Mailing Date: March 16, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 09-1890
v.	:	
KENRICH ATHLETIC CLUB 121 South 19th Street Philadelphia, PA 19103-4905	:	License No. C-1927

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: James E. Dailey, Esquire
PENNSYLVANIA STATE POLICE
Bureau of Liquor Control Enforcement
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O P I N I O N

Kenrich Athletic Club ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), mailed January 6, 2011, wherein the ALJ sustained the citation against Licensee, and imposed a

three hundred dollar ($300.00) fine and a one (1)-day suspension which was deferred pending the renewal of Licensee's license.

The Citation charged Licensee with violating section 406(a)(1) of the Liquor Code [47 P.S. § 406(a)(1)], on July 19, 2009, by selling alcoholic beverages to nonmembers.

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 discretion, or if his 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.[1] The ALJ noted that this was the third listing of the case, and denied Licensee's Counsel's request for a continuance.[2] [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 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. 14]. 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

[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].

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, offering no additional evidence on Licensee's behalf. Mr. Twardy stated he was ill and unable to proceed, but indicated that Mr. Moser still represented him. [Admin. Notice]. The record does not indicate that Mr. Twardy asked for a continuance of the July 21, 2010 hearing. [Admin. Notice].

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.
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> (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.
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> (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

[2] This hearing had been continued on October 30, 2009, at the request of Licensee's Counsel, and on January 12, 2010, at the request of Licensee's Counsel. [Admin. Notice].

> 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.
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> (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.
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> (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.
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> (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.
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> (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 from the March 10, 2010 hearing, 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.[3]

[3] 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.

O R D E R

The decision of the ALJ is affirmed.

Licensee's appeal is dismissed.

The fine of three hundred dollars ($300.00) remains unpaid.

The case is hereby remanded to the ALJ to ensure compliance with this Opinion and impose new dates for the one (1)-day suspension.

Pennsylvania Liquor Control Board

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Board Secretary