

Mailing Date: September 3, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 13-1991
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

CIRCOLO MARIO BIANCO : License No. C-2753
3500-04 Wharton Street :
Philadelphia, Pa 19146 : LID 1380
: :
:

Counsel for John J. McCreesh, III, Esquire
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OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") appeals from the Adjudication and Order of Administrative Law Judge David Shenkle ("ALJ"), mailed June 2, 2014, wherein the ALJ dismissed the first count and sustained the remaining

four (4) counts of Citation No. 13-1991 ("the Citation") issued by the Bureau.

On October 1, 2013, the Bureau issued the Citation against Circolo Mario Bianco ("Licensee"). The first count of the Citation charged Licensee with violating section 406(a)(1) of the Liquor Code [47 P.S. §406(a)(1)], on July 14, July 24, and July 27, 2013, by selling alcoholic beverages to nonmembers.

The second count of the Citation charged Licensee with violating sections 406(a)(4) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(4), 4-493(16)], on July 27, 2013, by selling, furnishing and/or giving alcoholic beverages between 3:00 a.m. and 7:00 a.m.

The third count of the Citation charged Licensee with violating section 499(a) of the Liquor Code [47 P.S. § 4-499(a)], on July 27, 2013, by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages after 3:30 a.m.

The fourth count of the Citation charged Licensee with violating section 499(a) of the Liquor Code [47 P.S. § 4-499(a)], on July 27, 2013, by permitting patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 3:30 a.m.

The fifth count of the Citation charged Licensee with violating sections 401(a) and 406(a)(1) of the Liquor Code [47 P.S. §§ 4-401(a), 4-406(a)(1)], on July 27, 2013, by selling, furnishing, or giving liquor for off-premises consumption.

A hearing was held on April 15, 2014, in which Andrew R. Britt, Esquire, appeared as counsel for the Bureau, and John J. McCreesh, III, Esquire, appeared on behalf of Licensee. By Adjudication and Order mailed June 2, 2014, the ALJ dismissed count one of the Citation and issued an aggregate fine of one thousand eight hundred dollars (\$1,800.00) on the remaining counts. The Bureau filed a timely appeal with the Pennsylvania Liquor Control Board ("Board") on July 2, 2014.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall 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. 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, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal, the Bureau contends that the ALJ committed an error of law in dismissing the first count of the Citation.¹ Specifically, the Bureau takes issue with the ALJ's conclusion that the Bureau failed to present sufficient evidence in support of the first count of the Citation due to the absence of testimony from the investigating officer, Officer Erin Lawinzak, who was not present at the hearing on April 15, 2014.

The Board has reviewed the certified record, including the ALJ's Adjudication and Order, the Bureau's Appeal, Licensee's brief, and the Notes of Testimony and Exhibits from the hearing held on April 15, 2014, and concluded that the ALJ did commit an error of law in dismissing the first count of the Citation as it pertains to the events of July 27, 2013.

The record reveals that on three (3) occasions, Bureau enforcement officers conducted undercover visits to the licensed establishment ("club") to investigate sales to nonmembers. [N.T. 5-6, 16-17, 21]. On July 14, 2013, Officer Ashley Wysocki accompanied Officer Erin Lawinzak to the club. [N.T. 6]. Upon entering the club at approximately 12:50 a.m., the two officers were greeted by a

¹ The Bureau is not appealing the ALJ's decision to sustain counts two, three, four, and five of the Citation.

doorperson who did not inquire as to the membership status of either officer. [N.T. 6, 13]. Officer Wysocki testified that she was never a member of the club. [N.T. 7]. The officers asked the club's doorperson if they could become members, and the doorperson advised the officers that they had to be thirty (30) years of age to be eligible for membership. (N.T. 7, 12). This policy was also reflected on signage outside the club indicating that patrons must be thirty (30) years of age to enter the club. [N.T. 9]. Officer Wysocki testified that neither officer was thirty (30) years of age, and their respective ages were accurately reflected on the identification they provided to the doorperson. [N.T. 7, 11, 14]. Nonetheless, the officers were permitted to enter the club and approached the bar, where Officer Lawinzak ordered, paid for and received two (2) beers, handing one (1) of the beers to Officer Wysocki. [N.T. 7, 8]. The bartender who served the beer to the officers did not inquire as to the membership status or age of the officers. [N.T. 8].

