

Mailing Date: DEC 21 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1360
LIQUOR CONTROL ENFORCEMENT	:	Citation No. 09-1675
	:	
v.	:	Incident No. W02-392449
	:	Incident No. W02-395169
GERMAN AMERICAN FEDERATION	:	
OF LACKAWANNA CO.	:	LID - 1670
13 WALDORF LANE	:	
SCRANTON, PA 18505	:	As Consolidated Under
	:	Citation No. 09-1360
	:	
LACKAWANNA COUNTY	:	
LICENSE NO. CC-3565	:	

BEFORE: JUDGE THAU
BUREAU COUNSEL: Craig A. Strong, Esquire
LICENSEE: John J. Brazil, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of two citations that were issued by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against German American Federation of Lackawanna Co. (Licensee), License Number CC-3565.

Citation No. 09-1360

This citation¹ was issued on June 17, 2009 and contains three counts.

The first count charges Licensee with violations of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)] and Sections 5.71 and 5.73 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.71 and §5.73]. The charge is that during the period September 1, 2008 through April 30, 2009, Licensee, by servants, agents or employes, failed to maintain records in conformity with the provisions of the Liquor Code and Title 40 of the Pennsylvania Code.

1. Commonwealth Exhibit No. C-2, 09-1360, N.T. 7.

The second count charges Licensee with a violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that Licensee, by servants, agents or employes, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding April 30, 2009.

The third count charges Licensee with violations of Section 492(8) of the Liquor Code [47 P.S. §4-492(8)]. The charge is that on December 19, 2008, January 14, 29, February 12, 18, 25, March 6, 12, 25, April 2 and 8, 2009, Licensee, by servants, agents or employes, transported malt or brewed beverages without a license.

Citation No. 09-1675

The citation² was issued on July 17, 2009 and charges Licensee with violations of Sections 431(b) and 441(e) of the Liquor Code [47 P.S. §4-431(b) and §441(e)]. The charge is that on January 15, February 3, 18 and March 31, 2009, Licensee, by servants, agents or employes, purchased malt or brewed beverages from a primary importing distributor whose geographical area assigned by the manufacturers of said products does not include its premises.

An evidentiary hearing was conducted on November 5, 2009 at the Scranton State Office Building, PUC Hearing Room 318, 100 Lackawanna Avenue, Scranton, 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 June 3, 2009 and completed it on June 16, 2009. (N.T. 7)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on May 28, 2009. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, 09-1360, N.T. 6)

2. Commonwealth Exhibit No. C-2, 09-1675 as Consolidated Under Citation No. 09-1360, N.T. 96.

Citation No. 09-1360

Count Nos. 1 and 2:

3. A Bureau Enforcement Officer conducted an administrative inspection of Licensee's records on April 30, 2009. The Officer found income records which showed beer and liquor sales were recorded in single line entries as opposed to columnar form. (N.T. 10-11)

4. During the summer, Licensee promoted an outdoor event. The Officer noted the accounting for food and beer was rounded off, i.e. the cents columns had no figures. (N.T. 13-14)

5. The Officer was provided with cash register detail tapes for April of 2009. After recording the totals and the detail tape in Licensee's records, Licensee discards the detail tapes. (N.T. 13-14)

6. Licensee's Treasurer has a Bachelors degree in accounting and a Masters degree in taxation. (N.T. 67-69)

7. Licensee's accounting system is kept electronically by use of a software program. Licensee maintains five accounts. Once the necessary information is input, the program can arrange the information for any interval such as monthly, weekly or daily. Because of the flexibility of the software, Licensee is able to arrange its accounting information in virtually any format requested. Licensee can do pie charts or graphs. Licensee maintains a separate account for dues which are posted weekly. Once a month, Licensee's records are reconciled in order to ensure accuracy. (N.T. 91-93). (Licensee's Exhibit Nos. L-1, L-2, L-3 and L-4, (N.T. 53; 93)

Count No. 3:

8. On the dates charged, Licensee transported beer from an Importing Distributor to the licensed premises without a permit. (N.T. 17-19)

Citation No. 09-1675

9. Licensee purchased beer from an Importing Distributor whose geographical area assigned by the manufacturer of that beer did not include the licensed premises. (N.T. 97-98)

CONCLUSIONS OF LAW:

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

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Count No. 1:

2. The Bureau has **failed** to prove that Licensee, by servants, agents or employes, failed to maintain records in conformity with the provisions of the Liquor Code and Title 40 of the Pennsylvania Code, during the period September 1, 2008 through April 30, 2009.

Count No. 2:

3. The Bureau has **failed** to prove that Licensee, by servants, agents or employes, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding April 30, 2009.

Count No. 3:

4. **Sustained** as charged.

Citation No. 09-1675

Count No. 1:

5. **Sustained** as charged, as Consolidated under Citation No. 09-1360.

DISCUSSION:

The Two Citations Arise Out of One Investigation

Based on my reasoning in *Case Beer & Soda Outlet, Inc.*, 2 Sel.Op. ALJ 124, I find the two citations arise out of one investigation. I do so because the same Officer's investigative work forms the bases for both citations. Moreover, the two citations include overlapping dates. Finally, I was provided with no rational explanation supporting a finding that the two citations are based on separate investigative activity.

