

Mailing Date: AUG 31 2009

[Appeals](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-0916
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-362490
	:	
v.	:	
	:	LID - 2477
	:	
PENBROOK POST NO. 730	:	
AMERICAN LEGION HOME	:	
ASSOCIATION	:	
3813 WALNUT ST.	:	
HARRISBURG, PA 17109-2533	:	
	:	
	:	
DAUPHIN COUNTY	:	
LICENSE NO. CC-5376	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL BALLARON
LICENSEE: P. RICHARD WAGNER, ESQUIRE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on May 29, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against PENBROOK POST NO. 730 AMERICAN LEGION HOME ASSOCIATION, License Number CC-5376 (hereinafter "Licensee").

The citation contains six 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 employes, failed to maintain complete and truthful

records covering the operation of the licensed business for a period of two years immediately preceding February 27, 2008, 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 320 of the Local Option Small Games of Chance Act [10 P.S. §320] in that on August 21, 2007, Licensee, by its servants, agents or employes, conducted small games of chance at an unapproved location.

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 on February 27, 2008, and divers occasions within the past year, 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 fourth 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 December 1 through 7, 8 through 14, 15 through 21, 22 through 28, 29 through 31, 2007, January 1 through 7, 8 through 14, 15 through 21, 22 through 28 and 29 through 30, 2008, 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 fifth count charges Licensee with violation of Sections 401(b) and 406(a)(1) of the Liquor Code [47 P.S. §§4-401(b) and 4-406(a)(1)] in that on October 20, 2007, Licensee, by its servants, agents or employes, sold alcoholic beverages to nonmembers.

The sixth count charges Licensee with violation of Sections 5.71, 5.73 and 5.74 of the Liquor Control Board Regulations [40 Pa. Code §5.71, 5.73 and 5.74] in that on February 27, 2008, Licensee, by its servants, agents or employes, failed to maintain records in conformity with Title 40 of the Pennsylvania Code.

The investigation which gave rise to the citation began on October 3, 2007 and was completed on March 25, 2008; and notice of the violation was sent to Licensee by Certified Mail on April 10, 2008. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on December 10, 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:

COUNT 1

1. On February 27, 2008 an officer of the Bureau entered the licensed premises. She identified herself by badge and identification to female bartenders Danelle Steinmeier and Chris Huntzinger and advised them of her intention to conduct a routine inspection (N.T. 11).
2. During her inspection of the licensed premises, the officer observed a wall dispensing unit which dispensed strip tickets in exchange for money. There were six deals or games combined in the wall unit, which made it impossible to ascertain the weekly payout by serial number (N.T. 12-13).
3. The officer further observed that the flare cards for the games in the wall unit were not on display (N.T. 14).
4. When the officer reviewed the small games of chance records of Licensee, she found that there were no records kept of pull tab winners who had won over \$100.00 (N.T. 1718).
5. The officer also observed that Licensee was keeping its small games of chance records by date of the month rather than by operating week as required (N.T. 18).

COUNT 2

6. In reviewing the checking records of Licensee, the officers came upon an entry showing a payment to Jokers Wild Entertainment in the amount of \$84.00. Licensee's officers admitted that Licensee had purchased small games of chance from its supplier, Jokers Wild Entertainment, and had supplied the games to its auxiliary. The auxiliary had sold the games at a picnic held in Schellsville (N.T. 20-22 and Exhibit C-7).

COUNT 3

7. The financial records for Licensee club for the calendar year 2007 and January of 2008 reveal that the gross income from small games of chance, after payouts were made to winners was \$520,970.00. The expense for purchasing additional small games of chance during this period was \$37,840.00. This leaves net income from small games of chance of \$483,130.00 (N.T. 23-25 and Exhibits C-8 and C-9).
8. The only donations made by Licensee during the calendar year 2007 or in January of 2008 amounted to \$1,568.93 (N.T. Exhibits C-8 and C-09).

9. If the donations made by the parent organization, the American Legion Post, in the amount of \$17,537.13 (N.T. Exhibit C-11) are considered, the total donations by both organizations during the calendar year 2007 and January 2008 were \$19,106.06 (N.T. 29-30).

10. When the charitable donations are deducted from the net income from sale of small games of chance for the period, a balance of \$464,023.94 is left which was used to meet operating expense of Licensee club (N.T. 30-310).

COUNT 4

11. In the course of her review of the small games of chance records of Licensee, the officer determined that Licensee paid out the following amounts as prizes on small games of chance during the following seven day periods:

January 1-7, 2008	\$36,938.00
January 8-14, 2008	\$34,894.00
January 15-21, 2008	\$40,139.00
January 22-28, 2008	\$45,632.00

(N.T. 19-20 and Exhibit C-6).

