



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 6, 2017

JUDGES

Jason C. Greaves
10533 Main Street
Fairfax, VA 22030

Kristina Perry Stoney
Senior Assistant Attorney General & Section Chief
900 E. Main Street
Richmond, VA 23219

Re: Mall Amusements, LLC v. Virginia Alcoholic Beverage Control Board,
CL 2016-9959

Dear Mr. Greaves and Ms. Stoney:

This matter is before the court on Petitioner's Petition for Appeal from an adverse decision of the Alcoholic Beverage Control Board ("the Board") finding that Petitioner violated Code §§ 4.1-304(A)<sup>1</sup> and 4.1-225(1)(b),<sup>2</sup> and 3 VAC 5-50-10<sup>3</sup> and 3 VAC 5-50-20.<sup>4</sup> The court heard argument on the Petition on January 20, 2017.

<sup>1</sup> "No person shall . . . sell any alcoholic beverages to any individual when at the time of such sale he knows or has reason to believe that the individual to whom the sale is made is (i) less than 21 years of age . . . ."

<sup>2</sup> "The Board may suspend or revoke any license . . . in which [sic] case the Board may impose penalties as provided in § 4.1-227, if it has reasonable cause to believe that: 1. The licensee . . . b. Within the five years immediately preceding the date of the hearing held in accordance with § 4.1-227, has . . . (ii) violated any provision of Chapter 3 (§ 4.1-300 et seq.); . . . (iv) violated or failed or refused to comply with any regulation, rule or order of the Board . . . ."

<sup>3</sup> "A . . . . [N]o licensee shall sell any alcoholic beverage to a person whom he shall know, or have reason at the time to believe, is: 1. Under the age of 21 years . . . ."

<sup>4</sup> 3 VAC 5-50-20 concerns determination of the legal age of a purchaser, which is not at issue here.

Petitioner cited several grounds for review: 1) the administrative hearing officer was not an impartial decision-maker, denying Petitioner its right not to be deprived of a property interest without due process;<sup>5</sup> 2) the Board did not produce or subpoena the lead agent; 3) the administrative hearing officer did not establish a chain of custody and foundation for the admission as evidence of the empty bottle; 4) the administrative hearing officer admitted the empty bottle as evidence of the alcoholic content of the bottle; and 5) lack of substantial evidence.

Having reviewed the findings of the administrative hearing officer and the transcript of the hearing, because courts must "strive to decide cases on the 'best and narrowest grounds available,'" *Alexandria Redev. & Housing Auth. v. Walker*, 290 Va. 150, 156, 772 S.E.2d 297, \_\_\_ (2015), the court will rule only on Ground 4 ("the hearing officer admitted the empty bottle as evidence of the alcoholic content of the bottle") as resolution of that issue will obviate the necessity to decide any of the other issues.

#### FACTS

At the hearing on December 16, 2015 before the administrative hearing officer, an underage buyer, Thomas Kelly, testified that he "asked for a Bud Light," that the bartender, Mr. Peacemaker, "asked for ID," that Mr. Peacemaker "looked at [the] ID" for "probably a good three seconds," and made a comment about Mr. Kelly's appearance. Record ("R.") 86. Mr. Peacemaker then "went to get the beer from the cooler, and he opened it and handed it to me. I handed him the money, and he attempted to make the sale on the register." R.94. When it appeared that Mr. Peacemaker could not make the sale on the register, "he tried to make the sale out of his own pocket, out of his wallet, and when he realized he couldn't, he asked across the restaurant for someone to help him make the sale, and at that point I was asked to leave by the agent." R.95. Mr. Kelly then "exited." R.96.

Upon being shown a bottle, Mr. Kelly testified: "This is the bottle that he got for me from the cooler and placed in front of me." R.98. The administrative hearing officer then stated that it "appears to be a bottle of Bud Light beer." R.98. In response to the administrative hearing officer's question, "Does it have an alcohol content on the side?" and requesting that Mr. Kelly be shown the bottle, (R. 98-99), Mr. Kelly responded: "4.2 percent alcohol volume." R.99. Photographs of the bottle were also identified by Mr. Kelly. R.100. Counsel for Petitioner objected to the bottle (R.101) and the photographs. R. 100.

