Mailing Date: NOV 24 2009 Appeal

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

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| PENNSYLVANIA STATE<br>POLICE, BUREAU OF<br>LIQUOR CONTROL ENFORCEMENT | : | Citation No. 08-2891<br><br>Incident No. W09-377847 |
| v. | : | LID - 1618 |
| NORTH END WANDERERS<br>ATHLETIC ASSN<br>308 WOODLAWN AVE<br>BETHLEHEM PA 18018-2628<br><br>NORTHAMPTON COUNTY<br>LICENSE NO. C-3432 | : | |

JUDGE SHENKLE
BLCE COUNSEL: Roy Harkavy, Esq.
LICENSEE COUNSEL: Charles R. Osinski, Esq.

**ADJUDICATION**

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on December 15, 2008. There are two counts in the citation.

The first count alleges that Licensee violated §407(a) of the Liquor Code, 47 P.S. §4407(a), on August 2, 2008, by selling malt or brewed beverages for consumption off premises.

The second count alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5513 of the Crimes Code, 18 Pa. C.S. §5513, on September 25 and October 1, 2008, by possessing or operating gambling devices or paraphernalia or permitting gambling or lotteries, poolselling and/or bookmaking on the licensed premises.

On July 23, 2009, the Bureau's motion to withdraw the first count was granted.

A hearing was held on July 24, 2009, in Plymouth Meeting, Pennsylvania.

FINDINGS OF FACT:

1. On November 24, 2008, the Bureau mailed a letter to the licensed premises which stated that it had received information of alleged violations, specified the allegations in words similar to those used in the citation, and stated that the investigation was assigned on July 15 and completed on November 4, 2008 (N.T. 4, Exhibit C-1).

2. The Bureau issued this citation on December 15, 2008, and a copy of it was mailed to Licensee on that date (N.T. 4-5, Exhibit C-2).

3. On August 2, 2008, a liquor enforcement officer entered the licensed premises at about 10:50 p.m., using a key he had obtained from another officer. There were about twenty patrons, attended by one bartender. There were five video game machines. During this visit the officer saw patrons in the area of the machines call to get the attention of the bartender, who would go to such patrons, speak with them, and then leave the area, return, and hand something to them (N.T. 7-9).

4. On August 20, 2008, the same officer entered the premises again in the same way. He sat at the bar and saw the same video game machines as before. A patron playing one of the machines called to the bartender, who went to where the patron was and spoke with him. The bartender then tapped buttons on the machine, left the area, and returned. The officer later saw the patron leaving the area, counting cash (N.T. 9-10).

5. On September 18, 2008, the same officer entered the premises again in the same way. No one was playing the video game machines during that visit (N.T. 10).

6. On September 25, 2008, the same officer entered the premises again in the same way. He played a video poker machine by inserting five dollars. Each credit was worth 25¢. He played a few credits down, and then deposited twenty dollars into the machine. His credits then stood at 77. He called to get the attention of one of the bartenders, who looked at the screen and said "I can't pay out on that until it equals." The bartender walked away. The other bartender explained to the officer that he could "only be paid on 80 or 60 or divide by fours." The officer played the points down to 60 and received a $15 payout (N.T. 10-12).

7. On October 1, 2008, the same officer entered the premises again in the same way. He played a video poker machine by inserting five dollars. He played for a while and then deposited twenty dollars into the machine. His credits then stood at 90. He played the points down to 80 and received a $20 payout. The bartender cleared the points accumulated on the machine by pressing a combination of buttons (N.T. 12-13).

8. Other liquor enforcement officers then entered the premises and openly interviewed the bartender about illegal payouts. The bartender denied the accusation. He showed the officers the safe where the money from the machines was kept. In this safe there was also money in envelopes marked with the first names of bartenders. All of the money, a total of $6,512, was seized, along with the five video game machines (N.T. 15-17, 32).

9. The liquor enforcement officer who entered the premises using the key he had obtained from another officer believed that the other officer had obtained it from a complaining witness, a person whose identity the Bureau wished to keep confidential. Nothing of what the

officer saw inside the licensed premises could have been observed outside of it. The officer had no information of exigent circumstances (in the sense that a person was in danger or evidence was about to be destroyed) which might have justified his entry into the premises (N.T. 24-27).

