

Mailing Date: OCT 22 2010

[Appeal](#)

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

| | | |
|-----------------------------|---|-------------------------|
| PENNSYLVANIA STATE | : | |
| POLICE, BUREAU OF | : | Citation No. 09-2152 |
| LIQUOR CONTROL ENFORCEMENT | : | |
| | : | Incident No. W03-395249 |
| | : | |
| v. | : | LID - 43534 |
| | : | |
| HUME MCNEAL BYERS | : | |
| AMVETS POST 224 HOME | : | |
| ASSOCIATION | : | |
| 750 N. FIFTH AVE. | : | |
| CHAMBERSBURG, PA 17201-1275 | : | |
| | : | |
| FRANKLIN COUNTY | : | |
| LICENSE NO. CC-6195 | : | |

BEFORE: JUDGE THAU
BUREAU COUNSEL: John H. Pietrzak, Esquire
LICENSEE: Carol A. Redding, Esquire
Patrick Redding, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on September 17, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Hume McNeal Byers Amvets Post 224 Home Association (Licensee), License Number CC-6195.

This citation¹ contains four counts.

The first count charges Licensee with a violation of Sections 471 and 493(12) of the Liquor Code [47 P.S. §4-471 and §4-493(12)], Section 311 of the Local Option Small Games of Chance Act [10 P.S. §311] and Section 901 of the Department of Revenue Regulations [61 Pa. Code §901]. The charge is that Licensee, by servants, agents or employees, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding July 7, 2009, concerning the Local Option Small Games of Chance Act.

1. Commonwealth Exhibit No. C-2, N.T. 11.

The second 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 February 8 through 14, March 15 through 21, April 19 through 25, May 24 through 30 and June 14 through 20, 2009, Licensee, by servants, agents or employes, offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven-day period.

The third count charges Licensee with violations of Section 471 of the Liquor Code [47 P.S. §4-471], Section 314 of the Local Option Small Games of Chance Act [10 P.S. §314] and Section 901 of the Department of Revenue Regulations [61 Pa. Code §901]. The charge is that on February 17, 2008 through March 21, 2009, 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 fourth count charges Licensee with violations of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)]. The charge is that Licensee, by servants, agents or employes, falsified records covering the operation of the licensed business between July 1, 2008 through July 31, 2009.

An evidentiary hearing was conducted on September 23, 2010 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, 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 4, 2009 and completed it on August 5, 2009. (N.T. 14)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on September 2, 2009. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 11)

Count Nos. 1, 2 and 3:

3. On July 31, 2009, a Bureau Enforcement Officer conducted an administrative inspection of Licensee's records for the period July 1, 2008 through July 31, 2009. The Officer reviewed those records in the presence of Licensee's President, Mr. N.; Treasurer, Mr. S.; Manager, Ms. C. (N.T. 47-50)
4. Mr. S. stated Licensee had been accounting for some of the Small Games of Chance income as liquor and beer sales. Mr. S. further explained the practice began in July 2008 and was designed so that Licensee would remain under the \$5,000.00 maximum payout per week. Mr. S. indicated that he did not quite understand the procedure but was aware it was taking place as he was the Treasurer and saw the accounting. Mr. S. explained when Licensee neared the \$5,000.00 payout limit, any future games during that seven-day interval were recorded as beer and liquor sales. (N.T. 62-64)
5. The Officer asked Mr. S. if anybody within the licensed organization could explain the exact procedure. Mr. S. told the Officer Mr. R., a bartender, who happened to be present that morning, would be able to explain the process to the Officer. Mr. S. gave the Officer permission to speak to Mr. R. When the Officer did so, he advised Mr. R. as to what information he gleaned from Mr. S. Mr. R. admitted he was involved with ringing Small Games of Chance income into the cash register as beer and liquor receipts. The practice began as indicated by Mr. S. and continued until approximately February or March of 2009, at which time Mr. R. was told to stop. (N.T. 64-69)
6. After talking to Mr. R., the Officer again spoke to Mr. N. and Mr. S. Mr. S. confirmed the practice ended sometime in March 2009. Licensee decided it was going to show accurate Small Games of Chance records and let the "chips fall where they may." (N.T. 71-73)
7. The Officer then inquired as to whether Licensee was diverting income from Small Games of Chance to the organization's operational costs. Both Mr. N. and Mr. S. acknowledged that proceeds from the Small Games of Chance were being used for operational expenses. (N.T. 72-73)

CONCLUSIONS OF LAW:

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

Count Nos. 1 and 3:

2. **Sustained** as to sometime in the month of February, 2008 through sometime in March, 2009.

