

Mailing Date: JAN 14 2011

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1094
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-391704
	:	
KENRICH ATHLETIC CLUB	:	
121 S. 19 TH ST.	:	LID - 1117
PHILADELPHIA PA 19103-4905	:	
	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. C-1927	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

JAMES E. DAILEY, ESQ.

FOR THE LICENSEE:

DONALD MOSER, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

Kenrich Athletic Club Citation

No. 09-1094

This proceeding arises out of a citation that was issued on May 19, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Kenrich Athletic Club, License Number C-1927 (hereinafter "Licensee").

Administrative hearings were held on Wednesday, March 10, 2010 and Wednesday, July 21, 2010, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

This matter proceeded on March 10, 2010 against the objections of Licensee's counsel, Donald Moser, Esq., in that this was the fourth listing of the matter. Mr. Moser asked for the matter to be continued for the presence of the club steward, who was allegedly ill. Since this was the fourth listing of the matter and there was no indication that the club steward was an essential witness or fact witness in this matter, the matter proceeded. Mr. Moser was instructed that he would have a period of time following receipt of the transcript to decide whether or not this matter should be bifurcated for additional testimony. Mr. Moser submitted a letter on May 6, 2010 indicating that his client would need until June 2, 2010 to decide if he would be providing additional testimony, or if any Commonwealth witnesses needed to reappear.

June 2, 2010 came and went without further communication regarding whether or not Licensee's counsel would be calling additional witnesses. Even though there was no request by Licensee, the matters were inadvertently scheduled for July 21, 2010. No notice was given that any additional witnesses would be forthcoming. In fact, Mr. Moser contacted this office and advised that he would not be present on July 21, 2010. Nevertheless, the club steward, Francis Twardy, appeared on behalf of the licensed club and asked to provide additional testimony. That request was granted. Mr. Twardy stated that Mr. Moser was still his attorney.

The citation contains two counts.

The first count charges Licensee with violation of Section 15.62(a) of the Liquor Control Board Regulations, 40 Pa. Code §15.62(a), in that on March 30, 31, April 1 and 2, 2009, Licensee, by its servants, agents or employees, failed to post in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from the outside of the premises, a Notice of Suspension.

The second count charges Licensee with violation of Section 15.62(b) of the Liquor Control Board Regulations, 40 Pa. Code §15.62(b), in that on April 1 and 2, 2009, Licensee, by its servants, agents or employees, posted notices on the licensed premises which stated or indicated that the licensed establishment was closed for a reason other than the suspension of the license.

COUNT NOS. 1 AND 2

FINDINGS OF FACT:

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1. An officer from the Bureau of Enforcement visited the licensed premises in March of 2009, when he was assigned to conduct a suspension check, relative to an Order of the Administrative Law Judge dated March 20, 2009 and April 1, 2009 (N.T. 14-15, March 10, 2010).

2. The Court takes judicial notice of a Supplemental Order of the Office of Administrative Law Judge dated March 20, 2009. The Supplemental Order indicates that by our Adjudication and Order dated February 19, 2009, the Office of Administrative Law Judge imposed a \$1,000.00 penalty along with a fourteen day suspension. However, the suspension period was deferred pending the renewal of the Licensee's license, at which time the suspension period would be fixed by further Order. On March 20, 2009, the Office of Administrative Law Judge was advised that the Licensee had been granted temporary authority to operate and issued an Order suspending the license for a period of fourteen days beginning at 7:00 a.m. on Monday, March 30, 2009 and ending at 7:00 a.m. on Monday, April 13, 2009. That mailing was sent by certified mail, return receipt requested to the Licensee via his attorney, the law firm of Goldstein and McHugh, PC. The certified mailing was signed as received on March 24, 2009. The Licensee's attorney submitted a Petition for Reconsideration indicating that he did not physically receive the Supplemental Order until March 30, 2009. He further indicated that the Licensee had a major event scheduled on Saturday, April 4, 2009 and that the imposition of the suspension at this time would cause a tremendous hardship in that little notice had been provided to the Licensee. Therefore the Court allowed Licensee to reopen on **Friday, April 3, 2009** and reimposed the remaining ten days of the fourteen day suspension to be served at a later date. This was done by Second Supplemental Order dated April 1, 2009 (N.T. 15-17, March 10, 2010).

3. Prior to the issuance of the Second Supplemental Order, on Tuesday, March 31, 2009, an officer from the Bureau of Enforcement went to the licensed premises, with a second Enforcement officer. They arrived at the premises at 6:45 p.m. They viewed the Samson Street side of the premises and the 19th Street side and observed no suspension placard posted in the window or on any door. The officers took pictures of the premises showing that there were no suspension placards posted (N.T.17-18, March 10, 2010).

