

Mailing Date: January 12, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-0654
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
PROGRESS FIRE CO.	:	License No. CC-5356
HOME ASSN.	:	
28 Short Street	:	LID 2468
Harrisburg, PA 17109-3730	:	

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**OPINION**

Progress Fire Co. Home Assn. (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), mailed October 12, 2010, wherein the ALJ sustained counts one and two and dismissed count three of Citation No. 10-0654 (“the Citation”) issued by the Pennsylvania State Police,

Bureau of Liquor Control Enforcement (“Bureau”), and imposed a fine of one thousand one hundred dollars (\$1,100.00) and suspended Licensee’s catering club liquor license for a period of fifteen (15) days.

The first count of the Citation charged Licensee with violating section 493(12) of the Liquor Code [47 P.S. § 4-493(12)], in that on March 1, 2010, Licensee, by its servants, agents or employees, failed to keep records on the licensed premises.

The second 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 August 24 through August 30, 2009, December 7 through December 13, 2009, and January 11 through January 17, 2010, 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 third count of the Citation charged Licensee with violating section 493(12) of the Liquor Code [47 P.S. § 4-493(12)], in that on March 1, 2010, Licensee, by its servants, agents or employees, refused an authorized employee of the Bureau access to records covering the operation of the licensed premises when the request was made during business hours.

In its appeal concerning the first two (2) counts of the Citation, Licensee argues broadly that: (1) the Bureau does not have jurisdiction to enforce the LOSGCA; (2) before requesting LOSGCA records, the Bureau should have a reasonable belief that a violation is occurring or will occur; and (3) in any event, LOSGCA records are not required to be kept on the business premises and are thus not open to inspection by Bureau Enforcement Officers.

The Pennsylvania Liquor Control Board (“Board”) has reviewed the certified record, including the ALJ’s Adjudication and Order, the Notes of Testimony and Exhibits from the hearing held on August 10, 2010, Licensee’s Appeal, as well as the Bureau’s response, and has concluded that the ALJ did not commit an error of law or abuse his discretion in regard to counts one and two.

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 2009 and 2010 calendar years. A Bureau Enforcement Officer conducted an administrative inspection of the licensed premises on February 3, 2010, and was provided all records except those relating to the LOSGCA. (N.T. 63). The officer requested that Licensee provide the LOSGCA records when he returned on March 1, 2010, but Licensee did not

provide the documents on the advice of counsel, as they were maintained off of the business premises. (N.T. 20-22). On March 1, 2010, the officer was instead provided reconciliation documents, from which he calculated Licensee's weekly small games of chance payouts based on explanations given by Licensee's treasurer and manager. (N.T. 32). The reconciliation documents revealed that for the seven (7)-day period from August 24 through August 30, 2009, Licensee awarded prizes in the amount of thirty-three thousand eighty-five dollars (\$33,085.00); for the seven (7)-day period from December 7 through December 13, 2009, Licensee awarded prizes in the amount of twenty-seven thousand four hundred fourteen dollars (\$27,414.00); and for the seven (7)-day period from January 11 through January 17, 2010, Licensee awarded prizes in the amount of thirty-two thousand nine hundred seven dollars (\$32,907.00). (N.T. 27).

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 Bureau lacks jurisdiction to investigate and impose penalties for offenses not enumerated in the Liquor Code, particularly those found in the LOSGCA. Thus, it argues the ALJ lacked subject matter jurisdiction and committed an error of law by imposing penalties under the Liquor Code for LOSGCA offenses.

In response to Licensee's appeal, the Bureau argues that resolution of this issue is governed by the Commonwealth Court's decision in Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Columbus Home Association, 989 A.2d 39 (Pa. Cmwlth. 2009).

