

Mailing Date: OCT 15 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 07-1537
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-351355
v.	:	
	:	LID - 23110
THE MECHANICSBURG CLUB	:	
333 HEINZ STREET	:	
MECHANICSBURG PA 17055-3211	:	
	:	
	:	
	:	
CUMBERLAND COUNTY	:	
LICENSE NO. CC-5354	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL LOVETTE
LICENSEE: P. RICHARD WAGNER, ESQUIRE
FOR WITNESSES: SCOTT CRAMER, ESQUIRE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 12, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against THE MECHANICSBURG CLUB, License Number CC-5354 (hereinafter "Licensee").

The citation contains three counts.

The first count charges Licensee with violation of Sections 471 and 493(12) of the Liquor Code [47 P.S. §§4-471 and 4-493(12)], Section 311 of the Local Option Small Games of Chance Act [10 P.S. §311] and Section 901 of the Department of Revenue Regulations [61 Pa. Code §901] in that Licensee, by its servants, agents or employees, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two years immediately preceding May 3, 2007, concerning the Local Option Small Games of Chance Act.

The second count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 315(b) of the Local Option Small Games of Chance Act [10 P.S. §315(b)] in that during the periods January 1 through 7, February 5 through 11, March 5 through 11 and April 2 through 8, 2007, Licensee, by its servants, agents or employes, offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven day period.

The third count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 901 of the Department of Revenue Regulations [61 Pa. Code §901] in that during the period September 1, 2006 through April 30, 2007, Licensee violated the Local Option Small Games of Chance Act, in that funds derived from the operations of games of chance were used for purposes other than those authorized by law.

The investigation which gave rise to the citation began on April 2, 2007 and was completed on June 12, 2007; and notice of the violation was sent to Licensee by Certified Mail on June 19, 2007. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on November 17, 2008 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

COUNTS 1, 2 AND 3

1. On April 20, 2007 an officer of the Bureau visited the licensed premises. He introduced himself to the person who answered the door, and asked for a club officer or manager. He was taken to the bar area where he was introduced to Charles Sechrist, the bartender. Mr. Sechrist summoned John Reninger, the Club president and Mike Gallagher, the club manager. The officer identified himself and explained that he was there to conduct a routine inspection (N.T. 9).

2. The officer questioned Mr. Reninger and Mr. Gallagher about maintenance of small games of chance records. Mr. Gallagher explained that Licensee was not maintaining seven day totals of prizes awarded from small games of chance and several other items such as gross sales per game, number of tickets per game, number of tickets not played, cost per play and payout totals per game (N.T. 11).

3. Mr. Gallagher explained to the officer that Licensee kept the players cards for each game and the dates the games were placed into and taken out of service were written on the player cards (N.T. 12).

4. The officer requested that Mr. Gallagher provided payout totals for prizes awarded from small games of chance for four separate seven day periods. He also requested a record of any prizes awarded in excess of \$100.00 (N.T. 12).

5. The officer returned to the licensed premises on April 25, 2007 where he met with Mr. Gallagher to collect the information that he had previously requested. Mr. Gallagher could provide no records of prizes awarded in excess of \$100.00. He also provided numbers for games that were taken out of play in the seven day periods. The officer requested that the lists be restricted to games that were placed into play and taken out during the designated seven day periods. He then made arrangements to return at a later date to review the seven day totals (N.T. 13-14).

6. On May 3, 2007 the officer again returned to the licensed premises to review the figures for amounts paid out on small games of chance during the designated seven day periods (N.T. 15).

7. The corrected figures provided by Licensee showed that the following amounts had been paid out by Licensee during the following seven day periods:

January 1-7, 2007 - \$62,150.00
February 5-11, 2007 - \$51,525.00
March 5-11, 2007 - \$65,575.00
April 2-8, 2007 - \$59,500.00

(N.T. 16-18 and Exhibit C-3).

8. On May 3, 2007 Mr. Gallagher admitted to the officer that no records were kept with respect to the awarding of prizes over \$100.00 or the winners of such prizes (N.T. 19).

9. The officer examined the financial statement of Licensee for the period from September 1, 2006 through April 30, 2007. The officer determined from this document that gross income from legitimate small games amounted to \$1,036,637.00 after the payouts of prizes won. The statement further indicates that Licensee made charitable donations during the same period of \$32,340.00. The statement also indicates that during this period Licensee purchased small games of chance in the amount of \$174,597.35. When the donations and small games of chance purchases are deducted from the gross income from small games of chance the net amount of proceeds from small games of chance is \$829,699.75 (N.T. 20-26 and Exhibit C-4).

