

Mailing Date: January 13, 2016

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 15-1044C
ENFORCEMENT	:	
	:	
v.	:	
	:	
JOHNSTOWN PHOENIX BAR &	:	License No. R-13846
RESTAURANT, INC.	:	
t/a Phoenix	:	LID 24166
200-202 Broad Street	:	
Johnstown, PA 15906-2714	:	

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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") Felix Thau mailed October 22, 2015, wherein the ALJ dismissed Citation No. 15-1044C. Having reviewed the record before the ALJ, the ALJ's opinion in support of dismissal, as

well as the Bureau's appeal brief, the Board reverses the ALJ's decision.

The Bureau issued the Citation to Johnstown Phoenix Bar & Restaurant, Inc. ("Licensee") on June 15, 2015, setting forth the following charge:

1. On May 11, 2015, 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, twenty (20) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1).

Licensee submitted an Admission, Waiver and Authorization form ("Waiver") in which it, *inter alia*, admitted to the violation charged and authorized the ALJ to enter an adjudication, without a hearing, based on the Bureau's summary of facts. Nonetheless, by Adjudication and Order mailed October 22, 2015, the ALJ dismissed the charge.¹ The Bureau filed a timely appeal on November 19, 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

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

There are two bases, both raised *sua sponte*, upon which the ALJ dismissed the charge of selling alcohol to a minor. The first is entrapment, an affirmative defense at common law; the second is a perceived failure by the Bureau to comply with the statute and regulations governing age compliance checks [18 Pa. C.S.A. § 6308(e); 37 Pa. Code § 23.1—23.24, *et seq.*].

With regard to entrapment, the ALJ concluded that the twenty-year-old minor, who purchased a beer from Licensee as part of a compliance check, used deception to induce Licensee's bartender to commit the violation. (Adjudication, pp. 3-4). As for the failure to

comply with the compliance check guidelines, the ALJ noted that neither the Crimes Code nor the Bureau's regulations expressly permits an underage buyer to misrepresent his/her age during an age compliance check. He therefore concluded that the underage buyer's statement that she was "twenty-something," when her precise age was 20, was "*ultra vires*" and in violation of the Bureau's authority within the scope of the age compliance check program. (Adjudication, pp. 4-5).

On appeal, the Bureau presents four arguments for reversing the decision of the ALJ. First, the Bureau contends that it was an error of law for the ALJ to raise the affirmative defense of common law entrapment *sua sponte*, whereas the defense should have been considered waived because it was not raised by Licensee. The Bureau's second argument is that the ALJ's finding that the underage buyer misrepresented her age, i.e. his basis for raising entrapment, was not supported by substantial evidence. Third, the Bureau asserts that the ALJ erred as a matter of law in applying common law entrapment to the instant, non-criminal enforcement matter under the Liquor Code. Finally, the Bureau argues it was an error of law for the ALJ to conclude, as an alternative basis for dismissing the Citation, that the Bureau violated its authority in conducting compliance checks.

The Bureau therefore asks the Board to reverse the ALJ, sustain the charge, and remand for an appropriate penalty.

As an initial matter, the record is clear that Licensee's bartender served an alcoholic beverage to a twenty-year-old minor on May 11, 2015, in violation of subsection 493(1) of the Liquor Code [47 P.S. § 4-493(1)]. (Adjudication, Findings of Fact Nos. 3-5). The unlawful sale occurred during a "compliance check" pursuant to subsection 6308(e) of the Crimes Code [18 Pa. C.S.A. § 6308(e)], which provides certain parameters that the Bureau must follow in conducting a compliance check. As a tool for enforcing subsection 493(1), the Bureau is 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. (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.*).

Turning to the Bureau's appeal, the first issue is whether the ALJ erred as a matter of law in raising, *sua sponte*, common law entrapment as a basis for dismissing the admitted violation. Citing precedent from Pennsylvania courts as well as the Board holding that

it is improper for a judge to raise a defense on behalf of a litigant, the Bureau argues that the ALJ exceeded his authority as an impartial arbiter when he “disregarded the parties['] proposed conclusions of law, advocated a defense sua sponte, found that the defense he raised was satisfied and dismissed the Citation.” (Bureau’s brief p. 6). The Board agrees.

