

Mailing Date: August 10, 2016

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 15-1872
ENFORCEMENT	:	
	:	
v.	:	
	:	
CH & JI, INC.	:	License No. R-873
6525 Rising Sun Avenue	:	
Philadelphia, PA 19111-5246	:	LID 53541
	:	

Counsel for Licensee  
(on appeal): Kwok S. Ling, Esquire  
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Philadelphia, PA 19107

Counsel for Bureau: Erik S. Shmukler, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
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Philadelphia, PA 19142

**OPINION**

CH & JI, Inc. ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") David L. Shenkle mailed June 8, 2016, wherein the ALJ sustained all six counts of Citation No. 15-1872 ("Citation") and imposed both a fine and a license suspension.

On October 27, 2015, the Pennsylvania State Police, Bureau of

Liquor Control Enforcement ("Bureau") issued the Citation to Licensee, charging it with six counts. The first count charged Licensee with violating section 437 of the Liquor Code, 47 P.S. § 4-437, and section 5.41 of the Pennsylvania Liquor Control Board's ("PLCB") Regulations, 40 Pa. Code § 5.41, in that during the periods June 1 through August 2 and August 12 through 30, 2015, Licensee operated the licensed premises without a valid health permit or license, which had expired on April 30, 2015. The second count charged Licensee with violating section 499(a) of the Liquor Code, 47 P.S. § 4-499(a), in that on August 1, 2015, Licensee failed to require patrons to vacate the part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the service of alcoholic beverages is required to cease. The third count charged Licensee with an additional violation of section 499(a) of the Liquor Code, in that on August 1, 2015, Licensee permitted patrons to possess alcoholic beverages and/or remove them from the part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

The fourth count charged Licensee with violating sections 406(a)(2) and 493(16) of the Liquor Code, 47 P.S. §§ 4-406(a)(2), 4-493(16), in that on August 1, 2015, Licensee sold, furnished, and/or gave alcoholic beverages between 2:00 a.m. and 7:00 a.m. The fifth

count charged Licensee with violating sections 406(a)(3) and 493(16) of the Liquor Code, 47 P.S. §§ 4-406(a)(3), 4-493(16), in that on August 16, 2015, Licensee sold, furnished, and/or gave alcoholic beverages on Sunday between 2:00 a.m. and 11:00 a.m. The sixth count charged Licensee with violating section 471 of the Liquor Code, 47 P.S. § 4-471, as well as section 10-602(3)(a.1)(iv) of The Philadelphia Code, known as the "Clean Indoor Air Worker Protection Law," in that on August 1 and 16, 2015, Licensee permitted smoking in a public place where smoking was prohibited.

A hearing was held on April 19, 2016. Chuan Y. Liu appeared, *pro se*, on behalf of Licensee. Erik S. Shmukler, Esquire, appeared on behalf of the Bureau. By Adjudication and Order mailed June 8, 2016, the ALJ sustained all six charges and imposed an aggregate penalty of a fine in the amount of \$150.00 and a license suspension of fourteen days. Licensee filed a timely appeal and an application for supersedeas<sup>1</sup> with the PLCB on July 7, 2016. The Bureau replied to Licensee's appeal and supersedeas request on July 20, 2016. The application for supersedeas was granted on July 28, 2016.

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<sup>1</sup> The violations sustained in counts four and five are classified as special violations under section 471(b) of the Liquor Code, 47 P.S. § 4-471(b) and section 17.3 of the PLCB's Regulations, 40 Pa. Code § 17.3, and thus were not automatically stayed upon the filing of an appeal. 40 Pa. Code § 17.31(a).

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. The PLCB 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 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 does not take issue with the ALJ’s decision to sustain the charges. Rather, Licensee requests a reduction in the penalty ordered by the ALJ, which may be considered an abuse of discretion allegation. Specifically, Licensee states that the suspension

will cause irreparable harm to the business and asks that it be reduced in duration from fourteen days to five.

While the Board sympathizes with Licensee's financial predicament, nothing in the Liquor Code permits the Board to alter a legal penalty imposed by the ALJ. It is within the sole discretion of the ALJ, once satisfied that a licensee committed the violation or violations charged by the Bureau, to determine an appropriate penalty within the statutory parameters.

For each of the violations sustained at counts one, two, three, and six of the Citation, section 471 of the Liquor Code permits the ALJ to impose a license suspension or revocation and/or fine of not less than \$50.00 and no more than \$1,000.00, while the permissible range of fines is between \$1,000.00 and \$5,000.00 for each of the violations sustained at counts four and five. 47 P.S. § 4-471(b).

Accordingly, the ALJ imposed a fine of \$150.00 at count one; a license suspension of two days each at counts two, three, and six; and a license suspension of four days each at counts four and five. The penalty pursuant to each charge is consistent with the parameters set forth in the Liquor Code, and thus the Board cannot find an abuse of discretion.

Moreover, an ALJ may consider a licensee's prior citation history

when imposing a penalty, and if a violation in question is a third or subsequent violation in a four-year period of, *inter alia*, any of the special offenses identified in section 471(b) of the Liquor Code, the ALJ is required to suspend or revoke the license. 47 P.S. § 4-471(c). In this case, the ALJ considered Licensee's record of thirteen adjudicated citations since it became licensed in 2004, and, as this was its third (and fourth) special violation in a four-year period, imposed a mandatory license suspension with respect to counts four and five. It was well within the ALJ's discretion to impose a suspension for any of the other charges, as well, especially in light of Licensee's history.

Therefore, for the foregoing reasons, the Adjudication and Order of the ALJ is affirmed.

## **ORDER**

The appeal of Licensee is denied.

The decision of the ALJ is affirmed.

The fine of \$150.00 has been paid.

The suspension period was deferred pending the resolution of Licensee's appeal. It is hereby ordered that Licensee's Restaurant Liquor License No. R-873, as well as all permits attendant to the license, be suspended for a period of fourteen days beginning at 7:00 a.m. on September 12, 2016 and ending at 7:00 a.m. on September 26, 2016.

Licensee is directed on September 12, 2016 at 7:00 a.m. to place a Notice of Suspension Placard (Form PLCB-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 September 26, 2016 at 7:00 a.m. to remove the Notice of Suspension Placard and return the license to its original wall location.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated May 31, 2016.

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

*John K. Starks*

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Board Secretary