10. The financial report indicates that during the period in question, Licensee had an overall operating loss of \$6,159.05 (N.T. 26-28 and Exhibit C-4).

CONCLUSIONS OF LAW:

Counts 1, 2 and 3 of the citation are **sustained**.

DISCUSSION:

ISSUES COMMON TO COUNTS 1, 2 AND 3

OTHER SUFFICIENT CAUSE

The Supreme Court of Pennsylvania has held that violations of the criminal laws of the Commonwealth of Pennsylvania by a liquor licensee, where appropriate scienter is present constitutes “other sufficient cause” as that term is used in Section 471 of the Liquor Code [47 P.S. §4-471], thus subjecting the licensee to the sanction provided by that section. *Pa Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

Section 327 of the Local Option Small Games of Chance Act (LOSGCA) [10 Pa. C.S. §327] provides that anyone violating the LOSGCA is subject to criminal sanctions. Therefore, violation of the LOSGCA by liquor licensees constitute “other sufficient cause” as that term is used in Section 471 of the Liquor Code subjecting the licensee to the sanctions provided by that section where the appropriate scienter is present.

SCIENTER

The Supreme Court of Pennsylvania has mandated that when a liquor licensee has been found to have committed a violation which is classified as “other sufficient cause” some element of scienter must be present before the penalties set forth in Section 471 of the Liquor Code (supra) may be applied. The test set forth by the court is as follows:

1. Whether the licensee knew or should have known of the illegal activities by an employe or patron. If so, the licensee is liable.
2. A licensee may defend his license by demonstrating he took substantial, affirmative steps to guard against a known pattern of illegal activities.

Pa. Liquor Control Board v. TLK, Inc. (supra).

With the foregoing in mind, I will address Counts 1, 2 and 3 of the citation.

COUNT 1

Licensee’s failure to keep records with respect to small games of chance, except for the player cards for each game upon with the dates each game was put into and taken out of service, was in violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)], Section 311 of the LOSGCA [10 P.S. §311] and Section 901 of the PA Department of Revenue Regulations [61 Pa. Code §901 et seq].

Section 493(12) of the Liquor Code (supra) requires liquor licensees to maintain complete and accurate records covering the operation of the licensed business for a period of two years.

Section 319 of the LOSGCA [10 P.S. §319] authorizes the Department of Revenue to promulgate regulations to carry out the provisions of the LOSGCA.

Section 317(f) of the LOSGCA [10 P.S. §317(f)] requires a licensee to make and keep such records as the Department of Revenue shall prescribe and make such records available as required by the Department of Revenue pursuant to regulation.

Section 901.461 of the Regulations of the Department of Revenue [61 Pa. Code §901.61] requires that licensees maintain records regarding small games of chance for a period of two years. Further, this section also requires eligible organizations to keep and maintain annual records of the activities related to small games of chance with separate totals of activities for each operating week.

The specific records which an eligible organization is required to keep are found at Sections 901.462 through 901.467 [61 Pa. Code §901.462 through 901.467].

Finally, Section 901.468 of the Department of Revenue Regulations [61 Pa. Code §901.468] again provides that records including invoices shall be maintained for a minimum of two years.

In this case the only records that Licensee maintained with respect to small games of chance were player cards for each game upon which were recorded the dates when each game was put into and taken out of play (See Finding No. 3 and 8).

Since Licensee failed to keep the records required as indicated above, I conclude that Count No. 1 of the citation is sustained.

COUNT 2

The record establishes that Licensee made payouts on small games of chance during four seven day periods between January 1, 2007 and April 8, 2007 which significantly exceeded \$5,000.00 in each of these periods. The charge in Count No. 2 is, therefore, sustained.

Section 315(b) of the LOSGCA [10 P.S. §315(b)] provides as follows:

...(b) Weekly limit. No more than \$5,000.00 in cash or merchandise shall be awarded by any eligible organization in any seven day period.

The record in this case establishes that during the four specific seven day periods examined by the officer, Licensee paid out on small games of chance between \$57,525.00 and \$65,575.00 (See Finding No. 4). It is clear, therefore, that Count No. 2 of the citation has been sustained.

COUNT 3

The record in this case establishes that income generated by Licensee from small games of chance were used to pay operating expenses rather than for public purposes.

