

Mailing Date: January 12, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-0939
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
THE EAGLES CLUB, INC.	:	License No. CC-2554
16-22 EAST MAIN STREET	:	
WAYNESBORO, PA 17268-1875	:	LID 3311

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OPINION

The Eagles Club, Inc. (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), mailed October 12, 2010, wherein the ALJ sustained Citation No. 09-0939 (“the Citation”) issued by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”),

and imposed a fine of three thousand fifty dollars (\$3,050.00) and suspended Licensee's catering club liquor license for a period of ninety (90) days.¹

The first count of the Citation charged Licensee with violating section 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)], in that during the periods between December 28, 2008 through January 3, 2009, January 11 through January 17, 2009, and February 8 through February 14, 2009, Licensee, by its servants, agents or employees, offered and/or awarded more than five thousand dollars (\$5,000.00) in cash or merchandise in a seven (7)-day period.

The second count of the Citation charged Licensee with violating section 471 of the Liquor Code and sections 5512 and/or 5513 of the Crimes Code [18 Pa. C.S. §§ 5512-5513], in that 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, on February 26, 2009, and various other occasions in the past year.

The third count of the Citation charged Licensee with violating section 102 of the Liquor Code [47 P.S. § 1-102], in that on February 26, 2009, and

¹ Licensee filed a Motion for Reconsideration of the ALJ's Adjudication and Order, which the ALJ denied by Opinion and Order mailed October 29, 2010.

various other occasions in the past year, Licensee, by its servants, agents, or employees, failed to fulfill its charter purposes.

The fourth count of the Citation charged Licensee with violating section 471 of the Liquor Code, section 314 of the LOSGCA [10 P.S. § 314], and section 901.701 of the Department of Revenue's Regulations [61 Pa. Code § 901.701], in that on February 26, 2009, and various other occasions in the past year, Licensee used funds derived from the operation of games of chance for purposes other than those authorized by law.

In its appeal, Licensee argues that: (1) the ALJ committed an error of law in sustaining the fourth count of the Citation; and (2) the ALJ abused his discretion in imposing a three thousand fifty dollar (\$3,050.00) fine and a ninety (90)-day suspension.²

The Pennsylvania Liquor Control Board ("Board") has reviewed the certified record, including the ALJ's Adjudication and Order, Licensee's Appeal, Licensee's Memorandum of Law in Support of its Appeal, the Notes of Testimony and Exhibits from the hearing held on August 10, 2010, as well as the Bureau's response, and has concluded that the ALJ did not commit an error of law or abuse his discretion.

² Although Licensee asserts that the ALJ abused his discretion with regard to the penalties imposed for the first, second, and third counts of the Citation, Licensee does not contend that the ALJ committed an error of law in sustaining those counts.

There is no dispute between the parties as to the material facts underlying the Citation. Licensee held a Small Games of Chance permit, and sold small games of chance during the 2008 and 2009 calendar years. An investigation conducted by the Bureau revealed that for the seven (7)-day period from December 28, 2008 through January 3, 2009, Licensee awarded prizes in the amount of ninety-two thousand two hundred forty dollars (\$92,240.00); for the seven (7)-day period from January 11, 2009 through January 17, 2009, Licensee awarded prizes in the amount of one hundred fifteen thousand four hundred twenty dollars (\$115,420.00); and for the seven (7)-day period from February 8, 2009 through February 14, 2009, Licensee awarded prizes in the amount of one hundred ninety thousand dollars (\$190,000.00). (N.T. 10). On at least one (1) day during the investigation, Licensee maintained two (2) pull-tab games which Licensee altered. (N.T. 12). A review of Licensee's charter revealed that its annual revenue was not permitted to exceed ten thousand dollars (\$10,000.00). (N.T. 15). Licensee stipulated that it diverted proceeds from the small games of chance operation to fund its day-to-day business operations. (N.T. 17-20).

By Adjudication and Order mailed October 12, 2010, the ALJ sustained all four (4) counts set forth in the Citation and imposed a fine of three thousand

fifty dollars (\$3,050.00) and a suspension of ninety (90) days. In issuing these penalties, the ALJ offered the following explanation:

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, 3 and 4 in this case.

At the conclusion of the hearing, counsel and I engaged in a colloquy as to what an appropriate penalty might be. I offered Licensee the possibility of voluntarily and temporarily halting any Small Games of Chance operations. Were Licensee to do so, I would consider that as mitigation. Licensee did not notify me that Licensee agreed to take this mitigating approach. (N.T. 41-47).

I further recognize this is Licensee's fourth violation related to exceeding the statutory \$5,000.00 weekly payout limit. Furthermore, the payouts recorded in this Adjudication are exceedingly large. Licensee leaves me no choice but to impose a severe sanction.

Considering this shocking pattern of violations, I cannot adopt the Bureau's recommended penalties,^[3] as I find them to be entirely inadequate.

I impose:

Count No. 1 - \$1,000.00 fine and a 90 day suspension.

Count No. 2 - \$1,000.00 fine.

Count No. 3 - \$50.00 fine.

Count No. 4 - \$1,000.00 fine.

(ALJ Adjudication at 5-6).

³ The Bureau recommended the following penalties: with regard to the first count, a one thousand dollar (\$1,000.00) fine and a fifteen (15)-day suspension; with regard to the second count, a one thousand dollar (\$1,000.00) fine; with regard to the third count, a fifty dollar (\$50.00) fine; and with regard to the fourth count, a five hundred dollar (\$500.00) fine.

