

Mailing Date: July 22, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 08-2432
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

THE CHARLES J. GILLIAN AMVETS POST : License No. C-5437
172 HOME ASSN. :
3600 Fairfield Road :
P.O. Box 234 :
Fairfield, PA 17320-0234 :

Counsel for Licensee: William C. Kollas, Esquire
1104 Fernwood Avenue
Suite 104
Camp Hill, PA 17011

Counsel for Bureau: Thomas M. Ballaron, Esquire
(on appeal) PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17110

OPINION

The Charles J. Gillian Amvets Post 172 Home Assn. (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Daniel Flaherty (“ALJ”), wherein the ALJ sustained Citation No. 08-2432 and imposed a two

thousand two hundred fifty dollar (\$2,250.00) fine and a five (5) day suspension.

The first count of the citation charged that during the periods May 18 through May 24, June 8 through June 14, July 13 through July 19, and August 10 through August 16, 2008, Licensee, by its servants, agents or employees, violated sections 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)], by offering and/or awarding more than five thousand dollars (\$5,000.00) in cash or merchandise in any seven (7) day period.

The second count of the citation charged that on August 21, 2008 and divers occasions during the previous year, Licensee, by its servants, agents or employees, violated 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], by possessing or operating gambling devices or paraphernalia or permitted gambling or lotteries, pool selling and/or bookmaking on its licensed premises.

The third count of the citation charged that for a two (2)-year period preceding August 21, 2008, Licensee, by its servants, agents or employees, violated sections 471 and 493(12) of the Liquor Code [47 P.S. §§ 4-471 and 4-493(12)], section 311 of the Local 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 failed to maintain complete and truthful records covering the operation of the licensed business.

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/her discretion, or if his/her decision was not based upon substantial evidence. 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, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal, Licensee contends that the ALJ committed errors of law in finding that Licensee violated section 471 of the Liquor Code and further asserts error in that the ALJ failed to recognize other statutory law which would apply in this matter, including but not limited to the Statutory Construction Act. Licensee also contends that the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) lacks jurisdiction in this matter involving small games of chance under 47 P.S. § 2-211. Lastly, Licensee

contends the gambling sections of the Crimes Code [18 P.S. § 5512 and/or § 5513] were not violated.

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the notes of testimony from the hearing of March 11, 2009, and the ALJ's Adjudication and Order, with Licensee's contention in mind, and has concluded that the ALJ did not commit an error of law or abuse his discretion, and based his decision upon substantial evidence when he affirmed the citation. Accordingly, we affirm.

A review of the record reveals that, on August 14, 2008, a Bureau enforcement officer went to the licensed premises for purposes of conducting a routine inspection. (N.T. 8-9). During the visit, the officer discovered small games of chance being sold from behind the bar, as well as seven (7) games being sold from a wall dispensing unit. (N.T. 9). The officer also observed an envelope containing a "200 Club ticket." (N.T. 9). The tickets in the envelope were described as raffle tickets sold for twenty-five dollars (\$25.00) each, wherein, for the first twenty-four (24) weeks, small drawings are conducted, and, on the twenty-fifth (25th) week, a larger drawing takes place in which a single prize of one thousand dollars (\$1,000.00) is awarded, as well as other smaller prizes. (N.T. 9). The officer identified a 200 Club ticket taken during

the open inspection. (N.T. 9-10; Ex. C-3). Upon inspection of the ticket, the officer noted that the tickets did not have a stub or other detachable section, and the purchaser's name, complete address and telephone number were not listed on them. (N.T. 11). Further, there was no date and time of drawing or location of the raffle listed on the ticket, and no special raffle permit number was listed on the ticket. (N.T. 11). The price of the raffle ticket was also not listed on the ticket. (N.T. 12).

During the routine inspection, the officer also examined Licensee's small games of chance records. (N.T. 10-12). For winners who had received over one hundred dollars (\$100.00), Licensee was not including the addresses of the winners and did not consistently include the full name of the winners as required by Chapter 61.901 of the Pennsylvania Code. (N.T. 13, 28). It should be noted that of sixty-four (64) winners listed on Licensee's records, sixty-three (63) are listed as having been paid five hundred dollars (\$500.00) and one (1) winner is listed as having been paid two hundred and fifty dollars (\$250.00). (N.T. 14; Ex. C-5).

