

Mailing Date: December 17, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 14-0660
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

ERNIE'S OF BRACKENRIDGE, : License No. R-1662
INC. :
t/a Ernie's Tavern :
1102 Brackenridge Avenue :
Brackenridge, PA 15014-1504 : LID 33730

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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 ("ALJ") Richard O'Neill Earley, mailed August 28, 2014, wherein the ALJ dismissed Count 2 of Citation No. 14-0660

("the Citation") issued against Ernie's of Brackenridge, Inc. t/a Ernie's Tavern ("Licensee").

On April 11, 2014, the Bureau issued the Citation to Licensee. The Citation contained three (3) counts: The first count charged Licensee with a violation of section 471 of the Liquor Code [47 P.S. § 4-471] and section 5513 of the Crimes Code [18 Pa. C.S. § 5513], in that on May 28, 31, July 9, 30, December 13, 2013; January 7, February 27, and March 5, 2014, Licensee, by its servants, agents or employees, possessed or operated gambling devices of paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises. The second count charged Licensee with a violation of section 493(2) of the Liquor Code [47 P.S. § 4-493(2)], in that on July 30, September 3, 9, October 1, 14, 21, 28, November 4, 11, 18, 19, 25, December 2, 9, 11, 15, 23, 29, 2013; January 5, 12, and 26, 2014 Licensee, by its servants, agents or employees, paid for purchases of malt or brewed beverages with other than Licensee's checks, cashier's checks or money orders. The third count charged Licensee with a violation of section 5513 of the Crimes Code [18 Pa. C.S. § 5513], in that on March 5, 2014, Licensee, by its servants,

agents or employees, failed to clean its malt or brewed beverage dispensing system at least once every seven (7) days.

On behalf of Licensee, Paul D. Zavarella, Esquire, submitted a letter, dated June 6, 2014, to Chief Judge Eileen Maunus, stating the terms of a non-binding recommended penalty for a plea/admission to resolve Citation 14-0660, specifically delineating fines of seven hundred fifty dollars (\$750.00) for Count 1; two hundred dollars (\$200.00) for Count 2, and one hundred fifty dollars (\$150.00) for Count 3. Enclosed with the letter was the executed original Admission, Waiver and Authorization, dated June 5, 2014. The Admission, Waiver and Authorization was time stamped June 9, 2014.

By Adjudication and Order mailed August 28, 2014, the ALJ sustained Counts 1 and 3, imposed a fine of nine hundred dollars (\$900.00) against Licensee, and dismissed Count 2. The Bureau filed a timely appeal with the Pennsylvania Liquor Control Board ("Board") on September 26, 2014 as to count 2.¹

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

¹ Neither the Bureau nor Licensee appealed the ALJ's Order regarding Counts 1 and 3; therefore, they are not before the Board and will not be discussed herein.

committed an error of law or abused his/her discretion, or if his/her 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). 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, the Bureau contends that the ALJ committed an error of law in dismissing Count 2 of the Citation. Specifically, the Bureau takes issue with the ALJ's conclusion, despite Licensee's Authorization, Admission and Waiver Form regarding all counts of the Citation, that a licensee who pays a distributor with cash for malt or brewed beverages

does not violate section 493(2) of the Liquor Code. [47 P.S. § 4-493(2)].

The Board has reviewed the certified record, including the ALJ's Adjudication and Order, the Bureau's Appeal and brief, and the language of the section of the Liquor Code upon which Count 2 of the Citation 14-0660 was issued.² The Board has concluded that the ALJ did not commit an error of law and/or an abuse of discretion in dismissing Count 2 of the Citation, but rather applied the statutory language of section 493(2) of the Liquor Code to the facts at hand and determined that the violation was improperly assigned to the retail licensee herein.

There is no dispute between the parties as to the material facts upon which the counts of the Citation were based and the waiver was submitted. The ALJ's Adjudication reveals the following finding of fact relative to count 2, specifically: on July 30, 2013, an Officer entered Licensee's premises and observed a delivery person from Centre-Craig Distributing, Inc., inform Licensee's corporate president that the malt/brewed beverage order totaled five hundred fifteen dollars (\$515.00). The president took five hundred fifteen dollars (\$515.00) cash from her purse and handed the money to the delivery person,

² Licensee did not submit any response to the Bureau's appeal.

who made a notation on the invoice and gave the president a copy. [ALJ Adjudication, FOF 5].

The error of law averred by the Bureau challenges the ALJ's dismissal of Count 2 based upon his interpretation of section 493(2) and conclusion that a licensee who pays a distributor with cash for malt or brewed beverages does not violate section 493(2) of the Liquor Code. [47 P.S. § 4-493(2)]. The Bureau supports its position by relying upon the omission of "cash" within the acceptable form of payments that a licensee may use to purchase malt or brewed beverages as delineated in section 493(2). The Bureau also relies upon past citation practices/ALJ adjudications of retail licensees paying a distributor or an importing distributor with cash, and upon prior Board opinions, none of which specifically address the issue herein.

It must be noted that the submission of a waiver by a licensee stipulates to the facts as presented by the Bureau, but does not deprive the court of its judicial prerogative in ascertaining whether the citation/violation issued to the licensee validly falls within the applicable statute/regulation. The law in Pennsylvania is that parties may stipulate and be bound by their acts as to the law of the case, in all matters affecting them as long as the stipulation does not concern

jurisdiction and prerogatives of the court. Foley Brothers, Inc. v. Commonwealth, Department of Highways, 400 Pa. 584, 163 A.2d 80 (1976). Accordingly, the ALJ is required to examine the section of the Code and verify that the facts establish a violation, as was done in the matter herein.

