

Mailing Date:

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 14-2489
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
JET-SET RESTAURANT, LLC	:	License No. R-9220
118 South 9 th Street	:	
Reading, PA 19602-1719	:	LID 62336

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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") David L. Shenkle mailed May 19, 2015, wherein the ALJ dismissed count one of Citation No. 14-2489 ("the Citation") and sustained count two. Having considered the record, the Adjudication and Order, the Bureau's appeal, as well as the

licensee's response, the Pennsylvania Liquor Control Board ("Board") affirms.

The Bureau issued the Citation to Jet-Set Restaurant, LLC ("Licensee") on December 29, 2014, setting forth the following charges:

1. On November 1, 2014, and one other occasion during 2014, you, by your servants, agents or employees, permitted four (4) minors, twenty (20) years of age, to frequent your licensed premises, in violation of Section 493(14) of the Liquor Code, 47 P.S. §4-493(14).
2. On November 1, 2014, you, by your servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to two (2) minors, twenty (20) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1).

[Citation, pp. 1-2].

Licensee submitted an Admission, Waiver, and Authorization ("Waiver") form on April 17, 2015, in which it, *inter alia*, admitted to the violations charged and authorized the ALJ to enter an adjudication without a hearing based on the Bureau's summary of facts. Based upon the stipulated facts, by Adjudication and Order mailed May 19, 2015, the ALJ sustained count two but declined to accept Licensee's waiver with respect to count one, dismissing the charge as a matter of

law.¹ Licensee was ordered to pay a fine in the amount of one thousand four hundred dollars (\$1,400.00) at count two, for selling a bottle of beer to a minor and permitting another minor to consume two (2) beers on the licensed premises on November 1, 2014. It was also ordered to become compliant with the Responsible Alcohol Management Program within ninety (90) days. The Bureau filed a timely appeal of the ALJ's dismissal of count one on June 18, 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 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

¹ Acceptance of a Waiver is at the discretion of the ALJ. [40 Pa. Code § 15.45(a)].

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 alleges that the ALJ committed an error of law in dismissing count one of the Citation, which charged Licensee with permitting minors to frequent the licensed premises, in violation of subsection 493(14) of the Liquor Code [47 P.S. § 4-493(14)]. Subsection 493(14) provides that minors, i.e. persons under twenty-one (21) years of age², generally are prohibited from frequenting a premises licensed to sell alcoholic beverages except in specific circumstances.³

The ALJ dismissed the charge based on his application of the standard used by the Pennsylvania Supreme Court in Appeal of Speranza, 416 Pa. 348, 206 A.2d 292 (1965), in which the Court held that evidence of ten (10) unsupervised minors on a licensed premises on a single occasion is insufficient to establish a violation for minors frequenting a licensed premises. In its opinion the Court interpreted

² Chapter 63 of the Crimes Code defines a minor, with respect to alcohol possession and consumption, as any person under twenty-one (21) years of age.

³ The statute provides five (5) exceptions which allow a minor to lawfully frequent a licensed premises; however, none of these exceptions is at issue in this case.

the term “frequent,” as used in subsection 493(14), as meaning “to visit often or to resort to habitually or to recur again and again, or more than one or two visits.” Speranza, 416 Pa. at 352, 206 A.2d at 294. The Court further explained:

We do not mean to say that it must be found that the *same* minor or minors come to the premises habitually. But it must be established by a fair preponderance of specific evidence that, as a course of conduct, licensees permit minors to come on the premises.

Id.

In this case, the stipulated facts indicate that on November 1, 2014, four (4) minors were present on the licensed premises without supervision, and one (1) of the minors had also been present unsupervised on the licensed premises on one (1) prior occasion within the preceding year. [Adjudication, Findings of Fact 1-4]. Two (2) of the minors acquired alcoholic beverages during their visit, and thus the ALJ sustained a violation of subsection 493(1) at count two. However, the ALJ found the foregoing facts deficient under Speranza to support a conclusion that Licensee permitted minors to frequent the licensed premises as alleged at count one. [Adjudication, p. 2].

In its brief the Bureau contends that Speranza should no longer govern charges relating to minors frequenting a licensed premises, because subsection 493(14) has been amended since the Court

interpreted the term “frequenting” in Speranza in 1965. Until 2003, subsection 493(14) provided that it was unlawful for licensees to “permit persons of ill repute, prostitutes or minors to frequent . . .” a licensed premises. As currently written, however, the prohibition with respect to minors is phrased differently, stating that “[m]inors may only frequent licensed premises if” The statute goes on to provide the five (5) circumstances under which a minor may lawfully “frequent” a licensed premises. The Bureau takes this change to indicate a legislative intent to prohibit minors from being present on a licensed premises “even a single time unless under one of the exceptions listed.” [Bureau’s Brief, p. 4].

It must first be noted that the Board agrees with the Bureau that the 2003 amendment to subsection 493(14) has muddied the waters as to whether the Speranza definition of “frequent” still applies. The inclusion of the words “may only” and “if” in the clause, “[m]inors may only frequent licensed premises if,” indeed seems to imply that what follows are the only circumstances under which a minor may lawfully be present on a licensed premises.

Nonetheless, the term “frequent” remains central to the current text as the unlawful conduct being targeted in subsection 493(14). Clearly the Legislature could have removed it in 2003 and replaced it

with “enter” or “be present on.” In that case there would have been no question that even a single occurrence of a minor being present on a licensed premises, absent one of the exceptions, would constitute a violation of subsection 493(14). However, the Legislature did not remove the word “frequent,” and its decision to retain that term of art suggests to the Board that it intended to carry forward the Supreme Court’s interpretation in Speranza, which had been applied and cited by the lower courts⁴ for decades by the time of the 2003 amendment.

Therefore, notwithstanding the public policy rationale of the Bureau’s preferred interpretation of subsection 493(14), with which the Board can certainly sympathize, the Board cannot find an error of law in the ALJ’s application of subsection 493(14) or his dismissal of count one. Under the Supreme Court’s interpretation of “frequent,” which the Board believes the ALJ is compelled to apply absent a legislative change or the Supreme Court reversing itself on this issue, his decision to dismiss count one of the Citation was not improper and was supported by substantial evidence.

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

⁴ See, e.g., Pennsylvania Liquor Control Bd. v. Beneficial & Protective Ass’n of Lacey Operatives of Philadelphia, 447 A.2d 1092 (Pa. Cmwlth. 1982); Appeal of Banks, 416 A.2d 631 (Pa. Cmwlth. 1980); Bresch v. Pennsylvania Liquor Control Bd., 401 A.2d 381 (Pa. Cmwlth. 1979).

ORDER

The appeal of the Bureau is dismissed.

The decision of the ALJ is affirmed.

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

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. Licensee must obtain certification within ninety (90) days of the mailing date of this Order.

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

Board Secretary