On July 24, 2013, Officer George Fritz accompanied Officer Lawinzak to the club, arriving there at approximately 9:55 p.m. [N.T. 16-17]. There was no club employee at the entrance to the club to check identification and membership status of the officers. [N.T. 18]. The officers approached the bar, and Officer Lawinzak ordered, paid

for, and received a bucket of ten (10)-ounce Bud Light beer bottles from a female bartender. [N.T. 18]. At no time did the bartender ask either officer for identification or proof of membership. [N.T. 19]. Officer Fritz testified that he has never been a member of the club. [Id.]. After consuming the purchased beer, the officers left the club at 11:55 pm. [N.T. 19].

Officer Corey Ranno accompanied Officer Lawinzak to the club on July 27, 2013 in furtherance of the investigation into the club's service to nonmembers. [N.T. 21]. The officers encountered a security guard at the door to the club who patted them down. [N.T. 22]. The officers paid a ten dollar (\$10.00) cover charge, and Officer Ranno was asked for and presented his identification. [Id.]. At no time was Officer Ranno asked about his membership status, nor was he asked to join the club as a member. [N.T. 23]. After paying the cover charge, both officers proceeded to the bar, where Officer Lawinzak ordered, purchased and received a bucket of five (5), ten (10)-ounce bottles of Bud Light Lime beer. [N.T. 23-24]. The bartender served the bucket of beer to the officers at 2:35 a.m. [N.T. 24]. The officers drank some of the beer, and shared some of the bottles with other patrons seated nearby at the bar. [Id.]. At 2:55 a.m., Officer Lawinzak ordered another bucket of beer from the bartender. [N.T. 25]. The

bartender served the bucket of five (5), ten (10)-ounce bottles of beer at 2:55 a.m. [Id.]. At 3:45 a.m. Officer Lawinzak ordered and was served a third bucket of beer bottles by the female bartender, implicating the second and third counts of the Citation. [Id.].

At 4:23 a.m., Officer Lawinzak went to the restroom, and while she was gone, Officer Ranno ordered a vodka-cranberry drink from the same bartender who had served the officers the buckets of beer. [N.T. 25-26]. The bartender did not ask Officer Ranno about his membership status [N.T. 26]. Officer Ranno received the drink from the bartender, and paid the bartender for the drink using currency from a pile of money that was atop the bar in front of his seat, implicating count one of the Citation [N.T. 28-29]. The money had been placed there by Officer Lawinzak and was also used earlier to purchase the three (3) buckets of beer for the officers. [N.T. 26, 28-29].² When Officer Lawinzak returned from the restroom, Officer Ranno handed her the vodka-cranberry drink. [N.T. 26]. Officer Lawinzak took one (1) sip of the drink, and the officers got up to leave. [Id.]. Officer Lawinzak spoke briefly with the female bartender, whom she identified by name while continuing to hold her vodka-cranberry drink, and then proceeded to walk out of the club, holding

² The funds used for purchasing the alcohol in furtherance of the investigation were reimbursed to the officers by the Pennsylvania State Police. [N.T. 29].

the three-quarter (3/4)-full drink in her hand. [N.T. 26-27]. No club employee attempted to stop Officer Lawinzak from leaving with the alcoholic beverage, nor did anyone advise or direct her to leave the beverage inside the club, implicating the fourth and fifth counts of the Citation. [N.T. 27].

The Bureau correctly asserts that the testimony concerning the events of July 27, 2013, establishing that Officer Ranno ordered and was served alcohol by Licensee, was sufficient to support the first count of the Citation. In his decision, the ALJ relied upon the source of the money used to purchase the drink, rather than the purchaser, as a basis for determining that the Bureau failed to sustain its burden in the absence of testimony from Officer Lawinzak. However, this conclusion is contradicted by precedent. Our Superior Court, while highlighting the plain language of the Liquor Code pertaining to club licensees, held:

Section 406 of the Code (47 P.S. § 4-406) contains the following provision: 'No club licensee nor its officers, servants, agents or employes, other than one holding a catering license, shall sell any liquor or malt or brewed beverages to any person except a member of the club'. In a number of decisions of this court it has been flatly ruled that a sale by a club licensee to a nonmember is a violation of the Code.

Appeal of 35th Ward Democratic Club, Inc., 245 A.2d 713, 714-15 (Pa. Super. 1968) (internal citations omitted). The court declined to create an exception for guests, adhering to the clear intent of the legislature in the language of the statute, which makes no mention of guests. (Id. at 715).