4. The premises was not open and was not operating at that time (N.T. 18, March 10, 2010).

5. On April 2, 2009 at approximately 11:25 p.m. the officer again went to the licensed premises. There appeared to be no activity inside the premises. Again the officer saw no PLCB suspension placard posted in any window or bulletin board. On this occasion, the officer saw a handwritten sign on the front door which indicated that the premises was closed due to plumbing repairs and that they would reopen on Friday, April 3, 2009. The officer used his I-Phone camera to take a picture of the sign (N.T. 28-29 and Exhibit B-4, March 10, 2010).

6. On April 2, 2009, the officer checked all the same areas which he had previously checked on March 31, 2009 (N.T. 31, March 10, 2010).

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7. There was no suspension placard posted on April 2, 2009 (N.T. 31, March 10, 2010).

8. A second officer from the Bureau of Enforcement visited the premises along with the second officer also from the Bureau on March 30, 2009. The officers arrived at the premises at 8:30 p.m. One officer was asked by the other officer to assist him in a suspension check of the premises regarding Citation No. 08-0930 (N.T. 45-46, March 10, 2010).

9. Upon arriving at the premises, the officer observed the outside of the premises and determined that there was not a suspension placard posted on any of the visible windows. He observed no placard on any side of the building (N.T. 46, March 10, 2010).

10. Shortly thereafter, a few males arrived at the premises, unlocked the doors and entered. At approximately 9:10 p.m., the officer entered the premises through the same unlocked, unguarded door and went to the bar on the first floor. He approached one of the males, both of whom were wearing yellow polo type shirts. As the officer approached, he was told that the bar was closed due to a plumbing issue in the basement and the officer immediately departed the area (N.T. 46, March 10, 2010).

11. The officer did not know whether or not any maintenance work was being done when he entered (N.T. 50, March 10, 2010).

12. At that time, there were no other sign indicating any other reason that the Licensee might be closed (N.T. 53, March 10, 2010).

13. Another officer started an investigation, along with the first officer, of the Kenrich Athletic Club. The officer went to the premises on April 1, 2009 at approximately 11:50 p.m. (N.T. 54, March 10, 2010).

14. The officer was present on another investigation, involving dollar beers on Wednesdays. The officer noted that the premises was closed and that there was a sign on the door that read that they were closed due to plumbing repairs (N.T. 56-57 and Exhibit B-4, March 10, 2010).

15. The officer noted that the sign was located on the entrance to the premises. She was not able to gain entrance to the premises. While there, she looked for a placard indicating that the premises was under suspension, but found no placard (N.T. 57, March 10, 2010).

16. The officer had visited the premises on three Wednesdays prior to the April 1, 2009 visit (N.T. 59, March 10, 2010).

17. An officer from the Bureau of Enforcement visited the premises, along with a second Bureau officer on Monday, March 30, 2009 and with a second officer on April 2, 2009. He noted no suspension placard on either occasion (N.T. 62-63, March 10, 2010).

18. On April 2, 2009, the officer noted that there was a handwritten sign posted on the front of the premises. He took a picture of the sign with his phone (N.T. 64-65, March 10, 2010).

19. An officer from the Bureau of Enforcement visited the premises, along with another officer on March 31, 2009 at approximately 6:45 p.m. They conducted an investigation for a suspension check. He took pictures of the premises. After making a thorough search of the premises, he found no suspension placard (N.T. 67-69 and Exhibit B-4, March 10, 2010).

20. Francis Twardy is the club steward (N.T. 5-6, July 21, 2010).

21. Mr. Twardy presented one witness, Christopher Twardy, in the bifurcated matter and also made a legal argument. Mr. Twardy indicated that they were closed on March 30th, 31st, April 1st and April 2nd and that he did not receive notice of the suspension until 7:15 p.m. on March 30th (N.T. 22, July 21, 2010).

22. Mr. Christopher Twardy indicated that between March 30 and April 2, 2009, there was a suspension placard posted on the building as was required on the side of Sansom Street and 19th (N.T. 28-30 and Exhibit L-1, July 21, 2010).

23. Mr. Twardy testified that the photo was taken on March 31, 2009 in that he was responsible for taking the photo (N.T. 30-31, July 21, 2010).

24. The Licensee indicated that the placard was not posted earlier because he had no notice from his attorney (N.T. 32, July 21, 2010).

CONCLUSIONS OF LAW:

Count No. 1 - On March 31, April 1 and 2, 2009, Licensee, by its servants, agents or employes, failed to post in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from the outside of the premises, a Notice of Suspension, in violation of Section 15.62(a) of the Liquor Control Board Regulations, 40 Pa. Code §15.62(a).

