

Mailing Date: July 6, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-0058
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
DETRICH-BRECHBILL HOME	:	License No. CC-6291
ASSN., INC.	:	
7966 Lincoln Way West	:	LID 45529
P.O. Box 303	:	
St. Thomas, PA 17252-9776	:	

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OPINION

Detrich-Brechbill Home Assn., Inc. (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), mailed May 2, 2011, wherein the ALJ sustained both counts of Citation No. 08-0058 (“the Citation”) issued by the Pennsylvania State Police, Bureau of Liquor

Control Enforcement (“Bureau”), and imposed a fine of seven hundred dollars (\$700.00).

The first count of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and sections 5512 and/or 5513 of the Crimes Code [18 Pa. C.S. §§ 5512-5513], in that on December 19, 2007, Licensee, by its servants, agents or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises.

The second count of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 315(b) of the Local Option Small Games of Chance Act (“LOSGCA”) [10 P.S. § 315(b)], in that during the periods between July 2 through July 8, 2007, and November 19 through 25, 2007, Licensee, by its servants, agents or employees, offered and/or awarded more than five thousand dollars (\$5,000.00) in cash or merchandise in a seven (7)-day period.

The Pennsylvania Liquor Control Board (“Board”) has reviewed the certified record, including the ALJ’s Adjudication and Order, Licensee’s Appeal, the Notes of Testimony and Exhibits from the hearing held on March 4, 2011, as well as the Bureau’s response, and has concluded that the ALJ did commit an

error of law in sustaining count one but did not err or abuse his discretion in sustaining count two, which was supported by substantial evidence.

The record reveals that Bureau Enforcement Officer John Deuter conducted an undercover visit to the licensed premises on October 7, 2007. [N.T. 7]. During this visit, Officer Deuter observed dry erase boards listing columns of numbers under the headings “Hogs” and “Reds.” [N.T. 7]. Under the “Hogs” column was “400, 400, 400, 400, 50,” while the “Reds” column listed “400, 400.” [N.T. 8-9]. Officer Deuter stated that in his experience he knows the terms “Hogs” and “Reds” refer to pull-tab games and that the numbers usually indicate the amount of money contained in a jackpot when the club is running progressive small games of chance. [N.T. 8].

On November 3, 2007, Officer Deuter conducted another undercover visit to the licensed premises. [N.T. 11]. On both occasions, he showed a membership card from another organization to gain entry. [N.T. 11]. On this date, Officer Deuter observed the same headings on the dry erase board; the “Hogs” column contained “400, 400, 150,” while the “Red” column contained “400, 400, 50.” [N.T. 12]. On November 24, 2007, Officer Deuter conducted a similar visit and observed that the “Hogs” column contained “400, 400, 300,” while the “Reds” column listed “400, 400, 50.” [N.T. 12-13].

On December 19, 2007, Officer Deuter returned to the licensed premises with the intention of conducting a routine inspection. [N.T. 13]. A woman answered the door and identified herself as Licensee's bartender, Cindy Scott. [N.T. 13]. Ms. Scott stated that the premises was not open at the time but allowed Officer Deuter in for the inspection. [N.T. 13]. Approximately fifteen (15) minutes later, Licensee's manager, Kevin Gillan, arrived. [N.T. 13-14]. Officer Deuter asked Mr. Gillan what the notations on the dry erase board meant, and Mr. Gillan explained that Licensee was altering the prize structures of the "Hogs" and "Reds" pull-tab games and that the jackpot cash was being kept in manila envelopes behind the bar. [N.T. 14-15].

The pull-tab games come with a predetermined prize structure from the manufacturer; at the conclusion of a game, prizes of one hundred dollars (\$100.00) and fifty dollars (\$50.00) are awarded to the holders of the corresponding numbers. [N.T. 16]. Sometimes the holder of a single number wins both prizes. [N.T. 16]. Licensee altered the games, according to Officer Deuter's account of Mr. Gillan's explanation, by not awarding the fifty-dollar (\$50.00) prize unless both prize numbers matched. [N.T. 17]. Until a game ended with matching numbers, Licensee stored the undistributed prizes of fifty dollars (\$50.00) in the "jackpot" envelopes. [N.T. 17]. This operation is

commonly known as a “progressive pool.” [N.T. 58]. When a game did end with matching numbers, Licensee awarded a total of five hundred dollars (\$500.00) to the winner, by combining the prize of one hundred dollars (\$100.00) with a jackpot envelope containing four hundred dollars (\$400.00). [N.T. 17-19].

