Mailing Date: August 3, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : : : : : :	Citation No. 10-1196
v.		
KENRICH ATHLETIC CLUB 121 South 19th Street Philadelphia, PA 19103-4905 (Mailing address: P.O. Box 30484, Philadelphia, PA 19103)	: : : : :	License No. C-1927 LID 1117

Representative for Licensee:	Francis W. Twardy, *Pro Se* Steward of Licensee
Counsel for Bureau:	James E. Dailey, Esquire Pennsylvania State Police, Bureau of Liquor Control Enforcement 6901 Woodland Avenue Philadelphia, PA 19142

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 April 20, 2011, wherein the ALJ sustained the first count of Citation No. 10-1196 ("the Citation") issued by the Pennsylvania State Police, Bureau of Liquor Control

Enforcement ("Bureau"), and imposed a fine of seven hundred fifty dollars ($750.00).

On June 15, 2010, the Bureau issued the Citation to Licensee, setting forth two (2) counts. 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 April 1 and 3, 2010, in that Licensee, by its servants, agents or employees, sold alcoholic beverages to nonmembers. The second count of the Citation charged Licensee with violating section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)] on April 3, 2010, in that Licensee, by its servants, agents or employees, 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.

A hearing was held regarding the Citation on September 29, 2010. James E. Dailey, Esquire, appeared at the hearing as counsel for the Bureau, and Francis Twardy, steward of the licensee, appeared *pro se* on behalf of Licensee.

By Adjudication and Order mailed April 20, 2011, the ALJ sustained Count 1 of the Citation, dismissed Count 2, and imposed a fine of seven hundred fifty dollars ($750.00). The ALJ also advised Licensee that failure to pay the fine within twenty (20) days of the mailing date of the Order would result in

Licensee's license being suspended or revoked. Licensee failed to pay the fine within the allotted twenty (20) days. As a result, by Supplemental Order mailed May 13, 2011, the ALJ suspended Licensee's license for at least one (1) day and continuing thereafter until the fine was paid. Licensee filed the instant appeal on May 20, 2011.[1]

In its appeal, Licensee asserts generally that the ALJ committed an error of law and/or abused her discretion in sustaining Count 1 of the Citation.[2] Licensee does not specify how the ALJ committed an error of law or abused her discretion; nor does it contend on appeal that the decision was not supported by substantial evidence. Therefore, the Board will conduct a general administrative review of the certified record, including the ALJ's Adjudication and Order, Licensee's Appeal, and the Notes of Testimony and Exhibits from the hearing held on September 29, 2010.

The record reveals that a Bureau enforcement officer, Shawnte McKoy, testified that she visited the licensed premises on April 1, 2010. [N.T. 18-19]. The officer stated that she entered the premises at approximately 10:10 p.m.

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[1] It is unclear from Licensee's appeal whether it is appealing from the April 20, 2011, Adjudication and Order or from the May 13, 2011, Supplemental Order. To the extent that Licensee seeks administrative review of the Supplemental Order, section 471 of the Liquor Code states that in the event a fine is not paid within twenty (20) days of the adjudication, the ALJ shall suspend or revoke the license. [47 P.S. § 4-471(b)]. Since the penalty is mandated by statute, the Board has no authority to alter the suspension imposed by the ALJ.

[2] Licensee's appeal makes reference to both counts of the Citation; however, Count 2 was dismissed by the ALJ. As the Bureau did not appeal the ALJ's dismissal of Count 2, only Count 1 is at issue in this appeal.

and ordered an alcoholic beverage from the bartender, paying eight dollars ($8.00) for it. [N.T. 21]. The officer was not a member of the club and was not questioned relative to being a member or a guest. [N.T. 19]. The officer stated that she was the only patron during her visit. [N.T. 20].

Another Bureau enforcement officer, Ryan Rutter, testified that he entered the licensed premises on April 3, 2010, as part of an undercover investigation. [N.T. 28-29]. The officer testified that he was asked to pay five dollars ($5.00) to enter, which he paid, and was charged three dollars ($3.00) inside at the bar for an alcoholic beverage. The officer stated that at no point was he questioned whether he was a member of the club or a guest. [N.T. 30]. The officer has never been a member of Licensee. [N.T. 31].

Christopher Twardy testified that when a patron comes to the licensed premises, his or her identification is scanned for age verification. [N.T. 43]. Mr. Twardy stated that the scanner also shows if the person is a member of Licensee. [N.T. 43]. If the person is not a member, Mr. Twardy indicated that the person may enter the premises as a guest of a member and may fill out an application to become a member at a later date. [N.T. 43].

Licensee also presented a property record from the Bureau indicating that a laptop computer was seized from the licensed premises pursuant to an

investigation by the Bureau regarding sales during a license suspension. [Ex. L-2].

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).

No club licensee nor its officers, servants, agents or employees, other than one holding a catering license, shall sell any liquor or malt or brewed beverages to any person except a member of the club. [47 P.S. § 4-406(a)(1)]. Here, evidence was presented that on April 1 and 3, 2010, Licensee's employees sold liquor or malt or brewed beverages to Bureau enforcement officers, who were not members of Licensee.

Licensee, through its steward, Francis Twardy, elicited testimony from the Bureau enforcement officers indicating that one (1) officer was mistaken

about the color of the awning above the entrance to the licensed premises, and the other could not remember the exact route traveled to reach the establishment. [N.T. 23, 32]. However, the ALJ found the testimony of the officers credible based on the time elapsed and the officers' lack of familiarity with the exact location of the licensed premises.

The ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Bd. of Probation and Parole, 510 A.2d 877 (Pa. Cmwlth. 1986). It is well settled that 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). The Board will not overturn the credibility determination of the ALJ here.

Regarding Mr. Twardy's contention that the laptop computer seized by the Bureau could contain exculpatory evidence, thus preventing Licensee from putting forth a full defense against Count 1 of the Citation, the Board concurs with the analysis of the ALJ. In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court ruled that suppression by the prosecution of evidence favorable to an accused, upon request, violates due process when the evidence is material to guilt or punishment. Id. at 87. The Pennsylvania

Supreme Court has defined "material" for such purposes as having a reasonable probability that, had the evidence been disclosed to the defendant, the result of the trial would have been different. Commonwealth v. Smith, 604 Pa. 126, 151, 985 A.2d 886, 900 (Pa. 2009). However, materiality is not established by the mere possibility that an item of undisclosed information might have been favorable to the defendant or affected the outcome. Id.

In this case, there is no indication that Licensee was denied its due process right to access exculpatory evidence in possession of the Bureau upon request. The mere testimony of Christopher Twardy that it is "possible" that the seized computer could help Licensee determine whether the Bureau's witness testimony "matches" Licensee's records [N.T. 46] is insufficient to show the computer contained material evidence under Smith. Furthermore, Licensee did not allege that it requested to have access to the computer prior to the hearing. In fact, as noted by the ALJ, Licensee failed to submit a pre-hearing memorandum, despite the ALJ providing Licensee notice that submission was required, thus permitting the ALJ to limit the scope of Licensee's defense. [40 Pa. Code § 15.43].

Based on the foregoing, the Board finds that the ALJ did not commit an error of law or abuse her discretion and that there is sufficient evidence to

sustain Count 1 of the Citation. Therefore, the Adjudication and Order of the ALJ sustaining Count 1 of the Citation and imposing a fine of seven hundred fifty dollars ($750.00) is affirmed in all respects.

O R D E R

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of seven hundred fifty dollars ($750.00) remains unpaid.

The case is hereby remanded to the ALJ to ensure compliance with this Opinion.

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Board Secretary