Record Keeping

Direct record keeping Liquor Code violations are based on Liquor Code Section 493(12) [47 P.S. §4-493(12)] and regulations promulgated in Title 40 Pa. Code. For this matter, the pertinent regulations are 40 Pa. Code §5.71 and §5.73.³

The array of delineated records licensees must maintain as required by statute or regulation, whether direct or derivative, although rather lengthy, may very well be just the tip of the iceberg when compared to the total number of records a licensee produces. Every piece of paper, every keystroke entry into a computer which documents a licensee's business, is a record.

When we discuss record keeping beyond that specifically required by law, we are in uncharted territory; indeed applying the rule of statutory construction which tells us that the expression of one is the exclusion of the other, one may conclude records not listed in law are not required.

We must not lose sight of the purpose of record keeping which is to create an audit trail which the government may use to verify compliance with law. Our laws also require records be kept in a certain fashion so that there is a level of ease and normalcy when the government conducts an audit.

When we apply these requirements mechanically, in minute detail, we are merely racking up points for failures to dot every "i" and cross every "t"; we lose sight of the greater picture as we delve into the imperfections of every pixel. We may even get to the point where we impose obligations where none exist.

3. It is interesting to note the Bureau also charges licensees with derivative record keeping violations, such as those adopted by the Department of Revenue regarding Small Games of Chance, pursuant to Liquor Code Section 471 [47 P.S. §4-471], related to other sufficient cause. I do not recall ever seeing a record keeping charge alleged for deficiencies in other records such as those required by the various taxing authorities.

By way of example, I was told licensees are required to keep certain records on a daily basis (N.T. 45). I have no idea where this rule comes from. The regulations herein referenced provide for nothing more than monthly reconciliations.

When Licensee produced a sampling of its records at the hearing, the Bureau argued the records were not in columnar form. In the strictest sense of the word, that is true. The records were arranged in a linear format, i.e. horizontally rather than vertically. However, if we rotate the document 90 degrees, the information is now arranged in columns rather than lines. Bottom line, the distinction is one of meaningless difference.

The citation was partly brought because Licensee did not maintain its detail tapes for two years, despite the fact that there is no specific duty to do so. A detail tape is, of course, Licensee's record of each transaction entered into a cash register, including totals for a fixed interval of time, arranged in whatever format a licensee inputs the data. That information is then transferred to more permanent records. I cannot conclude licensees are required to keep detail tapes for two years absent clear and specific statutory or regulatory language.

Another source of Bureau complaint, which is the underlying concern in this case, relates to Licensee's practice of rounding off pennies when preparing the accounting for the several outdoor events. Rounding off, the Bureau claims, is a sign of intentional inaccuracy which supports the assertion that club officials are draining the organization of funds as reported to the Bureau by the complainant.

To conclude that rounding off is an indication of misappropriation funds assigns an outrageous level of credence to an unverified complaint. Most of the hyperbolic metaphors that come to mind barely describe this remarkable stretch in thinking. If the real issue is misappropriation of funds, that charge should have been alleged based on the supposed inaccurate record keeping, which than would have constituted circumstantial evidence, albeit insufficient to prove the case.

But for the fact I perceived a need to explain my reading of the law as it pertains to the record keeping issues in this case, the entire Discussion could have taken but one paragraph, which is the following one.

Subsection (d) of Section 5.73, Title 40 Pa. Code, allows for electronic record keeping "in lieu of hard copy financial records required by subsection (a)-(c)." Compliance with subsection (d) replaces the duty to maintain records as required by subsections (a)-(c). Licensee has established its records comply with subsection (d).

PRIOR RECORD:

Licensee has been licensed since August 1, 1938, and has had two prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, (Commonwealth Exhibit No. C-3, N.T. 66):

Adjudication No. 87-3665. Fine \$200.00 and 3 days suspension.
Obtained liquor from sources other than Pennsylvania
State Stores.

Adjudication No. 04-1958. Fine \$700.00.

1. Failed to adhere to by-laws.
January 1 through September 9, 2004.
2. Possessed or operated gambling devices or
permitted gambling on your licensed premises
(machine).
August 22, 2004.
3. Funds derived from the operation of games of
chance were used for purposes other than those
authorized by law.
January 1 through September 9, 2004.

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. 3 and 4, as consolidated, in this case.

I impose:

Citation No. 09-1360

Count No. 1 - Dismissed.
Count No. 2 - Dismissed.
Count No. 3 - \$100.00 fine.

Citation No. 09-1675

Count No. 1 - \$100.00 fine.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$200.00 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.

Dismissal of Count Nos. 1 and 2

IT IS FURTHER ORDERED that Count Nos. 1 and 2 of Citation No. 09-1360, as consolidated, issued against German American Federation of Lackawanna Co., are hereby dismissed.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 9TH day of December, 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 cashier's check, certified check or money order. **Personal and business checks, are not acceptable unless bank certified.** 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. 09-1360, As Consolidated
GERMAN AMERICAN FEDERATION
OF LACKAWANNA CO.