

Mailing Date: APR 20 2011

[Appeal](#)
[Amended Order](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-1196
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-406536
	:	
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:

FRANCIS TWARDY PRO SE

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on June 15, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Kenrich Athletic Club, License Number C-1927 (hereinafter "Licensee").

An Administrative hearing was held on Wednesday, September 29, 2010, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

Francis Twardy, the steward of the club, was present at the hearing and indicated that he had authority to represent the club.

The citation contains two counts.

The first count charges Licensee with violation of Section 406(a)(1) of the Liquor Code, 47 P.S. §4-406(a)(1), in that on April 1 and 3, 2010, Licensee, by its servants, agents or employes, sold alcoholic beverages to nonmembers.

The second count charges Licensee with violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), in that on April 3, 2010, Licensee, by its servants, agents or employes, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

COUNT NOS. 1 AND 2

FINDINGS OF FACT:

1. The Bureau conducted an investigation of the licensed premises which began on January 13, 2010 and ended April 20, 2010. A notice of violation letter dated May 17, 2010 was mailed to the licensed premises by certified mail, return receipt requested. The return receipt card was signed as received at the licensed premises. A citation dated June 15, 2010 was sent to the licensed premises by certified mail, return receipt requested. The mailing was signed as received at the licensed premises (N.T. 9-12 and Exhibits B-1 and B-2).

2. The lead investigative officer from the Bureau of Enforcement began her investigation of the licensed premises on January 13, 2010, in the nature of a suspension check for a five day suspension, relative to Citation No. 08-2299. The officer conducted suspension checks on March 29, March 30, March 31 and April 1, 2010. After she had completed her investigation, she determined that the Licensee had obtained a supersedeas relative to Citation No. 08-2299 (N.T. 5-8).

3. During the course of the investigation for suspension check, the officer had two other officers visit the premises and ultimately issued a notice of violation letter based upon their findings (N.T. 8).

4. An officer from the Bureau of Enforcement visited the licensed premises on April 1, 2010. It was her understanding that the premises would be closed and that she was to conduct a suspension check. She found out there had been a stay with regard to the suspension and the premises was open. The officer arrived on April 1, 2010 at 10:10 p.m. She had never been to the premises prior to that night. She was not a member of the club. She did not complete a membership application. She arrived at the premises by herself (N.T. 20).

5. When the officer approached the premises on the outside of the building she saw the name, "O.N.E." There were no door personnel. She walked in the door and proceeded to the first floor bar area where there was a female bartender (N.T. 20-21).

6. The officer requested a Malibu rum and orange juice, for which she paid \$8.00. The bartender did not request identification; she was not required to sign a membership application. The officer was not provided with a wristband. She paid \$10.00 and was given \$2.00 change (N.T. 21).

7. The officer was in the premises for approximately forty minutes. She did not order a second drink. There were no other patrons in the premises (N.T. 22).

8. When questioned about her route to the licensed premises, she was not able to recall the streets that she took to get to the premises or its address. She identified the building by an awning with "O.N.E." printed on the outside. She indicated that she knew the exact address at the time, but was unable to remember on the day of hearing. She indicated that the premises was located in Center City. The officer went back to the premises on May 2, 2010, as a part of a raid detail. She confirmed that it was the same building that she had gone to on April 1, 2010 (N.T. 23-27).

9. Another officer from the Bureau of Enforcement visited the premises on April 3, 2010. He recalled the address of the premises as 121 South 19th Street in Philadelphia. He had been to the premises relative to another investigation (N.T. 29).

10. The officer entered the premises at approximately 12:35 a.m. on April 3, 2010. He noted the awning with "O.N.E." on it and recalled an old type door. He believed the awning to be

red. There were no doorpersons outside the premises at the door and he merely walked through the door. When he entered, he walked into a vestibule and he encountered a female at a desk. When he approached, he was told that it would cost five dollars to enter. He paid \$5.00 and was not questioned with regard to membership. The officer was not asked for identification, nothing was swiped and he did not sign a guest book. He indicated that he is not a member of the club (N.T. 30-31).

11. The officer noted that there were twenty people inside the premises. While inside, he ordered a twelve ounce bottle of Miller Lite beer, for which he paid \$3.00. He gave the bartender five dollars and she returned two dollars in change. He was not asked to sign a membership application, or guest book and did not receive a wrist band (N.T. 31-32).

12. The officer departed the premises at approximately 12:45 a.m. He was never challenged as to membership (N.T. 32).

13. Mr. Francis Twardy indicated that the awning was black and not red (N.T. 33).

14. Christopher Twardy testified that when a patron comes to the premises, his identification is checked for age through a scanner. That same scanner is used to verify whether or not the person is a member. Those who are not members can come into the premises as a member's guest. If they want to become a member, they can complete an application and come back at a later date once they are approved (N.T. 44).