Count No. 2 - On April 1 and 2, 2009, Licensee, by its servants, agents or employes, posted notices on the licensed premises which stated or indicated that the licensed establishment was closed for a reason other than the suspension of the license, in violation of Section 15.62(b) of the Liquor Control Board Regulations, 40 Pa. Code §15.62(b).

PRIOR RECORD:

Licensee has been licensed since August 17, 1960, and since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, has a record of prior violations as follows:

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Citation No. 07-1376. \$1,500.00 fine.

1. Sales to nonmembers.
February 17, March 7 and April 1, 2007.
2. Sales between 3:00 a.m. and 7:00 a.m. April 1, 2007.
3. Permitted patrons to possess or remove alcoholic beverages
after 3:30 a.m.
April 1, 2007.

4. Failed to require patrons to vacate the premises not later than
one-half hour after the required time.
April 1, 2007.

Citation No. 07-3003. \$3,500.00 fine.

1. Used loudspeakers or devices whereby music could be
heard outside.
September 8, 2007.
2. Sales to nonmembers.
May 18 and September 8, 2007.
3. Sales between 3:00 a.m. and 7:00 a.m. September 8,
2007.
4. Failed to require patrons to vacate the premises not later
than one-half hour after the required time. September 8,
2007.
5. Permitted patrons to possess or remove alcoholic
beverages after 3:30 a.m. September 8, 2007.
6. Sold an unlimited or indefinite amount of alcoholic
beverages for a fixed price. May 18, 2007.
7. Improper admission of members.
May 18, 2007.

Citation No. 08-0930. \$1,000.00 fine and ten days suspension.

1. Used loudspeakers or devices whereby music could be
heard outside. March 8, 2008.
2. Interfered with an Enforcement officer in the
performance of his duties.
March 8, 2008.

Citation No. 08-2299. \$3,000.00 fine and one day suspension continuing
thereafter until the fine is paid.

1. Used loudspeakers or devices whereby music could be heard
outside.

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April 6, 2008.

2. Sales between 3:00 and 7:00 a.m. April 6, 2008
3. Improper admission of members.
April 6, 2008.

Citation No. 08-3062. \$1,750.00 fine and one day suspension continuing thereafter until the fine is paid.

1. Sales to nonmembers.
November 8 and 22, 2008.
2. Used loudspeakers or devices whereby music could be heard outside.
November 8 and 22, 2008.

DISCUSSION:

An administrative hearing was held in Citation No. 08-0930 on December 17, 2008. By our Adjudication and Order dated February 9, 2009, the Office Administrative Law Judge issued an Order imposing a fine in the amount of One Thousand Dollars (\$1,000.00), along with a fourteen (14) day suspension. Section 471(b) of the Liquor Code requires that suspensions and revocations not go into effect until thirty days have elapsed from the date of the Adjudication, during which time the licensee may take an appeal as provided for in the Liquor Code. At the time the Adjudication was issued (February 9, 2009), the license was not active; therefore, the suspension was deferred pending reactivation of the license.

Licensee was represented by counsel at the hearing in Citation No. 08-0930; ***no appeal was taken from the original Adjudication and Order.*** Licensee was advised, by that Order, that the suspension would be set upon reactivation of the license. Immediately, upon receipt of information that the license had been reactivated, by Supplemental Order dated March 20, 2009, we set the dates of suspension to begin on March 30, 2009 and ending on April 13, 2009. Licensee's counsel was advised of the dates of suspension by certified mailing; the return receipt card was signed as received.

Licensee's counsel sent a letter on March 31, 2009 in the nature of a Petition for Reconsideration, indicating that Licensee had a major event planned for April 4, 2009 and that it would cause tremendous hardship if the event had to be cancelled. At all times it was specified and supposed that Licensee serve the first four days of the suspension from March 30, 2009 to April 2, 2009. By Second Supplemental Order dated April 1, 2009, the Office of Administrative Law Judge allowed the Licensee to reopen on Friday, April 3, 2009 and rescheduled the remaining ten (10) days of the suspension.

Mr. Twardy, the club steward, indicated that he did not become aware of the March 30, 2009 suspension until March 30, 2009. He claims that he spent the better part of the day locating a suspension placard and that he eventually posted the placard. However, officers from the Bureau of Enforcement testified credibly that while the premises was closed, despite a diligent search of the exterior of the premises, they did not find a suspension placard posted on the premises during the suspension period. On April 1 and April 2, 2009 a sign was posted indicating that the premises was closed for plumbing repairs and that they would open on Friday, April 3, 2009. In addition, two Bureau officers entered the premises and were advised by persons inside the premises that they were closed due to a plumbing issue in the basement. On April 1 and April 2, 2009, Licensee was fully aware of the suspension and the requirements for posting, but instead posted a sign indicating that the premises was closed for *other* reasons.