The resolution of this issue rests with the language of the pertinent section, specifically:

UNLAWFUL ACTS RELATIVE TO LIQUOR, MALT AND BREWED BEVERAGES AND LICENSEES

(2) PURCHASE OR SALE OF LIQUOR OR MALT OR BREWED BEVERAGES ON CREDIT; IMPORTING DISTRIBUTORS OR DISTRIBUTORS ACCEPTING CASH. For any licensee, his agent, servant or employe, to sell or offer to sell or purchase or receive any liquor or malt or brewed beverages except for cash, excepting credit extended by a hotel or club to a bona fide guest or member, or by railroad or pullman companies in dining, club or buffet cars to passengers, for consumption while enroute, holding authorized credit cards issued by railroad or railroad credit bureaus or by hotel, restaurant, retail dispenser eating place, club and public service licensees, importing distributors or distributors to customers not possessing a license under this article and holding credit cards issued in accordance with regulations of the board or credit cards issued by banking institutions subject to State or Federal regulation: Provided further, That nothing herein contained shall be construed to prohibit the use of checks or drafts drawn on a bank, banking institution, trust company or similar depository, organized and existing under the laws of the United States of America or the laws of any state, territory or possession thereof, in payment for any liquor or malt or brewed beverages if the purchaser is the payor of the check or draft and the licensee is the payee: Provided

further, That notwithstanding any other provision of this act to the contrary, it shall be unlawful for an importing distributor or distributor to accept cash for payment of any malt or brewed beverages from anyone possessing a license issued under this article, except it shall be permissible for the importing distributor or distributor to accept money orders or cashiers' checks for payment of any malt or brewed beverages in addition to any other type of payment authorized by the board from anyone possessing a license under this article...

[47 P.S. § 4-493(2)].

The object of statutory construction is to ascertain and effectuate the General Assembly's intent. The plain language of a statute is, as a general rule, the best indicator of such legislative intent. This general rule is subject to several important qualifications, including the precept that the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable. Equally favored presumptions are that the General Assembly does not intend to violate the Constitution of the Commonwealth, and that it intends to favor the public interest as against any private interest. [1 Pa. C.S. § 1922(3),(5)]; Mercury Trucking, Inc. v. Public Utility Commission, 618 Pa. 175, 55 A.3d 1056 (2012); Commonwealth, Department of Transportation v. Brown, 133 Pa. Cmwlth. 156, 576 A.2d 75 (1990). Courts may look beyond the language of the statute if the plain meaning would lead to such results. The Board notes an additional

rule of statutory construction: that the Liquor Code is to be read to restrain, not promote, the sale of alcohol. Hyland Enterprises, Inc. v. Pennsylvania Liquor Control Bd., 631 A.2d 789 (Pa. Cmwlth 1993); In re Application of El Rancho Grande, Inc., 496 Pa. 496, 437 A.2d 1150 (1981).

As acknowledged by the ALJ, the construction given a statute by those charged with its execution and application is entitled to great weight and should only be disregarded or overturned for cogent reasons and if clearly erroneous. The Board agrees with the ALJ that past citation practices by the Bureau and advisory opinions without specificity as to the interpretation of the pertinent section are not dispositive; instead, the Board finds that language of section 493(2) supports the position of the ALJ, not the position of the Bureau.

In examining the statutory history, Act 239 of 2004 modified section 493(2) of the Liquor Code by making it unlawful for a distributor or importing distributor to accept cash as payment for the purchase of malt or brewed beverages if the purchaser is licensed by the Board. [47 P.S. § 4-493(2)]. Act 39 of 2005 amended section 493(2) of the Liquor Code to prohibit distributors from accepting cash from retail licensees (hotels, restaurants, clubs, eating place retail

dispensers) at the time the beer is delivered to the retail licensee. The purpose of these changes was to protect the employees of distributors from the risks associated with carrying large amounts of cash. The amendment further delineated acceptable forms that distributors and importing distributors can accept, specifically certain types of checks, money orders, debit cards, electronic transfer of funds, and prepayment in cash prior to delivery, as well as those that cannot be accepted: cash on delivery, credit cards, checks if the payor is someone other than the licensed entity purchasing the malt or brewed beverages or if the payee is someone other than the distributor or importing distributor selling the malt or brewed beverages or credit. In Board Advisory Opinion No. 2005-32, it was noted that if a cash transaction for malt or brewed beverages occurs, it will be the selling distributor or importing distributor who will be cited since Act 239 prohibits the *acceptance* of cash.

In the matter herein, the citation was issued to a retail licensee for its practices of paying cash to the distributor. Since such a practice is not statutorily defined as a violation on the part of the retail licensee, Count 2 of the Citation must fail. Thus, the Board concurs with the ALJ in the dismissal of Count 2 and finds no error of law.

For the foregoing reasons, the Adjudication and Order dismissing
Count 2 is sustained.

ORDER

The Bureau's appeal is denied.

The decision of the ALJ dismissing the second count of the Citation is affirmed.

The fine of nine hundred dollars (\$900.00) has been paid in full.

Board Secretary