

Mailing Date: January 13, 1999

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

PENNSYLVANIA STATE POLICE, : Citation No. 97-0231
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :
 :
 :
 vs. :
 :
 :
 HOMESTEAD RESTAURANT, INC. : License No. R-AP-SS-19531
Homestead Inn :
3 Village Road :
Horsham, PA 19044-3812 :

Counsel for Licensee: Thomas P. Rogers, Esquire
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Bureau of Liquor Control Enforcement
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OPINION

Homestead Restaurant, Inc. t/a Homestead Inn ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge Tania E.

Wright (“ALJ”), wherein the ALJ fined Licensee \$1,500.00 and suspended Licensee’s license for a period of ten days.

The appeal stems from a two-count citation. Count One charged Licensee with violation of section 5.32(a) of the Board’s Regulations [40 Pa. Code §5.32(a)], in that on November 1, 8, 14, 15, 22 and 29, 1996 and December 5 and 16, 1996, Licensee, by its servants, agents or employees, used or permitted to be used on the inside of its licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside. Count Two of the citation charged Licensee with violation of sections 471 of the Liquor Code [47 P.S. §4-471] and 5503 of the Crimes Code [18 Pa. C.S. §5503], in that on November 1 and 8, 1996, the licensed establishment was operated in a noisy and/or disorderly manner.

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 Board¹ must affirm the decision.

¹ At its January 13, 1999 session, the Board voted 2-1 to affirm the decision of the ALJ.

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).

On appeal, Licensee raises fifteen allegations of error. Eleven of the issues concern particular findings of fact made by the ALJ. Two issues concern the ALJ’s conclusions of law, and two issues concern the penalty imposed. We have reviewed the record with Licensee’s objections in mind and conclude that there is substantial evidence in the record to support the ALJ’s decision.

The record reveals that a Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) officer and one neighbor whose house is located within 300 feet of the licensed premises testified on behalf of the Bureau. (N.T. 119). The Bureau’s officer testified to certain matters relative to her investigation of the charges in the citation. (N.T. 115-117). The bulk of the testimony came from the neighbor, Mrs. Ferrare. The neighbor’s testimony concerned the noise emanating from the licensed premises on

November 1, 8, 14, 15, 22 and 29, December 5 and 16, 1996. The neighbor initially testified that she regularly heard amplified music and/or loud crowd noise, generally on Wednesday through Saturday evenings. (N.T. 50-52). She ultimately kept a journal with particular dates of disturbances. (N.T. 51-54).

On November 1, 1996, she could hear crowd noise, laughing, thumping and/or loud music from the licensed premises from 6:00 p.m. until 11:30 p.m. (N.T. 124). The premises' doors were open and at one point that evening, she heard glass bottles being thrown and glass breaking. (N.T. 124, 130-131). On November 8, 1996, she heard noise and yelling made by a large crowd that was partially outside with the premises' doors open until rain forced the crowd to retreat inside the plastic sheeting. (N.T. 124-125). Even at that point, she could still hear a very loud bass drum and Caribbean music from the premises around 8:46 p.m.; the crowd was yelling and there was thumping in her home. (N.T. 125-126). On both of these occasions, she called the police to report the disturbances. (N.T. 124-125).

She further testified that on November 14, 1996, she heard throbbing music in her house. (N.T. 126). On November 15, 1996, upon her

9:45 p.m. arrival at her house, she heard loud music. (N.T. 126-127). On November 22, 1996, she heard crowd noise and loud music inside her house beginning at 7:00 p.m., and called the police at 8:45 p.m. and 10:45 p.m. as a result. (N.T. 127-128). On November 29, 1996, she could hear loud music in the evening from the premises, even though the plastic sheeting surrounding the Licensee's deck was down due to inclement weather. (N.T. 128-129). At 9:30 p.m., she called the police because of the drums and jazz music that was invading her bedroom. (N.T. 129).

The testimony involving the noise emanating from Licensee's establishment in December, 1996 was similar. On December 5, Mrs. Ferrare heard very loud music from the premises culminating in a phone call by her to the police at 10:00 p.m. (N.T. 129-130). On December 16 she could hear very loud Christmas carols, again from the premises, being sung from 11:30 a.m. through 1:00 p.m., or so. (N.T. 129-130). On both of these dates, she believed the doors to the premises were open. (N.T. 130). She did not know if any police citations were issued for these dates. (N.T. 132-133).

