

Mailing Date: September 2, 1998

**PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001**

PENNSYLVANIA STATE POLICE, : Citation No. 96-2691
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

KEYSTONE BREWERS, INC. : License No. G-25
t/a Pittsburgh Brewing Company :
Plant No. 1 Iron City Brewery :
3340 Liberty Avenue :
Pittsburgh, PA 15201-1321 :

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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 Robert F. Skwaryk ("ALJ"), wherein the ALJ dismissed the three count citation against Keystone Brewers, Inc. t/a Pittsburgh Brewing Company ("Licensee").

The first count of the citation charged Licensee with violation of section 431(d)(2) of the Liquor Code [47 P.S. §4-431(d)(2)], in that on August 13, 1996, Licensee, by its servants, agents or employes, gave distributing rights agreements to more than one importing distributor for designated brands of malt or brewed beverages in the same geographical territory.

The second count of the citation charged Licensee with violation of section 492(19) of the Liquor Code [47 P.S. §4-492(19)], in that on August 29, 1996, Licensee, by its servants, agents or employes, cancelled the distributing rights agreement of an importing distributor less than 90 days after written notice of such cancellation had been served and was without consent of the parties to the agreement.

The third count of the citation charged Licensee with violation of sections 431(b) and 471 of the Liquor Code [47 P.S. §§4-431(b) and 4-471], in that on August 13, 1996, Licensee, by its servants, agents or employes, conspired to circumvent the provisions of section 431(b) of the Liquor Code.

Pursuant to section 471 of the Liquor Code [47 P.S. §4-471], the appeal in this case must be based solely on the record before the ALJ. Where the decision of the ALJ is based upon substantial evidence, the Board must affirm the decision.

The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion requiring something more than a scintilla creating mere suspicion of the fact to be established. **Johnson vs. Pennsylvania Board of Probation and Parole**, 706 A.2d 903 (Pa. Cmwlth. 1998); **Chapman vs. Pennsylvania Board of Probation and Parole**, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

In its appeal, the Bureau asserts that the decision of the ALJ is not based upon substantial evidence, is not supported by current appellate caselaw and is contrary to the intent and purpose of the Liquor Code. Specifically, the Bureau argues that the ALJ erred by relying on the theory of "issue preclusion" which it alleges has not been adopted or recognized by any Pennsylvania appellate court. In addition, the Bureau alleges that the ALJ erred as a matter of law when he relied on the transcript of preliminary injunction proceedings that was not entered into evidence at the administrative hearing and was not stipulated to by either party. Furthermore, the Bureau alleges that the ALJ erred by not following the holdings of appellate case law with respect to the interpretation of section 431 of the Liquor Code.

The Board has reviewed the extensive record in this case and hereby adopts the ALJ's Findings of Fact as set forth in numbered paragraphs one through and including 49 of the ALJ's Adjudication and Order dated April 28, 1998.

First, the Bureau argues that the ALJ erred by relying on a theory of issue preclusion, which it alleges has not been adopted or recognized by any Pennsylvania appellate court. The Bureau's argument is well-taken; however, it is axiomatic that in the absence of binding authority, with respect to the interpretation of section 431 [47 P.S. §4-431], the ALJ may adopt primary persuasive authority, as he did in this case. Regardless, the Board concurs with the ALJ that the Superior Court's interpretation of section 431 [47 P.S. §4-431] in **Shewak Distributor, Inc. vs. Keystone Brewing, L.L.C.**, 704 A.2d 1108 (Pa. Super. 1998) should be followed as the most persuasive primary authority in this case.

Second, the Bureau alleges that the ALJ erred as a matter of law when he relied on the transcript of preliminary injunction proceedings which was not entered into evidence at the administrative hearing and was not stipulated to by either party. The Bureau argues that it was improper for the ALJ to use the transcript to find that the record in the administrative hearing was similar to the record established before the Beaver County Court of Common Pleas in a preliminary injunction matter.

The general rule in Pennsylvania for administrative hearings is that hearsay evidence, properly objected to, is not competent to support a finding of fact, and

that hearsay ordinarily inadmissible may support a finding of fact only if there is no objection and it is corroborated by other competent evidence in the record. A finding based solely on inadmissible hearsay will not stand. **Anderson vs. Commonwealth Department of Public Welfare**, 79 Pa. Cmwlth. 182, 648 A.2d 1167 (1983); **Walker vs. Unemployment Compensation Board of Review**, 27 Pa. Cmwlth. 522, 367 A.2d 366 (1976).

As the ALJ made no finding of fact based solely on the transcript, the Bureau's argument is without merit. Moreover, to the extent the ALJ should not have considered a record from another court's proceedings, we find any error that may exist to be harmless error.

Lastly, the Bureau alleges that the ALJ erred by not following the holdings of appellate case law with respect to the interpretation of section 431 of the Liquor Code. As discussed above, the ALJ, soundly we believe, interpreted section 431 in a manner consistent with appellate case law by considering the Superior Court's interpretation of section 431 in **Shewak Distributor, Inc. vs. Keystone Brewing, L.L.C.**, 704 A.2d 1108 (Pa. Super. 1998).

Based on the foregoing, the decision of the ALJ is supported by substantial evidence and is affirmed. Accordingly, the appeal of the Bureau is dismissed.

ORDER

The decision of the ALJ is affirmed.

The appeal of the Bureau is dismissed.

Board Secretary