As part of Officer Deuter’s routine inspection, he asked for and was provided with access to Licensee’s records relating to the LOSGCA. [N.T. 20]. Mr. Gillan provided the “tip jar sales report” via a computer, which Officer Deuter reviewed. [N.T. 21]. Officer Deuter obtained printouts of two (2) sample weeks of these records. [N.T. 21; Ex. C-3]. Because the payouts were not listed on the “tip jar sales report,” Mr. Gillan provided Officer Deuter with the flare cards from each game, which contain the payout amounts on the back of the card. [N.T. 29-30]. Officer Deuter did not ask Mr. Gillan what the actual payouts were for the pull-tab games. [N.T. 43]. Based on the number of pull-tab games played and completed, obtained via the “tip jar sales report,” and the payout amounts on the flare cards, Officer Deuter calculated the total weekly payouts for all of the pull-tab games put into play and completed by Licensee during the two (2) sample weeks. [N.T. 30; Ex. C-4]. According to Officer Deuter’s calculations, Licensee’s pull-tab games payouts for the seven

(7)-day period from July 2, 2007, through July 8, 2007, totaled twenty-seven thousand six hundred seventy-five dollars (\$27,675.00), and for November 19, 2007, through November 25, 2007, the pull-tab prizes awarded by Licensee totaled twenty-three thousand two hundred five dollars (\$23,205.00). [C-4].

On December 21, 2007, Officer Deuter contacted Mr. Gillan with the results of his investigation, and the investigation was completed on December 22, 2007. [N.T. 36; Ex. C-1]. A Notice of Violation letter was sent to Licensee on January 8, 2008. [N.T. 36]. The Citation was issued on February 14, 2008, and a hearing was held on March 4, 2011.

By Adjudication and Order mailed May 2, 2011, the ALJ sustained both counts set forth in the Citation and imposed a fine of seven hundred dollars (\$700.00). Licensee now appeals from the ALJ's Adjudication and Order.

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, 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, 510 A.2d 877 (Pa. Cmwlth. 1986).

On appeal, Licensee raises the following five (5) issues:

1. [The Bureau] does not have initial authority to enforce the [LOSGCA] (See, 47 P.S. § 2-211).
2. The [Bureau] did not have [a] reasonable belief that a violation of the [LOSGCA] was occurring or will occur (See, 61 Pa. Code 901.28(a)(2)).
3. The general allegation that [Licensee] possessed or operated gambling devices, poolselling or bookmaking was not properly charged because the more specific charge should have been an alleged violation of 61 Pa. Code 901.73(b)(1). (When there is a specific charge, a general charge cannot be sustained).
4. There was no testimony from the [Bureau] to sustain the charge that [Licensee] paid out more than \$5,000.00 in cash per week.

- A. The sole basis to support the charge was the [Bureau] officer who used the pay outs on the manufacturer's flare cards [N.T. 41] but never asked the Club Manager or anyone at the Club if they actually paid out the monies listed on the back of the flare cards [N.T. 43].
5. The ALJ did not properly consider that the "progressive game" had been previously sanctioned by a [Bureau] officer as being appropriate.

[Licensee's Appeal Form].

Licensee's first contention is that the Bureau lacks jurisdiction to investigate and impose penalties for offenses under the LOSGCA. By implication, Licensee thus argues the ALJ lacked subject matter jurisdiction and committed an error of law by imposing penalties under the Liquor Code for LOSGCA offenses.

This issue was clearly addressed by the Commonwealth Court's decision in Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Columbus Home Association, 989 A.2d 39 (Pa. Cmwlth. 2009). Section 471 of the Liquor Code empowers the Bureau to cite a licensee for violations of the Liquor Code "or upon any other sufficient cause shown."

[47 P.S. § 4-471(a)]. Including the Pennsylvania Supreme Court in Pennsylvania Liquor Control Bd. v. TLK, 544 A.2d 931 (Pa. 1988), the courts have consistently held that violations of criminal laws other than the Liquor Code may constitute sufficient cause for the imposition of penalties by an ALJ, pursuant to section 471, when reasonably related to the sale and use of alcoholic beverages, including gambling. Knights of Columbus, 989 A.2d at 44. The conclusion that a licensee’s illegal gambling practices, such as violations of the LOSGCA, justify the imposition of penalties pursuant to section 471 is consistent with the command of the Legislature, expressed in 47 P.S. § 1-104(a), “that all the provisions of the [Liquor Code] ‘shall be liberally construed’ for the protection of the public welfare, health, peace and morals of the people of the Commonwealth.” Knights of Columbus, 989 A.2d at 44-45; V.J.R. Bar Corp. v. Pennsylvania Liquor Control Bd., 390 A.2d 163, 164 (Pa. 1978). Therefore, the ALJ had authority to impose penalties pursuant to section 471, based upon underlying violations of the LOSGCA, in both counts of the Citation.

