

PENNSYLVANIA LIQUOR CONTROL BOARD
OFFICE OF CHIEF COUNSEL
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Date: ²⁸ 1/14/2015

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Total Number of Pages Including Fax Cover Sheet:

RE: J & D'S THE BROADWAY, LLC
t/a The Broadway
25 East Broadway Avenue
Clifton Heights, PA 19018-2305
Citation No. 13-0630
License No. R-660 LID 64438

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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: January 28, 2015

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 13-0630
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	:	

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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. 13-0630 and ordered Licensee to pay a fine of seven hundred dollars (\$700.00). Having considered Licensee's appeal, the Pennsylvania Liquor Control Board ("Board") affirms.

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee on April 2, 2013, setting forth the following charge:

1. On November 30, December 16, 17, 2012; January 24, 25, 26 and 27, 2013, 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).

(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 seven hundred dollar (\$700.00) fine. 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, Licensee makes five (5) assertions which will each be addressed, in turn. The first (3) allegations take issue with the sufficiency of the evidence relied upon by the ALJ, while the remaining allegations attack the constitutionality of the provision of the Liquor Code that Licensee was found to have violated.

Licensee first contends that the decision of the ALJ was not supported by substantial evidence because the ALJ failed to give adequate weight to Licensee's proffered evidence of "substantial affirmative measures to eliminate any loudspeaker noise from emanating from the licensed premises." [Licensee's Appeal Addendum, para. 1].

This argument may be quickly dismissed, because licensees are strictly liable for violations of the Liquor Code and the Board's Regulations. Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959); Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988). Although the Supreme Court in TLK held that a licensee may defend its license by demonstrating it took substantial affirmative steps to guard against known unlawful activity, this standard is only applicable to cases involving violations of laws other than the Liquor Code committed by employees or patrons in or around the licensed premises. TLK, 518 Pa. at 504, 544 A.2d at 933.

Thus, it appears Licensee is confusing the standards governing enforcement matters arising under section 471 of the Liquor Code. In this case, the Citation charged Licensee with violating subsection 493(34) of the Liquor Code, pertaining to noise, a strict liability offense. To impose a penalty for the violations alleged here, the ALJ must find by a preponderance of the evidence¹ that Licensee used or permitted to be used inside or outside of the licensed premises "a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard beyond the licensee's property line." [47 P.S. § 4-493(34)]. Nowhere in

¹ See In re Omicron Enterprises, 449 A.2d 857, 859 (Pa. Cmwlth. 1982).

subsection 493(34) is there any mention of "substantial affirmative measures," which are only relevant insofar as the ALJ considers them in mitigation for penalty assessment purposes.

Here, Licensee presented the testimony of one of its members, Dennis Massimo, who recounted some steps taken by Licensee in an attempt to mitigate its amplified noise problem. These measures included reducing the frequency with which Licensee hires a disc jockey, eliminating live bands as a form of entertainment, and implementing some changes recommended by a sound engineer hired by Licensee. [N.T. 50, 52-53].

It is clear from the ALJ's discussion that she did give some weight to Mr. Massimo's testimony regarding corrective measures. [See Adjudication, p.4]. The ALJ also gave consideration to Licensee's prior adjudicated citation record, which includes loudspeaker violations on November 5, 2011, and January 15, 2012, as well as the testimony from Licensee's neighbors indicating that, as of the date of the hearing, they were still being disturbed by amplified noise on Friday and Saturday nights. Ultimately, the ALJ determined that a fine of seven hundred dollars (\$700.00) was an appropriate penalty, which is

well within the statutory parameters for this type of offense.² Therefore, Licensee's first averment is without merit.

Licensee's second argument, regarding the motives of the Bureau's witnesses, may also be quickly dismissed. Specifically, Licensee alleges that it "proved, by a preponderance of the evidence, that the complaints of the neighbors, "MK" and "JK", [sic] were for an improper motive, and that the neighbors clearly have a personal vendetta against the Licensee." [Licensee's Appeal Addendum, para. 2].

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 is therefore without authority to disturb the ALJ's evidentiary findings, absent an abuse of discretion or a finding unsupported by substantial evidence of record.

In this case, the ALJ found the Bureau's witnesses to be credible, while Licensee's accusations of an "improper motive" were given little weight. Because credibility determinations are the ALJ's prerogative, and because a reasonable fact-finder could reach the same conclusion

² Section 471 of the Liquor Code prescribes the penalty for the type of violations alleged in the Citation, permitting the ALJ to suspend or revoke the license, or impose a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000.00), or both. [47 P.S. § 4-471(b)].

as the ALJ given the record here, Licensee's second averment is dismissed.

For the same reasons, Licensee's third argument must also be dismissed. Licensee contends that the ALJ's findings were unsupported by substantial evidence because the witnesses who testified failed to "connect the 'noise' they heard directly to a 'loudspeaker or similar device' located on the Licensed [sic] premises." [Licensee's Appeal Addendum, para. 3].

However, the record reflects that on November 30, 2012, a Bureau officer heard amplified music emanating from the licensed premises from a position on East Broadway Avenue and that the officer entered the licensed establishment, where he confirmed that the same music he heard outside was being played through Licensee's speakers. [N.T. 8-11, 16]. This evidence alone is sufficient to sustain the charge.

Moreover, to the extent Licensee is challenging the ALJ's finding of additional noise violations on December 16 and 17, 2012, and January³ 24, 25, 26, and 27, 2013, the ALJ, as finder of fact, is free to draw reasonable inferences from the evidence presented. Barylak v.

³ Although Licensee takes issue with the inclusion of a fight which occurred outside the licensed establishment on January 6, 2013, pointing out that a fight does not involve a loudspeaker, it is clear from the ALJ's conclusion of law that this incident was not among those considered to be a violation of subsection 493(34). [Adjudication, p. 3].

Montgomery County Tax Claim Bureau, 74 A.3d 414, 417 (Pa.Cmwlt. 2013). At the hearing the Bureau evinced the December 2012 and January 2013 violations through the testimony of Licensee's neighbors, as well as by the submission of a "noise log," in which one of the neighbors recorded the dates and times when she was disturbed by music coming from Licensee's establishment. (N.T. 22-31; Ex. B-3). All of the dates listed in the ALJ's conclusion of law were present in the neighbor's noise log. Therefore, there was substantial evidence to support the ALJ's conclusion that Licensee permitted amplified music originating from its premises to be heard beyond its property line.

Finally, Licensee's fourth and fifth arguments allege, respectively, that subsection 493(34) is unconstitutionally void and a deprivation of property without due process of law. No further explanation or support is given. [Licensee's Appeal Addendum, paras. 4-5].

Even if Licensee's constitutionality arguments had been fully articulated, the Board would be unable to address them because an administrative agency has no jurisdiction to consider a challenge to the validity of its enabling legislation. Borough of Green Tree v. Board of Property Assessments, Appeals and Review of Allegheny County, 459 Pa. 268, 328 A.2d 819 (1974). It may be noted, however, that duly enacted legislation carries with it a strong presumption of

constitutionality that will not be overcome unless legislation clearly, palpably, and plainly violates the Constitution. Commonwealth v. Swinehart, 541 Pa. 500, 508, 664 A.2d 957, 961 (1995).

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 seven hundred dollars (\$700.00).

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

John K. Starks

Board Secretary