

Mailing Date: MAR 11 2011

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-1368
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-403616
v.	:	
	:	LID - 3131
HOME ASSOCIATION	:	
BURT J. ASPER POST NO. 46	:	
THE AMERICAN LEGION 755	:	
PHILADELPHIA AVE.	:	
CHAMBERSBURG, PA 17201-1266	:	
	:	
FRANKLIN COUNTY	:	
LICENSE NO. CC-1370	:	

BEFORE: JUDGE THAU
BUREAU COUNSEL: Thomas M. Ballaron, Esquire
LICENSEE: Patrick J. Redding, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on July 15, 2010, as amended July 23, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Home Association Burt J. Asper Post No. 46, The American Legion (Licensee), License Number CC-1370.

This citation¹ contains two counts.

The first 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 September 20 through 26, October 18 through 24, November 15 through 21, December 13 through 19, 2009, January 17 through 23 and February 7 through 13, 2010, Licensee, by servants, agents or employes, offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven-day period.

1. Commonwealth Exhibit No. C-2, N.T. 128.

The second 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 during the period January 1 through December 31, 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.

An evidentiary hearing was conducted on February 23, 2011 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 November 12, 2009 and completed it on May 17, 2010. (N.T. 10)
2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on June 15, 2010. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 128)

Count No. 1:

3. On February 22, 2010, several Bureau Enforcement Officers went to the subject premises to conduct an administrative inspection at a time when the premises was open and in operation selling alcoholic beverages. The Officers wanted to talk to Licensee's Steward, Mr. S. The Officers were permitted entry to the Steward's office by Mr. J. and

Mr. N. The Officers inspected the office. Mr. S., Licensee's Steward arrived on the premises. He had access to the safes which were in his office.
(N.T. 20-22)

4. Mr. S. provided the Officers with Licensee's Jurisdictional Tip Jar Report (JTJR), a recognized Small Games of Chance record keeping system. (N.T. 22-23)
5. The Officers departed at 3:50 p.m., leaving with club officials a request for documents. (N.T. 24)
6. An Officer returned to the premises on March 4, 2010, at approximately 9:55 a.m., at the time and date originally scheduled. Licensee's Steward Mr. S. and Attorney were present. Counsel advised the Officer that his direction to Licensee was to maintain honest and accurate records. Mr. S. gave the Officer a box containing copies of Licensee's records which the Officer took with him. (N.T. 25-26)
7. On March 24, 2010, the Officer reviewed the JTJR. The Officer compared those records, as well as "flare cards" to a strip ticket purchased sometime earlier by another Officer. All of the records matched correctly. (N.T. 27-28)
8. The Officer selected six, seven-days accounting periods, one interval per month, for closer scrutiny as listed in Count No. 1. (N.T. 29-32)
9. For each of the six, seven-days accounting periods, the information in the JTJR is identically formatted. (N.T. 30-33)
10. These JTJR's (Commonwealth Exhibit No. C-3), on their face, list the payouts for the six, seven-days accounting period as follows: (N.T. 30-41)

<u>Seven-Day Period Ending</u>	<u>Payout Amount</u>
September 20-26, 2009	\$ 8,747.00
October 18-24, 2009	\$ 69,722.00
November 15-21, 2009	\$ 72,210.00
December 13-19, 2009	\$ 64,214.00
January 17-23, 2010	\$109,014.00
February 7-13, 2010	\$ 93,819.00

CONCLUSIONS OF LAW:

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

Count No.1:

2. **Sustained** as charged.

Count No. 2:

3. The Bureau has **failed** to prove that during the period January 1 through December 31, 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.

DISCUSSION:

I enter no Findings of Fact regarding Count No. 2 as the Bureau's basis for the charge is grounded in opinion, opinion which requires expert evaluation. The source documents for the Bureau's conclusion are Commonwealth Exhibit Nos. C-3, C-4 and C-5, Licensee's records. The remaining accounting exhibits were prepared by the Bureau to emphasize a point. Those exhibits do no more than rearrange data contained within Commonwealth Exhibit Nos. C-3 and C-4.

It is one thing to look at accounting data to explain entries. It is yet another to extend those entries by interpretation.

When I questioned the Officer regarding his accounting training and experience, it became abundantly clear he had none relating to the science of accounting. He did have experience in conducting Bureau record audits but that training hardly justifies qualifying the Officer as an expert in accounting.

I draw this conclusion absent any intent to disparage or demean the Officer. I am simply recognizing a reality. In fact, it is supremely unfair to require the Officer to conduct accounting audits with insufficient training.

By doing so, the Officer has been placed in an untenable position of having to testify in a specialty without the benefit of appropriate training. In the end, more time is wasted in allocating precious limited resources to ineffective endeavors. If audits requiring a level of expertise are to be done, then the investment in appropriate training is mandatory.

Opinion evidence is less reliable than fact. An opinion creates no facts (Pennsylvania Law Encyclopedia, Evidence §351). Expert opinion is admissible where the fact finder cannot be expected to draw correct inferences (Pennsylvania Law Encyclopedia, Evidence §381, §431, §432). Had the appropriate expertise been employed, I am confident the Bureau's presentation would not have taken such a cumbersome path, consisting of many diversions.

Sifting through the presentation, I conclude one of the Bureau's bottom lines was that Licensee's net income from Small Games of Chance for the accounting period, was \$348,000. Since Licensee presented charitable expenditures totaling \$28,000.00 (Commonwealth Exhibit No. C-5), for the same accounting period, the opinion/inference the Bureau would have me reach is that the difference (\$320,000) must have been spent for other than charitable purposes.

