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PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 13-1100
v.	:	
BIG D RESTAURANTS, LLC 7246 Kelly Street Pittsburgh, PA 15208	:	License No. R-7831 LID 63180

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O P I N I O N

Big D Restaurants, LLC ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") Roderick Frisk, mailed April 30, 2014, wherein the ALJ sustained Citation No. 13-1100 ("the Citation") and fined Licensee eight hundred dollars ($800.00).

On May 24, 2013, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee, charging it with two (2) counts. The first count alleged violations of section 471 of the Liquor Code [47 P.S. § 4-471] and subsection 637.6(a)(2) of the Clean Indoor Air Act [35 P.S. § 637.6(a)(2)] in that on January 28, February 4 and 20, and March 13, 2013, Licensee, by its servants, agents, or employees, smoked and/or permitted smoking in a public place where smoking is prohibited. The second count of the Citation charged Licensee with violating section 404 of the Liquor Code [47 P.S. § 4-404] in that on January 28, February 4 and 20, and March 13, 2013, Licensee, by its servants, agents, or employees, failed to adhere to the conditions of the agreement entered into with the Pennsylvania Liquor Control Board ("Board") placing additional restrictions upon the license.

A hearing was held on January 15, 2014, in which Nadia L. Vargo, Esquire, appeared as counsel for the Bureau, and Louis F. Caputo, Esquire, appeared as counsel for Licensee. By Adjudication and Order mailed April 30, 2014, the ALJ sustained both charges and ordered Licensee to pay an aggregate fine of eight hundred dollars ($800.00). Licensee filed a timely appeal with the Board on May 28, 2014.[1]

[1] The appeal acts as an automatic supersedeas. [47 P.S. § 4-471(b)].

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).

As an initial matter, section 404 of the Liquor Code expressly grants authority to the Board to enter into agreements conditionally approving the issuance, transfer, or extension of a retail liquor license. [47 P.S. § 4-404]. Section 404 also expressly states: "Failure by the applicant to adhere to the

agreement will be sufficient cause to form the basis for a citation under section 471 [of the Liquor Code.]" [Id.].

On appeal, Licensee argues that the decision of the ALJ to sustain count two of the Citation was an error of law and was not supported by substantial evidence.[2] Specifically, Licensee contends that the ALJ erred in finding that the Conditional Licensing Agreement ("CLA") between the Board and Licensee, which took effect April 28, 2010, requires Licensee to use a metal-detecting wand on all patrons entering the premises. It is Licensee's position that the record does not establish a violation of the CLA because the metal-detection provision is ambiguous and because Licensee made a "good faith" effort to comply.

Paragraph 5(b) of the CLA states: "Big D [Licensee] shall use a metal detecting wand on all patrons entering the premises and shall prohibit patrons from bringing weapons into the premises[.]" (N.T. 13; Ex. C-5). Thus, by its plain language, paragraph 5(b) requires Licensee to scan *all patrons entering the premises* with a metal-detecting wand. This provision, on its face, is unambiguous; if a patron enters the licensed establishment, he/she must first

[2] Licensee admitted to the violations charged in count one, and thus, it is not at issue in this appeal. (Adjudication, Findings of Fact Nos. 1, 2; N.T. 6).

be scanned. However, Licensee argues that the CLA as a whole is unclear when paragraph 5(b) is considered with paragraph 5(d), which provides:

> Big D [Licensee] shall maintain adequate security at the premises, including the employment of one (1) security guard between the hours of 9:00 p.m. and closing time on all Monday through Thursday evenings, and two (2) security guards between the hours of 9:00 p.m. and closing time on all other evenings that Big D [Licensee] is operating. At least one (1) security guard shall be present on the exterior of the premises beginning one half (1/2) hour prior to closing and remaining until one half (1/2) hour after closing, to ensure the orderly departure of patrons and monitor their departure. In addition, the security guard or another employee at Big D [Licensee] shall conduct a patrol of the entire exterior of the premises, including the parking lot, every one half (1/2) hour, from 9:00 p.m. until closing on all nights of operation. A record of each patrol, including the date and time of the patrol and the name of the employee conducting the patrol, shall be maintained by Big D [Licensee] as a business record, subject to section 493(12) of the Liquor Code[.]

(N.T. 13; Ex. C-5).

Clearly, paragraph 5(d) imposes an additional duty on Licensee, separate and distinct from the wanding requirement, in that Licensee must staff a minimum of one (1) or two (2) nightly security guards, depending on the day of the week. Again, the plain language of paragraph 5(d) does not indicate that it modifies paragraph 5(b) in any way. Indeed, it makes no mention of the wanding requirement. Therefore, as the ALJ concluded, Licensee's assertion

that the CLA requires patrons to be scanned with a metal-detecting wand *only* during the times when security guards are present is baseless.

Given the plain language of the CLA, and the undisputed facts, there is no question that the decision of the ALJ was supported by substantial evidence. On four (4) occasions, an undercover Bureau officer entered the licensed establishment without being scanned with a metal-detecting wand, in violation of paragraph 5(b) of the CLA. During the officer's visits, other patrons similarly entered the premises without being wanded. (N.T. 6-7). Therefore, ALJ did not err in sustaining count two.[3]

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.

[3] There was a suggestion at the hearing, from the testimony of Licensee's member Derrick Hemby, that Licensee is unclear about its obligations under the CLA. If that is indeed the case, Licensee is reminded that it is free to contact the Board at any time to seek clarification or, if necessary, modification of the terms of the CLA. But by signing the CLA as written, Licensee indicated its assent to the conditions provided therein, which have not changed since the Board approved the agreement on April 28, 2010. Those terms require Licensee to scan all patrons entering the premises with a metal-detecting wand. Regardless of its asserted interpretation after the fact, Licensee failed to comply with this provision on the dates charged.

The fine of eight hundred dollars ($800.00) has not been paid. Licensee is hereby ordered to pay the fine in the amount of eight hundred dollars ($800.00). Failure to pay the fine within twenty (20) days of the mailing date of this Order will result in license suspension and/or revocation.

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

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Board Secretary