The second error of law alleged by Licensee challenges the authority of the Bureau to request a licensee’s small games of chance records during routine inspections. Licensee bases this argument on its interpretation of section 901.28 of the LOSGCA Regulations. [61 Pa. Code § 901.28]. This section

requires that an inspecting agent of the Department of Revenue, or its authorized representatives, have a reasonable belief that a violation exists before an inspection of a licensee's LOSGCA records may be conducted. [61 Pa. Code § 901.28(a)(2)].

However, a Bureau enforcement officer is empowered to conduct routine inspections of licensees under the Liquor Code, and that authority includes the right to inspect all records covering the operation of the licensed business at any time the premises is open for business. [47 P.S. § 4-493(12)]. The reasonable belief standard of section 901.28 of the LOSGCA Regulations is not applicable where a Bureau enforcement officer enters a licensed establishment while it is open for business and requests documents covering the operation of the business pursuant to section 493(12) of the Liquor Code. Thus, if a licensee also holds a license to conduct small games of chance, the records required by the LOSGCA, including pull-tab records under section 901.464 [61 Pa. Code § 901.464], must be provided to the Bureau enforcement officer upon request, as these records clearly cover the operation of the licensed premises.

Here, Officer Deuter visited the licensed premises with the intention of conducting a routine inspection. [N.T. 13]. Although the establishment was

not open for business, Licensee's bartender Cindy Scott allowed Officer Deuter to proceed with his inspection, and Licensee's manager, Mr. Gillan, complied with the officer's requests during the inspection. [N.T. 13]. As part of that inspection, Officer Deuter requested Licensee's small games of chance records, pursuant to his authority under section 493(12) of the Liquor Code. The Board, therefore, rejects the second argument raised by Licensee.

The third issue on appeal raised by Licensee alleges a due process violation because of the generality of count one of the Citation. Licensee alleges that the ALJ committed an error of law and/or abused his discretion in sustaining count one because he found Licensee's conduct to primarily be a violation of section 901.731 of the LOSGCA Regulations [61 Pa. Code § 901.731], which was not referenced in the Citation. The ALJ concluded that Licensee's conduct was subsumed, nonetheless, under the broad prohibition on unlawful gambling found in section 5513 of the Crimes Code [18 Pa. C.S. § 5513], which was referenced in count one of the Citation as the underlying violation of section 471 of the Liquor Code. Specifically, the ALJ found that Licensee violated section 901.731 of the LOSGCA Regulations [61 Pa. Code § 901.731], and thus section 471 of the Liquor Code, by tampering with its pull-tab games in a manner that affected the chances of winning or losing.

Sections 5512 and 5513 of the Crimes Code provide a broad prohibition on all forms of unlawful gambling. Section 5512 of the Crimes Code defines “unlawful,” as used in that section, to mean “not specifically authorized by law.” [18 Pa. C.S. § 5512(d)]. As an exception to the general ban, the LOSGCA [10 P.S. §§ 311-327] and the Department of Revenue’s LOSGCA Regulations [61 Pa. Code § 901.1, *et seq.*] permit specific types of gambling, for the promotion of charitable or civic purposes. The Bureau contends, therefore, that a licensee operating a game of chance, such as the pull-tab game in this case, which does not meet every requirement of the LOSGCA to the letter of the law, is engaging in unlawful gambling in violation of sections 5512 and 5513 of the Crimes Code.

While the Board acknowledges the logic of the Bureau’s inference that a violation of certain provisions of the LOSGCA constitutes unlawful gambling under the Crimes Code, it does not agree that the mere reference to “sections 5512 and/or 5513 of the Crimes Code [18 Pa. C.S. § 5512 and/or § 5513]” and “operated gambling devices” comports with the notice requirement of due process and section 471(b) of the Liquor Code [47 P.S. § 4-471].¹

¹ Section 471 states, “No penalty provided by this section shall be imposed for any violations provided for in this act unless the bureau notifies the licensee of its nature within thirty days of the completion of the investigation.” [47 P.S. § 4-471(b)].

