

Mailing Date: July 15, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-2205
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
HOME ASSOCIATION CHARLES	:	License No. CC-5257
NITTERHOUSE POST 1599 V.F.W.	:	
747 SOUTH FOURTH STREET	:	
CHAMBERSBURG, PA 17201-3632	:	
	:	

Counsel for Licensee: Patrick James Redding, Esquire
19 North Main Street
Chambersburg, PA 17201

Counsel for Bureau: Thomas M. Ballaron, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17201

OPINION

Home Association Charles Nitterhouse Post 1599 V.F.W. (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ imposed a penalty consisting of a fine of two thousand dollars (\$2,000.00) and a one hundred eighty-one (181)-day license

suspension. The ALJ noted in his Adjudication and Order that Licensee could reduce the length of the suspension to ninety (90) days if it ceased operations under its Small Games of Chance Permit for a period of ninety (90) days. In a letter dated April 27, 2009, which the ALJ treated as a request for reconsideration, Licensee declined the ALJ's offer of leniency and refused to stop raising revenue via its Small Games of Chance Permit; thus, by Order dated May 12, 2009, the ALJ denied the request for reconsideration. The instant appeal followed.¹

Licensee challenges the length of the suspension imposed by the ALJ. Licensee also alleges that the ALJ abused his discretion and committed an error of law when he disregarded a constitutional claim made by Licensee.

Pursuant to section 471 of the Liquor Code, an appeal must be based solely on the record before the ALJ. [47 P.S. § 4-471]. 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

¹ Licensee also filed an Application for Supersedeas. This application was unnecessary because Licensee was not charged with a violation that was subject to an enhanced penalty. The filing of the appeal acts as a supersedeas or stay of the ALJ's Order, without the need to file an Application for Supersedeas. [47 P.S. § 4-471(b)].

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).

In addressing this matter, the Pennsylvania Liquor Control Board (“Board”) has reviewed the certified record provided by the Office of the Administrative Law Judge (“OALJ”), including the ALJ’s Adjudication and Order dated April 17, 2009, and the Supplemental Order dated May 12, 2009, with Licensee’s contentions in mind, and has concluded that the ALJ correctly imposed a fine and suspension within the parameters allowed by statute. Furthermore, the ALJ did not improperly disregard a constitutional argument made by Licensee during the hearing. Accordingly, we affirm.

The record reveals that on February 26, 2009, the ALJ conducted an administrative hearing to address the violations set forth in Citation No. 08-2205. Count 1 of the citation alleged that Licensee violated section 471 of the Liquor Code and section 315(b) of the Local Option Small Games of Chance Act, when it offered and/or awarded more than five thousand dollars (\$5,000.00) in cash or merchandise during five (5) consecutive seven (7)-day periods during February and March of 2008. [47 P.S. § 4-471; 10 P.S. § 315(b)]. Count 2 of the citation alleged that Licensee failed to maintain complete and truthful records

covering the operation of the licensed business for a period of two (2) years immediately preceding March 19, 2008, concerning the Local Option Small Games of Chance Act, in violation of sections 471 and 493(12) of the Liquor Code, section 311 of the Local Option Small Games of Chance Act, and section 901 of the Department of Revenue Regulations. [47 P.S. §§ 4-471, 4-493(12); 10 P.S. § 311; 61 Pa. Code § 901]. A hearing was conducted and evidence presented, after which the ALJ sustained the citation on both counts. [Adjudication & Order, April 17, 2009]. The ALJ imposed an aggregate penalty of a fine of two thousand dollars (\$2,000.00) and a one hundred eighty-one (181)-day license suspension. The ALJ directed that the Licensee could reduce the length of the suspension to ninety (90) days if it ceased operations under its Small Games of Chance Permit for a period of ninety (90) days and notified him of such. [Adjudication & Order, April 17, 2009]. On April 27, 2009, Licensee filed a letter requesting reconsideration of the suspension. [Order, May 12, 2009]. Licensee indicated it was continuing to conduct small games of chance and the ALJ declined to reduce the suspension and affirmed the April 17th Order.² [Order, May 12, 2009].

In its Appeal, Licensee claims the ALJ abused his discretion and committed an error of law when he disregarded a constitutional claim made by

² Board records indicate the two thousand dollar (\$2,000.00) fine was paid in full on May 12, 2009.

Licensee. After careful review of the transcript, the Board is unable to determine what constitutional claim, if any, was raised. At various times throughout the hearing, Licensee refers to a constitutional argument but the argument is never specifically stated or clearly developed. [N.T. 5-13, 58-61]. In fact, on several occasions, counsel for Licensee refused to identify the basis for the constitutional challenge or the provision it was attacking even though the ALJ repeatedly asked Licensee's counsel to do so. [N.T. 9, Ln. 13; 11, Ln. 22; 58-61]. Licensee cannot now complain that the ALJ disregarded an argument that was intentionally withheld from consideration. Therefore, the Board rejects Licensee's claim that the ALJ improperly refused to consider its constitutional claim.³

Licensee's remaining appellate issue concerns the length of suspension imposed by the ALJ. Licensee argues that the one hundred eighty-one (181)-day suspension was excessively harsh. The imposition of penalties is the exclusive prerogative of the ALJ. The Board may not disturb penalties that are within the parameters set forth in section 471(b). Section 471(b) of the Liquor

³ Even if the argument had been fully articulated, the Board would be unable to address the assertions because an administrative agency has no jurisdiction to consider a challenge to the validity of the statutes or regulations that enable it. Feingold v. Pennsylvania State Board of Chiropractic, 130 Pa. Cmwlth. 602, 568 A.2d 1365 (1999); Smolow v. Pennsylvania Dept. of Revenue, 419 Pa. Cmwlth. 324, 547 A.2d 478 (1988). This may be why counsel for Licensee chose not to articulate the constitutional argument before the ALJ. (N.T. 7). We note, however, that duly enacted legislation carries with it a strong presumption of constitutionality that will not be overcome unless legislation clearly, palpably, and plainly violates the Constitution. Commonwealth v. Cotto, 708 A.2d 806 (Pa. Super. 1998).

Code specifically prescribes a penalty of license suspension or revocation or a fine of fifty dollars (\$50.00) to one thousand dollars (\$1,000.00), or both, for counts one and two. [47 P.S. § 4-471(b)]. The statute does not set an upper limit to the number of days a license can be suspended. Thus, the one hundred eighty-one (181)-day suspension is clearly permissible and well within the scope of section 471(b).

Licensee contends that the ALJ thought the penalty excessively harsh as evidenced by the provision that would allow the reduction of the suspension if Licensee ceased operations under its Small Games of Chance Permit for ninety (90) days. This argument lacks merit. The potential suspension reduction offered by the ALJ afforded Licensee the opportunity to prove that it understood the need to comply with regulations pertinent to the operation of small games of chance, something Licensee has been incapable of doing in 2007 and 2008. [Adjudication & Order, Prior Record]. That Licensee chose not to avail itself of this opportunity for leniency does not mean the ALJ's original suspension of one hundred eighty-one (181) days was excessively harsh.

In conclusion, for the reasons set forth above, the Board affirms the decision of the ALJ and the imposition of the one hundred eighty-one (181)-day license suspension.

ORDER

The decision of the ALJ in regard to Citation 08-2205 is affirmed.

The appeal of Licensee is denied.

The fine has been paid.

Licensee must adhere to all other conditions set forth in the ALJ's Order issued April 17, 2009.

The case is hereby remanded for imposition of the one hundred eighty-one (181)-day license suspension.

Board Secretary