10. Four of the seized machines contained no money. The fifth machine, the one the officer played on October 1, 2008, contained only the $25 the officer had deposited (N.T. 34).

11. The complaining witness told the officer to whom she gave the key that she was "tired of seeing people lose all their money in the poker machines." The officer had only the witness' own statement that she was a member of this club; he did not verify it (N.T. 45-46).

12. Licensee's membership application process requires sponsorship by two active members, followed by investigation. When a member is approved, he or she receives a key to the premises and a membership card. Club policy prohibits members from giving or lending their keys to others. Violation of this rule results in expulsion, including one case a few months prior to the hearing in which a member loaned his key to his wife. She was asked to leave the premises because she was not a member; her husband lost his membership (N.T. 55-56).

13. Members must use their keys on two doors in order to gain access to the club; the same key operates both locks. This is the only method of entry. Persons knocking on the door are not allowed in. The general public is not allowed in. If a person has entered the premises using his or her key, people in the club assume that he or she is a member (N.T. 57-58).

14. On May 14, 2008, when the officer who obtained the key was present in the club conducting an open inspection, he was behind the bar and had the opportunity to help himself from a box of new keys in that area to be distributed to members in exchange for their old ones. Keys are changed annually. For a 30-day period at the time the change is made, old keys and new ones will both open the locks. The officer who obtained the key denied that he stole it from the box behind the bar (N.T. 47, 58-59).

CONCLUSIONS OF LAW:

The Bureau complied with all applicable requirements of the law concerning notice to Licensee of the results of its investigation and the filing of a citation within the time allowed.

The Act of July 5, 2004, P.L. 572, No. 71, 4 Pa. C.S. §1101 *et. seq.*, known as the Pennsylvania Race Horse Development and Gaming Act (RHDGA) did not affect the state's gambling regulatory scheme in a way that precludes enforcement of the charge alleged in the second count of this citation by officers of the Bureau.

The lending of a key which allowed access to the licensed premises by a member of the club to an officer of the Bureau for the purpose of facilitating an undercover investigation of the premises for alleged gambling violations was a violation of the club's rules concerning membership duties, but this did not render the evidence obtained as a result inadmissible as the fruit of an unreasonable search under the 4th Amendment to the United States Constitution.

Article 1, §8 of the Pennsylvania Constitution does not require a different result in this case than the result required by the 4th Amendment to the United States Constitution.

Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5513 of the Crimes Code, 18 Pa. C.S. §5513, on September 25 and October 1, 2008, by possessing and operating gambling devices and permitting gambling on the licensed premises.

DISCUSSION:

Any future reader of the transcript of testimony taken in this case should understand that there are many errors in the identification of the speaker. Words which I remember distinctly having said myself are misattributed to counsel, and vice versa. In general, this defect does not interfere with an understanding of what the witnesses said.

Licensee's counsel argued that the evidence in this case should be suppressed on two bases: in the first place, because it was obtained in violation of the club's rights under the 4th Amendment to the United States Constitution and Article 1, §8 of the Pennsylvania Constitution. In the second place, counsel argued that the Act of July 5, 2004, P.L. 572, No. 71, 4 Pa. C.S. §1101 *et. seq.*, known as the Pennsylvania Race Horse Development and Gaming Act (RHDGA) affected the state's gambling regulatory scheme in a way that precludes the charge alleged in the second count of this citation.

I will treat the second argument first because it is easier to dismiss.

Counsel concedes that the Liquor Code gives Bureau officers specific authority to arrest on view, except in private homes, without warrant, any person the officer, while in performance of his assigned duties, observes to be in violation of 18 Pa. C.S. §5513 (relating to gambling devices, gambling, etc.), among other things.

Counsel argues, however, that the RHDGA specifically repealed 18 Pa. C.S. §5513. Not quite. 4 Pa. C.S. §1903 says only that "[t]he provisions of 18 Pa. C.S. §5513(a) are repealed insofar as they are inconsistent with this part." There is nothing in RHDGA which requires the conclusion that 18 Pa. C.S. §5513(a) has been repealed in its entirety.

