. C-2]. Mr. Brennan appealed that decision to the Court of Common Pleas of Wayne County. [Ex. C-2].

In order to convince the Board to renew his license, Mr. Brennan offered to enter into the CLA, which imposed additional conditions on both the license and the premises. [Ex. C-2]. The terms of the CLA required Mr. Brennan to surrender his license to Licensing, and that the license would remain in safekeeping until the license was transferred "in accordance with this Agreement." [Ex. C-2 ¶7a]. The CLA also provided that "Neither Brennen nor his current or former employees, or his or their family members shall have any interest in this or any other license…." [Ex. C-2 ¶7d]. The CLA further clarified the issue: "Brennan shall not have any interest in the license or the licensed business other than that of landlord." [Ex. C-2 ¶7f].

On January 12, 2011, the three (3)-member Board approved both the license renewal and the CLA, thus resolving the objections Licensing had had with the 2009 renewal. [FOF 1.a]. In return, Mr. Brennan withdrew his Common Pleas appeal.

Subsequently, the Board approved Mr. Brennan's transfer of the liquor license to Laura Conklin. [FOF 1.b]. In a letter to Ms. Conklin dated March 2, 2011, the Board included the following notice:

> Please be advised, this transfer application is being approved in accordance with the conditions outlined in the attached Conditional Licensing Agreement (CLA) which was approved by the Board on January 12, 2011.

[FOF 1.b].

Nonetheless, on October 18, 2012, a Bureau officer arrived at the licensed premises and purchased beer, which was served to him by Mr. Brennan. [FOF 2]. After the Officer displayed his credentials, Mr. Brennan admitted that he usually opens the business and works until noon, that he pays the heat, water, sewer, fire insurance, county taxes, and makes repairs to the building, and that he allows Licensee to use his credit card to purchase items, for which she then reimburses Mr. Brennan. [FOF 3]. The Bureau issued the Citation on February 22, 2013. Licensee responded to the Citation by filing an Admission, Waiver and Authorization form ("Waiver"), admitting to all violations charged in the Citation, waiving the right to a hearing, and authorizing the ALJ to enter an adjudication, from which she waived her right to appeal.

After reviewing the undisputed facts and despite the Waiver signed by Licensee, the ALJ dismissed the Citation. According to the ALJ, the CLA was no longer in effect on that date because: (1) the CLA cannot be extended beyond the term for which it was issued; (2) a bartender does not have an interest in

the license so as to violate the CLA; and/or (3) the CLA's operative provisions are ambiguous so as to be construed against the maker, the Board.

In its appeal, the Bureau alleges that each of the three (3) bases cited by the ALJ is erroneous. Licensee filed no response to the Bureau's appeal.

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).

Here, as a result of the Waiver, the underlying facts are not in dispute. The ALJ took official notice of the CLA entered into on January 12, 2011 and found that, on the date charged, Mr. Brennan sold beer to a Bureau officer, and he admitted that he served various roles for Licensee. [FOF 1-3]. Nonetheless, the ALJ applied his reasoning in Bureau of Liquor Control Enforcement v. Derry Street Pub, Inc., Citation No. 12-1348 and concluded that the CLA was no longer in effect on the date of the admitted violation. As support for the principle that "[a] renewal CLA cannot be extended beyond the term for which it was issued," the ALJ cites his recent adjudication in Derry Street Pub, Inc. The Bureau in its appeal iterates the same arguments it raised in its appeal of Derry Street Pub.

The decision of the ALJ in Derry Street Pub has since been reversed by the Board, in an Opinion and Order mailed July 24, 2013.[1] There is no reason to revisit the ALJ's misguided decision in that case, which was an error of law and an abuse of discretion, and was not supported by substantial evidence. Like the CLA in Derry Street Pub, Licensee's CLA unambiguously provides, "These terms will remain in effect both on the license and on the premises unless and

[1] Derry Street Pub, Inc., appealed the Board's decision, and the matter is currently pending before the Court of Common Pleas of Dauphin County.

until a subsequent agreement is reached with the Board rescinding these restrictions." (Admin. Notice). The Board and Licensee have not reached any subsequent agreements rescinding the terms of the CLA. (Admin. Notice).

Unlike Derry Street Pub, however, the CLA at issue here was entered into by Licensee's predecessor, Mr. Brennan. The ALJ postulates that "to the extent the renewal CLA attempts to control the actions of others, it has no legal impact." [ALJ Op. at 3]. This is presumably in support of the ALJ's theory that a CLA extinguishes upon the transfer of the affected license.

This theory is contradicted by the language of the Liquor Code. Section 470 of the Liquor Code allows the Board to "enter into an agreement with the applicant concerning additional restrictions **on the license in question**." [47 P.S. § 4-470 (emphasis added)]. Mr. Brennan sought renewal of his license, but because of his actions or inactions as a licensee, Licensing would only agree to the renewal of his license if he agreed to stop being a licensee. [Ex. C-2 ¶¶7a, 7b]. That restriction, as well as the other restriction that Mr. Brennan "shall not have any interest in the license or the licensed business other than that of landlord," [Ex. C-2 ¶7f], became a restriction **on the license**. The CLA and its conditions, by the language of section 470, attached to the license, not the

licensee. After Mr. Brennan entered into the CLA, that liquor license acquired certain provisions unique to it, the provisions set forth in the CLA.