Licensee presented the testimony of five witnesses, four of whom were employees at the licensed establishment, and one who is the Code

Enforcement Officer of the township in which the licensed premises is located. The latter witness testified that the township has a noise ordinance prohibiting noise over a certain amount of decibels. (N.T. 142-144, Ex. L-4). The employee witnesses' testimony generally contradicted that of the Bureau's witness with regard to the location of the bands or entertainment, the dates and hours the bands played, and the resulting level of noise on the times in question. (N.T. 150-151, 159-160, 163, 167, 169, 172-174, 176, 178-181, 182-183, 189). Licensee's employees also testified to the various steps taken to control the noise, including the purchase of a sound level meter which measured the decibels emanating from Licensee's establishment. (N.T. 153-158, 162-167, 179, 183-188, 196-199, Ex. L-6). Licensee frequently used the sound meter to test the noise outside its licensed premises and the readings always were at a level slightly below the limit established by the township ordinance. (N.T. 154-155, 162, 167, 183-185). Cross-examination by Licensee of the neighbors revealed that a number of criminal noise citations against Licensee or its employees concerning several dates in the months prior to the dates in this

citation were ultimately decided in Licensee's favor. (N.T. 41-43, 70-72, 186, Ex. L-1).²

Taken as a whole, the factual findings that are the basis for Licensee's allegations of error (Findings of Fact Nos. 2 through and including 11) are supported by testimony in the record. The Board finds that the record amply supports that the witnesses did indeed testify to the matters complained of in the allegations.

It is well-established that matters of witness credibility are the sole prerogative of the ALJ, Borough of Ridgway vs. Pennsylvania Public Utility Comm'n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984), and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. That is not the case herein. Despite the uncontradicted evidence presented by Licensee that various disorderly conduct citations relating to the noise on other dates were dismissed by the local district justice and that the decibel readings taken by its employees did not exceed the maximum level set forth in the local ordinance, the ALJ found the Bureau's witness to be

² The hearing on this citation was part of a joint proceeding involving three citations issued for noise violations in 1996 against Licensee. Licensee's witnesses' testimony at times concerned the events of all three citations, and because parts of this testimony are the basis for many of Licensee's allegations of error, we have addressed Licensee's witnesses' testimony as a whole.

credible in her description of the noise that emanated from the licensed premises. The record provides sufficient evidence to support the ALJ's credibility determinations.

As the sole trier of fact, the ALJ is charged with determining the weight and sufficiency of all the evidence. Conflicts in the evidence must ultimately be resolved by the ALJ. The fact that criminal citations regarding some other dates were dismissed does not, in and of itself, become determinative of the issue of whether Mrs. Ferrare heard amplified noise emanating from Licensee's establishment. Rather, there could be any number of reasons why those particular citations were dismissed. It should also be noted that the standard of proof is less burdensome in an administrative proceeding than in a criminal proceeding. Similarly, decibel readings taken by Licensee's employees, while certainly having some value as evidence, are not determinative of the provision in the Board's Regulations prohibiting amplified noise being heard outside the licensed premises. The regulation does not base its prohibition on any certain level of noise, but just the fact that any prohibited noise escapes the premises. Therefore, the record provides substantial evidence to support the ALJ's conclusions of law.

The final two allegations of error relate to the penalty imposed by the ALJ. Licensee contends that a fine of \$1,500.00 and a license suspension of fifteen days was an abuse of discretion and unwarranted based both on Licensee's prior record and the length of time between the hearing and the adjudication. Initially, it should be noted that while the fine imposed for both counts of this citation totaled \$1,500.00, there was only a ten day suspension of the license for this particular citation (97-0231). Further, because the penalty imposed on each count was within the possible range specified in section 471 of the Liquor Code [47 P.S. §4-471], it was neither an abuse of discretion nor unwarranted based on the facts of the case. The record reveals that the ALJ was aware of Licensee's prior record when the penalty was determined.

As to Licensee's alleged error concerning timing, the Board is puzzled as to how the length of time between the hearing and the adjudication relates to the lawfulness of the penalty. Given that the fine and suspension imposed were within the statutory range, the Board has no authority to alter that penalty.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee is ordered to pay a fine of \$1,500.00 within twenty days of the mailing date of this order. Failure to do so will result in a suspension or revocation of this license with bond forfeiture.

It is ordered that Restaurant Liquor License No. R-19531 issued to Homestead Restaurant, Inc., t/a Homestead Inn, be suspended for a period of ten days **beginning** at 7:00 a.m. on Saturday, February 27, 1999; and **ending** at 7:00 a.m. on Tuesday, March 9, 1999.

Licensee is directed to place the enclosed placard of Notice of Suspension (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 its license from the wall and place it in a secure location on February 27, 1999.

Licensee is authorized on March 9, 1999 at 7:00 a.m. to remove the placard of suspension and return its license to its original wall location.

Licensee must adhere to all other conditions set forth in the ALJ's order.

Board Secretary