

Mailing Date: May 26, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-2299
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
KENRICH ATHLETIC CLUB	:	License No. C-1927
121 S. 19 th Street	:	
Philadelphia, PA 19103-4905	:	

Counsel for Licensee: Donald M. Moser, Esquire
150 Monument Road
Suite 515
Bala Cynwyd, PA 19004

Counsel for Bureau: Erik S. Shmukler, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Ave.
Third Floor
Philadelphia, PA 19020

OPINION

Kenrich Athletic Club (“Licensee”) appeals the Order of Administrative Law Judge Tania Wright (“ALJ”) dated December 30, 2009, wherein the ALJ

sustained the citation and imposed an aggregate fine of three thousand dollars (\$3,000.00) and a five-day license suspension.

Count 1 of the citation charged Licensee with violating section 5.32(a) of the Pennsylvania Liquor Control Board (“Board”) Regulations, in that on April 6, 2008, Licensee, by its servants, agents or employees, used or permitted to be used on the inside of the licensed premises, a loudspeaker or other similar device such that the sound of music could be heard outside. [40 Pa. Code § 5.32(a)]. Count 2 of the citation charged that on April 6, 2008, Licensee, by its servants, agents or employees, furnished and/or gave alcoholic beverages between the hours of 3:00 a.m. and 7:00 a.m., in violation of sections 4-406(a)(4) and 4-493(a)(6) of the Liquor Code. [47 P.S. §§ 4-406(a)(1); 4-493(a)(6)]. Count 3 of the citation charged that on April 6, 2008, Licensee, by its servants, agents or employees, improperly admitted members, in violation of section 102 of the Liquor Code. [47 P.S. § 1-102].

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused her discretion, or if her decision was not based on substantial evidence. The Commonwealth Court 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).

On appeal, Licensee asserts four (4) allegations of error and/or abuse of discretion. First, Licensee claims the ALJ committed an error of law and abused her discretion when she imposed an unduly harsh penalty for the three (3)-count citation. The second, third and fourth allegations all argue that the ALJ's decision was not based on substantial evidence because the Bureau's officer was not credible.

The Board has reviewed the record, including the ALJ's Adjudication and Order, the hearing transcript with the Licensee's contention in mind, and has concluded that the ALJ acted properly when she sustained all counts of the citation and imposed an an aggregate fine of three thousand dollars (\$3,000.00) and a five-day license suspension.

The Board will first address Licensee's argument that the ALJ's decision was not based on substantial evidence. Count 1 alleges that the licensee used a loudspeaker on the inside of the premises in such way that music could be heard outside the building. The record reveals that a Bureau officer, Sharon

Rooney, conducted an undercover visit to the licensed establishment in the early morning hours of April 6, 2008. [N.T. 7, 8]. Prior to entering the premises, Officer Rooney could hear music coming from the licensed premises while she was standing approximately thirty (30) feet away. [N.T. 9]. Upon entering the building, the officer confirmed that the music was coming from a DJ who was using loudspeakers set up on tripods. [N.T. 13, 14].

Count 2 charges that Licensee sold alcoholic beverages between the hours of 3:00 a.m. and 7:00 a.m. on April 6, 2008. Officer Rooney testified that she purchased vodka and cranberry juice mixed drinks at 3:05 a.m. and 3:10 a.m. on April 6, 2008, from bartenders at the licensed premises. [N.T.17, 18-19]. She explained that she knew the specific time because she looked at her watch which had been synchronized with the time on KYW News. [N.T. 17].

Count 3 alleges that licensee improperly admitted members in violation of section 102 of the Liquor Code. [47 P.S. § 1-102]. During her testimony, Officer Rooney explained that she was asked by the unidentified doorman to complete a membership application before entering the Kenrich Athletic Club. [N.T. 10]. She provided her false identification card, completed the application form using false information, and paid a \$20.00 fee. [N.T. 10, 11]. After returning the completed form, the doorman told Officer Rooney that she

would receive a copy of the form in the mail. [N.T. 10]. There was no discussion of the process for membership approval. [N.T. 10]. It is noteworthy that Christopher Twardy, Vice-President and Secretary of the Kenrich Athletic Club, admitted that such an admission procedure would be improper and inconsistent with the policy of the club. [N.T. 75; Exh. B-4].

Clearly there is substantial evidence to support the ALJ's decision to sustain each count of the citation. Licensee asserts that the ALJ should have disregarded the testimony of Officer Rooney because she was not credible. In support of its position, Licensee highlights the confusion in the record regarding the specific floor on which drinks were available. Essentially, this is a challenge that amounts to nothing more than dissatisfaction with how the ALJ accorded evidentiary weight. Licensee invites the Board to engage in a reevaluation of witness credibility on a cold record. Such an invitation has been previously rejected by the Commonwealth Court, and is similarly rejected by the Board in regard to this case. See Thorpe v. Pub. Sch. Employee's Ret. Bd., 879 A.2d 341 (Pa. Cmwlth. 2005). It is well-settled that matters of witness credibility are the sole prerogative of the ALJ, and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 480 A.2d 1253 (Pa.

Cmwlth. 1984). In the instant case, the ALJ found the testimony of Officer Rooney to be more credible than Charles Twardy and adequate to support the charge in the citation. The Board will not overturn the ALJ's well-reasoned opinion.

Having found that the ALJ's decision was supported by substantial evidence, the Board will turn its attention to Licensee's argument that the ALJ committed an error of law and abused her discretion by imposing unduly harsh fines.

It must be pointed out initially that the imposition of penalties is the exclusive prerogative of the ALJ. Section 471 of the Liquor Code prescribes the penalty for violations of the type found in Count 1 and Count 3 of the citation. The ALJ may impose a license suspension or revocation and/or a fine of not less than fifty dollars (\$50.00) or more than one thousand dollars (\$1,000.00). [47 P.S. § 4-471]. For Count 2, section 471 provides for the imposition of a penalty consisting of license suspension or revocation and/or a fine of not less than one thousand dollars (\$1,000.00) or more than five thousand dollars (\$5,000.00). [47 P.S. § 4-471]. The ALJ in the instant case imposed the following fines:

Count 1 - \$500.00 and one (1) day suspension

Count 2 - \$2,000.00 and two (2) day suspension

Count 3 - \$500.00 and two (2) day suspension

Because the penalty is clearly within the statutory ranges set forth in the Liquor Code, and the Board has no authority to alter the penalty imposed by the ALJ, the decision of the ALJ as to the penalty is affirmed.

ORDER

The decision of the ALJ is affirmed as to Citation No. 08-2299.

The appeal of Licensee is dismissed.

Licensee must adhere to all penalties and conditions set forth in the ALJ's Order issued December 30, 2009.

Board Secretary