Prior to leaving the premises on August 14, 2008, the officer left two (2) requests for records with Mrs. Ott, Licensee's Board-approved manager and bartender on duty. (N.T. 14). The officer's request included Licensee's annual

records, operating week records, itemized records for game raffle drawings and prizes of over one hundred dollars (\$100.00) and records concerning use of proceeds and any special raffle permit it might have. (N.T. 15). The officer asked that the records be produced on August 21, 2008. (N.T. 15). On August 21, 2008, the officer returned to the licensed premises; however, she received no records with regard to the small games of chance contained in the wall unit. (N.T. 17). The officer received no records relative to the seven (7) games of chance on the wall unit with respect to gross receipts, expenses related to the conduct of the game, total costs of prizes paid out, or records showing how the proceeds for these games of chance were being used. (N.T. 17-18).

During both visits to the premises on August 14 and August 21, 2008, the officer did observe Licensee selling the 200 Club raffle tickets. (N.T. 16). The officer did not see a special raffle permit on either of his visits in August 2008. (N.T. 16). Mrs. Ott informed the officer that, in the past, Licensee had obtained a special raffle permit prior to the last week of the drawing. (N.T. 16).

The officer also discussed with Mrs. Ott another game that was sitting behind the bar called the “double club” or “club jar.” The game was a double seal layer card that the officer believed to be worth fifty dollars (\$50.00) on each side. Licensee was holding out four hundred dollars (\$400.00) from the

jar and, when the seals would match with the same number, Licensee paid out five hundred dollars (\$500.00) to the winners. (N.T. 18). The officer further discovered that the records regarding the payouts for the double club were not being kept correctly. (N.T. 19). The records failed to contain the names and addresses and were not complete for the winners. (N.T. 19; Ex. C-4).

Upon examination of the records for small games of chance payouts during seven (7) day operating weeks, the officer found that the following amounts were paid out by Licensee during the following seven (7) day periods:

May 18-24, 2008 - \$34,480.00
June 8-14, 2008 - \$41,915.00
July 13-19, 2008 - \$37,295.00
August 10-16, 2008 - \$32,340.00

(N.T. 20-24; Ex. C-6).

Kimberly L. Ott, general manager of Licensee, testified on behalf of Licensee. (N.T. 32). Ms. Ott admitted that Licensee was not accounting for certain wall unit gambling machines. (N.T. 36-37). Ms. Ott also admitted to the difficulties Licensee has with accounting for the gambling machines because there is more than one game per machine. (N.T. 36-37).

Steven A. Moritz, treasurer and financial officer for Licensee, also testified on its behalf. (N.T. 41-42). Mr. Moritz handles the raffles for Licensee.

(N.T. 43-45). Richard F. Abraham, outgoing president and chaplain of Licensee, testified on behalf of Licensee. (N.T. 47-48). Mr. Abraham and Ms. Ott each indicated that they thought they were filing the appropriate records/documents and accounting for the gambling activities, based on conversations that they allegedly had with the enforcement agents who had provided the forms. (N.T. 36, 48-49).

In the instant case, Licensee paid out prizes on small games of chance during four (4), seven (7)-day periods between May 18, 2008 and August 16, 2008 in amounts well in excess of the five thousand dollar (\$5,000.00) weekly limit set forth in section 327 of the LOSGCA. [10 P.S. § 327]. Licensee's own records establish such payouts to range from thirty-two thousand three hundred forty dollars (\$32,340.00) to forty-one thousand nine hundred fifteen dollars (\$41,915.00).

In response to Licensee's appeal, the Bureau argues that resolution of this case is governed 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), regarding Citation No. 07-2746. The Board agrees that the cited case makes it clear that the Bureau is empowered to cite a licensee for violations of gambling laws such

as those found in the Crimes Code and the LOSGCA, under section 411 of the Liquor Code. [47 P.S. § 4-471]. The Bureau has jurisdiction in matters involving the LOSGA since such would constitute “other sufficient cause shown” as set forth in section 471 of the Liquor Code, as acknowledged by the Commonwealth Court in Knights of Columbus and the Pennsylvania Supreme Court in Pennsylvania Liquor Control Bd. v. TLK, 544 A.2d 931 (Pa. 988). For “other sufficient cause” cases, the Bureau must prove by a preponderance of the evidence, in addition to the elements of the underlying offense, that the licensee knew or should have know about the activity on or about its licensed premises, and failed to take substantial affirmative steps to curb the activity. [See TLK, supra]. In the instant case, Licensee was previously cited under Citation No. 03-0929 for the same violation of section 327 of LOSGCA. Accordingly, Licensee should have known that payouts in excess of five thousand dollars (\$5,000.00) are not permitted.

