

Mailing Date: April 8, 2015

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 14-1082C
ENFORCEMENT	:	
	:	
v.	:	
	:	
VRAHOS INCORPORATED	:	License No. R-11618
t/a Nick's Pizza Restaurant	:	
822-824 Main Street	:	LID 50746
Bethlehem, PA 18018	:	

Counsel for Licensee: Theodore J. Zeller III, Esquire
 Norris, McLaughlin & Marcus, P.A.
 The Paragon Centre, Suite 300
 1611 Pond Road
 Allentown, PA 18104

Counsel for Bureau: Roy Harkavy, Esquire
 Pennsylvania State Police,
 Bureau of Liquor Control Enforcement
 2936 Airport Road
 Bethlehem, PA 18017

OPINION

Vrahos Incorporated ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") David Shenkle mailed February 4, 2015, wherein the ALJ sustained Citation No. 14-1082C and ordered Licensee to pay a fine and obtain certification through the Pennsylvania Liquor Control Board's ("Board") Responsible Alcohol

Management Program ("RAMP"), outlined in section 471.1 of the Liquor Code [47 P.S. § 4-471.1].¹ Having reviewed the Notes of Testimony from the hearing held on November 13, 2014, the Adjudication and Order, as well as Licensee's appeal, and the Pennsylvania State Police, Bureau of Liquor Control Enforcement's ("Bureau") reply, the Board affirms the decision of the ALJ.

The Bureau issued the Citation to Licensee on June 2, 2014, setting forth the following charge:

1. On April 17, 2014, you, by your servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, nineteen (19) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1).

(Ex. C-2). A hearing was held on November 13, 2014, in which Roy Harkavy, Esquire, appeared as counsel for the Bureau. Theodore J. Zeller III, Esquire, appeared on behalf of Licensee. By Adjudication and Order mailed February 4, 2015, the ALJ sustained the charge and

¹ The ALJ issued a consolidated Adjudication and Order that addressed the subject Citation and Citation No. 14-0310C, finding in both cases that Licensee sold to a minor in violation of section 493(1). Section 471(d) [47 P.S. § 4-471(d)] mandates RAMP certification in the event of a licensee's first offense of section 493(1). Since, logically, there can only be one "first offense" here, the mandatory RAMP requirement was triggered by the adjudication of the earlier citation, Citation No. 14-0310C, although the two (2) citations entered Licensee's citation record on the same date, February 4, 2015. See Ball Park's Main Course, Inc. v. Pennsylvania Liquor Control Bd., 641 A.2d 713 (Pa. Cmwlth. 1994). It is not clear whether the ALJ intended to impose RAMP certification relative to *both* citations, which would be mandatory with respect to Citation No. 14-0310C and discretionary with respect to this Citation, but it makes no difference because the end result is that Licensee must obtain RAMP certification within ninety (90) days of the mailing date of the Adjudication and Order.

imposed a penalty of a fine in the amount of one thousand five hundred dollars (\$1,500.00). The ALJ also ordered Licensee to obtain RAMP certification within ninety (90) days of the mailing date of the Adjudication. Licensee filed a timely appeal with the Board on February 20, 2015.

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, while not disputing that the sale to a minor occurred, Licensee contends the ALJ erred in failing to be persuaded by Licensee's entrapment defense. Licensee's position, articulated both at the hearing and on appeal, is that a preponderance of the evidence in this case supports the elements of the defense of entrapment, as codified in section 313 of the Crimes Code [18 Pa. C.S. § 313]. Specifically, Licensee argues that the Bureau's use of nineteen (19)-year-old undercover buyer Nicholas Sweigart, who appears relatively old for his age, amounted to an unlawful trap by which the Bureau induced Licensee to commit the violation. It therefore asks the Board to reverse the ALJ and dismiss the Citation.

As an initial matter, the record is clear that Licensee's bartender served an alcoholic beverage to a minor on April 17, 2014, in violation of subsection 493(1) of the Liquor Code [47 P.S. § 4-493(1)]. (N.T. 39-40, 63). While the Liquor Code enumerates affirmative defenses² to alleged violations of subsection 493(1), none has been raised by Licensee in this case. Instead, Licensee contends that the violation should be excused as the fruit of the Bureau's alleged entrapment.

² See 47 P.S. § 4-495.

The sale to a minor in this case arose during an “age compliance check” of Licensee that was initiated by the Bureau on April 17, 2014. (N.T. 38). As a tool for enforcing subsection 493(1), the Bureau is expressly permitted to make undercover visits to licensed establishments during which an officer, employee, or intern of the Bureau who is a minor attempts to purchase liquor or malt or brewed beverages. Section 6308 of the Crimes Code, in addition to shielding undercover minors from prosecution for purchasing or attempting to purchase alcoholic beverages during a compliance check, provides certain requirements which the Bureau must follow in conducting the Age Compliance Check Program. [18 Pa. C.S.A. § 6308(e)]. The regulations of the Pennsylvania State Police provide additional requirements, e.g., mandating certain prior training for underage buyers. [See 37 Pa. Code § 23.1-23.24, *et seq.*].

