

Mailed November 6, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 12-1558
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
STAR SOCIAL CLUB	:	License No. C-601
212 East Market Street	:	
West Chester, PA 19380	:	LID 642
	:	

Counsel for Licensee: Edward B. McHugh, Esquire (on appeal)  
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**OPINION**

On September 27, 2013, Star Social Club (“Licensee”), filed an Appeal (“Appeal”) from the Adjudication and Order of Administrative Law Judge David

Shenkle (“ALJ”), mailed September 19, 2013, which sustained Citation No. 12-1558 (“the Citation”) and revoked the license.

On October 15, 2012, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued a Notice of Violation letter to Licensee, advising Licensee that the Bureau had conducted an investigation which might result in the issuance of a citation against Licensee. The Notice of Violation was sent by first class and certified mail to Licensee at the licensed premises (212 East Market Street, West Chester, Pennsylvania 19380). The Notice of Violation was received by Licensee at the licensed premises, as indicated by the signature on the certified mail return receipt card. (N.T. 7, Ex. B-1).

On October 31, 2012, the Bureau issued the Citation to Licensee. Count 1 of the Citation charged Licensee with violating section 406(a)(1) of the Liquor Code [47 P.S. § 4-406(a)(1)], in that, on September 8 and 15, 2012, Licensee, by its servants, agents or employees, sold alcoholic beverages to nonmembers. Count 2 of the Citation charged Licensee with violating section 491(10) of the Liquor Code [47 P.S. § 4-491(10)] in that, on September 8, 2012, Licensee, by its servants, agents or employees, refilled liquor bottles. Count 3 of the Citation charged Licensee with violating section 102 of the Liquor Code [47 P.S. § 1-102], in that, on September 8, 2012, Licensee, by its servants, agents,

or employees, improperly admitted members. The Citation was sent by first class and certified mail to Licensee at the licensed premises (212 East Market Street, West Chester, Pennsylvania 19380). The certificate of mailing for the Citation was returned as unclaimed; the first class mailing was not returned. (N.T. 8; Ex. B-2].

On May 22, 2013, a citation hearing notice was mailed by the Office of Administrative Law Judge via first class and certified mail to Licensee at the licensed premises (212 East Market Street, West Chester, Pennsylvania 19380). The hearing notice advised the parties that a hearing would be held on July 16, 2013. The certificate of mailing for the hearing notice was returned as unclaimed; the first class mailing was not returned.

A hearing regarding the Citation was held on July 16, 2013.<sup>1</sup> Erik Shmukler, Esquire, appeared at the hearing as counsel for the Bureau, and presented the testimony of Bureau Officers Justin Clark and Kareen Davis. Licensee did not attend the hearing or present any evidence.

By Adjudication and Order mailed September 19, 2013, the ALJ sustained the Citation and revoked the license, effective October 28, 2013. The Adjudication and Order was sent by first class and certified mail to Licensee at

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<sup>1</sup> The hearing transcript mistakenly refers to the date as Tuesday, July 17, 2013, whereas it should be Tuesday, July 16, 2013.

the licensed premises (212 East Market Street, West Chester, Pennsylvania 19380).

On September 27, 2013, Licensee filed an appeal with the Pennsylvania Liquor Control Board (“Board”). Licensee’s Counsel asserts that the ALJ “abused [his] discretion, committed an error of law and made determinations unsupported by the record in connection with his Findings of Fact Nos. 1 through 7 as well as his Conclusion of Law.” Furthermore, Licensee’s Counsel states that Licensee “never received the Notice of Hearing and the hearing was held *ex parte*, without the Licensee being afforded the opportunity to present a defense.” The Board has conducted 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 July 16, 2013.

Pennsylvania courts have, for many years, followed the “mailbox rule,” which provides that “depositing in the post office a properly addressed, prepaid letter raises a natural presumption, founded in common experience, that it reached its destination by due course of mail.” Jensen v. McCorkell, 154 Pa. 323, 325, 26 A. 366, 367, (1893) (citation omitted). The Pennsylvania Supreme Court noted: “The overwhelming weight of statistics clearly indicates that letters properly mailed and deposited in the post office are received by the

addressees.” Meierdierck v. Miller, 394 Pa. 484, 487, 147 A.2d 406, 408 (1959). Therefore, “[e]vidence that a letter has been mailed will ordinarily be sufficient to permit a jury to find that the letter was in fact received by the party to whom it was addressed.” Szymanski v. Dotey, 52 A.3d 289, 292 (2012) (citing Shafer v. A.I.T.S., Inc., 428 A.2d 152, 156 (Pa. Super. 1981)).

Licensee alleges that it did not receive the hearing notice, but offers nothing to rebut the presumption of the mailbox rule. Indeed, Licensee received the Notice of Violation letter, as indicated by the signature on the certified mail return receipt card. Licensee also received the ALJ’s Adjudication, as indicated by the appeal filed by its Counsel only eight (8) days after the mailing date of the Adjudication. The Board is not persuaded that Licensee was “not afforded the opportunity to present a defense.” As noted by the Pennsylvania Supreme Court,

Rights and privileges, however essential, must be given some measure of protection by those who hold them, or they are lost.

Dept. of Transp. v. Warenczuk, 534 Pa. 623, 626 (1993).

The Board notes that, 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. [47 P.S. § 4-471(b)]. 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). Furthermore, the ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Board of Probation and Parole, 98 Pa. Cmwlth. 28, 510 A.2d 877 (1986).

