

Mailing Date: October 5, 2016

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 15-1543
ENFORCEMENT	:	
	:	
v.	:	
	:	
KANE COUNTRY CLUB	:	License No. PGR-347
6654 Route 6	:	
P.O. Box 387	:	LID 67360
Kane, PA 16735-4246	:	

Representative for	Roger J. Klaiber, Vice President
Licensee:	Kane Country Club
	6654 Route 6
	P.O. Box 387
	Kane, PA 16735-4246

Counsel for Bureau:	Nadia L. Vargo, Esquire
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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, wherein the ALJ dismissed Citation No. 15-1543, issued against Kane Country Club

("Licensee"). Having reviewed the record and considered the Bureau's appeal, the Pennsylvania Liquor Control Board ("Board") affirms.

The Bureau issued the Citation to Licensee on August 26, 2015, charging Licensee with violating section 3.52(a) of the Board's Regulations, 40 Pa. Code § 3.52(a), in that during the period April 7 through July 25, 2015, Licensee, by its servants, agents, or employees, permitted other persons to operate a business on the licensed premises. Licensee submitted an Admission, Waiver, and Authorization ("Waiver") form on October 19, 2015, 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. Based upon the stipulated facts, by Adjudication and Order mailed January 22, 2016, the ALJ dismissed the charge as a matter of law, despite Licensee's submission of the Waiver.¹ The Bureau filed a timely appeal on February 22, 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 the ALJ's decision was not based upon substantial evidence. 47 P.S. § 4-471(b). The Commonwealth Court

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

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).

The relevant facts are not in dispute. Licensee holds a privately-owned public golf course restaurant liquor ("PGR") license for use at its golf course premises, known as Kane Country Club. During the period April 7 through July 25, 2015, a restaurant was operated on the licensed premises under the name "Kelly's On the Green." Adjudication, p. 2. On June 9, 2015, a Bureau officer visited the licensed premises and spoke with Kelly Martin, who stated that she leased the restaurant area from Licensee but did not serve alcohol;

instead, Licensee's bartenders sold and served all alcoholic beverages. Id.

During the officer's visit, Licensee's Board-approved manager, John Rook, confirmed Ms. Martin's account that she leased the restaurant area, which was on the licensed premises. Id. Mr. Rook also stated that Ms. Martin was not an officer of Licensee and that Licensee had not obtained the Board's approval for Ms. Martin to operate another business on the licensed premises. Id. The officer returned on July 28, 2015, and determined that the restaurant's last day of operation was July 25, 2015. Id.

The ALJ's decision to dismiss the charge in this case was based upon his interpretation of section 461(e.1) of the Liquor Code, which defines "privately-owned public golf course" as "the restaurant facilities at any privately-owned golf course open for public accommodation." 47 P.S. § 4-461(e.1). It further provides that a liquor license, i.e. a PGR license, may be issued to a privately-owned public golf course operator and that the licensee "may designate a concessionaire to provide food, alcoholic beverage and nonalcoholic beverage service at the restaurant facility." Id. The ALJ read these provisions as granting a PGR licensee the inherent right to designate any person or entity it chooses to serve as a concessionaire,

apparently without the of approval of, or even notice to, the Board. Adjudication, p. 3.

Because the ALJ interpreted subsection 461(e.1) to provide express authority for Licensee to designate a concessionaire, the ALJ rejected the Bureau's allegation that Licensee's admitted leasing of the restaurant to Ms. Martin without Board approval constituted a violation of subsection 3.52(a) of the Board's Regulations. Subsection 3.52(a) provides, in pertinent part, that a licensee "may not permit other persons to operate another business on the licensed premises." 40 Pa. Code § 3.52(a). Explaining that "[subsection] 3.52(a) of the regulations may not be interpreted so broadly as to eliminate a PGR's privilege to designate a concessionaire under [subsection] 461(e.1) of the Liquor Code," the ALJ concluded that the Bureau failed to meet its burden² and dismissed the Citation as a matter of law. Adjudication, p. 4.

In its appeal, the Bureau contends that Licensee's failure to obtain Board approval of its agreement with Ms. Martin to lease the restaurant portion of the licensed premises constituted a violation of subsection 3.52(a). It argues that the designation of a concessionaire,

² The Bureau must prove an alleged violation by a preponderance of the evidence. In re Omicron Enterprises, 449 A.2d 857, 859 (Pa. Cmwlth. 1982).

referenced in subsection 461(e.1), is akin to the appointment of a management company and thus requires Board approval.

The Board has reviewed the ALJ's adjudication, the Bureau's brief, the relevant statutory provisions, and the Board's prior advisory opinions on the topic. As pointed out by the ALJ, section 461(e.1) of the Liquor Code expressly authorizes the holder of a privately-owned public golf course to designate a concessionaire to provide food, alcoholic beverage, and non-alcoholic beverage service at the restaurant facility. To the extent that section 3.52(a) is inconsistent with section 461(e.1), it is the statute and not the regulation that prevails. Therefore, the ALJ did not err in dismissing the appeal.

Nonetheless, the ALJ is not correct when he asserts that a PGR licensee need not inform the Board when it hires a concessionaire. An entity that operates, manages, or otherwise supervises all or part of a licensee's business would fall under the Liquor Code's definition of a management company. While licensees can use management companies, they must first seek approval to do so from the Board. See 47 P.S. §§ 4-404(a), 4-436(f), 4-477(g). Therefore, a PGR licensee which fails to notify the Board that it is using a concessionaire

does so in violation of the Liquor Code, even if it is technically not a violation of section 3.52(a) of the Board's Regulations.³

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

³ This is not to fault the Bureau, since it relied on an advisory opinion that certainly suggests that section 3.52(a) is the provision at issue. Violation of an advisory opinion, however, is not grounds for an enforcement action.

ORDER

The appeal of the Bureau is dismissed.

The decision of the ALJ is affirmed.

John K. Starks

Board Secretary