

Mailing Date: October 26, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-1437
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
KENRICH ATHLETIC CLUB	:	License No. C-1927
121 South 19 th Street	:	
Philadelphia, PA 19103-4905	:	LID 1117
(Mailing address: P.O. Box 30484,	:	
Philadelphia, PA 19103)	:	

Representative for Licensee: Francis W. Twardy, *Pro Se*
Steward of Licensee (on appeal)

Counsel for Bureau: James E. Dailey, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
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OPINION

Kenrich Athletic Club (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), mailed July 22, 2011, wherein the ALJ sustained counts one (1), two (2), and three (3) of Citation No. 10-1437 (“the Citation”) issued by the Pennsylvania State Police,

Bureau of Liquor Control Enforcement (“Bureau”), and imposed an aggregate fine of two thousand five hundred dollars (\$2,500.00).

On July 20, 2010, the Bureau issued the Citation to Licensee, setting forth four (4) counts. However, only the first three (3) counts are at issue in this appeal.¹

The first count of the Citation charged Licensee with violating section 15.62 of the Board’s regulations [40 Pa. Code § 15.62] on April 30, 2010 and May 1, 3, 4, 5, 6, 7 and 9, 2010, in that Licensee, by its servants, agents or employees failed to post in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from the outside of the premises, a Notice of Suspension.

The second count of the Citation charged Licensee with violating sections 491(1), 492(2), and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2), and 4-493(16)] on April 30, 2010 and May 1, 2010, in that Licensee, by its servants, agents or employees, sold, furnished and/or gave alcoholic beverages during a time when the club liquor license was suspended.

¹Count 4 of the Citation charged Licensee with permitting one (1) female minor, twenty (20) years of age, to frequent the licensed premises. This count was dismissed by the ALJ and Licensee does not appeal that decision. Accordingly, Count 4 will not be addressed in this opinion.

The third 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 30, 2010 and May 1, 2010, in that Licensee, by its servants, agents or employees, sold alcoholic beverages to nonmembers.

A hearing was held regarding the Citation on May 26, 2011. James E. Dailey, Esquire, appeared at the hearing as counsel for the Bureau. There was no appearance at the hearing on behalf of Licensee. At the ALJ's direction, the hearing proceeded *ex parte*. [N.T. 4].

On appeal, Licensee's steward contends that he did not receive notice of the May 26, 2011 hearing. Licensee further argues that the ALJ committed an error of law and abused his discretion by improperly imposing the suspension because the suspension had been overturned by the Pennsylvania Liquor Control Board's ("Board") decision dated May 6, 2010, as well as an Order issued by Judge Daniel J. Anders on June 6, 2011. Finally, Licensee challenges the Bureau's authority to enter the licensed premises because such entry was made as part of a suspension check stemming from a Supplemental Order issued by ALJ Wright on April 7, 2011.

The Board has reviewed the certified record, including the Notes of Testimony from the hearing held on May 26, 2011, as well as the ALJ's

Adjudication and Order, with the Licensee's and Bureau's contentions in mind and has concluded that the ALJ's ruling is without error and is supported by substantial evidence with regard to counts one, two, and three of the Citation.

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).

The record reveals that a Bureau enforcement officer, Ryan Rutter, visited the licensed premises on May 1, 2010. [N.T. 5]. Pursuant to a Supplemental Order from the Office of the Administrative Law Judge regarding Citation 08-0930, the license was suspended from April 30, 2010 at 7:00 a.m. through May 10, 2010 at 7:00 a.m. [N.T. 5]. When Officer Rutter arrived at the premises on May 1, 2010 at approximately 11:42 p.m., the premises was open,

operating and the placard providing notice that the liquor license had been suspended was not posted. [N.T. 5-6]. Officer Rutter observed security personnel inside and the manager, Christopher Twardy “out front.” [N.T. 6]. When the officer entered, the security personnel requested to see his identification. [N.T. 6]. After showing the security personnel his identification, Officer Rutter proceeded down the main hall to a desk where a girl was sitting. [N.T. 7]. The girl asked him for his ID and directed him to sign a piece of paper that read “condition of membership.” [N.T. 7]. After he signed the paper, Officer Rutter was permitted to enter the premises where he observed approximately six (6) patrons. [N.T. 7-8]. He then proceeded to the main bar where he purchased an alcoholic beverage. [N.T. 8]. After receiving his alcoholic beverage, he went to the back room where there was a pool table and called a pre-arranged detail of Bureau officers. [N.T. 8]. After calling the pre-arranged detail, he went back to the bar and purchased another alcoholic beverage and waited at the bar until the pre-arranged detail arrived. [N.T. 8]. At no point was the officer questioned by the bartender as to whether or not he was a member of the club. [N.T. 9]. The officer was not a member of the club. [N.T. 7].

On May 3, 4, 5, and 6, 2010, Officer Rutter, returned to licensed premises to verify that the premises was closed pursuant to the imposed suspension. [N.T. 10-13]. On each of those dates, the officer observed that the premises was closed, but the suspension placard was not posted. [N.T. 10-13].

The ALJ properly took judicial notice of Court of Common Pleas of Philadelphia Order dated April 6, 2010, which affirmed the suspension imposed by the ALJ on Citation No. 08-0930. [N.T. 15].