Count No. 2:

3. The Bureau **failed** to prove that during the periods February 8 through 14, March 15 through 21, April 19 through 25, May 24 through 30 and June 14 through 20, 2009, Licensee, by servants, agents or employees, offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven-day period.

Count No. 4:

4. As Count No. 4 is a restatement of Count No. 1, I dismiss the charge.

DISCUSSION:

Were it not for the vicarious admissions,² I would be hard pressed to sustain the charges. But, for the admissions, the Bureau's case would have rested upon what amounts to a forensic accounting analysis of Licensee's records. The Bureau's witness, the investigating Officer, while certainly competent within his realm of expertise, does not have the requisite training or education to qualify as such an expert. Consequently, I can only accept the Officer's testimony about his records review and inferences he drew therefrom as motivation to question Licensee's officers.

I recognize the soundness of Licensee's argument, that is logically inconsistent to claim records are false while, at the same time, base a charge on those supposedly false records.³ If the records are untrustworthy for one purpose, absent some rational explanation, they must be untrustworthy for all purposes. That reasoning is what drove me to enter no findings with respect to Count No. 2, thus requiring a dismissal.

2. See Ohlbaum on the Pennsylvania Rules of Evidence Section 803(25), et. seq.

3. Bureau counsel did not explain and I am at a loss to understand why the charges target differing periods of time.

I dismiss Count No. 4, because it is nothing more than a more precise description of what is embodied in Count No. 1. Count No. 4 is a specification, if you will, as to how Licensee has broken the law, as described in Count No. 1.

Because Licensee accounted for Small Games of Chance income in the liquor and beer sales category, it necessarily follows that those diverted funds can never be traced. Consequently, the use of those funds for other than charitable purposes is palpable even without an admission to that effect. In fact, Mr. S. admitted on the witness stand that Licensee could not survive without Small Games of Chance income (N.T. 168).

PRIOR RECORD:

Licensee has been licensed since January 1, 1999, and has had three prior violations (Commonwealth Exhibit No. C-9):

Adjudication No. 04-0082. Fine \$450.00.

1. Failed to maintain complete and truthful records covering the operation of small games of chance for a period of two years. December 17, 2003.
2. Awarded an individual prize exceeding the maximum cash value of \$500.00 for any single chance without a special permit. December 8, 2003.
3. Offered and/or awarded more than \$5,000.00 in cash or merchandise in any 7-day period. December 7 through 13, 2003.

Adjudication No. 07-2561. Fine \$1,750.00 and 15 days suspension.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling on the licensed premises (raffles and tickets). August 15 and 30, 2007.
2. Offered and/or awarded more than \$5,000.00 in cash or merchandise in any 7-day period. July 29 through August 25, 2007.
3. Improper admission of members. June 4, 2007.

Adjudication No. 08-1403. Fine \$1,050.00 and 30 days suspension.

1. Funds derived from the operation of games of chance were used for purposes other than those authorized by law.

September 1, 2007 through April 16, 2008.

2. Offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven-day period.

December 30, 2007 through January 5, 2008, January 6 Through 12, January 13 through 19, January 20 through 26, January 27 through February 2, February 3 through 9 and February 17 through 23, 2008.

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 and 3 in this case.

I am very disconcerted with Licensees deliberate violation of law. In “cooking the books,” Licensee’s officers and employes have likely subjected themselves to criminal sanctions. Certainly, the prosecuting authority ought to be notified of Licensee’s violations.

I impose:

- Count No. 1 – \$1,000.00 fine and 120 days suspension.
- Count No. 2 – Dismissed.
- Count No. 3 – \$1,000.00 fine.
- Count No. 4 – Dismissed.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of \$2,000.00 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.

Imposition of Suspension

IT IS FURTHER ORDERED that the Catering Club Liquor license (including all permits) of Hume McNeal Byers Amvets Post 224 Home Association, License No. CC-6195, be suspended for a period of one hundred twenty (120) days, **BEGINNING** at 7:00 a.m., on Monday, January 3, 2011, and **ENDING** at 7:00 a.m., on Tuesday, May 3, 2011.

Licensee is directed, on Monday, January 3, 2011, at 7:00 a.m., to place a placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised, if replacement placards are needed for any reason, they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized, on Tuesday, May 3, 2011, at 7:00 a.m., to remove the placard of suspension and return its license to its original wall location.

Dismissal of Count Nos. 2 and 4

IT IS FURTHER ORDERED that Count Nos. 2 and 4 in Citation No. 09-2152, issued against Hume McNeal Byers Amvets Post 224 Home Association, are DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 21ST day of October, 2010.



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, Pennsylvania 17110-9661

Citation No. 09-2152
HUME MCNEAL BYERS
AMVETS POST 224 HOME ASSOCIATION