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 discretion, or if his 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 first contends that the ALJ committed an error of law in sustaining count four of the Citation. Specifically, Licensee contends that it did not violate section 314 of the LOSGCA [10 P.S. § 314] and/or section 901.701(b) of the Department of Revenue’s Regulations [61 Pa. Code § 901.701(b)] because its use of net proceeds from the small games of chance sales to cover its operating costs constituted a “public interest purpose.”

Section 314 of the LOSGCA requires that “[a]ll proceeds of games of chance shall be used exclusively for public interest purposes or for the purchase of games of chance permitted by this act.” [10 P.S. § 314]. Similarly, section 901.701(b) of the Department of Revenue’s Regulations provides that

“[a] licensed eligible organization shall use games of chance proceeds exclusively for public interest purposes or for the purchase of games of chance permitted by this act” [61 Pa. Code § 901.701(b)]. Section 313 of the LOSGCA defines “public interest purposes” as:

One or more of the following:

- (1) Benefiting persons by enhancing their opportunity for religious or education advancement, by relieving or protecting them from disease, suffering or distress, by contributing to their physical, emotional or social well-being, by assisting them in establishing themselves in life as worthy and useful citizens or by increasing their comprehension of and devotion to the principles upon which this nation was founded.
- (2) Initiating, performing or fostering worthy public works or enabling or furthering the erection or maintenance of public structures.
- (3) Lessening the burdens borne by government or voluntarily supporting, augmenting or supplementing services which government would normally render to the people.
- (4) Improving, expanding, maintaining or repairing real property owned or leased by an eligible organization and used for purposes specified in paragraphs (1), (2) and (3).

The term does not include the erection or acquisition of any real property, unless the property will be used exclusively for one or more of the purposes specified in this definition.

[10 P.S. § 313].

Licensee points to the Statutory Construction Act, which defines “person” to include corporations, partnerships and associations, as well as

natural persons, and provides that such definition applies “unless the context clearly indicates otherwise.” [1 Pa. C.S. § 1991]. Licensee urges that its members qualify as persons whose social well-being was enhanced by the internal use of the small games of chance proceeds and, therefore, concludes that it did not violate the LOSGCA or the Department of Revenue’s Regulations.

In response, the Bureau argues that resolution of this issue is governed by the Board’s decision in Pennsylvania State Police, Bureau of Liquor Control Enforcement v. American Legion Home Association of Annville, Citation Nos. 05-2078 and 06-0213, November 15, 2007, affirmed on appeal by the Court of Common Pleas of Lebanon County on March 3, 2009. As it did in Annville, the Bureau sets forth compelling arguments in support of interpreting “public interest purposes,” as used in the LOSGCA, to exclude financing a club’s own operations. First, under the mandate of section 1921(a) of the Statutory Construction Act [1 Pa. C.S. § 1921(a)], each provision of a statute must be considered in light of the legislative intent. The General Assembly specifically stated in section 312 of the LOSGCA that the playing of small games of chance for the purpose of raising funds by certain nonprofit associations, for the promotion of charitable or civic purposes, is in the public interest. [10 P.S. §

312]. The Supreme Court has defined “charitable” as a gift for general public use. American Society for Testing and Materials v. Board of Revision of Taxes, 423 Pa. 530, 225 A.2d 557 (1967). In addition, it may generally be presumed that the General Assembly intends to favor the public interest against any private interest and that it does not intend a result that is absurd or unreasonable. [1 Pa. C.S. §§ 1922(1), (5)]. It is within this context that section 313 of the LOSGCA [10 P.S. § 313] must be read. The definition of “public interest purposes” contained therein is replete with references to helping, protecting, and benefiting the public, rather than the essentially private cause of the holder of the small games of chance permit.

The Board finds that the Bureau’s interpretation of section 313 of the LOSGCA and, by extension, section 901.701(b) of the Department of Revenue’s Regulations [61 Pa. Code § 901.701(b)] is the proper one. The Board agrees that Licensee’s use of the proceeds from its small games of chance to cover its operating costs violated the LOSGCA and is, thus, “other sufficient cause” under section 471 of the Liquor Code [47 P.S. § 4-471].

Turning now to Licensee’s abuse of discretion contention, Licensee points to the disparity between the penalties imposed by the ALJ and the penalties recommended by the Bureau. The exercise of judicial discretion

requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. The Pennsylvania Supreme Court defined an abuse of discretion as “not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 602 A.2d 1300, 1305 (1992).

In this case, there is no evidence in the record to suggest that the ALJ’s conclusion was the result of misapplication of the law, prejudice or bias, or that it was manifestly unreasonable. The penalty relative to each of the four (4) counts fell within the statutory guidelines under section 471 of the Liquor Code. [47 P.S. § 4-471]. The ALJ was under no obligation to follow the recommended penalties put forth by the Bureau, or to schedule the license suspension around any major holidays. Furthermore, the penalty was reasonable in light of the severity of the violations.

For the foregoing reasons, the Adjudication and Order of the ALJ sustaining the Citation and imposing a fine of three thousand fifty dollars (\$3,050.00) and a ninety (90)-day suspension is affirmed in all respects.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of three thousand fifty dollars (\$3,050.00) has been paid in full.

The case is hereby remanded for imposition of the ninety (90)-day suspension in accordance with this Opinion.

Board Secretary