Counsel goes on to contend that the RHDGA created a uniform, state-wide regulatory scheme concerning slot machines (whether in licensed casinos or not) and that since the BLCE was not the beneficiary of grants authorized under 4 Pa. C.S. §1408(c), it was not intended or allowed to enforce the anti-slot machine provisions of the RHDGA after its effective date, July 5, 2004. Not so. The Bureau's investigatory authority flows from the Liquor Code, and has done so since 1987. Legislation enacted in 2004 did not change this.

Finally under this portion of his presentation, Mr. Osinski has included a grab-bag of arguments based on the hypocrisy of the state's prohibition of the use of slot machines in private clubs, given the larger amount of legal gambling from which the state itself receives a share. These

observations are political in nature, and do not rise to the level of anything an administrative law judge may properly consider in deciding a citation case.

Mr. Osinski's argument that the evidence should be suppressed because Licensee's rights were infringed by the Bureau's investigation in this case is more substantial.

Mr. Osinski analogized the present case to the case of a person entrusted with a key to enter one's home – such as a cleaning person – who gives it to another without authorization. The giving of the key is a breach of the original trust, and the subsequent entry was not authorized by the homeowner. In fact, the subsequent entry is breaking and entering, even though a key was used, because it violated the club's reasonable expectation of privacy. In this view it does not matter whether the key came from a faithless member or was stolen by an overzealous enforcement officer. In either case the use of the key was a violation of the club's security procedures.

I note at first that there is controlling precedent for the principle that evidence obtained by illegal search and seizure must be excluded from consideration in the hearing of an alleged Liquor Code violation. *Leonardziak Liquor License Case*, 233 A.2d 606 (Pa. Super., 1967).

Mr. Osinski acknowledged that beverage alcohol is a heavily regulated industry, and that liquor enforcement officers have a right to identify themselves at the door of a licensed premises, whereupon they are entitled to enter and search the premises completely. He argues, however, that this right does not include the right to enter licensed premises surreptitiously, in violation of club rules prohibiting members from lending their keys to anyone.

It is true that *Commonwealth v. Black*, 530 A.2d 423 (Pa. Super. 1987) stands for the proposition that private clubs have a reasonable expectation of privacy, and are therefore entitled to the constitutional protections Mr. Osinski asserts.

*Black* was an appeal from a judgment of sentence for possession of controlled substances. The appellant was the manager of a licensed club who was using part of the premises as his personal office. A local police officer entered the club without a warrant one day at 4:00 a.m. and saw what he believed to be small amounts of controlled substances in plain view on a table. The officer left the premises and returned at 5:00 a.m. with a valid search warrant. He seized the contraband and arrested the appellant.

The court held that the premises was an area in which the appellant had a reasonable expectation of privacy, since it was clear that to gain entrance to the club, members had to enter a vestibule, ring a buzzer, and then display proof of membership to a doorman. Although the Liquor Code authorized PLCB agents to conduct warrantless searches under some circumstances, this power did not extend to local police. Since the police officer who saw the contraband was therefore not in a place were he was entitled to be, the search was illegal and the evidence should have been suppressed.

The rule in *Black* is not so broad as counsel argues, because it turns upon the identity of the officer who saw the contraband in the first place. The court's opinion fairly requires the conclusion that if the officer had been an officer of the BLCE, empowered to search licensed premises without warrant, the result would have been different.

In *Loggia Liberia Italia No. 941*, Citation No. 90-1861 (1992), the Board considered an appeal by a licensee from a suspension imposed by Administrative Law Judge Howard B. Elbling. The licensee was cited for sales of alcoholic beverages to nonmembers without prior arrangement. An officer of the BLCE waited outside the club premises until he saw that a doorman was not present to check his membership. When this occurred he entered the premises "trailing behind" a member who used a card key. This was in violation of notices posted on the premises. Once inside, the officer purchased beer, although he was never a member of the club and there were no catered events scheduled.

The Board affirmed the suspension, since warrantless searches by Bureau officers are allowed under the Liquor Code. The opinion states that "this Board will not second-guess the investigatory tactics employed absent some method or act which would offend one's sense of fairness, especially since there is no constitutional right to sell alcohol."

