

Mailing Date: NOV 07 2011

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-1692
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W02-413215
v.	:	
	:	LID - 506
PALMERTONI MAGYAR	:	
SZOVETKEZET	:	
317 LEHIGH AVE.	:	
PALMERTON, PA 18071-1809	:	
	:	
	:	
CARBON COUNTY	:	
LICENSE NO. CC-186	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL STRONG
LICENSEE: CHARLES R. OSINSKI, ESQUIRE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on November 5, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against PALMERTONI MAGYAR SZOVETKEZET, License Number CC-186 (hereinafter "Licensee").

The citation charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 5513 of the Crimes Code [18 Pa. C.S. §5513] in that on June 13, 2010, Licensee, by its servants, agents or employes, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises.

The investigation which gave rise to the citation began on May 19, 2010 and was completed on July 8, 2010; and notice of the violation was sent to Licensee by Certified Mail on July 26, 2010. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on July 27, 2011 in the Scranton State Office Building, 100 Lackawanna Avenue, Scranton, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. On June 13, 2010, two officers of the Bureau arrived at the licensed premises to conduct an investigation. The officers identified themselves to a female bartender named Ms. Brios who allowed them in (N.T. 9).
2. Ms. Brios contacted the president of Licensee club, Stephen Vasko, who spoke with the officers during the remainder of the investigation (N.T. 9).
3. The officers found two video machines on the licensed premises (N.T. 10).
4. The officers inspected the first machine and found it to be a "Tons of Fun" machine. This machine provides two categories of games. One category of games is a group of amusement games such as are found on "Mega Touch" machines. There were fifteen such legitimate games on this machine. The other categories of games were games which are involved in gambling such as blackjack, keno, slot machines and poker. There were twenty-eight (28) gambling type games available on this machine (N.T. 10-11).
5. In response to questions asked by one of the officers, the President of Licensee club, Mr. Vasko, said that the vendor who owns the machines comes to collect from them weekly on Saturday or Sunday. The vendor, when he collected, opened the machine and pressed the accounting screen button for the gambling type games. An accounting screen comes up which shows: how much money went into the machine; how much money went out of the machine; and how much money had been knocked out credit wise. The vendor would make a calculation from these figures, and Licensee club would receive 60% of the profit from the gambling type games (N.T. 12-13).
6. At the request of the officers, Mr. Vasko opened the "Tons of Fun" machine. The officers found a red button which brought up an accounting screen for the gambling type games (N.T. 14-15).
7. When money is put into the machine, the player receives one credit for each five cents (\$.05) deposited (N.T. 15).
8. The officers placed \$3.00 into the machine and noted that it was accounted for on the accounting screen as money put in the machine (N.T. 15-16).

9. The accounting screen for the gambling type games was divided into two categories: "current book" and "lifetime book." The "lifetime book" would account for the entire time the machine was in use. The "current book" accounted for the current week until the vendor arrived, took note of the figures for the week and erased them. The accounting figures showed from week to week, how much money went into the machine; how much money went out; and how many credits were "knocked off" on the machine (N.T. 17-18).

10. The gambling type games each took two to three seconds to play, and there was no skill involved in playing them (N.T. 15).

11. Mr. Vasko, president of Licensee club admitted to the officer that the club made payouts on the machine (N.T. 20).

12. The officer could find no "knock-off" device on the second machine. Consequently it was not inspected or seized (N.T. 27).

CONCLUSION OF LAW:

The charge in the citation is **sustained**.

DISCUSSION:

The preponderance of the credible evidence in the record establishes that gambling activity in the form of payouts took place in connection with the "Tons of Fun" video machine. Further inspection of the machine revealed that it was a gambling device per se. Since the necessary scienter was present, I conclude that the charge in the citation has been sustained.

It is the established rule that, under proper circumstances the sanctions provide by Section 471 of the Liquor Code [47 P.S. §4-471] may be imposed upon the holder of a liquor license who has violated a gambling statute. *Mar-Kodis Diner, Inc. v. Com. of PA Liquor Control Board*, 532 A.2d 940 (Cmwlth Ct. 1987).

Section 5513(a)(4) of the Pennsylvania Crimes Code [18 Pa. C.S. §5513(a)(4)] makes it unlawful for the owner, tenant, lessee or occupant of any premises to allow any part thereof to be used for the purpose of unlawful gambling.

In this case, Mr. Vasko, President of Licensee club, admitted to the investigating officers that the club made payouts of the machines (See Finding No. 11). At the hearing, Mr. Vasko attempted to recant the admission saying that he told the officers that the club did not pay out on the machines (See N.T. 36).