COUNT 5

12. On October 20, 2007, an officer of the Bureau entered the licensed premises in an undercover capacity (Stipulation N.T. 6-7).

13. The officer ordered a bottle of Yuengling Lager beer from the female bartender. He paid the bartender \$5.00 and received \$3.15 in change (Stipulation N.T. 7).

14. The bartender never questioned the officer concerning membership in Licensee club not did she ask for identification (Stipulation N.T. 7).

15. The officer was not nor had he ever been a member of Licensee club (Stipulation N.T. 7).

16. There were no catered events held at Licensee club on October 20, 2007 (N.T. 20).

COUNT 6

17. During the course of her review of Licensee's records on February 27, 2008, the officer reviewed the minutes of meetings of Licensee club. During that review the officer discovered that financial records were not attached to the minutes. Further no dates of application were included with the names of potential new members; and the details concerning the salaries of their salaried bookkeeper, manager and adjutant were not part of the judicial records of the club (N.T. 15-16).

CONCLUSIONS OF LAW:

Counts 1, 2, 3, 4, 5 and 6 of the citation are **sustained**.

DISCUSSION:

ISSUES COMMON TO COUNTS 1, 2, 3 AND 4

OTHER SUFFICIENT CAUSE

The Supreme Court of Pennsylvania has held that violations of the criminal laws of the Commonwealth on premises covered by a liquor license constitutes "other sufficient cause" as that term is used in Section 471 of the Liquor Code [47 P.S. §4-471]. *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, violations of the LOSGCA by liquor licensees constitute "other sufficient cause" as that term is used in Section 471 of the Liquor Code (supra), where the appropriate scienter is present.

SCIENTER

The Supreme Court of Pennsylvania has mandated that when a licensee is 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.

TLK, Inc. (supra).

In this case, it is clear that the officers of Licensee club were aware of all of the activities and circumstances involved in Counts 1, 2, 3 and 4 of the citation. Further, there is no indication that anyone was making any effort to correct the conditions and circumstances in question. I, therefore, conclude that the scienter required under *TLK, Inc.* (supra) is present as to all of these counts.

With the foregoing in mind, I will address Counts 1, 2, 3 and 4 of the citation.

COUNT 1

The record establishes that Licensee failed to keep complete and truthful records concerning LOSGCA on the licensed premises for a period of two years concerning the LOSGCA.

Section 493(12) of the Liquor Code [47 P.S. §4-493(12)] requires liquor licensees to keep complete and truthful records concerning the operation of the licensed business on the licensed premises for a period of two years.

Section 464(9) of the Local Option Small Games of Chance Regulations (LOSGCR) [61 Pa. Code §901.464(9)] requires the holder of a small games of chance license to keep and maintain a record of winners of prizes in excess of \$100.00.

In this case Licensee failed to maintain a record of winners of prizes in excess of \$100.00 (See Finding No. 4).

Section 734(i-iii) of the LOSGCR [61 Pa. Code §734(i-iii)] requires a LOSGC licensee to keep an inventory of punchboard and pull-tab games. In this case, Licensee commingled six deals in a wall dispensing unit, making it impossible to maintain the required records (See Finding No. 2).

Finally Section 466(2) of the LOSGCR [61 Pa. Code §901.466(2)] requires a LOSGC licensee to record the total amount of prizes awarded per operating week. Section 1 of the LOSGCR defines an operating week as seven consecutive operating or non-operating days [61 Pa. Code §901.1]. In this case Licensee kept its records by calendar month which left three day “operating weeks” for the months of January and February 2008 (See Finding No. 5).

Based upon the foregoing, I conclude that the records of Licensee concerning small games of chance were clearly not complete, and the charge in Count No. 1 of the citation is sustained.

COUNT 2

Licensee allowed small games of chance, which it had purchased, to be sold at a location other than the location listed on its Small Games of Chance License in violation of the Small Games of Chance Act (SGOCA) [10 P.S. §311 et seq)].

Section 320(b.1) of the SGOCA [10 P.S. §320(b.1)] provides that an eligible organization must notify the district attorney and the licensing authority in writing of the change of games cite and the dates and times that will be affected before it may sell small games of chance at any location other than that listed on its small games of chance application or license.

In this case, the record establishes that Licensee purchased small games of chance from its distributor and provided them to its auxiliary which sold the games at a picnic in Schellsville (See Finding No. 6). There is no indication the required notifications were made. Consequently, I conclude that Count No. 2 of the citation is sustained.