Our Supreme Court has repeatedly “criticized the practice of courts reaching for issues not presented by the litigants.” Commonwealth v. Branham, 467 Pa. 605, 607-08, n.3, 359 A.2d 766, 767, n.3 (1976) (citations omitted). Accordingly, the appellate courts have overturned several lower court rulings based on issues raised *sua sponte*. See, e.g., Witt v. Com., Dep’t of Banking, 493 Pa. 77, 425 A.2d 374 (1981); Wiegand v. Wiegand, 461 Pa. 482, 337 A.2d 256 (1975); Erie Indemnity Co. v. Coal, 441 Pa. 261, 272 A.2d 465 (1971); MacGregor v. Mediq Inc., 576 A.2d 1123 (Pa. Super 1990). As the Board has previously stated², this principle applies similarly to ALJs, who are expected to be fair and impartial. (1 Pa. Code § 35.189).

In this case, the ALJ rejected Licensee’s Waiver, which was

² See, e.g., the Board’s opinion in Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Legion Post 304 Home Ass’n, Citation No. 13-2597 (November 19, 2014). The Court of Common Pleas of Carbon County recently affirmed the Board’s decision.

submitted by Licensee's counsel, and raised an affirmative defense on Licensee's behalf. In light of the clear disdain shown by our courts for this type of judicial overreaching, the Board is compelled to reverse the ALJ's decision. It was clearly an error of law.

Even assuming, *arguendo*, that the ALJ's *sua sponte* introduction of the defense of entrapment were permissible, and that the doctrine of entrapment applied to an enforcement matter under the Liquor Code,³ the Board agrees with the Bureau, as illustrated in its second and third arguments, that there was insufficient evidence to find the sale to a minor in this case was the fruit of an unlawful trap set by the Bureau. The stipulated facts show that the Bureau's underage buyer, who was twenty years old, on May 11, 2015, attempted to purchase a beer at Licensee's bar. The bartender asked for identification, and the underage buyer searched her purse. While she was searching, the bartender asked the underage buyer how old she was, to which the flustered minor responded, "twenty something." Licensee's bartender then replied, "No one looks that long; I trust you." The bartender then took the minor's payment and served the beer.

³ See Smith v. Pennsylvania State Horse Racing Com'n, 517 Pa. 233, 238, 535 A.2d 596, 598 (1988) (the statutory defense of entrapment as codified is available only in the context of criminal matters).

Under the common law entrapment defense, which has, albeit rarely, been raised in administrative proceedings⁴, the accused is required to show (1) that he/she was not predisposed to commit the crime and (2) that law enforcement 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). Moreover, 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.”

⁴ See Smith 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.”).

Commonwealth v. Koczvara, 397 Pa. 575, 581, 155 A.2d 825, 828 (1959).

In the instant matter, the record is void of any evidence of egregious or shocking investigative methods employed by the Bureau. Instead, the underage buyer's conduct would appear to fall under mere "artifice and stratagem," which are "legitimate tactics that may be employed by law enforcement officials to detect and combat crime." Commonwealth v. Lee, 396 A.2d 724, 725 (Pa. Super. 1978). It is well known that minors misrepresent their age regularly when attempting to acquire alcohol; in fact, by the mere *act* of requesting an alcoholic beverage from a server, a minor is implicitly representing that he/she is of legal drinking age. Answering "twenty something" when asked for her age did not suddenly render this minor's conduct egregiously deceptive. The compliance check, including the underage buyer's vague, equivocal statement, did nothing more than present Licensee's bartender with an opportunity to commit the offense. Thus, the Bureau's compliance check in this case was no different from a real-world encounter with a minor who is attempting to skirt the law. Because the ALJ's finding of entrapment was not supported by substantial evidence, his decision must be overturned on that basis, as well.

Finally, the Board agrees that the ALJ's second foundation for dismissing the Citation, i.e. that the underage buyer's actions were "*ultra vires*" vis-à-vis the parameters of the compliance check program, is also unfounded. There is no mention of an underage buyer verbally misrepresenting his/her age in either subsection 6308(e) of the Crimes Code or the regulations of the Pennsylvania State Police. However, the legislative history of Act 141 of 2002, which added subsection (e) to section 6308, indeed demonstrates, as noted in the Bureau's brief, that a clause prohibiting an underage buyer from orally misrepresenting his/her age was considered but ultimately rejected by the legislature. Therefore, it appears the legislature intended to permit the tactic when it created the compliance check program, and the ALJ erred in finding the minor's verbal statement to require dismissal of the Citation.

Accordingly, for the foregoing reasons, the Adjudication and Order is reversed, and the appeal of the Bureau is granted.

ORDER

The appeal of the Bureau is granted.

The decision of the ALJ is reversed.

The case is hereby remanded to the Office of Administrative Law Judge for the imposition of an appropriate penalty.

Board Secretary