

Mailing Date: March 16, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-1268
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
KENRICH ATHLETIC CLUB	:	
121 South 19 <sup>th</sup> Street	:	License No. C-1927
Philadelphia, PA 19103-4905	:	

Counsel for Licensee: Francis W. Twardy, Steward (on appeal)

Donald M. Moser, Esquire (at hearing)  
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 Avenue  
Philadelphia, PA 19142

OPINION

Kenrich Athletic Club (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Tania Wright (“ALJ”), mailed January 3, 2011, wherein the ALJ sustained Citation No. 09-1268 (“the Citation”) issued by

the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), and imposed an aggregate fine of one thousand dollars (\$1,000.00) and a two (2)-day suspension.

The first count of the Citation charged Licensee with violating section 406(a)(1) of the Liquor Code [47 P.S. § 4-406(a)(1)] on February 11 and March 26, 2009, by selling alcoholic beverages to nonmembers.

The second count of the Citation charged Licensee with violating sections 401 (a) and 406(a)(1) of the Liquor Code [47 P.S. §§ 4-401(a), 4-406(a)(1)] on February 11, 2009, by selling, furnishing and/or giving Liquor for consumption off premises.

The third count of the Citation charged Licensee with violating sections 104(a) and 401 of the Liquor Code [47 P.S. §§ 1-104(a), 4-401] and section 13.102 of the Liquor Control Board Regulations [40 Pa. Code § 13.102], on February 11, 2009, by furnishing more than one (1) free drink per patron.

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. 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 upon substantial evidence. The Commonwealth Court has 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, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal, Licensee, now acting through its steward, Francis Twardy, contends that the ALJ committed an error of law and abused her discretion by not permitting Licensee a “fair court trial” when the ALJ denied Licensee’s continuance request because Mr. Twardy was ill and unable to be present at the scheduled hearing.

The record demonstrates that a hearing was held on March 10, 2010, over Licensee’s Counsel’s objection.<sup>1</sup> The ALJ noted that this was the fourth listing of the case, and denied Licensee’s Counsel’s request for a continuance.<sup>2</sup> [Admin. Notice]. The ALJ further advised Licensee’s Counsel that an officer other than the club steward, could be present on behalf of Licensee. [Admin. Notice]. Licensee’s Counsel made no indication that the club steward was an essential fact witness. [Admin. Notice]. At the instant hearing, Licensee’s

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<sup>1</sup> Licensee’s Counsel’s objection actually occurred in the course of another hearing held earlier on the same day involving Licensee and Citation No. 09-1094. [Admin. Notice].

<sup>2</sup> This hearing had been continued on August 18, 2009, at the request of the Bureau, October 30, 2009, at the request of Licensee’s Counsel, and on January 12, 2010, at the request of Licensee’s Counsel. [Admin. Notice].

Counsel was present and cross-examined witnesses, but presented no witnesses on Licensee's behalf.

However, the ALJ permitted Licensee's Counsel to bifurcate the hearing if Licensee needed to present additional witnesses. [N.T. 3/10/10, 33]. Licensee's Counsel's request to bifurcate the hearing was due fifteen (15) days after receipt of the transcript. [N.T. 14-15]. The ALJ received the transcript on March 24, 2010. [Admin. Notice]. By letter, Licensee's Counsel acknowledged receipt of transcript and requested additional time to receive the record to determine if additional witnesses would be presented at a second (bifurcated) hearing. [Admin. Notice]. The ALJ did not receive subsequent notice from Licensee's Counsel that additional witnesses would be presented. [Admin. Notice]. Nonetheless, a hearing was inadvertently scheduled for July 21, 2010. [Admin. Notice]. Licensee's Counsel advised the ALJ that he would not be present, but Mr. Twardy did appear at the rescheduled hearing, offered testimony on Licensee's behalf. [N.T. 7/21/10, 4].

Section 15.54 of the Board's Regulations provides the following as it relates to continuances of a citation matter before the ALJ:

(a) No case will be continued without just cause and then only by the chief ALJ or a designee.

(b) A party moving for a continuance shall, if required by the OALJ, submit an affidavit containing the facts alleged as the reason for the motion. The affidavit shall set forth the names and addresses of all parties concerned, the caption, number and term and the cause which may be the basis of the motion and other information the ALJ may request.

(c) If application is made for continuance prior to the date set for hearing because of the absence of a witness, a motion, if required by the OALJ, shall be presented setting forth the facts which it is believed the witness will prove, the efforts made to procure the attendance of the witness, the movant's belief in the facts and the reasons for the belief, and that a continuance will enable the party to procure the presence or testimony of the witness. The application shall identify the witness by name and last known address.

(d) If an application is made for a continuance because of the illness of a licensee, witness or counsel, the application, if required by the OALJ, shall be accompanied by a medical certificate attesting to the illness and inability to testify.

(e) Except as otherwise provided in this section, a continuance may be approved if a written request for the continuance is received by the OALJ at least 48 hours prior to the time fixed for hearing.

(f) A request for a continuance received by the OALJ within the 48-hour period will not be granted unless satisfactory arrangement in writing is made with the OALJ for the payment of expenses resulting from the continuance. The OALJ may waive payment of

the expenses and the requirement that the request be in writing in case of extenuating circumstances.

(g) A request for a continuance of hearing because a waiver of hearing was filed after the hearing was scheduled will not be granted until the waiver is approved and accepted by the OALJ.

[40 Pa. Code § 15.54].

It is well settled that the power to grant or refuse a continuance is an inherent power of an administrative agency, and it is subject to reversal only upon a showing of an abuse of discretion. Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 602 A.2d 1300, 1305 (1992). In Hainsey, the Pennsylvania Supreme Court defined an abuse of discretion as “not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.” [Id., 602 A.2d at 1305].

In the instant case, it is clear that the ALJ had already continued the hearing three (3) times prior to the March hearing, at Licensee’s request. It is also clear that the ALJ decided the case based upon the notes of testimony from both the March 10, 2010 and July 21, 2010 hearings, giving both the Bureau and Licensee an opportunity to present evidence related to the Citation.

Accordingly, the Board finds that the ALJ did not abuse her discretion in not granting Licensee's continuance request.<sup>3</sup>

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<sup>3</sup> Since Licensee's appeal related only to the denial of its continuance request and not to the actual averments of the Citation or the Adjudication and Order of the ALJ, the Board finds it to be unnecessary to examine the decision of the ALJ, other than to note that the penalty imposed was well within the dictates of section 471 of the Liquor Code [47 P.S. § 4-471] and will not be disturbed on appeal.

ORDER

The decision of the ALJ is affirmed.

Licensee's appeal is dismissed.

The fine of one thousand dollars (\$1,000.00) remains unpaid.

The case is hereby remanded to the ALJ to ensure compliance with this Opinion and impose new dates for the two (2)-day suspension.

Pennsylvania Liquor Control Board

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Board Secretary