

Mailing Date: November 4, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 08-0916
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

PENBROOK POST No. 730 : License No. CC-5376
AMERICAN LEGION HOME ASSOC. :
3813 Walnut Street :
Harrisburg, PA 17109-2533 :

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OPINION

Penbrook Post No. 730 American Legion Home Association (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Daniel T. Flaherty, Jr. (“ALJ”), wherein the ALJ sustained the citation, and imposed a penalty consisting of a three thousand dollar (\$3,000.00) aggregate fine, and a ten-day (10) suspension of the license.

The citation consisted of six (6) counts. The first count of the citation charged that Licensee violated section 471 and 493(2) of the Liquor Code, section 311 of the Local Option Small Games of Chance Act (“LOSGCA”), and section 901 of the Department of Revenue Regulations by failing to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding February 7, 2008, concerning the LOSGCA. [47 P.S. §§ 4-471, 4-493(2); 10 P.S. § 311; 61 Pa. Code § 901].

The second count of the citation charged that on August 21, 2007, Licensee conducted small games of chance at an unapproved location in violation of section 471 of the Liquor Code and section 320 of the LOSGCA. [47 P.S. § 4-471; 10 P.S. § 320].

The third count of the citation charged that on February 27, 2008, and other times during the year, Licensee improperly used proceeds derived from small games of chance for unauthorized purposes in violation of section 471 of the Liquor Code and section 901 of the Department of Revenue Regulations. [47 P.S. §§ 4-471; 61 Pa. Code § 901].

The fourth count of the citation charged that Licensee violated section 471 of the Liquor Code and section 315(b) of the LOSGCA by offering and/or

awarding more than five thousand dollars (\$5,000.00) in cash or merchandise in any seven (7)-day period, during the periods December 1 through 7, 8 through 14, 15 through 21, 22 through 28 and 29 through 30, 2007, January 1 through 7, 8 through 14, 15 through 21, 22 through 28 and 29 through 30, 2008. [47 P.S. § 4-471; 10 P.S. § 315(b)].

The fifth count of the citation charged that Licensee sold alcoholic beverages to non-members on October 20, 2007, in violation of sections 401(b) and 406(a)(1) of the Liquor Code. [47 P.S. §§ 4-401(b), 4-406(a)(1)].

The sixth count of the citation charged that Licensee violated sections 5.71, 5.73 and 5.74 of the Liquor Control Board Regulations in that on February 27, 2008, and other occasions in the past year, Licensee failed to maintain records in conformity with Title 40 of the Pennsylvania Code. [40 Pa. Code §§ 5.71, 5.73, 5.74].

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. The Commonwealth Court 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 (Pa. Cmwlth. 1984).

The Board has reviewed the certified record, including the Notes of Testimony from the hearing held on December 10, 2008, as well as the ALJ's Adjudication and Order, with Licensee's contentions in mind and has concluded that the ALJ's ruling is without error and is supported by substantial evidence. Accordingly, we affirm.

Licensee raises five (5) issues on appeal. First, Licensee contends the ALJ erred in failing to recognize that the Pennsylvania State Police, Bureau of Liquor Enforcement ("Bureau") does not have authority to enforce the LOSGCA pursuant to 47 P.S. § 2-211. Second, Licensee contends that the ALJ failed to recognize that enforcement authority for the LOSGCA is not vested in the Bureau. Third, Licensee contends that the ALJ committed an error of law when he refused to recognize that Department of Revenue agents, when enforcing the LOSGCA, must have "reasonable cause" to search small games of chance records, which did not occur herein. Fourth, the ALJ committed an error of law when he failed to find that the "such other sufficient cause" language of section 471 of the Liquor Code does not give the Bureau authority

to enforce small games of chance. Finally, Licensee argues that the ALJ improperly applied the holding in Pennsylvania Liquor Control Board v. TLK, Inc., 544 A.2d 931 (Pa. 1988), in that TLK applies to an ALJ's authority to suspend a license, not the original enforcement authority of the Bureau¹.

In Issues 1, 2, 4 and 5, Licensee essentially argues that the Bureau does not have authority to conduct enforcement activities involving LOSGCA². The Board rejects this argument. By citing a licensee for its failure to comply with the LOSGCA, the Bureau is not seeking to enforce the LOSGCA; rather it is complying with the legislative mandate that it enforce the provisions of the Liquor Code. [47 P.S. § 2-211].

Section 471 of the Liquor Code states, in part, that the Bureau may issue a citation and order a licensee to appear before an administrative law judge “upon any other sufficient cause shown.” [47 P.S. § 4-471(a)]. This catch-all phrase was specifically included in the Liquor Code to provide the ample powers of enforcement needed to ensure the protection of the public welfare, health, peace and morals of the people of the Commonwealth. Such a broad

¹ All of Licensee's arguments pertain to violations involving the LOSGCA. As Counts 5 and 6 of the citation do not involve the LOSGCA, it is assumed that Licensee is not appealing the ALJ's adjudication and penalties for these counts.