Counsel for Petitioner further objected to the bottle and the photographs being used to prove the alcohol content of the bottle:

[T]he bottle is empty. And under 4.1-352 and 353, as Madam is aware . . . an alcohol content on a bottle can be prima facie evidence of content if that bottle is, in fact, sealed and full. If the bottle is empty, there has to be a lab certificate.

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<sup>5</sup> The primary basis for Petitioner's argument that the administrative hearing officer was not an impartial decision-maker was that the administrative hearing officer conducted the questioning of the witnesses. Petitioner did not raise any argument regarding the statutory authority for the regulation which authorizes an administrative hearing officer to question witnesses, 3 VAC 5-10-110(B)(5).

R.102.

With respect to the alcohol content of the bottle, the administrative hearing officer concluded:

These photographs of the Bud Light bottle, which was taken directly from Agent Matikonis, demonstrate that it was an alcoholic beverage that was delivered to Mr. Kelly on this occasion.

R.152.

On July 6, 2016, the Board "adopted and incorporated" by "reference" as its "final decision" the "initial decision" of the administrative hearing officer. R.45. The instant Petition followed.

#### The Standard Of Judicial Review

Code § 2.2-4027 provides in pertinent part:

The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: . . . (ii) compliance with statutory authority . . . .

When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be to determine whether there was substantial evidence in the agency record to support the agency decision. The duty of the court with respect to the issues of law shall be to review the agency decision de novo.

Virginia's appellate courts have explained the standards to be applied. See *Shippers' Choice of Virginia, Inc. v. Smith*, 52 Va. App. 34, 37-38, 660 S.E.2d 695, \_\_\_ (2008) ("where the issue involves a legal determination or statutory interpretation, this Court does a *de novo* review"). Further, a "reviewing court may set the agency action aside, even if it is supported by substantial evidence, if the court's review discloses that the agency failed to comply with a substantive statutory directive." *Browning-Ferris Ind. v. Residents Involved*, 254 Va. 278, 284, 492 S.E.2d 431, \_\_\_ (1997). Moreover, an "agency does not possess specialized competence over the interpretation of a statute merely because it addresses topics within the agency's delegable authority." *Finnerty v. Thornton Hall, Inc.*, 42 Va. App. 628, 634, 593 S.E.2d 568, \_\_\_ (2004). Finally, *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 404, 468 S.E.2d 905, \_\_\_ (1996) teaches the following:

The sole issue involves a question of statutory interpretation. The issue does not involve "the substantiality of the evidential support for findings of fact," *id.* at (iv), which requires great deference because of the specialized competence of the agency. Instead, when, as here, the question involves a statutory interpretation issue, "little deference is required to be accorded the agency decision" because the issue falls outside the agency's specialized competence. *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 246, 369 S.E.2d 1, 9 (1988). In sum, pure statutory interpretation is the prerogative of the judiciary.

251 Va. at 404.

The sole issue here is one of statutory interpretation, i.e., whether, in light of Code § 4.1-353, the alcohol content of the bottle can be determined by the label on the empty bottle. The court's review is thus *de novo* and little deference is required to be accorded the agency decision.

**The Administrative Hearing Officer's Reliance On The  
Label On The Empty Bottle Contravenes Code § 4.1-353**

Code § 4.1-353 provides:

In any prosecution for violations of this title, where a sealed container is labeled as containing an alcoholic beverage as defined herein, such labeling shall be *prima facie* evidence of the alcoholic content of the container. Nothing shall preclude the introduction of other relevant evidence to establish the alcoholic content of a container, whether sealed or not.<sup>6</sup>

Thus, the General Assembly has established that the only instance in which the label on a bottle may be evidence of the alcoholic content of the container is when the container is sealed and, even then, it is only *prima facie* evidence of the alcoholic content of the container, i.e., evidence that is only presumptive, not conclusive, and may be rebutted or contradicted. Under no other circumstances is the label evidence of the alcoholic content of the container. Thus, in the case at bar, the label on the empty bottle was not evidence of the alcoholic content of the bottle. It follows that the photographs of the bottle are also not evidence of its alcoholic content because the photographs are merely an image of the label on the bottle.

