

Mailing Date: July 20, 2016

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 15-0428
ENFORCEMENT	:	
	:	
v.	:	
	:	
Q & D, INC.	:	License No. R-17928
t/a Lamplighter	:	
8 Campbell Avenue	:	LID 19019
Havertown, PA 19083-1523	:	

Representative for	John P. Quinn, President
Licensee:	Q & D, Inc.
	t/a Lamplighter
	8 Campbell Avenue
	Havertown, PA 19083

Counsel for Bureau:	Andrew R. Britt, Esquire
	Pennsylvania State Police,
	Bureau of Liquor Control Enforcement
	6901 Woodland Avenue, 3 rd Floor
	Philadelphia, PA 19142

OPINION

Q & D, Inc. t/a Lamplighter ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") Tania E. Wright mailed April 28, 2016, wherein the ALJ sustained both counts of Citation No. 15-0428. Having considered the record, the Adjudication and Order, Licensee's appeal, as well as the response of the

Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), the Pennsylvania Liquor Control Board ("Board") affirms.

The Bureau issued the Citation to Licensee on March 17, 2015, setting forth the following charges:

1. On January 1, 2015, you, by your servants, agents or employees, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 A.M., in violation of Section 499(a) of the Liquor Code, 47 P.S. §4-499(a).
2. On January 1, 2015, you, by your servants, agents or employees, sold, furnished and/or gave alcoholic beverages between 2:00 A.M. and 7:00 A.M., in violation of Sections 406(a)(2) and 493(16) of the Liquor Code, 47 P.S. §§4-406(a)(2) and 4-493(16).

Citation, pp. 1-2.

A hearing was held on October 15, 2015. John P. Quinn, Licensee's president, appeared on its behalf. Andrew R. Britt, Esquire, appeared on behalf of the Bureau. Based upon the evidence presented at the hearing, by Adjudication and Order mailed April 28, 2016, the ALJ sustained both counts of the Citation and ordered Licensee to pay a fine in the amount of \$250.00 on count one and to serve a one-day suspension of its liquor license on count two, which is an enhanced violation under section 471(b) of the Liquor Code, 47 P.S. § 4-471(b). Licensee filed this timely appeal on May 24, 2016.

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 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, Licensee argues that the ALJ’s factual findings were not supported by substantial evidence. With regard to count one, Licensee contends the ALJ erred in finding that the people seated at Licensee’s bar, who were in possession of alcoholic beverages after

2:30 a.m., were patrons. Instead, Licensee asserts that the only people present on the licensed premises at that time were employees, although Licensee concedes that these individuals were drinking alcoholic beverages. In Licensee's appeal, Mr. Quinn writes that he has "been in the bar business for fifty years and bartenders and waitresses have always sat and ate [sic] and talked after their shifts were over and especially after New Year's Eve." Appeal, Attachment p. 1.

Section 499(a) of the Liquor Code provides, in pertinent part:

"[A]ll patrons of a licensee shall be required to leave that part of the premises habitually used for the serving of liquor or malt or brewed beverages to guests or patrons not later than one-half hour after the time the licensee is required by this act to cease serving liquor or malt or brewed beverages and shall not be permitted to have any previously served liquor or malt or brewed beverages in their possession...."

47 P.S. § 4-499(a). As a restaurant liquor licensee, Licensee is required to cease serving alcohol by 2:00 a.m., and thus its patrons may no longer possess alcoholic beverages after 2:30 a.m. 47 P.S. § 4-406(a)(2). "Patron" is expressly defined in the Liquor Code as "an individual who purchases food, nonalcoholic beverages, liquor, alcohol or malt or brewed beverages for a consideration from a licensee **or any person on the licensed premises except those actually engaged in an employment related activity.**" 47 P.S. § 1-102 (emphasis added).

In this case, Bureau Officer Erick Gall testified that at 2:59 a.m. on January 1, 2015, he was driving past the licensed premises when he saw lights on inside and decided to investigate. (N.T. 7-8). He walked through the main entrance of the establishment, which was unlocked, and observed five people, whom the officer assumed to be patrons, seated around the bar. (N.T. 8). Two of the individuals had open bottles of beer in front of them, and one was consuming the beer. (N.T. 9). Although one of the individuals told the officer that everyone present was an employee, the officer did not observe anyone cleaning up the premises. (N.T. 10-11).

Based on this testimony, there was substantial evidence for the ALJ to find that the individuals possessing alcoholic beverages after 2:30 a.m. were patrons. Despite Licensee's contention that everyone remaining at the establishment after hours was an employee, the definition of the term "patron" in the Liquor Code expressly includes any person on the licensed premises who is not "actually engaged in an employment related activity." Thus, even if the individuals were all employed by Licensee, the undisputed fact that they were seated at the bar in possession of beers at 2:59 a.m., i.e. clearly not performing any employment-related activities, is sufficient to support the ALJ's

conclusion that Licensee committed a violation of section 499(a) of the Liquor Code.