It is within my province, and is part of my responsibility to determine the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa.Cmwlth 1989). I may give testimony such consideration as it may deserve, and accept it or reject it in whole or in part. *McFarland Landscape Service v. Workmen's Comp. Bd. Of Appeal*, 557 A.2d 816, 817-18 (Pa.Cmwlth 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

In this case I find the original statement made by Mr. Vasko, when taken in connection with his explanation as to how the proceeds from the machine were divided establishes by a preponderance of the evidence that payouts were being made by Licensee. As Mr. Vasko explained, once a week the vendor came to the premises and made a calculation of profit from information brought up which showed how much money went into the machine, how much money went out of the machine and how much money had been knocked out credit wise. From these figures the profit for the week was calculated, and Licensee would receive 60% of the profit (See Finding No. 5). There would be no need for a calculation of profits if payouts were not made. The amount of money in the machine could simply be divided. In light of the above, I conclude that the preponderance of the evidence establishes that the "tons of fun" machine was used for illegal gambling.

In addition the record in this case establishes that the "tons of fun" machine is a gambling device per se.

Section 5513(a)(1) of the Crimes Code [18 Pa. C.S. §5513(a)(1)] is violated if a person intentionally or knowingly maintains any device to be used for gambling purposes except playing cards.

To make a determination as to whether a particular device is a gambling device per se, the characteristics of the device must be compared with the three elements necessary to gambling, i.e. consideration, a result determined by chance rather than skill and a reward. *Com. v. Two Electronic Poker Game Machine*, 465 A.2d 973 (Pa. 1983).

In this case, consideration is found in that a player receives one credit for each five cents (\$.05) placed in the machine (See Findings No. 7 and 8).

The element of chance is found in the fact that each game took only two to three seconds, and no skill was required (See Finding No. 10).

In *Two Electronic Poker Game Machines* (supra) the Pennsylvania Supreme Court held that a "knock down" feature and the ability to record games knocked down provide sufficient circumstantial evidence to establish by a preponderance of the evidence the reward element of the test for a gambling device per se.

In this case the machine in question had a knock down mechanism and recorded the number of games knocked down (See Findings No. 5 and 9).

On the basis of the foregoing, I conclude that the machine in question was a gambling device per se and its presence on the licensed premises violated Section 5513(a)(1) of the Crimes Code (supra).

The Supreme Court of Pennsylvania has mandated that when a licensee has been found to have committed a violation which is classified as "other sufficient cause," some element of scienter must be present before the penalties set forth in Section 471 of the Liquor Code (supra) may be applied. The test set forth by the court is as follows:

1. Whether the licensee knew or should have known of the illegal activities by an employe or patron. If so, the licensee is liable.
2. A licensee may defend his license by demonstrating he took substantial, affirmative steps to guard against a known pattern of illegal activities.

Pa. Liquor Control Board v. TLK, Inc., 544 A.2d 931 (Pa. 1988).

In this case, the president of Licensee corporation clearly knew that the machine in question was on the licensed premises and that payouts were made on the gambling type games. Further, there is no evidence that any steps were taken to prevent these activities from taking place. The necessary scienter is, therefore, present in this case.

With both gambling activity and the presence of a gambling device having been established, I conclude that the Bureau has met its burden and the charge in the citation is sustained.

PRIOR RECORD:

Licensee has been licensed since January 1, 1934, and has had three prior violation(s) since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

Citation No. 01-1654. Fine \$450.00.

1. Possessed or operated gambling devices or permitted gambling on the licensed premises (machine).

Citation No. 08-1357. Fine \$550.00.

1. Possessed or operated gambling devices or permitted gambling on the licensed premises (sports pools, tickets and machines). May 10, 2008.

Citation No. 10-0505. Fine \$1,150.00.

1. Failed to adhere to bylaws. October 14, 2009.
2. Improper admission of members. October 14, 2009.
3. Possessed or operated gambling devices or permitted gambling on the licensed premises (machines). October 14, November 15, December 10, 2009; January 30 and 31, 2010.

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. Further, Section 471(c) requires that the penalty imposed include license revocation or suspension where the violation in question is the third or subsequent violation of the offenses referred to in subsection 471(b) of the Liquor Code [47 P.S. §4-471(b)] and/or Crimes Code within a four year period. Therefore, license revocation or suspension must be included as part of the penalty.

Under the circumstances of this case, the penalty imposed shall be a fine of \$1,000.00 and three days suspension.

ORDER

THEREFORE, it is hereby ordered that Licensee PALMERTONI MAGYAR SZOVETKEZET, pay a fine of \$1,000.00 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.

IT IS FURTHER ORDERED that Licensee's liquor license (including all permits) License No. CC-186 be suspended for a period of three days **BEGINNING** at 7:00 a.m. on Monday, January 9, 2012 and **ENDING** at 7:00 a.m. on Thursday, January 12, 2012.

Licensee is directed on January 9, 2012 at 7:00 a.m. to place the enclosed 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 January 12, 2012 at 7:00 a.m. to remove the placard of suspension and return his license to its original wall location.

Jurisdiction is retained.

Dated this 1ST day of November, 2011.



Daniel T. Flaherty, Jr., J.

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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.

IF YOU WISH TO APPEAL THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER, THE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE MAILING DATE OF THE ORDER. PLEASE CONTACT CHIEF COUNSEL'S OFFICE AT 717-783-9454.

Detach here and submit 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.** Make 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. 10-1692
Palmertoni Magyar Szovetkezet