Mailing Date: October 15, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 13-0385C
v.	:	
DSD ENTERTAINMENT, INC. 254-256 South 12th Street Philadelphia, PA 19107-5638	:	License No. R-7680 LID 63643

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O P I N I O N

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") David Shenkle, mailed July 15, 2013, wherein the ALJ sustained

Citation No. 13-0385C ("the Citation") and imposed a fine of three thousand dollars ($3,000.00).

On March 5, 2013, the 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 January 31, 2013, 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. The Citation was the fourth in a series of four (4) citations issued to Licensee alleging violations of subsection 493(1) occurring on July 11, August 4, and September 27, 2012, and January 31, 2013.[1]

A consolidated hearing was held on all four (4) citations on May 30, 2013. Andrew Britt, Esquire, appeared at the hearing as counsel for the Bureau. Edward Taraskus, Esquire, appeared on behalf of Licensee. Licensee stipulated to the facts as provided by the Bureau in its pre-hearing memorandum. (N.T. 8; Ex. B-3). By Adjudication and Order mailed July 15, 2013, the ALJ sustained the Citation and imposed a fine of three thousand dollars ($3,000.00). A timely appeal by the Bureau followed.

[1] Respectively, the four (4) citations are as follows: Citation No. 12-1198C, issued August 14, 2012; Citation No. 12-1503, issued October 16, 2012; Citation No. 13-0186, issued February 12, 2013; and Citation No. 13-0385C, issued March 5, 2013.

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 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).

The sole issue raised by the Bureau on appeal is whether the ALJ committed an error of law in applying the penalty criteria of section 471 of the Liquor Code [47 P.S. § 4-471] and ordering only a fine in this case. The Bureau contends that the adjudication of this Citation represents Licensee's fourth

violation of section 493 in a period of seven (7) months, and, as such, section 471 requires the ALJ to suspend or revoke the license.

Section 471 prescribes the penalty for the type of violation sustained in the Citation, a violation of subsection 493(1) for sales to minors. In such cases, the ALJ is required 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)]. Section 471 further provides that:

> If the violation in question is a *third or subsequent violation* of any offense referred to in subsection (b) or Title 18 of the Pennsylvania Consolidated Statutes (relating to crimes and offenses), occurring within a period of four years, the administrative law judge shall impose a suspension or revocation.

[47 P.S. § 4-471(c) (emphasis added)].

In this case, the ALJ consolidated "for adjudication only" Licensee's four (4) citations, including this Citation, and issued one Adjudication and Order in which he sustained the violations charged in all four (4) citations and ordered Licensee to pay a fine of eight thousand seven hundred fifty dollars ($8,750.00), representing the sum of the fines imposed for each citation. While the ALJ incrementally increased the amount of the fine for each citation, he did not order a suspension for any of the violations because of his conclusion that none of the "adjudications" issued in the Adjudication and Order of July 15,

2013, "can be said to be prior or subsequent to any of the others." [Adjudication, p. 5 (emphasis in original)].[2]

The Bureau argues that the plain language of subsection 471(c) references third or subsequent "violations," meaning the Legislature intended that the date of the violation, i.e. the date charged in the citation, controls when an ALJ assesses the licensee's prior citation history in determining an appropriate penalty. In support, the Bureau cites Ball Park's Main Course, Inc. v. Pennsylvania Liquor Control Bd., 641 A.2d 713 (Pa. Cmwlth. 1994), as well as the Board's opinion in Alki, Inc., Citation No. 08-1248C, mailed May 6, 2009. The ALJ also cites to Ball Park's and Alki, Inc., in support of his contrary conclusion that the actual date on which the violation occurred is of no consequence in terms of a licensee's prior record under section 471. Rather, according to the ALJ, "the controlling date is the mailing of the ALJ's adjudication." [Adjudication, p. 5].

In Ball Park's, the Commonwealth Court ruled that the Board may not consider citations which have not yet been adjudicated in deciding whether to renew a licensee's license, although the Board may consider citations which

[2] It is noted that section 471(b) of the Liquor Code allowed the ALJ to suspend or even revoke for this type of offense, even though he believed that such suspension or revocation was not mandated under the circumstances. That he chose not to do so and opted instead to impose increasing fines is not reversible error.

have been adjudicated but are still on appeal before a trial court. In rendering its decision, the court identified the point at which a citation is "adjudicated" and thus eligible to be considered as part of a licensee's citation history under section 470 of the Liquor Code [47 P.S. § 4-470] as follows:

> Once an ALJ has issued an order finding that a licensee has violated the Code, the citation has been adjudicated. Once the citation has been adjudicated, Section 470(a) of the Code, which governs the renewal of licenses, permits the Board to consider the violation in determining whether to renew the license.

