

Mailing Date: NOV 12 2010

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

PENNSYLVANIA STATE :
POLICE, BUREAU OF : Citation No. 10-1037
LIQUOR CONTROL ENFORCEMENT :
 : Incident No. W01-410041
v. :
 : LID - 11603
6840 MARKET STREET INC :
6840-44 MARKET ST :
UPPER DARBY PA 19082 :
 :
DELAWARE COUNTY :
LICENSE NO. R-AP-SS-4858 :

JUDGE SHENKLE
BLCE COUNSEL: James E. Dailey, Esq. (as to 1st and 4th count)
Erik S. Shmukler, Esq. (as to 2nd and 3rd counts)
LICENSEE COUNSEL: John J. McCreesh, III, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on May 18, 2010. There are four counts in the citation.

The first count alleges that Licensee violated §4-467 of the Liquor Code, 47 P.S. §4-467, on March 27, 2010, by failing to display its liquor license in the manner required by law.

The second count alleges that Licensee violated §493(1) of the Liquor Code, 47 P.S. §4-493(1), on March 27, 2010, and on divers other occasions within the past year, by selling, furnishing, and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one female and one male minor, eighteen and twenty years of age.

The third count alleges that Licensee violated §493(14) of the Liquor Code, 47 P.S. §4-493(14), on March 27, 2010, and on divers other occasions within the past year, by permitting one female and one male minor, eighteen and twenty years of age, to frequent its licensed premises.

The fourth count alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5513 of the Crimes Code, 18 Pa. C.S. §5513, on March 27, 2010, by possessing or operating gambling devices or paraphernalia or permitting gambling or lotteries, poolselling and/or bookmaking on the licensed premises.

A hearing was held on August 31, 2010, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On March 27, 2009, a detail of liquor enforcement officers and officers of the Upper Darby Police Department entered the licensed premises at about 12:30 a.m. There were about 25 patrons, attended by two bartenders. An officer identified himself to one of the bartenders and informed her that they were conducting an open inspection for sales to minors. This officer also conducted a routine inspection, in which he found that the liquor license was wrinkled and very dirty and not covered by a clear, transparent substance (N.T. 6-10, 43).

2. A liquor enforcement supervisor who was a part of this detail saw three Dodge City brand video poker machines in the premises, two of which were electrified and in operation. The supervisor went behind the bar and asked a bartender to open the cash register. In the bartender's presence, the supervisor removed three slips of paper from the cash register (N.T. 17-18).

3. The first slip bears a hand-lettered number 180 and the initials R.C. The second slip bears the hand-lettered number \$300.00, the date 3/26/10 and a signature, "Henery" (*sic*, lettered) and Henry Joyner (in cursive script). The third slip was a cash register slip with the printed date 03.25.10 followed by the hand-lettered notations "1st machine / \$5.00 / Stuck / Julio" [each entry between the slashes is on its own line] (N.T. 18-21, Exhibit B-3).

4. After finding these slips, the supervisor took the bartender aside and asked her what the payout procedure was for the three individual machines. She said that if a patron wanted to be paid off, the patron would come to the bartender, identify the machine he or she was playing, the number of points, and the patron's name. The bartender would then contact the owner, provide him with the information from the patron, and then turn off the machine (N.T. 21-22).

5. After making this statement to the supervisor, the bartender then said "we don't pay off." Based on the totality of the circumstances observed by the supervisor, i.e., one machine being turned off with two in operation, the slip with the \$300 notation and the date of 3/26, the supervisor concluded that the machines were used for gambling and ordered them seized (N.T. 22-23).

6. The seized machines were inspected and found to contain \$23, \$14, and \$36.50 respectively. They were not equipped with the capability of instantly reducing accumulated credits to zero; they were not gambling devices *per se* (N.T. 12, 14).

7. One of the liquor enforcement officers who participated in the open inspection noticed two youthful patrons seated at the rear of the bar with their backs facing the rear wall. The officer recognized one of them from a previous incident at another bar. The officer determined this young man's identity and birth date and noticed that he had a strong odor of alcohol on his breath. The young woman with him admitted to the officer that she was under 21 (N.T. 44-45).

8. Official records of the Pennsylvania Department of Transportation confirm that the young man's birth date was 10/16/1989 and the young woman's was 05/08/1991. Officers issued citations to each of them for underage consumption of alcohol (N.T. 45-48, Exhibits B-5 and B-6).

CONCLUSIONS OF LAW:

Licensee violated §4-467 of the Liquor Code, 47 P.S. §4-467, on March 27, 2010, by failing to display its liquor license in the manner required by law.

Licensee violated §493(1) of the Liquor Code, 47 P.S. §4-493(1), on March 27, 2010, by selling, furnishing, and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one female and one male minor, eighteen and twenty years of age.

The evidence did not prove that Licensee violated §493(14) of the Liquor Code, 47 P.S. §4-493(14), on March 27, 2010, and on divers other occasions within the past year, by permitting one female and one male minor, eighteen and twenty years of age, to frequent its licensed premises.

Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5513 of the Crimes Code, 18 Pa. C.S. §5513, on March 27, 2010, by permitting gambling on the licensed premises.

DISCUSSION:

Licensee presented testimony which might have provided an alternative explanation for the three slips of paper seized from the cash register, but I did not believe it.

I find the circumstantial evidence of gambling in this case sufficient to sustain the charge in the fourth count. The procedure used by Licensee's employees when a patron asks to be paid off for accumulated points only makes sense if the machines are actually used for gambling. The fact that patrons ask for payment is a good indication of their understanding that payment will be made. If payments were not being made there would be no reason to take the machine on which the points were accumulated out of service. I understand the word "we" in the statement "we don't pay off" to refer to the bartenders personally, not the licensed premises.

PRIOR RECORD:

Licensee has been licensed since September 28, 1984, and has had prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, as follows:

Citation No. 90-1583. \$600.00 fine.

1. Refilled liquor bottles.
2. Fortified, adulterated and/or contaminated liquor.
3. Not a *bona fide* restaurant (insufficient food and equipment).

Citation No. 93-1088. 1 day suspension.

1. Refilled liquor bottles.
2. Fortified, adulterated and/or contaminated liquor.

Citation No. 95-1540. \$500.00 fine and 1 day suspension.

1. Sales during prohibited hours on primary election day.
2. Sales to a visibly intoxicated person.

Citation No. 00-2138. \$1,400.00 fine.

1. Sales to a minor.

Citation No. 07-2758C. \$2,500.00 fine.

1. Sales to minors. September 7, 2007.
2. Sales to visibly intoxicated persons. October 6, 2007.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine, or both, for violations of the type found in this case. For violations of the type found in Count Nos. 1 and 4 any fine must be in the \$50.00 to \$1,000.00 range. For violations of the type found in Count No. 2 any fine must be in the \$1,000.00 to \$5,000.00 range. Penalties are assessed as follows:

- Count No. 1 – a fine of \$100.00.
- Count No. 2 – a fine of \$1,500.00.
- Count No. 3 – DISMISSED.
- Count No. 4 – a fine of \$500.00.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, 6840 Market Street, Inc., License No. R-AP-SS-4858, shall pay a fine of TWO THOUSAND ONE HUNDRED DOLLARS (\$2,100.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

Dated this 26TH day of October, 2010.



David L. Shenkle, J.

jb

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. 10-1037
6840 Market Street, Inc.