Licensee was certainly aware of those provisions. She is mentioned several times in the CLA [CLA ¶¶7b, 7c, 7d, 7e] which indicates that Mr. Brennan was already considering transferring the license to her. While that does not prove actual notice upon the Licensee, she did receive actual notice about the CLA in the Board's letter to her on March 12, 2011. Moreover, when Licensee received the Citation that was based solely upon her violation of the terms of the CLA, she signed a waiver, admitting to having violated the terms of the CLA.

There is no basis within the CLA or the Liquor Code for the ALJ's position that the CLA cannot be extended beyond the licensing term in which it was issued. Such a position is an error of law, an abuse of discretion, and not supported by substantial evidence. Therefore, the ALJ erred in concluding that the CLA was no longer in effect during the admitted violation on October 18, 2012. The decision to dismiss the Citation on this basis was an error of law, an abuse of discretion, and not supported by substantial evidence.

As to the ALJ's second ground for dismissing the Citation, the ALJ concluded that, even if the CLA were applicable beyond the term for which it

was issued, "a bartender does not have an interest in the license so as to violate the CLA." [ALJ Op. at 3]. Surely every employee has an interest in the continued operation of its employer, for if the employer fails, the employee is out of a job. This is particularly true for those employees who rely on tips from customers to make up for the low hourly wage, such as wait staff and bartenders.

Moreover, the ALJ's overly simplistic assessment misses the issue. The issue is not merely whether a bartender has an interest in the license, the issue is whether Mr. Brennan has an interest in this license, in violation of the CLA.

Prior to the CLA, Mr. Brennan held the license and Licensing was prepared to deny his application for renewal. It was Licensing's position that Mr. Brennan did not meet the standard required of liquor licensees. The renewal was ultimately granted only because Mr. Brennan entered into the CLA and agreed to place the license in safekeeping until it was transferred to someone else. Paragraph 7d of the CLA provides:

> Neither Brennan nor his current or former employees, or his or their family members **shall have any interest in this or any other license** or be appointed manager in this or any other licensee without Board approval for a period of two (2) years. Notwithstanding the foregoing, nothing contained within this paragraph shall prohibit Laura Conklin from applying for the transfer of this license.

[Ex. C-2 ¶7d (emphasis added)]. Any confusion about that paragraph is certainly clarified by paragraph 7f: "Brennan shall not have any interest in the license or the licensed business other than that of landlord." [Ex. C-2 ¶7f].

Nonetheless, only a year and a half after Licensee took over the business, Mr. Brennan was behind the bar, serving a beer to the Bureau officer. As the ALJ found, Mr. Brennan admitted that he (a) usually opens the business and works until noon; (b) pays the heat, water, sewer, fire insurance, county taxes and repairs the building; and (c) permits Licensee to use his credit card to purchase items, and she subsequently reimburses him. [FOF 3].

While the activities described in (b) could fall within Mr. Brennan's role as landlord, the activities in (a) and (c) are far beyond what could be expected of a landlord. It defies credulity that the ALJ could conclude, from the admitted, undisputed facts, that Mr. Brennan did not have an interest in the license. In one sentence, the ALJ states, "The best that I may deduce from Mr. Brennan's behavior and admissions is that he is Licensee's employee and short-term loan advancer." [ALJ Op. at 6]. Yet in the very next sentence, the ALJ goes on to say, "[T]here is insufficient proof to determine what Mr. Brennan's interest in the license may be." [Id.].

It is not necessary to determine exactly what Mr. Brennan's interest in the license may be. His interest is obviously more than just a landlord. Thus, the ALJ's second basis for finding that the CLA was not violated is an error of law, an abuse of discretion, and not supported by substantial facts.

As to the ALJ's third ground for dismissing the Citation, he concluded that the CLA's operative provisions are ambiguous and should be construed against the maker, the Board.

The instant case is straightforward. Mr. Brennan had a liquor license, but Licensing would not renew it unless he transferred his license to another party. Licensing also required that Mr. Brennan have no other interest in the license or the licensed business other than that of "landlord." Mr. Brennan agreed to these terms and transferred the license to Licensee, who was made aware of the terms of the CLA that attached to the license. Only a year and a half later, Mr. Brennan was working for the Licensee, opening the bar, working as a bartender, and loaning the Licensee his credit card for various purchases related to the business. Licensee received a citation, charging her with violation of the CLA. In response, she filed a waiver and admission form, acknowledging that she had, in fact, violated the CLA.

Nonetheless, the ALJ spends a page and a half of his opinion pondering factual scenarios that are not present, and therefore, are not relevant, to wit:

- "If one shared a sixth grade school project with Mr. Brennan, does that constitute an indirection connection?"
- "If one was once married to Mr. Brennan's second cousin, is that person to be included as Mr. Brennan's family member?"
- "Is Paragraph 7b based upon some sort of blood guilt or guilt by association?"

[ALJ Op. at 5]. None of these questions are present in the instant matter. The facts in the case at issue and the applicable CLA provisions are not ambiguous.

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, and pursuant to section 471 of the Liquor Code [47 P.S. 4-471], this matter will be remanded to the ALJ in order to allow him to impose the appropriate penalty.

ORDER

The appeal of the Bureau is sustained.

The decision of the ALJ is reversed.

Licensee admitted to the violation charged in the Citation.

This matter is remanded to the ALJ to impose a penalty for the October 18, 2012 incident.

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Board Secretary