I must say that if this is the standard to apply, my own sense of fairness is not offended by the Bureau's exploitation of the willingness of a member of the club to violate her duty not to share her key with anyone.

*Commonwealth v. Ginter*, 432 A.2d 1024 (Pa. Super. 1981), was an appeal by the Commonwealth from a trial court order suppressing evidence seized from a nonlicensed private club. Although the club took steps to prevent nonmembers from entering, one of the PLCB agents talked a member into bringing her in as his guest. Other agents took advantage of a distraction to enter behind the back of a doorman. The trial court suppressed the evidence because of the extensive security measures the club had employed to exclude nonmembers.

On appeal Superior Court reversed, based on an analogy to cases in which agents misrepresent their identity and purpose, such as the witness who testified to admissions of jury tampering made by Jimmy Hoffa, who did not realize that he was talking to an undercover agent. The court quoted the United States Supreme Court, which has never "expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. U.S.*, 385 U.S. 293, 302 (1966).

Counsel also drew my attention to the decision of Administrative Law Judge Felix Thau in *Molly's Pub, Inc.,* Citation No. 06-2551. An officer of the BLCE, while walking alongside the licensed premises at 3:13 a.m. on a Sunday, heard laughter and the faint sound of music coming from the second floor of the premises. He stepped over a chain barring entrance to a staircase to an outside deck attached to the premises. Attached to the chain was a "No Trespassing" sign. From the deck, he saw through the edges of curtains that there were people inside. He pushed aside the curtains behind a door which was ajar and identified himself to the people inside, who were drinking beer.

The licensee claimed this was criminal trespass, but Judge Thau sustained the citation, since the officer had heard the laughter and music at a place where he was lawfully entitled to be, and this gave him reason to believe there were patrons in the premises. Judge Thau found that the laughter and music were like items in "plain view" and that exigent circumstances justified the entry without a warrant.

Rounding out the list of cases said to be relevant to this issue, my attention was called to *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), *Lawrence v. City of Philadelphia, et. al.*, 676 F. Supp. 644 (USDC, ED of PA, 1988), and *Commonwealth v. Russo*, 864 A.2d 1279 (Pa. Cmwlth. Ct., 2005).

In *Colonnade*, an agent of the Alcohol and Tobacco Tax Division of the Internal Revenue Service attended a party at the petitioner's premises and observed possible federal excise tax law violations. When agents later visited the premises, another party was in progress and alcohol was being served. Agents inspected the cellar and asked the manager to open the locked liquor storeroom. The petitioner's president asked if the agents had a warrant, and they responded that they did not need one. He refused to unlock the room. Agents broke the lock and seized liquor which they suspected of being refilled.

The law provides that an owner who refuses to admit an officer of the Treasury Department to a building or place is liable to forfeit $500 for each refusal. The question was whether this sanction was the exclusive remedy, absent a warrant to break and enter. Justice Douglas wrote the Opinion of the Court, and noted in conclusion:

> We deal here with the liquor industry long subject to close supervision and inspection. As respects that industry, and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector. – 397 U.S. at 77.

The analogy in the liquor law context must be to 47 P.S. §4-493(21), which makes it unlawful for a licensee to refuse Bureau officers the right to inspect completely the entire licensed premises at any time during which it is open for business, or when patrons, guests or members are in the portion of the premises where alcohol is sold. This is not, however, an exclusive remedy, and a charge under this section does not prevent the Bureau from preferring other charges as well.

*Lawrence* was a civil rights action against city police officers who saw individuals leaving a licensed club after hours. They attempted to enter the premises, but were refused and left. The following morning the officers again sought entry to the premises; they did not have a search warrant, and were not accompanied by agents of the PLCB. Plaintiff refused them entry and was arrested. A search of the club produced no evidence of violations; charges against the plaintiff were later dropped. The court granted plaintiffs' motion for summary judgment, because local police were not authorized to conduct warrantless searches of licensed premises under 47 P.S. §2-209. Only PLCB enforcement officers (now the BLCE) had that authority.