The Bureau also cites to Columbia Yacht Club v. Pennsylvania Liquor Control Bd., 543 A.2d 613 (Pa. Cmwlth. 1988) in support of its assertion that the ownership of the money used to purchase the drink is not relevant where the purchaser of the drink was not a member of the club. The holding in the Columbia Yacht Club decision is persuasive here, and was seemingly not considered by the ALJ. As the Bureau contends, the relevant inquiry is whether or not Officer Ranno, a nonmember, was sold an alcoholic beverage. (Bureau's Appeal, p. 3). The ALJ found that Officer Ranno "ordered a drink containing vodka for [Officer Lawinzak]" and "paid for the drink when it was served from the money which had been placed on the bar by [Officer Lawinzak]." (Adjudication, p. 2). It is of no consequence for whom the drink was ultimately destined or from where the money came, but rather, in accordance with Columbia Yacht Club, to whom Licensee sold the drink. The ALJ's finding that Officer Ranno, who was indisputably not a member of the club, purchased a drink from an

employee of Licensee clearly mandates sustaining the first count of the citation under section 406(a)(1) of the Liquor Code [47 P.S. §406(a)(1)], for the incident that occurred on July 27, 2013. The ALJ's legal conclusion to the contrary was clearly erroneous, as substantial evidence was presented to support the first count of the Citation as to the events of July 27, 2013.

While the events of July 14 and 24, 2013 are compelling and persuasive to the Board as establishing a pattern whereby Licensee had no regard for the membership status of the officers, there is not a sufficient basis upon which to overturn the findings and conclusions of the ALJ as to those dates. In the absence of Officer Lawinzak's testimony, the record does not contain substantial evidence to support the first count of the citation as to the incidents of July 14 and 24 and the dismissal of count one as it relates to those dates was proper.

The Board further notes that our Supreme Court has highlighted the factors that distinguish club liquor laws from those governing retail licensees:

It is beyond question that the Commonwealth's overall liquor licensing scheme, as embodied in the Liquor Code, serves a legitimate interest in protecting public health and safety by regulating the sale of liquor so as to prevent its abuse. Within this scheme, the General Assembly has distinguished club licenses from other licenses in a number of ways, e.g. clubs are permitted to make sales after 2:00

a.m. and to make sales on Sunday without a special permit, 47 P.S. § 4-406; club licenses do not count against the quota of licenses which may be awarded in a municipality, 47 P.S. §§ 744-1002 and 744-1003; and the holder of a club license must be a nonprofit corporation or association, 47 P.S. § 1-102.

According to the statutory definition, the main purposes of a club are the “mutual benefit, entertainment, fellowship or lawful convenience” of the members. 47 P.S. § 1-102. The sale of liquor is secondary to, indeed in facilitation of, these purposes. The same is not true of commercial establishments whose main purpose is the sale of liquor for profit. Whereas the purposes of a club can be achieved despite the revocation of a liquor license, the purposes of a commercial establishment cannot.

Pennsylvania Liquor Control Bd. v. Spa Athletic Club, 485 A.2d 732, 735 (Pa. 1984). Based upon Licensee’s actions on the three occasions presented to the ALJ at the April 15, 2014 hearing, Licensee clearly prioritized the sale of alcohol over maintaining the integrity and purpose of its membership. At no time did Licensee inquire about the membership status of the officers, even allowing them to enter the club on July 14 despite being ineligible for membership and entrance because of their age. Although the July 14 and July 24 incidents, due to the absence of testimony from the investigating officer, were not established as violations of section 406(a)(1) of the Liquor Code by a preponderance of the evidence, to the satisfaction of the ALJ, they certainly demonstrate a pattern of disregard of the Liquor Code by

Licensee. This disregard was especially apparent in the events of July 27, 2013, when Licensee committed multiple violations of the Liquor Code, including service to nonmembers.

Based upon the foregoing, the Board finds that the ALJ committed an error of law in dismissing the first count of the Citation as to the July 27, 2013 incident. In all other respects the Adjudication is sustained.

ORDER

The Bureau's appeal is granted in part and denied in part.

The decision of the ALJ dismissing the first count of the Citation is reversed as to July 27, 2013.

The decision of the ALJ dismissing the first count of the Citation is sustained as to July 14 and July 24, 2013.

The fine of one thousand eight hundred dollars (\$1,800.00) has been paid in full.

It is hereby ordered that this matter is remanded to the ALJ in order to impose an appropriate penalty consistent with this Opinion and Order.

Board Secretary