15. Mr. Francis Twardy presented a property receipt which indicated that the Bureau confiscated a dell laptop computer from the licensed premises on May 2, 2010. Mr. Francis Twardy asked Mr. Christopher Twardy if he had access to his computer whether it would be possible to tell the "validity of any of these individuals who claim they came into the club or whether or not they came into the club?" Mr. Christopher Twardy stated that it would be possible, but he couldn't because he didn't have the computer (N.T. 44-47).

16. Mr. Christopher Twardy indicated that April 3 was his birthday and that there were approximately 200 guests at the licensed premises (N.T. 48-49).

CONCLUSIONS OF LAW:

All statutory prerequisites for notice to the Licensee were satisfied.

Count No. 1 - On October 16, 2009, Licensee, by its servants, agents or employes, sold alcoholic beverages to nonmembers, in violation of Section 406(a)(1) of the Liquor Code, 47 P.S. §4-406(a)(1).

Count No. 2 - There is insufficient evidence to prove that on April 3, 2010, Licensee, by its servants, agents or employes, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside, in violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a).

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:

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.
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:

The only charge on which the Bureau proceeded was sales to nonmembers. The Bureau presented testimony from three Enforcement officers. The lead investigative officer indicated that she was investigating the premises for being open at a time when a suspension had been imposed by the Office of Administrative Law Judge. The investigating officer determined that due to Licensee's appeal of that Order, there was a stay of the Order, which allowed Licensee to be open.

During the course of the officer's investigation, which began January 13, 2010 and ended April 20, 2010, officers from the Bureau entered the premises on April 1, 2010 and April 3, 2010 and made purchases of alcoholic beverages. The two officers claim that they were admitted after paying a cover charge, but were not questioned as to membership and were not members of the club.

The Administrative Law Judge is responsible for determining the credibility of the witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa. Cmwlth. 1989). The Court finds the Bureau officers' testimony credible. The Licensee pointed out that while the officer stated that the premises had an awning that said "O.N.E.," the trade name of the club, the color of the awning was black and not red. Licensee made much of one officer not knowing the route that she took to the premises and that she did not know that the specific area where the premises is located is referred to as Rittenhouse Square, as opposed to the broader reference, Center City Philadelphia. Licensee argues that the officer *never* visited this club. On the other hand, the Court inferred that the officer is not a frequent visitor to the area and unlikely that she is a member of the licensed club. The officer stated that she participated in the raid of May 2, 2010 and thus verified that the location of the club was indeed the same as that she visited on her April 1, 2010 visit.

Licensees are held strictly liable for violations of the Liquor Code and its regulations. The Bureau presented sufficient credible evidence for the Court to find that Licensee sold to nonmembers. However, Licensee asserts that they could *possibly* substantiate their own testimony relative to the procedure used and/or refute the Bureau's evidence if they had the computer, which is now in possession of the Bureau. While Licensee's claim could be convenient or self-serving, due process is paramount to these proceedings and is worthy of careful examination. Licensee must be afforded notice and an opportunity to be heard.

Licensee presented a property receipt (Exhibit B-2) evidencing that a computer confiscated from the premises is in the possession of the Bureau. On May 2, 2009 the Bureau of Enforcement confiscated various items from the licensed premises as a part of a subsequent investigation of the licensed premises. The Bureau gave Licensee a property receipt listing those specific items, which included a Dell computer. The Bureau does not deny that a computer was seized on the licensed premises or that they are currently in possession of the computer.

The Bureau did not deny, confirm nor were they asked to address whether or not they were aware of the contents of the computer and/or in possession of licensee's membership records, including applications and rosters, or whether they would or could produce those records. No evidence from that computer was offered in this citation matter.

Despite being in possession of a property receipt (Exhibit L-2) listing the computer as an item seized in the Bureau's raid of the premises on May 2, 2010, Licensee refers to the computer as having been *stolen*.

(Francis Twardy) Q. If you had the computer, which was absconded, according to L-2, with the memberships, is it possible you'd be able to tell the validity of any of these individuals who claim they came into the club or whether or not they came into the club? (N.T. 44)

The Court then interrupted Mr. Francis Twardy because of his characterization on the information. However, the Court made no finding or ruling with regard to the lawfulness of the seizure. That Mr. Twardy was given a property receipt for the item negated his claim that it was stolen. However, the Court finds it necessary to address whether the computer was inaccessible and what if any outcome it had in the proceedings. Licensee claims that if it had access to the computer it is *possible* that they would be able to disprove the testimony. The questioning by Mr. Francis Twardy on this issue continued as follows:

(Francis Twardy) Q. If you had access to the computer, is it possible you would be able to see if the testimony earlier matches to the computer?