There is certainly case law supporting the position that the Bureau has a degree of latitude in the generality of its charges when issuing citations for violations of the Liquor Code. See Pennsylvania Liquor Control Bd. v. Camiel's Beverage Co., 300 A.2d 834 (Pa. Cmwlth. 1973); In re Parkway Distributing Co., 205 A.2d 660 (Pa. Super. 1964); In re Hankin, 195 A.2d 164 (Pa. Super. 1963). Specifically, the Commonwealth Court has held that where a citation informs the licensee of the "type and date of the alleged violation," it satisfies the due process notice requirement. Pennsylvania Liquor Control Bd. v. Reda, 463 A.2d 108, 109 (Pa. Cmwlth. 1983).

However, there is no excuse for merely giving notice of a general charge when a more specific charge is applicable. The Bureau clearly was in possession of evidence that Licensee violated section 901.731 of the LOSGCA Regulations [61 Pa. Code § 901.731]. At the hearing, the Bureau directed the ALJ's attention to section 901.731 after Licensee repeatedly inquired as to what specific regulation was violated by the practice of altering pull-tab payouts. [N.T. 48-52]. Nonetheless, the Bureau chose to phrase count one of the Citation as follows:

On December 19, 2007, you, by your servants, agents, or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling

and/or bookmaking on your licensed premises, in violation of section 471 of the Liquor Code [47 P.S. § 4-471] and sections 5512 and/or 5513 of the Crimes Code [18 Pa. C.S. § 5512 and/or 5513]”

[Ex. C-2].² Furthermore, the Bureau never amended the Citation, prior to or at the hearing, to charge Licensee with violating section 901.731 of the LOSGCA Regulations, instead of or in addition to sections 5512 and/or 5513 of the Crimes Code. Because the Board finds that Licensee’s due process right regarding notice of the type and date of the alleged violation was not satisfied, the Board concludes that the ALJ erred in sustaining count one of the Citation.

Turning now to count two of the Citation³, Licensee contends in its fourth issue on appeal that there was insufficient evidence to show that Licensee awarded more than five thousand dollars (\$5,000.00) in prizes during a seven (7)-day period. Specifically, it argues the Bureau failed to prove the actual amount of Licensee’s payouts because Officer Deuter used the manufacturer’s payout amounts listed on the flare cards provided by Licensee, rather than asking Licensee what the true amounts were.

² By its plain language, count one of the Citation appears to allege that Licensee violated section 471 of the Liquor Code because it operated gambling devices or permitted gambling devices on the licensed premises. The Board takes administrative notice of the fact that this language is typically used in citations when a licensee does not have a permit to conduct any type of gambling on the premises and, thus, is in violation of the law by permitting gambling to occur. Here, however, Licensee was permitted to operate small games of chance, and thus it is counterintuitive to allege it violated section 471 by operating gambling devices when it was permitted under the LOSGCA to do so. It begs the question as to what was the underlying violation of the LOSGCA, and this information should have been provided in the Citation.

³ Because the ALJ erred in sustaining count one of the Citation, there is no reason to address Licensee’s fifth issue on appeal, which deals with the weight given to Licensee’s witness’ testimony relating to count one.

The “tip jar sales reports” Licensee provided to Officer Deuter during his routine inspection do not appear to show the actual payout amounts for the various pull-tab games put into play at the licensed premises. [Ex. C-3]. Therefore, Officer Deuter requested the flare cards and explained to Mr. Gillan that he “needed to review the flare cards to have a payout total.” [N.T. 61]. Licensee gave no indication to Officer Deuter that the flare card totals did not match its actual payout amounts, nor did it put forth evidence at the hearing to rebut Officer Deuter’s calculations, which showed Licensee’s pull-tab payouts clearly exceeded five thousand dollars (\$5,000.00).⁴ This uncontroverted evidence was sufficient to support the ALJ’s finding that Licensee violated section 315(b) of the LOSGCA [10 P.S. § 315(b)].

For the foregoing reasons, the Adjudication and Order of the ALJ is reversed as to count one of the Citation and affirmed as to count two.

⁴ Section 315 of the LOSGCA states that “[n]o more than \$5,000 in cash or merchandise shall be awarded by any eligible organization in any seven-day period.” [10 P.S. § 315(b)]. For the seven (7)-day period from July 2, 2007, through July 8, 2007, the flare cards indicated Licensee awarded prizes for its pull-tab games totaling twenty-seven thousand six hundred seventy-five dollars (\$27,675.00), and for November 19, 2007, through November 25, 2007, the total payouts were twenty-three thousand two hundred five dollars (\$23,205.00). [Ex. C-4].

ORDER

The appeal of Licensee is granted in part and denied in part.

The decision of the ALJ is reversed as to count one, and the fine imposed with regard to that count is vacated.

The decision of the ALJ is affirmed as to count two.

The remaining fine of five hundred dollars (\$500.00) has not been paid.

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

Board Secretary