

Mailing Date: January 14, 2015

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 14-0168
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

DENIGHT ENTERPRISES, LLC : License No. R-4784
t/a Paradise Bar and Grille :
718-720 Alter Street :
Hazleton, PA 18201-3133 : LID 59291

For Licensee: Jason Misto, *Pro Se*

Counsel for Bureau: Craig A. Strong, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
2936 Airport Road
Bethlehem, PA 18017

OPINION

Denight Enterprises, LLC, trading as Paradise Bar and Grille ("Licensee"), appeals from the Adjudication and Order of Administrative Law Judge Felix Thau ("ALJ"), mailed October 29, 2014, wherein the ALJ sustained Citation No. 14-0168 ("the Citation") and imposed a fine of one thousand four hundred dollars (\$1,400.00).

On February 7, 2014, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee,

charging it with violating section 493 of the Liquor Code [47 P.S. § 4-493] in that on January 1, 2014, Licensee, by its servants, agents, or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated patron.

A hearing was held on June 5, 2014, in which Craig A. Strong, Esquire, appeared as counsel for the Bureau, and Jason Misto, member of Licensee, appeared *pro se* on behalf of Licensee.¹ Witnesses testified on behalf of the Bureau and the Licensee. Subsequently, the ALJ issued his Adjudication and Order, and Licensee filed a timely 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 Pennsylvania Liquor Control Board ("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

¹ At the beginning of the hearing, the ALJ introduced the case as involving a different licensee at a different citation number. [N.T. 4]. This appears to be harmless error; the remainder of the hearing clearly pertains to Licensee and the Citation at issue.

(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 specifically takes issue with Finding of Fact No. 3, which states:

3. On the date charged, an undercover Bureau Enforcement Officer observed a bartender serve an alcoholic beverage to a visibly intoxicated patron. After entering at 12:50 a.m., the Officer sat at the bar. His attention was drawn to a woman who was being assisted to the bar counter by two other customers. While at the bar counter, the woman stood but was wobbling. She displayed slurred speech when asked by another customer if she wanted another drink. Two customers assisted the woman in sitting on a bar stool. The bartender served the woman a mixed drink. (N.T. 10-17).

Licensee asserts that, although there were two (2) officers present during the investigation, only one (1) testified at the hearing and was present for questioning, which Licensee apparently perceives as problematic. At the hearing, Enforcement Officer Richard Stegman

testified for the Bureau, and his first-hand testimony supports Finding of Fact No. 3. [N.T. 10-17]. The other officer did not have first-hand testimony since he was in the bathroom at the time the patron staggered to the bar and was served by the bartender. [N.T. 26]. Therefore, given the testimony of Officer Stegman, this argument by Licensee is irrelevant and does not provide a basis for reversing the decision of the ALJ.

In addition, Licensee asserts that "sufficient consideration was not given to the witness testimony of three RAMP²-trained staff members all who agreed that the [woman in question], while exhibiting excessive behavior, was not exhibiting signs of intoxication." [PLCB-1918, Appeal of Administrative Law Judge Adjudication]. The first witness, William Minnick, was the bartender who served the patron in question.³ [N.T. 33]. He admitted, though, that he did not see the patron approaching the bar and that on the night in question, he was very busy serving people and cleaning glasses. [N.T. 47-48]. The second witness, Tiffany, was at the licensed premises with the patron in question, but left before the investigating officers arrived.

² RAMP stands for Responsible Alcohol Management Program.

³ Of the three (3) witnesses who testified for Licensee, only Mr. Minnick actually testified that he has received RAMP training, although the record is silent as to when he received the training. [N.T. 35].

[N.T. 57]. The third witness was Jason Misto, who offered differing testimony from Officer Stegman. [N.T. 58-69].

The ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Bd. of Probation and Parole, 98 Pa. Cmwlth. 28, 510 A.2d 877 (1986). It is well settled that the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 480 A.2d 1253 (Pa. Cmwlth. 1984).

Licensee has failed to establish that the ALJ's Adjudication and Order was an abuse of discretion, an error of law, or based upon findings that were not supported by substantial evidence. Therefore, the Board affirms the decision of the ALJ.

ORDER

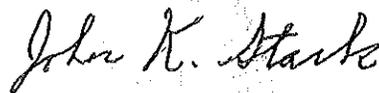
The appeal of Licensee is denied.

The ALJ's decision is affirmed.

Licensee has paid the fine of one thousand four hundred dollars (\$1,400.00) in full.

The requirement that Licensee comply with the requirements of section 471.1 of the Liquor Code, pertaining to the Responsible Alcohol Management Program, remains in effect. As there was no supersedeas in this case, Licensee shall receive RAMP certification within ninety (90) days of October 29, 2014, the mailing date of the Adjudication.

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



John K. Starks

Board Secretary

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.