Based upon its review, the Board concludes that the ALJ did not commit an error of law and his decision was supported by substantial evidence. The Bureau presented the first-hand testimony of two (2) of its officers who were directly involved with the investigation of Licensee. Officer Karen Davis, who has been employed by the Bureau for over ten and a half (10½) years, provided first-hand testimony of the actions of Licensee that formed the basis for the Citation.

Count 1 of the Citation charged Licensee with violating section 406(a)(1) of the Liquor Code, which prohibits a club from “selling liquor or malt or

brewed beverages to any person except a member of the club.” [47 P.S. § 4-406(a)(1)]. Count 3 of the Citation charged Licensee with violating section 102 of the Liquor Code, which requires that clubs “shall ... admit members by written application, investigation and ballot...” [47 P.S. § 1-102]. Officer Davis visited the licensed premises on September 8, 2012. (N.T. 10). He was not a member of Licensee’s club, but he was permitted to enter the club, pay ten dollars (\$10.00) and receive an “associate member card.” (N.T. 11). There was no waiting period before he received the card and he was not required to fill out an application for membership; he only had to produce a driver’s license. (N.T. 11-12). Then, Officer Davis proceeded to buy beer from the bartender without having to produce his membership card. (N.T. 13).

On September 15, 2012, Officer Davis again visited the licensed premises. (N.T. 14). A man in the lobby asked Officer Davis if he had a membership to the club, whereupon Officer Davis showed the “associate member card” he had received at his prior visit. (N.T. 14). Officer Davis was then permitted to enter the club and purchase alcoholic beverages. (N.T. 15). He purchased an alcoholic beverage at approximately 1:37 a.m., and another at approximately 2:15 a.m. (N.T. 15-16). On both occasions, the bartender did not ask Officer Davis if he was a member of the club; she simply took his money and brought

him a beer. (N.T. 15-16). At no time did Officer Davis receive any communication from Licensee concerning his membership, as Licensee did not collect any contact information from Officer Davis when he paid ten dollars (\$10.00) and received his “associate membership card” on September 8, 2012. (N.T. 15)

Count 2 of the Citation charged Licensee with violating section 491(10) of the Liquor Code, which prohibits any licensee from refilling, in whole or in part, any liquor bottle or other liquor container with any liquid or substance whatsoever. [47 P.S. § 4-491(10)]. While Officer Davis was at the licensed premises on September 8, 2012, he observed an employee open a fully sealed Ciroc bottle and pour half the contents into an empty Ciroc bottle. (N.T. 13).

Based on the evidence presented at the hearing, the ALJ sustained each count of the Citation. The ALJ’s decision is supported by substantial evidence and is in conformity with the law.

Having found no error of law and determined that the ALJ’s decision was supported by substantial evidence, the Board turns its attention to whether the ALJ abused his discretion in sustaining the Citation and revoking the license. The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and

due consideration. The Pennsylvania Supreme Court has 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.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 602 A.2d 1300, 1305 (1992). Further, the imposition of penalties is the exclusive prerogative of the ALJ; the Board may not disturb penalties which are within the parameters set forth in the Liquor Code.

In this case, there is no evidence in the record to suggest that the ALJ’s conclusion was the result of prejudice or bias, or that it was manifestly unreasonable. Section 471 of the Liquor Code prescribes the penalty for the type of violation sustained in the Citation, and permits the ALJ to impose a license suspension or revocation and/or a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000.00). [47 P.S. § 4-471].

The extensive record of Licensee includes the following citations and penalties:

Citation No.	Violation	Penalty
91-2014	Sales to nonmembers	\$350.00 fine
91-2892	Sales to nonmembers	\$350.00 fine and 3 days

		suspension
94-0819	Sales to nonmembers	\$500.00 fine and 3 days suspension
01-1271	Purchased malt or brewed beverages on credit	\$150.00 fine
09-0058	Sales to nonmembers; Gambling (machines and tickets)	\$1,100.00 fine
10-0642	Sales to nonmembers; Improper admission of members; Loudspeakers could be heard outside	\$800.00 fine and 5 days suspension
10-0791	Improper admission of members	\$200.00 fine and 1 day suspension
11-0836	Sales to nonmembers; Loudspeakers could be heard outside; Noisy and/or disorderly operation	\$2,400.00 fine
12-0936	Sales to nonmembers	\$1,000.00 fine and 7 days suspension.

Seven (7) of the citations that Licensee received included a count of sales to nonmembers, and two (2) of Licensee’s prior citations included a count of improper admission of members. These two (2) types of offenses were present in eight (8) of the past nine (9) citations filed against Licensee, and contributed to fines totaling six thousand seven hundred dollars (\$6,700.00) and nineteen (19) days of suspension.

The ALJ revoked the license, stating: “A review of the prior record of Licensee convinces me that there is no penalty short of revocation which could reform its conduct.” Since the revocation of the license is clearly within the

statutory range set forth in the Liquor Code, and the Board has no authority to alter a lawful penalty imposed by the ALJ, the decision of the ALJ to revoke the license is affirmed. Therefore, for the foregoing reasons, the Adjudication and Order of the ALJ sustaining the Citation and revoking the license is affirmed in all respects.

**ORDER**

The appeal of Licensee is dismissed.

The decision of the ALJ is affirmed.

Club Liquor License No. C-601 (LID 642) remains revoked effective  
October 28, 2013.

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Board Secretary