

Mailing Date: FEB 17 2009

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-1804
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-372208
v.	:	
	:	LID - 35679
OMEGA PSI PHI FRATERNITY	:	
KAPPA OMEGA CHAPTER	:	
2020 STATE ST.	:	
PO BOX 60333	:	
HARRISBURG, PA 17106-0333	:	
	:	
DAUPHIN COUNTY	:	
LICENSE NO. CC-6270	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Andrew J. Lovette, Esquire
Pennsylvania State Police
3655 Vartan Way
Harrisburg, PA 17110

For Licensee
James H. Rowland, Jr.,
Esquire
812 N. Seventeenth Street
PO Box 1424
Harrisburg, PA 15107-1424

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on August 28, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Omega PSI PHI Fraternity Kappa Omega Chapter (Licensee), License Number CC-6270.

This citation¹ contains four counts.

The first count charges Licensee with a violation of Sections 102 and 461.1 of the Liquor Code [47 P.S. §1-102 and §4-461.1] and Section 5.75(1) of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.75(1)]. The charge is that on May 27, 2008, Licensee, by servants, agents or employees, operated its licensed club without a valid charter.

The second count charges Licensee with a violation of Section 102 of the Liquor Code [47 P.S. §1-102]. The charge is that on May 27, 2008, Licensee, by servants, agents or employees, operated the club not in conformity with the Liquor Code definition of “club.”

The third count charges Licensee with a violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)] and Sections 5.71, 5.72, 5.73 and 5.74 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.71, §5.72, §5.73 and §5.74]. The charge is that on May 27, 2008, Licensee, by servants, agents or employees, failed to maintain records in conformity with the provisions of the Liquor Code and Title 40 of the Pennsylvania Code.

The fourth count charges Licensee with a violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that Licensee, by servants, agents or employees, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding April 21, 2008.

An evidentiary hearing was conducted on January 7, 2009 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on April 2, 2008 and completed it on July 2, 2008. (N.T. 18)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on July 21, 2008. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 7)

1. Commonwealth Exhibit No. C-2, N.T. 8.

Count Nos. 1, 2, 3 and 4:

3. On April 4, 2008, the investigating Officer contacted Mr. N. who was listed on the records of the Pennsylvania Liquor Control Board as Keeper of Finance. The Officer made arrangements to conduct an inspection of the premises on April 7, 2008. Mr. N. unlocked the door for the Officer. The Officer requested to see Licensee's records. Mr. N. explained he did not have any records. The Officer provided Mr. N. with a formal, written request for records. The Officer arranged to visit the premises on April 21, 2008. (N.T. 28-30)

4. The Officer returned to the premises on April 21, 2008 at 2:00 p.m. to review the records that had been previously requested. The Officer was greeted by a Mr. F. who identified himself as the Banquet Manager. Mr. F. unlocked the door. Mr. F. permitted the Officer to enter the premises after unlocking the door. The Officer conducted a routine inspection. Mr. N. arrived approximately ten to fifteen minutes after the Officer entered the premises. The Officer asked for liquor and beer invoices. Mr. N. stated he did not have access to those invoices. He contacted Mr. C. (N.T. 31-35)

5. Mr. F. provided the Officer with one liquor purchase after that telephone call. Mr. F. was able to provide the Officer with other documents relating to beer, food and liquor sales. The Officer toured the building and requested to see the Club Charter and By-laws. The Officer was not provided with either document and could not find them during the inspection. (N.T. 36-37; 40-41)

6. On May 27, 2008, after continuing discussions with individuals, the investigating Officer received a letter which was attached to an e-mail (Commonwealth Exhibit No. C-3).

7. The recently appointed Basileous (equivalent to the President) was appointed in November, 2008. The organization elects new officers on a yearly basis from October to October. (N.T. 89-94)

8. Licensee's Charter was on the licensed premises during all relevant periods, on the second floor. The Charter was presented at the hearing for my inspection. The Officer did inspect the second floor but did not enter a locked office. The Charter was on the wall in that office. (N.T. 95-97)

9. During the relevant period, Licensee did maintain Minutes of meetings as required but they were not on the licensed premises. Licensee also maintained a membership list during the relevant period but that too was not on the licensed premises. Licensee maintained By-laws during the relevant period but they were not on the licensed premises. Mr. N. and Mr. F. were unfamiliar with the location of these documents. (N.T. 97-99)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

Count No. 1:

2. The Bureau has **failed** to prove that on May 27, 2008, Licensee, by servants, agents or employes, operated its licensed club without a valid charter.

Count No. 2:

3. The Bureau has **failed** to prove that on May 27, 2008, Licensee, by servants, agents or employes, operated the club not in conformity with the Liquor Code definition of "club."

