

Mailing Date: March 29, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-1543
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	License No. C-1927
v.	:	
	:	
KENRICH ATHLETIC CLUB	:	LID 1117
121 South 19 th Street	:	
Philadelphia, PA 19103-4905	:	
	:	

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

Donald M. Moser, Esquire (at hearing)
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OPINION

Kenrich Athletic Club (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Tania E. Wright (“ALJ”), mailed January 25,

2011, wherein the ALJ sustained Citation No. 09-1543 against Licensee, and imposed an aggregate fine of two thousand dollar (\$2000.00) and a three (3)-day suspension which was deferred pending the renewal of Licensee's license.

The first count of the Citation charged Licensee with violating section 406(a)(1) of the Liquor Code [47 P.S. § 406(a)(1)], on May 5, 14 and 31, 2009, by selling alcoholic beverages to nonmembers.

The second count of the Citation charged Licensee with violating section 5.32(a) of the Liquor Control Board Regulations [40 Pa. Code § 5.32(a)] on May 5, 14 and 31, 2009, by using, or permitting to be used on the inside of its licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

The third count of the Citation charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 493(1)], on May 31, 2009, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated 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 his or her discretion, or if his or 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. Additionally, Licensee challenges the ALJ’s assessment of credibility regarding Enforcement Officer Ryan Rutter’s testimony. Specifically, Licensee argues that Officer Rutter’s testimony regarding service to a visibly intoxicated person was not credible because Officer Rutter did not obtain identification from the intoxicated person or require him to testify.

The record demonstrates that a hearing was held on March 10, 2010, over Licensee’s Counsel’s objection.¹ The ALJ noted that this was the third listing of

¹ 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].

the case, and denied Licensee's Counsel's request for a continuance.² [Admin. Notice]. The ALJ further advised Licensee's Counsel that a club 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 Counsel was present and cross-examined the witness, 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, p. 36]. Licensee's Counsel's request to bifurcate the hearing was due fifteen (15) days after receipt of the transcript. [N.T. 7/21/10, p. 4]. 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. [N.T. 7/21/10, p. 4]. The ALJ did not receive subsequent notice from Licensee's Counsel that additional witnesses would be presented. [N.T. 7/21/10, p. 5]. Nonetheless, a hearing was inadvertently scheduled for July 21, 2010. [Admin. Notice]. Licensee's Counsel was not

² This hearing had been continued on October 30, 2009, at the request of Licensee's Counsel, and on January 12,

present, but Mr. Twardy did appear at the rescheduled hearing. During the July 21, 2010 hearing, Mr. Twardy called his son, Christopher Twardy, to testify and he recalled Officer Rutter [N.T. 7/21/10, p. 66, 80].

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 two (2) times, both at Licensee's request. It is also clear that the ALJ decided the case based upon the notes of testimony, after giving Licensee the opportunity to present additional evidence related to the Citation. Accordingly, the Board finds that the ALJ did not abuse her discretion in not granting Licensee's continuance request.

Licensee's second argument amounts to nothing more than dissatisfaction with how the ALJ resolved issues of credibility and accorded evidentiary weight. Licensee essentially invites the Board to reevaluate the credibility of the witnesses and to reweigh the evidence. However, 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. Public 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 clearly found the testimony of Officer Rutter credible and adequate to support the charges set forth in the Citation. Officer

Rutter testified that a patron “slammed his shoulder into the doorframe and spilled a drink on him.” [N.T. 3/10/10, p. 17]. Officer Rutter explained that he continued to observe the patron pass two (2) bouncers as he stumbled down the stairs holding onto the railing to steady himself. [N.T. 3/10/10, p. 18]. Upon reaching the first floor, Officer Rutter observed the patron stumble again and grab onto the ATM machine. [N.T. 3/10/10, p. 18]. Officer Rutter watched the patron proceed to the bar and waive his empty cup. [N.T. 3/10/10, p. 19-20]. When the bartender did not respond, the patron proceeded to stumble back up the stairs to the third floor. [N.T. 3/10/10, p. 20-21]. As the patron passed by the bouncers, one (1) of the bouncers asked him if he was “ok”, but the patron ignored the bouncer and continued to the third floor. [N.T. 3/10/10, p. 22]. Once he reached the third floor, the patron proceeded to the bar where he waited for the bartender. [N.T. 3/10/10, p. 22]. As the patron stood at the bar, Officer Rutter observed him wobbling and noticed that he had glassy-eyes. [N.T. 3/10/10, p. 22]. Officer Rutter asked the patron if he was alright and the patron replied with a grunt. [N.T.,\ 3/10/10, p. 22, 24]. When the bartender asked the patron what he wanted, the patron had to repeat himself four (4) to five (5) times because the bartender could not understand him. [N.T. 3/10/10, p. 24]. As the patron attempted to tell the bartender what he wanted, Officer

Rutter could hear that his speech was slurred. [N.T. 3/10/10, p. 24]. After obtaining his drink, Officer Rutter observed the patron bumping into people on the dance floor. [N.T. 3/10/10, p. 25, 27]. After last call was announced, Officer Rutter observed the patron go down the stairs and fall “flat on his back” when he reached the first floor. [N.T. 3/10/10, p. 25].

Based on the preceding evidence, Officer Rutter’s testimony constitutes substantial evidence supporting the ALJ’s determination that Licensee’s employees sold alcoholic beverages to a visibly intoxicated person on May 31, 2009. Therefore, the Board rejects Licensee’s second argument and will not disturb the ALJ’s determinations as to credibility.

For the foregoing reasons, the Adjudication and Order of the ALJ is affirmed.

ORDER

The decision of the ALJ is affirmed.

Licensee's appeal is dismissed.

The fine of two thousand dollars (\$2,000.00) remains unpaid.

The case is hereby remanded to the ALJ to ensure compliance with this Opinion and impose new dates for the three (3)-day suspension.

Pennsylvania Liquor Control Board

Board Secretary