

Mailing Date: March 17, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-2891
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
NORTH END WANDERERS	:	
ATHLETIC ASSOCIATION	:	License No. C-3432
308 Woodlawn Avenue	:	
Bethlehem, PA 18018-2628	:	

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**OPINION**

North End Wanderers Athletic Association (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ sustained the citation and imposed a fine in the amount of seven hundred fifty dollars (\$750.00).

The citation charged Licensee with (1) violating section 407(a) of the Liquor Code in that on August 2, 2008, Licensee, by its servants, agents or employees, sold malt or brewed beverages for consumption off premises; and (2) violating section 471 of the Liquor Code and section 5513 of the Crimes Code in that on September 25 and October 1, 2008, Licensee, by its servants, agents or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises.<sup>1</sup> [47 P.S. §§ 4-407(a), 4-471; 18 Pa. C.S.A. § 5513].

Pursuant to section 471 of the Liquor Code, the appeal in this case 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/her discretion, or if his/her 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).

Licensee raises three (3) issues in its appeal. First, Licensee claims that the ALJ committed an error of law by failing to find that the mode of entry into

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<sup>1</sup> The Bureau's motion to withdraw Count 1 was granted prior to the hearing. [N.T. 61].

the club utilized by an officer of the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) violated Licensee’s rights under the Fourth Amendment of the United States Constitution and Article 1, Sec. 8 of the Pennsylvania Constitution. Second, Licensee argues that there was not substantial evidence to support the ALJ’s conclusion that the Bureau officer believed a club member consented to the Bureau’s use of her key to enter Licensee’s premises. Third, Licensee contends that the ALJ committed an error of law by failing to find that the Pennsylvania Race Horse Development and Gaming Act divests the Bureau of all authority to enforce the prohibition against illegal slot machines.

The Pennsylvania Liquor Control Board (“Board”) has reviewed the record, including the ALJ’s Adjudication and Order, with Licensee’s contentions in mind, and has concluded that the ALJ did not commit an error of law when he refused to suppress evidence collected by the Bureau. Furthermore, the ALJ’s decision is supported by substantial evidence.

The record reveals the following facts relevant to Count 2 of the citation. After a complaint was filed, the Bureau began an investigation on July 5, 2008, into unlawful gambling activities on the licensed premises. [N.T. 42]. In order to further the investigation, the Complainant provided Officer Stegman with a

key to the club. [N.T. 42]. Because Officer Stegman had conducted previous investigations at the licensed premises and was known to club officers, the case was assigned to Officer Pirozzi so he could proceed with an undercover investigation. [N.T. 42].

Officer Pirozzi visited the licensed premises on August 2, August 20, September 18, September 25, and October 1, 2009. [N.T. 8-12]. Each visit was made during Licensee's regular hours of operation. [N.T. 8-12]. On each visit he entered the club using the key provided by the Complainant. [N.T. 8, 9, 10, 11, 12]. Officer Pirozzi was never asked to present proof that he was actually a member of the club. [N.T. 30]. In fact, two (2) of Licensee's witnesses testified that they assumed he was a member because he had a key. [N.T. 56, 61].

On his first visit, Officer Pirozzi observed the following. The licensed premises contained five (5) video game machines. [N.T. 8]. When a player was finished playing, he waved the bartender over and a discussion ensued. [N.T. 9]. The bartender, identified as Glenn Zechman, left the area and returned to hand an unidentified object to the patron. [N.T. 8, 9]. During his second visit, Officer Pirozzi made similar observations regarding the activity involving video game machines. On this date, the bartender was Jimmy. After being called over by a patron, Jimmy pushed some buttons on the video game machine and left the area. [N.T. 10]. The bartender returned and handed something to the

patron. [N.T. 10]. Officer Pirozzi watched as the patron left the area counting cash. [N.T. 10]. On September 18, 2009, officer Pirozzi paid a third visit to Licensee, but no patrons were playing the video game machines and he left without obtaining any new information. [N.T. 10].

Officer Pirozzi continued his undercover investigation on September 25, 2009. On that date, the officer sat down at one of the video game machines and determined it was a video poker machine. [N.T. 11]. He put five dollars (\$5.00) into the machine and received twenty (20) credits valued at twenty-five cents (\$.25) each. [N.T. 11]. He played some credits then deposited additional funds into the machine. [N.T. 11]. When he called over the bartender, Glenn Zechman, he was informed that the bar couldn't "pay out on that until it equals." Officer Pirozzi then called over another bartender named Gary. Gary advised that "you can only be paid out 80 or 60 or divide by fours." [N.T. 11]. Officer Pirozzi continued to play until the points were down to sixty (60) and then Gary paid him fifteen dollars (\$15.00). [N.T. 11, 12]. Gary, the bartender, retrieved the money from a tan-colored money box secured in a safe in a side room. [N.T. 12].

Officer Pirozzi returned to the licensed premises for a final visit on October 1, 2009. [N.T. 12]. He put a total of twenty-five dollars into the machine and played the credits down to eighty (80). [N.T. 13]. The bartender

looked at the screen, left, and returned with twenty dollars (\$20.00) for Officer Pirozzi. [N.T. 13]. The bartender, Glen Zechman, took the money from what appeared to be the same tan-colored box located in the safe in a separate area of the establishment as noted during Officer Pirozzi's previous visit. [N.T. 13]. Officer Pirozzi then called for additional Bureau officers. [N.T. 13]. An inspection was conducted and the money and video poker machines were seized. [N.T. 13-15]. Officer Pirozzi testified that, based on his experience and training, it was his opinion that the video poker machines constituted video gambling devices *per se*.<sup>2</sup>

In its first issue, Licensee challenges the Bureau's the legality of the Bureau's method of gaining entry to the licensed premises. The North End Wanderers Athletic Association is a private social club that holds Club Liquor License No. C-3432, for premises located at 308 Woodlawn Ave., Bethlehem, Pennsylvania. As a Board licensee, North End Wanderers Athletic Association has agreed to submit to the enforcement authority of the Bureau. [47 Pa.C.S.A. §§ 2-211, 4-493(21)]. This includes investigations and inspections conducted during regular business hours. [47 Pa.C.S.A. § 4-493(21)].