The Board agrees that the Knights of Columbus case makes it clear that the Bureau is empowered to investigate and cite a licensee for violations of gambling laws such as those found in the Crimes Code and the LOSGCA, under section 471 of the Liquor Code. [47 P.S. § 4-471(a)]. The Bureau has jurisdiction in matters involving the LOSGA since such would constitute "other sufficient cause shown" as set forth in section 471 of the Liquor Code, as acknowledged by the Commonwealth Court in Knights of Columbus and the Pennsylvania

Supreme Court in Pennsylvania Liquor Control Bd. v. TLK, 544 A.2d 931 (Pa. 1988). The courts have consistently held that violations of criminal laws other than the Liquor Code may constitute sufficient cause for the imposition of penalties, pursuant to section 471, when reasonably related to the sale and use of alcoholic beverages, including gambling. Knights of Columbus, 989 A.2d at 44.

The second error of law alleged by Licensee challenges the authority of the Bureau to request a licensee's small games of chance records during routine inspections. Licensee bases this argument on its interpretation of section 901.28 of the LOSGCA Regulations. [61 Pa. Code § 901.28]. This section requires that an inspecting agent of the Department of Revenue, or its authorized representatives, have a reasonable belief that a violation exists before an inspection of a licensee's LOSGCA records may be conducted. [61 Pa. Code § 901.28(a)(2)].

However, a Bureau Enforcement Officer is empowered to conduct routine inspections of licensees under the Liquor Code, and that authority includes the right to inspect all records covering the operation of the licensed business at any time the premises is open for business. [47 P.S. § 4-493(12); Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Penbrook

Post No. 730 American Legion Home Association, Citation No. 08-0916, November 4, 2009]. Thus, the reasonable belief standard is irrelevant where a Bureau Enforcement Officer enters a licensed establishment while it is open for business and requests documents covering the operation of the business pursuant to section 493(12) of the Liquor Code [47 P.S § 4-493(12)]. The Board, therefore, rejects the second argument raised by Licensee.

Licensee further contends that, as a matter of law, LOSGCA records are not required to be kept on the licensed premises and, thus, are not within the scope of the documents reviewable by a Bureau Enforcement Officer under section 493(12) of the Liquor Code [47 P.S § 4-493(12)]. It should be noted that while this argument, if successful, could warrant dismissal of count one, it has no bearing on count two because Licensee stipulated to the fact that its payouts exceeded the limit of five thousand dollars (\$5,000.00) in violation of section 471 [47 P.S § 4-471].

Nonetheless, the ALJ did not err in sustaining count one, and properly cited both section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] and the Department of Revenue Regulations to resolve the issue. Under section 901.31 of the LOSGCA Regulations, the Department of Revenue or an authorized representative, such as a Bureau Enforcement Officer, “[i]n addition to the

examination of records authorized during an inspection of the premises . . . is authorized to examine the reports, books, accounts and records, and the inventory related to games of chance of a licensed distributor, registered manufacturer, licensed eligible organization or their representatives.” [61 Pa. Code § 901.31]. Furthermore, section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] requires that a licensee keep all records covering the operation of the licensed business on the licensed premises. Thus, it is clear that a licensee operating small games of chance must maintain LOSGCA records on the licensed premises and provide them when lawfully requested.<sup>1</sup> By failing to do so, therefore, Licensee was in violation of section 493(12) of the Liquor Code [47 P.S. § 4-493(12)].

For the foregoing reasons, the Adjudication and Order of the ALJ sustaining the Citation and imposing a fine of one thousand one hundred dollars (\$1,100.00) and a fifteen (15)-day suspension is affirmed in all respects.

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<sup>1</sup> Licensee’s refusal to provide the LOSGCA records was the basis for count three of the Citation, which was dismissed by the ALJ. The Bureau did not file a cross-appeal concerning the dismissal, and it must therefore stand as adjudicated.

**ORDER**

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of one thousand one hundred dollars (\$1,100.00) has yet to be paid.

The case is hereby remanded to the ALJ to ensure compliance with this Order and impose new dates for the fifteen (15)-day suspension.

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Board Secretary