Ball Park's, 641 A.2d at 718-719. Thus, a prior violation of the Liquor Code enters the offending licensee's citation history on the date it is adjudicated, at which time it may be considered by the Board in rendering renewal decisions.

Although Ball Park's involved a license renewal matter under section 470, the Board has previously extended the Commonwealth Court's reasoning to section 471 and the consideration by an ALJ of a licensee's prior history in penalty determination in enforcement matters. In Alki, Inc., the licensee, Alki, Inc. ("Alki"), like Licensee in this case, was found to have violated subsection 493(1) by selling to a minor for the third time within a four (4)-year span; however, the ALJ imposed only a fine. The ALJ's decision not to order Alki to serve a suspension was based on the ALJ's belief that one (1) of Alki's two (2) prior adjudicated citations for sales to a minor was not a final adjudication in

that the thirty (30)-day appeal deadline, measured from the mailing date of the adjudication, had yet to pass. The Bureau appealed, and the Board found that the ALJ committed an error of law by failing to consider both prior violations in setting the penalty pursuant to subsection 471(c). Applying Ball Park's, the Board concluded that because the adjudication of a citation equates to a finding of a violation of the Liquor Code, an ALJ must consider all citations *adjudicated prior to* the subject adjudication when determining whether to apply the mandatory suspension provided for in subsection 471(c). Alki, Inc., Citation No. 08-1248C, Opinion p. 5. The Board therefore vacated the fine in Alki, Inc. and ordered the ALJ to suspend or revoke the license, with or without a fine.

Returning to this case, application of subsection 471(c) is complicated by the fact that the ALJ issued a single Adjudication and Order, including a single conclusion of law, sustaining the violations charged in all four (4) of Licensee's pending citations. Although the ALJ denied Licensee's motion to consolidate Citation No. 13-0186 and Citation No. 12-1503 [see Adjudication, p. 2], the decision of the ALJ to consolidate "for adjudication only" Licensee's four (4) citations ultimately had a substantive effect on the applicable penalty parameters. Clearly, had the ALJ mailed separate adjudications and orders, on

separate days, in each of the four (4) citation matters, in the order in which the citations were issued, then Licensee would have been subject to a mandatory suspension under subsection 471(c) because Citation No. 13-0186 and this Citation would have been Licensee's third and fourth adjudicated violations for sales to a minor, respectively, in less than four (4) years. Of course, even if the ALJ had issued separate adjudications for each citation but mailed them all on the same day, Licensee would still succeed in avoiding a mandatory suspension because as of that mailing date, Licensee would have no prior adjudicated citations for sales to a minor.

Without question, the fact that Licensee sold to minors on four (4) occasions in the span of a mere seven (7) months is troubling. Moreover, the benefit to administrative economy by consolidating "for adjudication" Licensee's four (4) citations is seemingly minimal, while the public detriment in this case, allowing a licensee with four (4) adjudicated citations for serving minors in less than four (4) years to avoid a mandatory suspension, is substantial.

However, the Board is unable to find an error of law or abuse of discretion in this case.[3] Contrary to the Bureau's assertion, as discussed, the date of the alleged violation is not the relevant date in determining whether an adjudicated citation is a "third or subsequent violation," for purposes of the penalty criteria in subsection 471(c). Consistent with Ball Park's, the relevant date is the date of the order finding that the licensee committed the violation. Here, the ALJ properly found that on the date Licensee's four (4) citations were adjudicated, Licensee had no prior adjudicated violations of subsection 493(1) because all four (4) sales to a minor were sustained and mailed on the same date. As Licensee had no *prior* violations of subsection 493(1) of record, no suspension was required. Thus, in the span of twenty-four (24) hours, Licensee went from having no adjudicated violations for selling to a minor to having four (4), and in the event Licensee imprudently incurs a fifth such violation within the next four (4) years, it will be subject to a mandatory suspension.

[3] It should be noted that, although not rising to the level of bias, the ALJ's professed distaste for license suspensions [see Adjudication, p. 6] must not come into play in the ALJ's use of discretion in managing his hearing calendar or issuing adjudications in matters pending before him. The need for administrative efficiency notwithstanding, intentionally stockpiling and issuing adjudications against the same licensee on the same day in order to avoid a mandatory suspension would clearly be in contravention of the legislative intent behind subsection 471(c). The Board does not believe the ALJ intentionally did so in this case, but if there was evidence of such a practice, it would be an abuse of discretion.

Therefore, since the fine is within the statutory guidelines set forth in the Liquor Code, and for the foregoing reasons, the Adjudication and Order of the ALJ is affirmed.

ORDER

The appeal of the Bureau is denied.

The decision of the ALJ is affirmed.

The fine of three thousand dollars ($3,000.00) has been paid in full.

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Board Secretary