Count No. 3:

4. The Bureau has **failed** to prove that on May 27, 2008, Licensee, by servants, agents or employes, failed to maintain records in conformity with the provisions of the Liquor Code and Title 40 of the Pennsylvania Code.

Count No. 4:

5. The Bureau has **failed** to prove that Licensee, by servants, agents or employes, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding April 21, 2008.

DISCUSSION:

I suppose some would like me to grow tired of remarking how Title 40 Pa. Code §5.91, relating to reporting changes in club officers, renders it difficult for government officials to know who are the current club officers. It is a point which I will continue to reference as I repeatedly see the consequences of that inconvenience in this administrative process.

The pertinent regulation mandates that clubs report changes in officers only at renewal, the equivalent of once every two years. A change in Steward (Manager) is to be reported at validation or renewal, or once every year. There is no requirement to report such changes as they occur, as is the case for corporations. The result is at any given time our government has no record of the current officers. Indeed, officers may be removed and/or added any number of times within a given reporting cycle, yet the government is never apprised of those changes. More problematic is the inability of the government to monitor those who are in charge for personal qualifications.

The Bureau argues it matters not how many changes in officers may have occurred. If the Bureau contacts those listed on the most recent filing with the Pennsylvania Liquor Control Board as officers, then the Bureau and I must rely on the assertions of those persons as speaking on behalf of the organization.

This theory supposes that the Pennsylvania Liquor Control Board has the requisite legal authority to approve of the named officers in the sense that the Pennsylvania Liquor Control Board is the final authority on corporate/organizational changes. Any person not reported to the Pennsylvania Liquor Control Board is therefore legally not a club officer. Put in another way, the Bureau suggests the Liquor Code supplants and supersedes all bodies of law dealing with organizations.

The reality is that laws regarding organizations and the Liquor Code are applied in consort. It is now almost thirty years to the day that our Commonwealth Court expressed the principle that the Pennsylvania Liquor Control Board did not have the power to approve of a corporate change accomplished pursuant to the Uniform Commercial Code. *McMahon v. Com., Liquor Control Bd.*, 400 A.2d 255 (Pa.Cmwlt. 1979). Consequently, if a change in club officers is accomplished pursuant to relevant law, that change cannot be legally altered by the Pennsylvania Liquor Control Board.

The Bureau further advises the first three charges are based entirely on a letter which was sent to the investigating Officer as an attachment to an e-mail (Commonwealth Exhibit No. C-3, N.T. 68), as the Officer made no visit to the premises on the single date charged in the first three counts. It is initially questionable whether that letter may be construed as an exception to the Hearsay Rule for admissions by an authorized agent. The letter is not endorsed and there is vague evidence in this record relating to the authority of the sender to bind Licensee.

Assuming the letter's admissibility is undoubtedly established, I cannot accord the letter any weight. There is nothing in the letter that expressly reads as an admission to any of the three charges in question. In fact, the portion to which the Bureau directs me as the most damaging is the beginning of the second bullet which reads:

“The **Club** (as in original) “side” of the license is **INACTIVE** (as in original). Starting a Club would memberships, minutes, appointments, ...

I hesitate to define the second sentence as a sentence at all as it fails to have a complete predicate. There is no verb between the words “would” and “memberships” as the text suggests there should be. What the Bureau asks me to do is to interpret the letter as an admission. The letter is so vague that I cannot conclude the author intended for it to be read in the manner the Bureau suggests.

Curiously, the Bureau had more direct evidence to support any or all of the first three charges based on the Officer's observations while at the licensed premises on April 21, 2008. Yet, that date does not appear in the first three charges. To some degree, I find it legally unacceptable to provide testimony regarding possible dates of violation other than those actually charged.

There is an element of unfairness when that course of action is taken as the licensee has not been given formal notice that there will be testimony regarding the violations on a date not charged. When we say something is unfair in the legal system, we are, of course, addressing Due Process.

I dismiss Count No. 4 because I am quite satisfied the records the Bureau claims were non-existent, were available for inspection, albeit not at the licensed premises.² I am convinced the persons to whom the Officer spoke did not have the requisite knowledge to respond to the Officer's inquires with a high degree of accuracy. This is true even if individuals with whom the Officer spoke had authority to speak on behalf of Licensee.

2. The Bureau did not charge Licensee with failing to have records on the licensed premises.

ORDER:

NOW THEREFORE, it is ordered that Citation No. 08-1804 issued against Omega PSI PHI Fraternity Kappa Omega Chapter is DISMISSED.

Dated this 4th day of February, 2009

A handwritten signature in cursive script that reads "Felix Thau". The signature is written in black ink and is positioned above a horizontal line.

Felix Thau, A.L.J.

pm

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.