In *Russo*, Commonwealth Court held that game agents' seizure of evidence of bearbaiting at a place on the defendant's land, posted with "No Trespassing" signs, where it could not be seen from the road, but was at least ninety feet from the defendant's hunting camp, did not violate the defendant's rights under Article 1, §8 of the Pennsylvania Constitution. It was already clear that this seizure was not prohibited by the 4th Amendment to the United States Constitution, because

there is no reasonable expectation of privacy in an open field, not part of the curtilage of a home. The court noted that game officers were permitted to "[g]o upon any land or water outside of buildings, posted or otherwise, in the performance of the officer's duty." – 864 A.2d at 1284. This right is similar to the right possessed by officers of the Bureau.

In thinking about these cases and doing additional research I have concluded that the principles of law governing *Illinois v. Rodriguez*, 497 U.S. 177 (U.S. 1990) are most analogous to the facts of this case. Police in that case responded to the home of a woman in Chicago whose daughter showed signs of a severe beating. The daughter said that the respondent had beaten her.

She told police where the respondent was, referring to the place as "our apartment." Police drove with her to the apartment, which she unlocked with her own key. The police entered and saw the respondent asleep, along with drugs and paraphernalia in plain view.

Rodriguez' suppression motion established that the beaten woman had vacated the apartment several weeks earlier, and had no authority to consent to the police entry. The trial court sustained the motion, suppressing the evidence. The Appellate Court of Illinois affirmed and the Illinois Supreme Court denied the State's petition for leave to appeal. The United States Supreme Court granted certiorari and reversed. The relevant test was summarized this way:

> As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief'" that the consenting party had authority over the premises? *Terry* v. *Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid. – 497 U.S. at 188-189.

In the present case the weight of the evidence persuades me that a member of the club who was "tired of seeing people lose all their money in the poker machines" complained of this fact to the BLCE. Reasonable officers of the Bureau could conclude that this member had the same right of access to the premises as any other member, and that she could therefore provide them with her key so as to allow them to conduct an undercover investigation.

The fact that the disaffected member was prohibited by the club's rules from sharing that key with others does not turn the BLCE's exploitation of the opportunity she provided into a search in violation of the club's 4th Amendment rights.

The club is in the position of Jimmy Hoffa, who entrusted incriminating information to an undercover agent. If the agent had been the person he pretended to be the information would have gone no further.

The Fourth Amendment also does not protect a wrongdoer's misplaced belief that a person whom he allows to frequent the place where the wrongdoing is done will not betray him.

As to counsel's argument that Article 1, §8 of the Pennsylvania Constitution provides additional privacy protection to Licensee, I have seen no court decision which would justify that conclusion, based on the facts of this case.

PRIOR RECORD:

Licensee has been licensed since February 19, 1938, and has had prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, as follows:

Citation No. 88-0216. $600.00 fine and 7 days suspension.
1. Sales to nonmembers.
2. Gambling.

Citation No. 88-1671. $450.00 fine and 3 days suspension.
1. Gambling.

Citation No. 89-1459. $1,000.00 fine and 4 days suspension.
1. Gambling.

Citation No. 03-0252. $300.00 fine.
1. Gambling. January 27, 2003.

Citation No. 04-1541. $850.00 fine.
1. Sales to nonmembers. May 26, 2004.
2. Failed to keep records on the licensed premises. June 23, 2004.
3. Gambling. May 26 and June 28, 2004.

Citation No. 07-0531. $350.00 fine.
1. Failed to maintain complete and truthful records covering the operation of small games of chance for a period of two years. February 7, 2007.
2. Funds derived from the operation of games of chance were used for purposes other than those authorized by law.

Citation No. 08-1321. $250.00 fine.
1. Funds derived from the operation of games of chance were used for purposes other than those authorized by law. May 14, 2008.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the $50.00 to $1,000.00 range, or both, for violations of the type found in this case.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, North End Wanderers Athletic Assn., License No. C-3432, shall pay a fine of seven hundred fifty dollars ($750.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

Dated this 18TH day of November, 2009.

David L. Shenkle, J.

jb

**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

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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. 08-2891
North End Wanderers Athletic Assn.