What this rationale fails to address is two crucial values; the accounting balance at the beginning as well as the ending of the accounting period are essential. When we do an accounting, we are freezing time to evaluate what occurred during that interval. One must know what was in the pot at the beginning of that time and what remains in the pot at the end. For example and assuming the values presented are accurate, it may be that the remaining funds (\$320,000) represent the balance at the end of the accounting period. Further, it may be that some of those funds were expended for charitable purposes during a subsequent accounting interval.

The law does not require that appropriate charitable expenditures occur within the accounting period for which funds are collected.

The Bureau provides another series of values that supposedly demonstrates Licensee broke the law. The Bureau points to a value of \$291,524 in unaccounted funds. The Bureau also provides an end of accounting period value of \$160,000, thus leaving a difference of \$131,524 as "unaccounted for."

When I asked whether the opening balance was included, the reply was in the negative. If the opening balance was \$131,524 then there are no missing funds. More importantly and assuming for purposes of argument, the Bureau's assertion that \$131,000 was missing in Licensee's account, the forensic analysis has just begun.

It is at this point that the expert evaluates the data to determine where those funds might be. It may be they were stolen; it may be the values were placed in improper accounting categories; it may be that mathematical errors occurred when transposing numbers from source documents. I have just begun to tap into the "may be" list. Clearly, the inference that there are funds missing is,

by itself, unsupported. The subsequent inference that those “missing” funds were expended for illegal purposes is even more attenuated.

Finally, what is additionally interesting about the Bureau’s data analysis is that there appears to be two alternate theories with differing values (\$320,000 and \$131,524), as a basis for me to conclude Licensee broke the law. I am not comforted by the alternate presentations.

Actually, I am led to be even more suspicious of the significance of the numbers and the opinions drawn from them. The mechanical and bookkeeping exercise of taking Licensee’s source documents and rearranging the information therein in several other formats, leaves a result that is confusing and scientifically unsupported.

It takes no expert to know, if you add the value at the beginning of an accounting period to the income drawn during that accounting period, and subtract the cost related to generating that income, then the remainder represents the amount at the end of the accounting period. However, it is for the expert to engage in deeper analysis where there are mathematical inconsistencies in the accounting process.

PRIOR RECORD:

Licensee has been licensed since March 22, 1971, and has had three prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, (Commonwealth Exhibit No. C-10, N.T. 128):

Adjudication No. 06-0826. Fine \$1,300.00.

1. Possessed or operated gambling devices or permitted gambling on the licensed premises (sports pool). February 15, 2006.
2. Compensated persons to conduct small games of chance. February 15, 2006.
3. Failed to maintain complete and truthful records covering the operation of small games of chance for a period of two years. February 15, 2006.

4. Offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven day period. January 16-22, January 23-29, January 30-February 5 and February 6-12, 2006.

Adjudication No. 07-2328. Fine \$3,000.00 and 40 days suspension.

1. Failed to maintain complete and truthful records covering the operation of small games of chance for a period of 2 years. August 1, 2007.
2. Offered and/or awarded more than \$5,000.00 in cash or merchandise in any 7-day period. April 2-8, May 7-13, June 4-10, and July 2-8, 2007.
3. Possessed or operated gambling devices or permitted gambling on the licensed premises (tickets). April 2-8, May 7-13, June 4-10, and July 2-8, 2007.

Adjudication No. 08-1517. Fine \$4,000.00 and 80 days suspension.

1. Failed to maintain complete and truthful records covering the operation of Small Games of Chance for a period of 2 years. March 26, 2008.
2. Awarded more than \$5,000.00 in cash or merchandise in any 7-day period. During 12 7-day periods from November 17, 2007 through March 22, 2008.
3. Failed to maintain records in conformity with the Liquor Code and Title 40 of the Pennsylvania Code. April 3, 2008.
4. Falsified records covering the operation of the licensed business. Between February 1 and March 31, 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 this case.

I need not spend time in discussing why I have revoked this license. The record will speak to that. Because of the very serious, unabated, outrageously blatant defiance of law, I took the unusual step of expediting the transcript preparation so that the Adjudication could be released as quickly as possible. In cases such as this, government response must be swift and severe. I impose:

Count No. 1 – Revocation of license.
Count No. 2 - Dismissed.

ORDER:

Imposition of Revocation

THEREFORE, it is hereby ordered that Catering Club Liquor license No. CC-1370, issued to Home Association Burt J. Asper Post No. 46, The American Legion, be **REVOKED**, effective at 7:00 a.m., on Monday, May 2, 2011. Any Wholesale Liquor Purchase Permit Card or discount card issued in connection with the aforementioned license is hereby **CANCELLED**.

Licensee is directed to remove its license from the wall on Monday, May 2, 2011 at 7:00 a.m., and return the license and Wholesale Liquor Purchase Permit Card and/or discount card to the Pennsylvania Liquor Control Board, Bureau of Licensing, Northwest Office Building, Capital and Forster Streets, Harrisburg, Pennsylvania 17124-0001, personally or by certified mail so as to be received no later than Monday, May 9, 2011.

Withdrawal of Count No. 2:

IT IS FURTHER ORDERED that Count No. 2 of Citation No. 10-1368, issued against Home Association Burt J. Asper Post No. 46, The American Legion is DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 11TH _____ day of March, 2011.



Felix Thau, A.L.J.

HOME ASSOCIATION
BURT J. ASPER POST NO. 46
THE AMERICAN LEGION
CITATION NO. 10-1368`

PAGE 9

pm

HOME ASSOCIATION
BURT J. ASPER POST NO. 46

THE AMERICAN LEGION
CITATION NO. 10-1368`

PAGE 9

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.