Section 314 of the LOSGCA [10 P.S. §314] as pertinent, provides as follows:

...All proceeds of games of chance shall be used exclusively for public interest purposes or for the purchase of games of chance as permitted by this act.

In this case, Licensee, during the period from September 1, 2006 through April 30, 2007 realized income from small games of chance which after deduction of charitable contributions and purchase of small games of chance amount to \$829,699.25. This money was not used for public purposes but rather applied to operating expenses during a period when licensee had an operating loss which exceeded \$6,000.00 (See Findings No. 9 and 10).

Such use of net proceeds from small games of chance clearly violates Section 314 of the LOSGCA (supra) and the charge in Count 3 of the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since September 26, 1952, and has had two prior violation(s) since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

Citation No. 89-1041. Fine \$900.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on the licensed premises.

Citation No. 05-0611. Fine \$250.00.

1. Offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven day period. February 13 through 19, 2005.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or 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.

Under the circumstances of this case, the penalty imposed shall be as follows:

Count 1 - \$1,000.00 and 10 days suspension

Count 2 - \$1,000.00 and 10 days suspension

Count 3 – one day suspension and continuing thereafter until Licensee submits written certification verifying that Licensee has disgorged the net proceeds from small games of chance in the amount of \$829,699.25 and paid said amount to a legitimate charity or charities registered with the Commonwealth of Pennsylvania or the United States Government.

ORDER

THEREFORE, it is hereby ordered that Licensee THE MECHANICSBURG CLUB, pay a fine of \$2,000.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that the catering club license (including all permits) of THE MECHANICSBURG CLUB, License No. CC-5354 be suspended for a period of 21 day(s) **BEGINNING** at 7:00 a.m. on Monday, January 4, 2010, and further that said license remain suspended until: (1) Licensee has forwarded a certification verifying that Licensee has disgorged the net proceeds from small games of chance in the amount of \$829,699.25 and paid said amount to a legitimate charity or charities registered with the Commonwealth of Pennsylvania or the United States Government; and (2) said certification has been approved and the suspension terminated by further Order. Said certification is to be returned to the Office of Administrative Law Judge, Pennsylvania Liquor Control Board, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, PA 17110-9661. A copy of the Certification is to be sent to Thomas M. Ballaron, Assistant Counsel, Bureau of Liquor Control Enforcement, Pennsylvania State Police, 3655 Vartan Way, Harrisburg, PA 17110.

Licensee is directed on January 4, 2010 at 7:00 a.m. to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised if replacement placards are needed for any reason they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

IT IS FURTHER ORDERED that if Licensee submits a certification within 30 days from the mailing date of this Adjudication and if the certification is found to be acceptable, and if the Bureau supports the certification, the one day suspension, imposed in Count 3 of the citation, shall be vacated.

LICENSEE MAY NOT RESUME OPERATION OF THE LICENSED PREMISES UNTIL FURTHER ORDER BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE.

Jurisdiction is retained pending final resolution of the penalty in this matter.

Dated this 7TH day of October, 2009.

A handwritten signature in cursive script, reading "Daniel T. Flaherty, Jr.", is written over a horizontal line.

Daniel T. Flaherty, Jr., J.

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MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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.

Detach here and submit stub with payment

The fine must be paid by Treasurer's Check, Cashier's Check or Certified Check. **Personal checks, which includes business-use personal checks, are not acceptable.** Make check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661

Citation No. 07-1537
The Mechanicsburg Club

CERTIFICATION

_____ hereby certifies that he/she is the _____ of Licensee, THE MECHANICSBURG CLUB, 333 Heinz Street, Mechanicsburg, PA 17055-3211; and

Licensee has paid the following amounts to the following charities:

CHARITY

AMOUNT

I/We, the above Licensee(s) [or authorized officer(s) thereof], under penalty of law [18 Pa.C.S. §4904], relating to unsworn falsification to authorities] acknowledge that I/We are signing and executing this document as the authorized act and deed of the Licensee. I/We certify that the foregoing is true and correct.

SIGNATURE

DATE

Original to be sent to: Office of Administrative Law Judge, Pennsylvania Liquor Control Board, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg PA 17110-9661.

One copy of certification to be sent to: Thomas Ballaron, Assistant Counsel, Bureau of Liquor Control Enforcement, Pennsylvania State Police, 3655 Vartan Way, Harrisburg, PA 17110.