COUNT 3

Licensee used proceeds from small games of chance for purposes other than purchase of small games of chance and public interest purposes.

Section 314 of the SGOCA provides in part as follows:

...All proceeds of games of chance shall be used exclusively for public interest purposes or for the purchase of games of chance...

The record establishes that Licensee realized \$464,023.94 from the sale of small games of chance after deductions of awarded prizes, purchase of games of chance and charitable deductions. This amount was used to meet operating expenses of Licensee club (See Findings 7, 8, 9 and 10).

Since the operating expenses of the club do not constitute "public interest purposes," I conclude that Count No. 3 of the citation is sustained.

COUNT 4

During the seven day periods alleged in Count No. 4 Licensee awarded more than \$5,000.00 in prizes on small games of chance.

Section 315(b) of the SGOCA [10 P.S. §315(b)] and Section 702(b) of the SGOCR [61 Pa. Code §901.702(b)] both prohibit the payment of more than \$5,000.00 in prizes on small games of chance in any seven day period.

In four consecutive seven day periods from January 1, 2008 through January 28, 2008 Licensee paid out on small games of chance amounts which ranged from a low of \$34,894.00 to a high of \$45,632.00. Consequently, I conclude that Count No. 4 of the citation is sustained.

COUNT 5

Licensee has stipulated that on October 20, 2008 a bartender on the licensed premises sold beer to an officer of the Bureau, acting in an undercover capacity. The officer was not a member of Licensee club, and no catered event was being held (See Findings 12, 13, 14, 15 and 16). Count No. 5 is, therefore, sustained.

COUNT 6

The record establishes that, as of February 27, 2008 Licensee failed to attach its financial records to meeting minutes as required by 40 Pa. Code §5.74(3). Further, no dates of application of potential new members were included in the minutes as required by 40 Pa. Code §5.74(2). In addition, Licensee failed to provide the detail of salaries for its bookkeeper, manager and adjutant in its financial records as required by 40 Pa. Code §5.73(b). (See Finding No. 17).

Based upon the foregoing, Count No. 6 of the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since February 1, 1956, and has had four prior violation(s) since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

Citation No. 89-0911. Fine \$350.00.

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

Citation No. 92-1954. Fine \$600.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on the licensed premises (machines and tickets).

Citation No. 93-1696. Fine \$250.00.

1. Sales to nonmembers without prior arrangement.

Citation No. 06-0495. Fine \$1,850.00.

1. Failed to maintain coil cleaning records. January 27, 2006.
2. Failed to maintain complete and truthful records covering the operation of small games of chance for a period of 2 years. January 27, 2006.
3. Conducted drawings other than those authorized by law. October 28, November 29, December 28, 2005 and January 27, 2006.
4. Funds derived from the operation of games of chance were used for purposes other than those authorized by law. January 27, 2006.
5. Offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven day period. December 18 through 24 and December 25 through 31, 2005.
6. Sales to nonmembers. October 28, 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 - \$250.00 fine
- Count 2 - \$250.00 fine
- Count 3 - \$1,000.00 fine and 5 days suspension

PENBROOK POST NO. 730
AMERICAN LEGION HOME
ASSN.
CITATION NO. 08-0916

PAGE 10

Count 4 - \$1,000.00 fine and 5 days suspension
Count 5 - \$300.00 fine
Count 6 - \$200.00 fine

ORDER

THEREFORE, it is hereby ordered that Licensee PENBROOK POST NO. 730 AMERICAN LEGION HOME ASSOCIATION, pay a fine of \$3,000.00 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.

PENBROOK POST NO. 730
AMERICAN LEGION HOME
ASSN.
CITATION NO. 08-0916

11
PAGE

IT IS FURTHER ORDERED that Licensee's liquor license (including all permits) License No. CC-5376 be suspended for a period of ten days **BEGINNING** at 7:00 a.m. on Monday, September 28, 2009 and **ENDING** at 7:00 a.m. on Thursday, October 8, 2009.

Licensee is directed on September 28, 2009 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.

Licensee is authorized on October 8, 2009 at 7:00 a.m. to remove the placard of suspension and return his license to its original wall location.

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

Dated this 26TH day of August, 2009.



PENBROOK POST NO. 730
AMERICAN LEGION HOME
ASSN.
CITATION NO. 08-0916

12

Daniel T. Flaherty, Jr., J. an

PAGE

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. 08-0916
Penbrook Post No. 730 American
Legion Home Assn.