

Mailing Date: AUG 4 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-2735
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-377216
v.	:	
	:	LID - 2177
HERBERT B. DALY	:	
EX-SERVICEMEN'S CLUB	:	
385 MAIN ST.	:	
PO BOX 176	:	
VINTONDALE, PA 15961	:	
	:	
CAMBRIA COUNTY	:	
LICENSE NO. C-4762	:	

BEFORE: JUDGE THAU
BUREAU COUNSEL: Emily L. Gustave, Esquire
LICENSEE: David A. Raho, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on November 21, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Herbert B. Daly Ex-Servicemen's Club (Licensee), License Number C-4762.

This citation¹ contains seven counts.²

The first count charges Licensee with a violation of Section 406(a)(1) of the Liquor Code [47 P.S. §4-406(a)(1)]. The charge is that on July 26, 2008, Licensee, by servants, agents or employes, sold alcoholic beverages to nonmembers.

1. Commonwealth Exhibit No. C-2, N.T. 7

2. The Bureau's various Motions to Withdraw Count Nos. 3, 4 and 5 were granted.

The second count charges Licensee with a violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 5503 of the Crimes Code [18 Pa. C.S. §5503]. The charge is that on August 9, 2008, Licensee, by servants, agents or employes, engaged in disorderly conduct.

The third count charges Licensee with a violation of Section 102 of the Liquor Code [47 P.S. §1-102]. The charge is that on April 9, 2008, club officers and trustees were not elected in accordance with the Liquor Code, in that officers and trustees of the parent lodge automatically become officers or trustees of the licensed club.

The fourth count charges Licensee with a violation of Section 5.81 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.81]. The charge is that on September 11, 2008, Licensee, by servants, agents or employes, failed to adhere to by-laws.

The fifth count charges Licensee with a violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)] and Section 5.52 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.52]. The charge is that on September 11, 2008, Licensee failed to maintain coil cleaning records.

The sixth count charges Licensee with a 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]. The charge is that on September 11, 2008, Licensee violated the Local Option Small Games of Chance Act, in that funds derived from the operation of games of chance were used for purposes other than those authorized by law.

The seventh count charges Licensee with violations 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)]. The charge is that during the periods December 16 through 22, 2007, March 9 through 15 and April 20 through 26, 2008, Licensee, by servants, agents or employes, offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven-day period.

An evidentiary hearing was conducted on July 8, 2009 at the Hampton Inn, 180 Charlotte Drive, Altoona, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on July 2, 2008 and completed it on October 5, 2008. (N.T. 15)

2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on October 31, 2008, as amended. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 7)

Count No. 1:

3. On July 26, 2008, two Bureau Enforcement Officers arrived at the premises at approximately 7:30 p.m., in an undercover capacity. They were questioned as to membership. One Officer indicated he was not a member of the organization or any affiliate while the other Officer was a member of an affiliated organization. The non-member Officer ordered beer from the barmaid. He placed money in front of his position at the bar. The barmaid took the money as payment for the beer served to the non-member Officer. (N.T. 16-21)

Count No. 2:

4. On August 9, 2008, Licensee's Steward and a customer became involved in a disagreement which escalated to physical conduct. The disagreement spilled out into the parking lot of the premises. Licensee's Steward was criminally charged for disorderly conduct and found guilty of same before a District Magistrate, after a hearing and based on his behavior during the disagreement.
(N.T. 66-74-80)

Count Nos. 6 and 7:

5. Licensee was using profits from its Small Games of Chance operation to pay utility bills. During first seven-day period from December 16, 2007 through December 22, 2007, Licensee awarded \$7,588.00 in prizes. During the second seven-day period from March 9, 2008 through March 15, 2008, Licensee awarded \$5,375.00 in prizes and during the third seven-day period from April 20, 2008 through April 26, 2008, Licensee awarded \$5,265.00 in prizes. (N.T. 7-11)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

Count No. 1:

2. **Sustained** as charged.

Count No. 2:

3. **Sustained** as charged.

Count No. 3:

4. **Withdrawn.**

Count No. 4:

5. **Withdrawn.**

Count No. 5:

6. **Withdrawn.**

Count No. 6:

7. **Sustained** as charged.

Count No. 7:

8. **Sustained** as charged.

DISCUSSION:

With respect to Count No. 1, I am constrained to find a violation based on strict liability.