² The Board notes that Licensee does not challenge the sufficiency of the evidence to establish the violations, only the authority of the Bureau to act.

provision is required because “it is almost impossible to anticipate all of the actions that may justify enforcement.” In Re Quaker City Development Co., 365 A.2d 683 (Pa. Cmwlth. 1976). Consequently, the Bureau has been assigned the task of monitoring all conduct reasonably related to the sale and use of alcoholic beverages, not just enforcing the laws directly related to the sales of liquor and malt or brewed beverages.

The courts have held that “other sufficient cause shown” includes a variety of conduct not expressly prohibited by the statute but related to the sale and use of alcoholic beverages. Examples of prohibited conduct include drug trafficking, prostitution, gambling and disorderly conduct. Pennsylvania Liquor Control Board v. T.L.K., 544 A.2d 931 (Pa. 1988) (drug trafficking); V.J.R. Bar Corp. v. Pennsylvania Liquor Control Board, 390 A.2d 163 (Pa. 1978) (gambling); Tahiti Bar, Inc. Liquor License Case, 150 A.2d 112 (1959) (prohibiting association between entertainers and patrons); In re Ciro’s Lounge, Inc., 358 A.2d 141 (Pa. Cmwlth. 1976) (noisy and disorderly conduct); Reiter Liquor License Case, 98 A.2d 465 (Pa. Super. 1953) (presence of prostitutes, lewd acts, obscene language, and noisy and disorderly conditions on premises). Each of these activities, when conducted in a licensed establishment, disrupts the orderly and peaceful sales and use of alcoholic beverages. Thus, because the

troublesome conduct occurs on licensed premises, the Bureau has the authority to take action.

When small games of chance are conducted in a licensed establishment, all laws governing their operation must be followed. The LOSGCA governs the operation of small games of chance. [10 P.S. 311 *et seq.*]. The penalties for failure to comply with the LOSGCA include summary and misdemeanor criminal charges, fines, and forfeiture of the license. [10 P.S. § 327]. When a licensee does not comply with the provisions of the LOSGCA, unlawful and criminal behavior occurs on licensed premises. Like drug trafficking and prostitution, unlawful small games of chance disrupt the orderly and peaceful sales and use of alcoholic beverages. Therefore, the Bureau has the authority to halt prohibited activity, and is required to do so, under the legislative mandate found in the Liquor Code³.

³ The Board recently addressed the issue of jurisdiction for enforcement of the LOSGCA in the case of Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Columbus Home Association, Citation No. 07-2746. In a written opinion and order dated April 2, 2008, the Board affirmed the decision of the ALJ that the Bureau is authorized to inspect LOSGCA records.

The Board's decision was subsequently appealed to the Dauphin County Court of Common Pleas at No. 2008 CV 4823 CV. In a Memorandum Opinion, Judge Turgeon affirmed the decisions of the ALJ and the Board and denied the appeal. This decision has precedential authority for other cases arising from organizations in Dauphin County such as this one.

Licensee argues that the actions of the Bureau constitute enforcement of the LOSGCA. This position is incorrect. The penalties imposed by the ALJ were those dictated by section 471 of the Liquor Code, not the penalties set forth in the LOSGCA [47 P.S. § 4-471; 10 P.S. § 327]. The Bureau was enforcing the Liquor Code and Board Regulations, not the LOSGCA.

Licensee does not dispute that there is sufficient substantial evidence to prove the violations set forth in the Citation. Therefore, upon a finding that the Bureau has the authority to conduct enforcement activities on licensed premises as set forth in the Liquor Code, including monitoring the operation of small games of chance, the first, second, fourth and fifth issues raised on appeal by Licensee, are dismissed.

The Board now turns its attention to the third issue of Licensee's appeal. Although it is not clear, it appears that Licensee is arguing that the Bureau must have a reasonable belief that a violation of the LOSGCA has occurred before it can inspect a licensee's records. Licensee bases this argument on its interpretation of section 901.28 of the LOSGCA Regulations. [61 Pa. Code § 901.28]. This section requires that a Revenue agent have a reasonable belief

An appeal of the common pleas decision was filed with the Commonwealth Court, No. 2377 C.D. 2008. On October 19, 2009, in an unreported memorandum decision, a three-judge panel held that the Bureau has the enforcement authority to investigate violations of the LOSGCA.

that a violation exists before it can conduct an inspection of licensee's records. [61 Pa. Code § 901.28(a)(2)]. The foregoing section specifically defines the inspection powers of a Revenue agent. However, the Bureau is proceeding under the authority it has under the Liquor Code, and that authority includes the right to completely inspect a licensed premises at any time the premises is open. [47 P.S. § 4-443(21); Commonwealth v. Runkle, 430 A.2d 676 (Pa. Super. 1981)]. Thus, the reasonable belief standard applies only to Revenue agents and does not apply to the Bureau. The Board, therefore, rejects the third argument raised by Licensee.

Based upon the foregoing, the decision of the ALJ is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee pay the fine of three thousand (\$3,000.00) dollars within twenty (20) days of the mailing date of this Order. Failure to do so will result in license suspension and/or revocation.

It is further hereby ordered that Licensee's Catering Club Liquor License No. CC-5376 be suspended for a period of ten (10) days, beginning at 7:00 a.m. on Monday, January 4, 2010, and ending at 7:00 a.m. on Thursday, January 14, 2010.

This case is hereby remanded to the ALJ to ensure compliance with this order.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated August 31, 2009.

Board Secretary