In addition, Licensee clearly violated sections 5512 and/or 5513 of the Crimes Code [18 Pa. C.S. §§ 5512 and/or 5513]. The officer found Licensee was actively selling 200 Club tickets during the officer’s visits on August 14, 2008 and August 21, 2008 without a special raffle permit, which Licensee was required to have thirty (30) days prior to the sale of the tickets. By engaging in

the sale of the 200 Club tickets without the special raffle permit, Licensee acted in violation of section 321 of the LOSGCA. [10 P.S. § 321]. Section 5512 of the Crimes Code [18 Pa. C.S. § 5512] makes it unlawful for licensees to set up or maintain any unlawful lottery or numbers game. Thus, operating the 200 Club ticket scheme without a permit is a violation of the Crimes Code and is sufficient to sustain the second count of the citation.

The Board also finds substantial evidence to sustain the ALJ's decision as to count three (3) of the citation. By its own admission, Licensee did not maintain any records pertaining to the activity on the wall units dispensing the seven (7) small games of chance. Further, Licensee's records failed to include the addresses for winners of prizes in excess of one hundred dollars (\$100.00). While Licensee would like to have the Board believe that it merely forgot to include recordkeeping on the wall units, Licensee readily admits that this citation is not its first violation for failure to maintain complete and truthful records. As the ALJ noted in his Adjudication, Licensee was cited on two (2) prior occasions for failure to maintain complete and truthful records pursuant to Citation Nos. 03-0929 and 07-0962. A third and subsequent repeat offense leaves no room for doubt that this Licensee should have known to maintain

complete and truthful records as a result of the previous violations and their aftermath.

Section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] requires liquor licensees to maintain complete and accurate records covering the operation of the licensed business for a period of two (2) years.

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

Section 901.461 of the LOSGCA [61 Pa. Code § 901.461] requires that a licensee maintain records regarding small games of chance for a period of two (2) years.

Section 901.462 of the LOSGCA [61 Pa. Code § 901.462] requires that small games of chance records must include the following:

- (1) The gross receipts from the conduct of games of chance.
- (2) The full details of expenses related to the conduct of small games of chance.
- (3) The total cost of the prizes paid out for the small games of chance; and
- (4) The details of how the proceeds from the small games of chance were used or dispensed by the eligible organization.

Section 901.464 of LOSGCA [61 Pa. Code § 901.464] requires that

annual records for the operations of punchboards and pull tab games must include the following:

- (1) The name of the punchboard or pull tab deal.
- (2) The manufacturer's serial number on the punchboard or pull tab deal.
- (3) The date the game was placed in play.
- (4) The date the game was removed from play.
- (5) The total number of plays in each deal or punchboard.
- (6) The cost per play.
- (7) The cost to the eligible organization of the prizes paid, including cash and merchandise.
- (8) The cash value of all prizes; and
- (9) A list of winners' names and addresses per prizes in excess of one hundred dollars (\$100.00).

Finally, section 901.468 of LOSGCA [16 Pa. Code § 901.468] requires that records involving small games of chance be maintained for a minimum of two (2) years.

Given these various laws and the testimony and exhibits in this case, there is substantial evidence to establish that, for the period of two (2) years immediately preceding August 21, 2008, Licensee failed to maintain complete and truthful records in violation of sections 471 and 493(12) of the Liquor Code [47 P.S. §§ 4-471 and 4-493(12)], section 311 of the LOSGCA [10 P.S. § 311] and section 901 of the Department of Revenue Regulations [61 Pa. Code § 901].

For the reasons set forth above, the ALJ acted properly and was well within the parameters established by section 4-471 of the Liquor Code [47 P.S. § 4-471] in sustaining all three (3) counts of the citation and in the imposition of a fine and suspension.

ORDER

The decision of the ALJ is affirmed.

The appeal of the Licensee is dismissed.

The fine of two thousand two hundred fifty dollars (\$2,250.00) has been paid.

It is ordered that Licensee's Catering Club Liquor License No. C-5437 be suspended for a period of five (5) days, beginning at 7:00 a.m. on Monday, September 13, 2010 and ending at 7:00 a.m. on Saturday, September 18, 2010. Licensee is directed to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and printed with red and black ink) in a conspicuous place on the outside of the licensed premises, and to remove the license from the wall and place it in a secure location on the effective date of said suspension.

Licensee must adhere to all other conditions set forth in the ALJ's Order dated February 5, 2009. The case is hereby remanded to the ALJ to ensure compliance with this Order.

Board Secretary