It was, however, the finding of the administrative hearing officer ("adopted and incorporated" by the Board) that the "photographs of the Bud Light bottle . . . demonstrate that it was an alcoholic beverage that was delivered to Mr. Kelly on this occasion." R.152. The administrative hearing officer made no finding with regard to other evidence supporting the alcoholic content of the bottle. Because the decision of the Board must "be upheld, if at all, on the same basis articulated in the order by the agency itself," *Burlington Truck Lines v. United States*, 371 U.S. 156, 169 (1962),<sup>7</sup> and, as a matter of law, the photographs of the bottle are not evidence of its alcoholic content, the Board's conclusion is not in "compliance with statutory authority . . . ." As a result,

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<sup>6</sup> The term "*prima facie* evidence" is:

only a presumption, which the other evidence may rebut or contradict; [] such a presumption is not conclusive; [] it cuts off no defense, interposes no obstacle to a contest of all of the issues of fact, and relieves neither the court nor the jury from the duty to determine all of the questions of fact from the weight of the whole evidence. It is merely a rule of evidence and not the determination of a fact.

*Barton v. Camden*, 147 Va. 263, 273, 137 S.E. 465, \_\_\_ (1927).

<sup>7</sup> Adopted in *May Dept. Stores Co. v. Commonwealth*, 02 Vap UNP 3356012 (2002) ("Court must determine the validity of agency rules solely on the basis articulated by the agency itself in the administrative record made in connection with the rulemaking.").

the decision of the Board that Petitioner violated Code §§ 4.1-304(A) and 4.1-225(1)(b), and 3 VAC 5-50-10 and 3 VAC 5-50-20, is also not in "compliance with statutory authority . . . ."

**Conclusion**

Having found that the Board's decision that Petitioner violated Code §§ 4.1-304(A) and 4.1-225(1)(b), and 3 VAC 5-50-10 and 3 VAC 5-50-20, is not in "compliance with statutory authority," pursuant to Code § 2.2-4029,<sup>8</sup> the decision of the Board must be set aside and the matter remanded to the Board with instructions to dismiss the charge.

Sincerely yours,



Richard E. Gardiner  
Judge

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<sup>8</sup> Code § 2.2-4029 provides in pertinent part: "Where a regulation or case decision is found by the court not to be in accordance with law under § 2.2-4027, the court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law."

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MALL AMUSEMENTS, LLC )  
 )  
Petitioner )  
 )  
v. ) CL 2016-9959  
 )  
VIRGINIA ALCOHOLIC BEVERAGE )  
CONTROL BOARD )  
 )  
Respondent )

FINAL ORDER

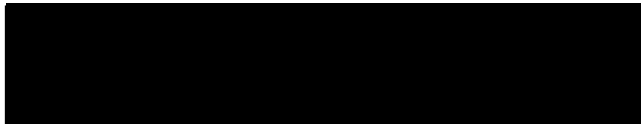
THIS MATTER came before the court on Petitioner's Petition for Appeal from an adverse decision of the Alcoholic Beverage Control Board.

IT APPEARING to the court, for the reasons stated in the court's letter of February 6, 2017, that the Petition should be granted, it is hereby

ORDERED that the Petition is GRANTED and it is further

ORDERED that, pursuant to Code § 2.2-4029, the decision of the Board is SET ASIDE and the matter REMANDED to the Board with instructions to dismiss the charge.

ENTERED this 8<sup>th</sup> day of February, 2017.



Richard E. Gardiner  
Judge

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