While Licensee claims to no avail that the suspension placard was posted from March 30 to April 2, 2009, Licensee argues in the alternative that he was not obliged to obey the Order of Suspension, because he was not given thirty (30) days notice by the Supplemental Order, prior to the imposition of the suspension.¹

¹ As a result of Licensee's Petition for Reconsideration filed March 31, 2009, the Office of Administrative Law Judge rescheduled the remaining ten days of the suspension to begin on Friday, April 17, 2009. Licensee appealed the April 1, 2009 Order in Citation No. 08-0930, to the Pennsylvania Liquor Control Board. Only the remaining ten days of the suspension were addressed because it was supposed that Licensee had in fact served the first four days of the suspension. On May 20, 2009, the Board affirmed the Opinion of the Administrative Law Judge and remanded the matter back for imposition of the remaining ten (10) days suspension.

The suspension was scheduled to begin on Friday, June 19, 2009 and end on Monday, June 29, 2009. Licensee appealed to the Court of Common Pleas. The imposition of the ten day suspension was stayed pending disposition of that matter. The matter was heard *de novo* before the Court of Common Pleas. By Order dated March 18, 2010, the Honorable Gary F. DiVito REMANDED the matter to this office for imposition of the *unserved* days of the suspension. On April 7, 2010, the Office of Administrative Law Judge set the suspension date to begin on Friday, April 30, 2010. The starting date of the suspension was twenty three days from the date of the *Order of Suspension on Remand*, but more than

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thirty days from the Decision and Order of the Court of Common Pleas, during this time period, no appeal was taken by Licensee.

On May 3, 2010, Licensee filed an appeal to the Pennsylvania Liquor Control Board from our Order of Suspension on Remand, dated April 7, 2010. Licensee alleged, amongst a plethora of other complaints that 47 P.S. Section 471(b) requires a thirty day period, during which licensees may appeal, before a suspension can go into effect.

The PLCB upheld Licensee's appeal ruling that the Office of Administrative Law Judge was required to give Licensee thirty (30) days notice before imposition of the suspension, during which time Licensee can take an appeal, notwithstanding the procedural posture of that particular matter. The Bureau appealed the Order of the Board and questioned the jurisdiction of the Board to have heard the appeal. The matter is now on appeal before the Common Pleas Court of Philadelphia.

Licensee now makes that same argument regarding imposition of the deferred suspension, that is to say, the suspension was set immediately after the Office of Administrative Law Judge was notified that Licensee's license was reactivated. Licensee was not given thirty (30) days notice before imposition of the previously deferred suspension.

More than thirty days elapsed between the date of Adjudication (February 9, 2009) and the imposition of the suspension. However, we agree that there was not thirty days notice given between the Supplemental Order (March 20, 2009), which set the dates of suspension, and the date of imposition of suspension. Nevertheless, Licensee admits that he had **actual** notice of the Order on or before the date of imposition. Even if Licensee were entitled to another thirty (30) days notice, the Court is not of the mind that licensees may simply disregard Orders of the Court, in this case the Order of the Office of Administrative Law Judge. There are legal remedies available to protect licensees in the event of error, *many* of which Licensee has availed himself both through counsel and *pro se*.

The Court notes that Licensee may not have had a suspension placard immediately available to him in order to timely post it on March 30, 2009, when Licensee was notified by its attorneys that the premises was under suspension. However, by March 31, 2009, when the Court received the Petition for Reconsideration, it was clear that Licensee had been made aware of the suspension and was taking steps to avoid it. By April 1, 2009, the Office of Administrative Law Judge had responded to Licensee's attorneys and had granted Licensee some relief in allowing the Licensee to reopen on April 3, 2009. Licensee is without excuse for its blatant disregard of the Order for Suspension by failing to post a Notice of Suspension placard on March 31, April 1 and 2, 2009 and by posting a notice that the premises was closed for plumbing repairs on April 1 and 2, 2009. After careful consideration of the matter and that the license is inactive, monetary penalties shall be imposed.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$50.00 or more than \$1,000.00, or both, for violations of the type found in this case.

Therefore, penalties shall be assessed as follows:

Count No. 1 - \$250.00.

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Count No. 2 - \$250.00.

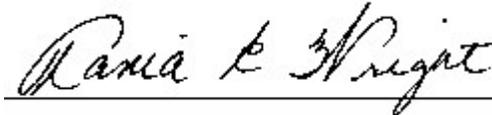
Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, Kenrich Athletic Club, License Number C-1927, pay a fine of Five Hundred Dollars (\$500.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

In order to insure compliance with this Order, jurisdiction of this matter is retained.

Dated this 3RD day of January, 2011.



Tania E. Wright, J.

NOTE: 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.

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Detach Here and Return Stub with Payment

The fine must be paid by Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal Checks, which include business-use personal checks, are not acceptable.**

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Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail, along with any required documentation, to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

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