Turning to count two, Licensee argues that the ALJ erred in finding that the evidence of a \$3.50 transaction at 2:55 a.m. on January 1, 2015, which a Bureau officer noted during an inspection of Licensee's records on January 14, 2015, demonstrated a sale of alcoholic beverages after 2:00 a.m. Rather, according to Licensee, the record of a transaction at 2:55 a.m. was the result of Licensee's bartender ringing up the sale of a domestic beer that had actually taken place prior to 2:00 a.m. According to Mr. Quinn:

The officer observed a \$3.50 purchase (that's a domestic beer). The purchase was made before 2:00AM and the customer left and left the money on the bar. When the bartenders finished their food and drink they rang up the sale at 2:55. The sale was made prior to 2:00AM. The bartender thought it was a tip and called the bartender that left and asked him, was it a tip or beer cash. That's when they rang it on the register. There were no sales after 1:54 and that is a fact.

Appeal, Attachment pp. 1-2.

As referenced above, restaurant liquor licensees must cease alcohol sales by 2:00 a.m. 47 P.S. § 4-406(a)(2). Section 493(16) further provides that it is unlawful for a licensee to give, serve, or deliver any alcoholic beverages during prohibited hours. 47 P.S. § 4-493(16).

Here, Officer Gall testified that while observing Licensee's electronic point-of-sale records in connection with a routine inspection on January 14, 2015, he found a transaction that had occurred on January 1, 2015, at 2:55 a.m. for \$3.50. (N.T. 16). Mr. Quinn, who was present with Officer Gall during the inspection, informed the officer that the transaction appeared to involve an alcoholic beverage, but he explained that the patron "was probably served before 2:00 a.m." and that "the bartender finally closed out the ticket at this time from the money that was left on the bar." (N.T. 18). The last recorded transaction, prior to the 2:55 a.m. transaction at issue, was a sale at 1:54 a.m. (N.T. 28).

Thus, the record contains two conflicting explanations as to the nature of the 2:55 a.m. transaction. On the one hand, Licensee asserts that what appears to be an after-hours sale was in fact a matter of delayed record-keeping by its bartender, with the underlying service of a beer occurring prior to 2:00 a.m. However, Licensee's own records suggest that a beer was sold at 2:55 a.m.

In such situations it must be emphasized that, as fact-finder, the ALJ has the exclusive right to resolve conflicts in the evidence, make credibility determinations, and assign evidentiary weight. McCauley v. Pennsylvania Bd. of Probation and Parole, 510 A.2d 877 (Pa. Cmwlth.

1986) (citations omitted). Absent an abuse of discretion or a lack of substantial evidence, the Board cannot overturn the ALJ's evidentiary decisions.

In this case, the ALJ agreed with Officer Gall in finding Mr. Quinn's excuse to be insufficient to overcome the documentary evidence of an after-hours sale of beer. As the ALJ explained in her Discussion:

Mr. Quinn offered a *possible* explanation for late entry on the cash register, but the Court did not find the explanation credible given the almost hour between what should have been the last service of alcohol at 2:00 a.m. and the time the sale was rung up on the cash register at 2:55 a.m.

Adjudication, p. 5.

Because this finding is reasonable and grounded in substantial evidence in the testimony, the Board cannot reverse the ALJ's determination as to the second count. Accordingly, for the foregoing reasons, the Adjudication and Order is affirmed in all respects, and the appeal of Licensee is dismissed.

ORDER

The appeal of Licensee is dismissed.

The decision of the ALJ is affirmed.

Licensee has not paid the fine of \$250.00 assessed with respect to count one. While the fine was due on May 18, 2016, Licensee's timely appeal acted as an automatic supersedeas of the penalty assessed at count one. 40 Pa. Code § 17.31(c). Therefore, Licensee is ordered to pay the fine of \$250.00 to the Office of Administrative Law Judge within twenty days of the mailing date of this Order.

It is further ordered that Licensee's Restaurant Liquor License No. R-17928, as well as all permits attendant to the license, be suspended for a period of one day beginning at 7:00 a.m. on Monday, August 22, 2016 and ending at 7:00 a.m. on Tuesday, August 23, 2016.

Licensee is directed on Monday, August 22, 2016 at 7:00 a.m. to place a Notice of Suspension Placard (PLCB Form 1925) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is authorized on Tuesday, August 23, 2016 at 7:00 a.m. to remove the Notice of Suspension Placard and return its license to its original wall location.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated April 26, 2016.

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

John K. Starks

Board Secretary