Another Bureau enforcement officer, Christopher Keisling, testified that he entered the licensed premises on April 30, 2010, as a result of a suspension check for Citation No. 08-0930. [N.T. 16]. When the officer arrived at the premises at approximately 9:50 p.m. on April 30, 2010, the premises was operating, the front door was open, and security personnel were outside of the premises. [N.T. 17]. As he approached the premises, Officer Keisling was stopped by a security guard and asked to provide his ID and upon showing his ID, he was permitted to enter. [N.T. 17]. The officer seated himself at the bar and purchased a twelve (12) ounce bottle of Miller Lite beer. [N.T. 18.]. The officer remained inside the premises for approximately ten (10) minutes and was never questioned as to whether he was a member of the club. [N.T. 18].

Officer Keisling was not a member of the club. [N.T. 17]. Additionally, the officer observed that the suspension placard was not posted. [N.T. 18-19].

Another Bureau enforcement officer, George Tritz, testified that on May 7, 2010, at approximately 7:30 p.m., he arrived at licensed premises to verify that the premises was closed pursuant to the imposed suspension. [N.T. 20]. The officer observed that the premises was closed, but the suspension placard was not posted.² [N.T. 20].

The Board takes administrative notice of its files which reveal that the license in question was suspended pursuant to an Adjudication and Order issued for Citation No. 08-0930. (Admin. Notice). Section 15.62(a) provides that

[i]n the case of a suspension of a license, the Order of the Administrative Law Judge shall direct the licensee to post in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises, a notice of the suspension in the form and size and containing the provisions the Office of Administrative Law Judge may require. The notice shall remain posted during the entire period of suspension.

[40 Pa. Code § 15.62(a)]. There is undisputed evidence that on April 30, 2010 and May 1, 3, 4, 5, 6, 7 and 9, 2010, during a time that it was mandated to do so,

² Officer Tritz testified that he searched all of the windows of the premises and observed a “cease operations” placard issued by the City of Philadelphia. No notice of suspension was observed in the windows.

Licensee failed to post a Notice of Suspension in a conspicuous place on the outside of its premises.

Nevertheless, Licensee argues that it was not obligated to comply with the Order of Suspension for Citation No. 08-0930 because subsequent appellate decisions dated May 6, 2010 and June 6, 2011, overturned the suspension. However, this argument must fail since Licensee cannot simply disregard Orders of the Court that may have been set-aside during a later appeal. It is well settled that: "... an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." United States v. Mine Workers, 330 U.S. 258, 293, 67 S.Ct. 677, 696, 91 L.Ed. 884 (1947). Indeed, there are legal remedies available of which Licensee may avail itself rather than simply choosing to disregard a valid order. Accordingly, the Board finds that the ALJ did not abuse his discretion in regard to Count 1.

Additionally, Licensee and its servants, agents or employees are prohibited from selling, furnishing and/or giving alcoholic beverages during a time when the club liquor license was suspended. [47 P.S. § 4-491(1), 4-492(2), and 4-493(16)]. Further, 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, uncontradicted evidence was presented that on April 30, 2010 and May 1, 2010, Licensee's employees sold liquor or malt or brewed beverages to Bureau enforcement officers, who were not members of Licensee, during a time when the club liquor license was suspended.

As previously discussed, Licensee cannot simply disregard orders of the Court. See United States v. Mine Workers, *supra*; Ewing v. Oliver Realty, Inc., 451 A.2d 751 (Pa. Super. 1982). Accordingly, the Board finds that the ALJ did not abuse his discretion in regard to Count 2. Likewise, the Board finds that the ALJ did not abuse his discretion in regard to Count 3.³

Finally, the Board takes administrative notice of the Certified Record in this matter and notes that Chris Twardy signed a return receipt card, acknowledging receipt of the notice for the originally scheduled hearing date of April 6, 2011. That notice was mailed via First Class and Certified Mail to 121 S. 19th Street, Philadelphia, Pennsylvania. (Admin. Notice). The Certified Record further details that notice of the May 26, 2011 hearing was sent via First Class

³ Licensee's suggestion that the present citations must be dismissed because Officer Rutter was present on the licensed premises to investigate the suspension order must fail. Officer Rutter's presence was lawful. See Com. v. Bennett, 827 A.2d 469 (Pa. Super. 2003). Further, uncontroverted evidence contained in the record supports the notion that the Order issued by Judge Wright suspending the subject liquor license was valid at the time this investigation. Accordingly, Licensee's argument regarding the propriety of Officer Rutter's presence is disregarded.

and Certified Mail to Licensee at the same address – 121 S. 19th Street, Philadelphia, Pennsylvania on April 8, 2011. (Admin. Notice). Although the return receipt card was not returned to the Office of Administrative Law Judge, sufficient evidence exists to support the finding that the Notice was sent to Licensee at 121 South 19th Street, Philadelphia, Pennsylvania.

Based on the foregoing, the Board finds that the ALJ did not commit an error of law or abuse his discretion and that there is sufficient evidence to sustain Counts 1, 2, and 3 of the Citation. Therefore, the Adjudication and Order of the ALJ sustaining Counts 1, 2, and 3 of the Citation and imposing an aggregate fine of two thousand five hundred dollars (\$2,500.00) is affirmed in all respects.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee is ordered to pay the one thousand dollar (\$1,000.00) enhanced penalty portion of the fine immediately. Failure to do so will result in a suspension or revocation of the liquor license. Licensee is further ordered to pay the one thousand five hundred dollar (\$1,500.00) non-enhanced penalty portion of the fine within sixty (60) days of the mailing date of this Order. Failure to do so will result in a suspension or revocation of this license.

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

Board Secretary