With respect to Count No. 2, I am also constrained to find a violation based on the Magistrate's finding of guilty against the Steward for disorderly conduct, which conduct occurred in the parking lot of the premises. Furthermore, for purposes of *Pa. Liquor Control Bd. V. TLK, Inc.*, 544 A.2d 931 (Pa. 1988). I have consistently held that any conduct by a Manager/Steward is the legal equivalent to licensee conduct. Therefore, the holding regarding employe or patron conduct in *TLK*, supra does not apply.

PRIOR RECORD:

Licensee has been licensed since October 17, 1947, and has had twelve prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

Adjudication No. 91-2100. Fine \$350.00.

1. Improper admission of members.
2. By-laws did not meet requirements of the Liquor Code.
3. Failed to maintain records in conformity with Title 40 of the Pennsylvania Code.

Adjudication No. 91-2918. Fine \$1,150.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on a licensed premises (poker machine).
2. Sales to visibly intoxicated persons.
3. Sales to nonmembers.

Adjudication No. 92-1259. Fine \$2,000.00 and 21 days suspension.

Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on a licensed premises (machine).

Adjudication No. 93-1125. Fine \$200.00 and 3 days suspension.

Sales to nonmembers.

Adjudication No. 94-2604. Fine \$1,000.00 and 10 days suspension.

Sales to visibly intoxicated persons.
September 11, 1994.

Adjudication No. 96-0129. 1 day suspension.

1. Failed to require patrons to vacate the premises not later than one-half hour after the required time.
December 31, 1995.
2. Permitted patrons to possess and/or remove liquor or malt or brewed beverages after 3:30 A.M.
December 31, 1995.

Adjudication No. 96-0797. 3 days suspension.

Failed to require patrons to vacate the premises not later than one-half hour after the required time.
March 17, 1996.

Adjudication No. 96-1647. Fine \$450.00 and 2 days suspension.

Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on a licensed premises (machines).
May 31 and June 5, 1996.

Adjudication No. 97-1206. 5 days suspension.

1. Sales to a minor.
December 6, 1996.
2. Minor frequenting.
December 6, 1996.
3. Sales to nonmembers.
December 6, 1996.

Adjudication No. 99-0237. Fine \$300.00 and 3 days suspension.

1. Failed to maintain records in conformity with Title 40 of the Pennsylvania Code.
July 1, 1998 through November 30, 1998.
2. Failed to maintain complete and truthful records covering the operation of the licensed business for a period of 2 years concerning the Local Option Small Games of Chance Act.
January 20, 1999.

Adjudication No. 99-0585. Fine \$500.00 and 3 days suspension.

1. Permitted patrons to possess and/or remove alcoholic beverages after 3:30 A.M.
February 20 and March 20, 1999.
2. Sales between 3:00 A.M. and 7:00 A.M.
February 20, 1999.

Adjudication No. 00-0776. Fine \$200.00 and 3 days suspension.
Noisy and/or disorderly operation.

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 Count Nos. 1, 2, 6 and 7 in this case.

I find the facts supporting Count No. 1 to be so compelling and so close to the line, that I impose a \$50.00 fine. I do so similarly with respect to Count No. 2 because, based on what I heard, the Steward was doing nothing but what he was supposed to do and that is to attempt to remove an unruly customer.

Accordingly, I impose:

- Count No. 1 – \$50.00 fine.
- Count No. 2 – \$50.00 fine.
- Count No. 3 – Withdrawn.
- Count No. 4 – Withdrawn.
- Count No. 5 – Withdrawn.
- Count No. 6 – \$150.00 fine.
- Count No. 7 – \$150.00 fine.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$400.00 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.

Withdrawal of Count Nos. 3, 4 and 5

THEREFORE, IT IS FURTHER ORDERED THAT Count Nos. 3, 4 and 5 of Citation No. 08-2735, issued against Herbert B. Daly Ex-Servicemen's Club are WITHDRAWN.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 28TH day of July, 2009.



Felix Thau, A.L.J.

pm

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.

Detach Here and Return Stub with Payment

The fine must be paid by treasurer's check, cashier's check, certified check or money order. Personal Checks, which include business-use personal checks, are not acceptable. Please make your guaranteed 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. 08-2735
HERBERT B. DALY
EX-SERVICEMEN'S CLUB