Licensee argues that the Bureau violated its right to be free from unreasonable search and seizure when it used a key to enter the licensed

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<sup>2</sup> Licensee does not challenge the ALJ's conclusion that the video poker machines are gambling devices *per se*.

premises. Licensee contends that it sufficiently protected its right to privacy by limiting access to the club to only those people with keys. Keys are only assigned to members, therefore, only members are permitted access to the club.

It is a long-standing principle that liquor enforcement officers have the authority to conduct warrantless searches of premises licensed to sell alcohol. In Commonwealth v. Runkle, the Superior Court considered whether enforcement officers possessed the authority to conduct a warrantless search of a private social club licensed by the Board. Commonwealth v. Runkle, 430 A.2d 676 (Pa. Super. 1981). The facts in Runkle are very similar to those in the instant case. The Board<sup>3</sup> received an anonymous complaint that unlawful gambling was occurring at a licensed social club. An enforcement officer entered the club and conducted a full inspection of the premises. The officer did not act in an undercover capacity, but displayed his credentials and was admitted to the club. The court held that Board enforcement officers were authorized by statute to conduct warrantless searches, therefore, there was no violation of Licensee's Fourth Amendment rights. Id.

In Commonwealth v. Ginter, the court went a step farther and considered whether liquor enforcement officers could use trickery and

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<sup>3</sup> Runkle was decided before the creation of the Bureau.

deception to gain entry to a private social club licensed by the Board in order to investigate unlawful activities. Commonwealth v. Ginter, 432 A.2d 1024 (Pa. Super. 1981). In Ginter, liquor enforcement officers gained entry to a social club through the use of subterfuge. A female officer entered the club by pretending to be the guest of a member. The male officer gained access to the club by joining a group of members as they were buzzed into the club's first entrance. When the doorman, who was stationed on the second floor was busy, the male officer snuck into the club. At no time were the officers asked for identification before they were served alcoholic beverages. In holding that there was no violation of the club's expectation of privacy, the court stressed that stealth and deception are necessary tools of law enforcement. Id. at 1026. Without such weapons, there would be no way to stop criminal activity that occurred behind closed doors.

Applying the foregoing case law to the facts in the instant case, the Board concludes that there was no violation of Licensee's expectation of privacy.<sup>4</sup> Deception and trickery may be used to gain entry to a private social club. Furthermore, entry with a key provided by a club member is no different

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<sup>4</sup> Both of the cases relied upon in the instant decision address warrantless entry in the context of the Fourth Amendment of the United States Constitution. As Licensee does not argue that Art. 1, Sec. 8 of the Pennsylvania Constitution provides additional protections, these cases are dispositive on the issue.

than sneaking in as the member's guest. The only difference is that the member was not physically present to use the key. As there was no violation of the club's expectation of privacy, the ALJ properly denied the request to suppress evidence collected by Officer Pirozzi.<sup>5</sup>

The Board will next address Licensee's third appellate claim in which Licensee argues that the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act"), 4 Pa.C.S.A. § 1101 *et seq.*, removed the Bureau's authority to investigate illegal gambling conducted with slot machines.<sup>6</sup> The Gaming Act authorizes limited gaming in the form of slot machines at specific locations. [*Id.*]. Chapter 15 contains provisions that address the administration and enforcement of the Gaming Act. [4 Pa.C.S.A. § 1501 *et seq.*]. Section 1517(c) sets forth the powers and duties of the Pennsylvania State Police ("PSP") when enforcing the laws as they pertain to the use of slot machines as authorized under the Gaming Act. [4 Pa.C.S.A. § 1517(c)]. It is important to note that this section does not state that PSP is the sole agency vested with authority to conduct investigations involving all slot machines, regardless of location. PSP's enforcement authority is limited to slot machines in use

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<sup>5</sup> Licensee argues in its second claim that there was not substantial evidence to prove that owner of the key consented to the use of the key. The ALJ relied on the doctrine of apparent authority when he sustained the citation. As the Board is affirming the decision, but on different grounds, the issue of consent to use the key is not relevant to the Board's determination.

<sup>6</sup> Licensee did not cite to any specific sections of the Gaming Act or authority in case law to support its position in its brief.

pursuant to the Gaming Act. The current case involves video poker machines that are not subject to the Gaming Act's jurisdiction, as they are located in a private social club. Thus, the Gaming Act's enforcement provisions are not applicable.

Furthermore, section 1517(d.1) states that “[n]othing contained in subsection (d), Criminal Action, shall be construed to limit the existing regulatory or investigative authority of an agency or the Commonwealth whose functions relate to persons or matters within the scope of this part.” [4 Pa.C.S.A. § 1517(d.1)]. Clearly, the Legislature never intended to limit the pre-existing regulatory authority of the Bureau as it pertains to the enforcement of the Liquor Code. Based on the foregoing, the Board concludes that the ALJ properly dismissed Licensee's claim that the Gaming Act divested the Bureau of its authority to investigate illegal gambling when it involved slot machines.

**ORDER**

The decision of the ALJ is affirmed.

The appeal of the Licensee is denied.

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Board Secretary