In this case, there is no evidence or even allegation that the Bureau failed to comply with the applicable statutory or regulatory guidelines in conducting the age compliance check of Licensee on April 17, 2014. Rather, the sole question on appeal is whether the ALJ erred as a matter of law in his assessment of Licensee’s entrapment defense. The ALJ found that the evidence in this case fails to support

either the statutory entrapment of section 313 or the common law defense of entrapment. The Board agrees.

It must first be emphasized that Licensee's reliance on section 313 of the Crimes Code is misplaced. The Supreme Court has expressly construed the statutory defense of entrapment to be only applicable in criminal proceedings. Smith v. Pennsylvania State Horse Racing Com'n, 517 Pa. 233, 237, 535 A.2d 596, 598 (1988) ("[T]he defense of entrapment as codified is available only in the context of a criminal prosecution."). The Liquor Code is remedial civil legislation which is liberally construed, and enforcement matters before an ALJ are not criminal in nature. Slovak-American Citizens Club of Oakview v. Pennsylvania Liquor Control Bd., 549 A.2d 251, 254 (Pa. Cmwlth. 1988). Therefore, the Board will not address Licensee's interpretation of section 313 of the Crimes Code.

Even under the common law entrapment defense, which Licensee does not discuss but which has been raised in administrative proceedings³, the accused is required to show that (1) he/she was not predisposed to commit the crime and (2) that law enforcement

³ See Smith, 517 Pa. at 238, 535 A.2d at 598 ("Because instances may arise in the administrative setting, where, in order to prompt otherwise innocent licensees to violate laws and thereby lose their licenses, officials employ investigative techniques which are so egregious as to shock men of good conscience, we will not announce a rule which would preclude a tribunal so disposed from frustrating the intent of the overreaching officials by preserving the status of the licensee.").

induced the accused to commit the offense through methods of persuasion or inducement "likely to entrap the innocently disposed." Commonwealth v. Conway, 173 A.2d 776 (Pa. Super. 1961).

However, there is no entrapment where a law enforcement official merely furnishes or affords a liquor licensee an opportunity to commit an offense. See In re Reiter, 98 A.2d 465, 467-68 (Pa. Super. 1953); 4-6 Club v. Pennsylvania Liquor Control Bd., 442 Pa. 154, 158, 275 A.2d 40, 42 (1971). It must also be noted that licensees are strictly liable for violations of the Liquor Code and the Board's Regulations. Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 504, 544 A.2d 931, 933 (1988). Due to the "peculiar" and "highly dangerous" nature of the business of selling liquor, licensees of the Board must "assume the highest degree of responsibility to [their] fellow citizens." Commonwealth v. Koczwar, 397 Pa. 575, 581, 155 A.2d 825, 828 (1959).

In the instant matter, the ALJ's discussion shows a thorough consideration of the evidence, as well as the above precedent, in assessing whether the Bureau did more than merely furnish an opportunity to commit an offense. Although the ALJ agreed that the underage buyer, Mr. Sweigart, "does, indeed, appear[] to be an adult

well over 21,”⁴ he ultimately concluded that “[t]he facts in this case do not support a finding of common law entrapment” [Adjudication, p. 4]. This decision was based on both the Bureau’s and Licensee’s evidence, including a photograph of Mr. Sweigart taken on April 17, 2014, shortly before the age compliance check. [N.T. 65; Ex. L-2].

As fact-finder, the ALJ has the exclusive right to weigh the evidence, make credibility determinations, and resolve conflicts in the evidence. On review, the Board cannot overturn the ALJ’s credibility determinations or conclusions regarding conflicting evidence. Here, the ALJ found based on uncontroverted testimony that Licensee sold an alcoholic beverage to a minor, and he was not persuaded by Licensee’s entrapment defense. Therefore, the Board must affirm.⁵

Accordingly, for the foregoing reasons, the Adjudication and Order is affirmed, and the appeal of Licensee is dismissed.

⁴ [N.T. 66].

⁵ It should also be noted that Licensee’s appeal ignores an essential element of entrapment, namely that the accused be “innocently disposed” or a person “other than those who are ready to commit” the offense. The age compliance check of Licensee on April 17, 2014, was in fact a “recheck,” undertaken because the Bureau observed Licensee selling alcohol to an underage buyer in February 2014, resulting in Citation No. 14-0310C. [N.T. 41].

ORDER

The appeal of Licensee is dismissed.

The decision of the ALJ is affirmed.

The fine of one thousand five hundred dollars (\$1,500.00) has been paid.

The requirement that Licensee comply with the provisions 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 February 4, 2014, the mailing date of the Adjudication.

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

Board Secretary