(Christopher Twardy) A. It would be possible, but I can't because I don't have it.
(N.T. 47)

The Court surmises that Licensee claims to have been using the computer to scan identification cards and verify membership. Licensee did not specify and the Court remains unsure as to what information is supposedly retained in the computer that might now be probative of the issues.

Exculpatory evidence is evidence that is considered favorable to the accused person as distinguished from *inculpatory evidence*, which is evidence that shows or proves the culpability or guilt. In criminal cases, *suppression* by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,

irrespective of the good faith or bad faith of the prosecution. The duty to disclose may encompass impeachment evidence as well as direct exculpatory evidence, and the prosecution's duty under *Brady v. Maryland*, 373 U.S. 83 (1963) extends to exculpatory evidence in the files of police agencies of the same government prosecuting the case. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. However, the mere possibility that the information might have helped the defense, or might have affected the outcome of the trial does not establish materiality in the constitutional sense. *Commonwealth v. Smith*, 604 Pa. 126 (Pa. 2009).

At various stages of the proceeding, Licensee has indicated that he is represented by Donald Moser, Esq. The records of the Office of Administrative Law Judge indicate that Mr. Moser has entered his appearance and represented Licensee in some prior proceedings. Mr. Moser has sent various correspondence and requests on behalf of the Licensee. At the onset of this citation matter, it was not clear what the status was regarding legal representation of this club. Out of an abundance of caution, an attempt to avoid confusion and to insure that Licensee is advised of all requirements and proceedings, most often information was sent to both Mr. Twardy and the attorney of record, Mr. Moser. In this instance, the notice of hearing was sent to Mr. Moser, after first being sent to Mr. Francis Twardy by registered mail, but not delivered.

The Office of Administrative Law Judge sent Licensee a copy of the Bureau's prehearing memorandum prepared pursuant to 40 Pa. Code §15.43, which summarized the testimony and witnesses to be presented. According to the records of the Office of Administrative Law Judge, a pre-hearing was sent to the Licensee, by the Bureau, at the address of the steward, Francis Twardy. Mr. Twardy denies receipt of the pre-hearing. However, Mr. Twardy also denies receipt of the notice of violation and citation, despite signed returned receipt cards. On July 9, 2010, a notice was properly addressed and sent by the Office of Administrative Law Judge to Mr. Twardy's address of record (in that the premises was believed to be closed) providing him with a copy of the Bureau's pre-hearing memorandum and advising him that he or his attorney was required to complete a pre-hearing memorandum and return it on or before July 30, 2010. The regulation provides and Licensee was so advised that failure to return the prehearing could result in denial of the right to present testimony at the hearing.

No pre-hearing memorandum was filed by Licensee in this case. There was no request for information. Licensee did not advise the court that Licensee was without means to defend the action in that the computer containing evidence relevant to these proceedings was in the possession

of the Bureau. No request was made to have the Bureau make the computer or information from the computer available for hearing.

Mr. Moser was advised of the hearing, but did not appear at the time and date of hearing. Instead, Mr. Francis Twardy appeared and stated that he had authority to represent the club. Mr. Twardy, the club steward, represented the licensed club. Christopher Twardy offered testimony regarding the established procedure for admission to the club.

The Court finds that Licensee was afforded due process, i.e., notice and a full and fair hearing, and was not precluded from presenting a defense by any action of the Bureau. The Court further finds that on April 1 and April 3, 2010, Licensee sold alcoholic beverages to nonmembers.

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 - \$750.00 and one day suspension. Count
No. 2 - DISMISSED.

Accordingly, we issue the following

ORDER:

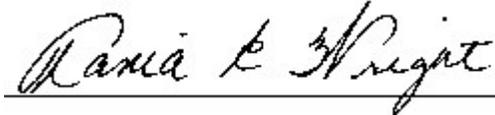
THEREFORE, it is hereby Ordered that Licensee, Kenrich Athletic Club, License Number C-1927, pay a fine of Seven Hundred Fifty Dollars (\$750.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that the Club Liquor License of Kenrich Athletic Club, License Number C-1927, be suspended for a period of one (1) day. However, the suspension period is deferred pending the renewal of Licensee's license, at which time the suspension period will be fixed by further Order.

The Bureau of Licensing is directed to notify the Office of Administrative Law Judge of the renewal of the license so that an Order may be entered fixing the dates of suspension.

Jurisdiction of this matter is retained.

Dated this 12TH day of APRIL, 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.** 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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Kenrich Athletic Club