

Mailing Date: August 17, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-1906
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
HOME ASSOCIATION CHARLES	:	License No. CC-5257
NITTERHOUSE POST 1599 V.F.W.	:	
747 South Fourth Street	:	
Chambersburg, PA 17201-3632	:	LID 3872

Counsel for Licensee: Patrick James Redding, Esquire
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OPINION

Home Association Charles Nitterhouse Post 1599 V.F.W. (“Licensee”) timely appealed from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”) mailed on June 21, 2011, wherein the ALJ imposed a fine of five thousand dollars (\$5,000.00) and a license suspension of one hundred fifty

(150) days on Citation No. 10-1906. In a letter dated June 30, 2011, Licensee submitted a request for reconsideration with the ALJ, and by Order mailed July 15, 2011, the ALJ denied Licensee's request for reconsideration. The instant appeal followed.¹

Pursuant to section 471 of the Liquor Code, an appeal must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/her decision was not based upon substantial evidence. The Commonwealth Court 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).

Count one of the Citation alleged that Licensee violated 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)], when it offered and/or awarded more than five thousand dollars (\$5,000.00) in cash or merchandise

¹ Licensee also filed an Application for Supersedeas. This application was unnecessary because Licensee was not charged with a violation that was subject to an enhanced penalty. The filing of the appeal acts as a supersedeas or stay of the ALJ's Order, without the need to file an Application for Supersedeas. [47 P.S. § 4-471(b)].

during the periods April 19 through 25, April 26 through May 2, May 3 through May 9, May 10 through May 16, May 17 through May 23, and May 24 through May 30, 2010. Count two of the Citation alleged that Licensee failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding August 5, 2010, concerning the LOSGCA, in violation of sections 471 and 493(12) of the Liquor Code [47 P.S. §§ 4-471, 4-493(12)], section 311 of the LOSGCA [10 P.S. § 311], and section 901 of the Department of Revenue Regulations [61 Pa. Code § 901]. Count three of the Citation alleged that Licensee violated section 471 of the Liquor Code [47 P.S. § 4-471] and sections 901.743(b) and 901.745(4) of the Department of Revenue Regulations [61 Pa. Code §§ 901.743(b), 901.745(4)], in that on June 4 and 6, 2010, Licensee, by its servants, agents or employees, failed to operate small games of chance in conformity with Title 61 of the Pennsylvania Code. Count four of the Citation alleged that Licensee violated section 471 of the Liquor Code [47 P.S. § 4-471] and section 315(a) of the LOSGCA [10 P.S. § 315(a)], in that on June 6, 2010, Licensee, by its servants, agents or employees, offered and/or awarded an individual prize exceeding the maximum cash value of five hundred dollars (\$500.00) for any single chance without a special permit. Count five of the Citation alleged that Licensee

violated section 471 of the Liquor Code [47 P.S. § 4-471] and section 314 of the LOSGCA [10 P.S. § 314], in that on August 5, 2010, funds derived from the operation of games of chance were used for purposes other than those authorized by law. After a hearing, the ALJ sustained the Citation on all five (5) counts. [Adjudication & Order, mailed June 21, 2011]. The ALJ imposed an aggregate penalty of a fine of five thousand dollars (\$5,000.00) and a one hundred fifty (150)-day license suspension.²

In addressing this matter, the Pennsylvania Liquor Control Board (“Board”) has reviewed the certified record provided by the Office of the Administrative Law Judge (“OALJ”), including the ALJ’s Adjudication and Order mailed June 21, 2011, the ALJ’s Opinion and Order Upon Reconsideration, Licensee’s Appeal, and the Notes of Testimony and Exhibits from the hearing held on May 9, 2011, and has concluded that the ALJ’s Ruling is without error and is supported by substantial evidence.

In its Appeal, Licensee first claims the basis of the penalty imposed by the ALJ was in error and the penalty of suspension will not accomplish the objection suggested by the ALJ. The Board finds Licensee’s argument without merit because the ALJ’s adjudication clearly provides that section 471 of the Liquor Code prescribes a penalty of license suspension and/or a fine between

² The five thousand dollar (\$5,000.00) fine was paid in full on July 19, 2011.

fifty dollars (\$50.00) and one thousand dollars (\$1,000.00) for each of the counts in Licensee's Citation, and the ALJ's penalty clearly falls within these parameters. The Board understands that Licensee may be taken aback by the ALJ's unique approach in addressing its penalty, but the ALJ's unique approach is no basis in the instant matter to overturn the ALJ's decision since the ALJ's penalty clearly falls within the statutory parameters, especially given the repeated nature of these offenses.

Licensee next argues in its appeal that "neither of the two Counts brought by the LCE should be sustained" and the ALJ was in error in doing so. The Board is unclear with regard to Licensee's claim because the Citation clearly had five (5) counts, not two (2) as indicated by Licensee. Since Licensee's claim is ambiguous, the Board will briefly address all five (5) counts in Licensee's citation.

With regard to count one, the record provides that Licensee's small games of chance payout reports show the payouts for the seven (7)-day periods ending April 25, May 2, May 9, May 16, May 23, and May 30, 2010 as thirty-eight thousand, two hundred and fifty dollars (\$38,250.00), twenty-nine thousand, one hundred dollars (\$29,100.00), twenty-eight thousand, nine hundred dollars (\$28,900.00), twenty-three thousand, eight hundred dollars

(\$23,800.00), forty-five thousand, twenty dollars (\$45,020.00), and twenty-eight thousand, eight hundred and sixty-five dollars (\$28,865.00), respectively. [N.T. 19-24; Ex. C-3]. It is clear to the Board that Licensee violated section 471 of the Liquor Code and section 315(b) of the LOSGCA because each of its weekly prize amounts in question were greater than five thousand dollars (\$5,000.00). [47 P.S. § 4-471; 10 P.S. § 315(b)].

As to count two, the record shows that Licensee failed to provide records for the total cost of prizes paid out for games of chance as required by section 910.462(3) of the Department of Revenue Regulations [61 Pa. Code § 901.462(3)], failed to provide detailed annual records of the name and address of winners for prizes over one hundred dollars (\$100.00) for pull-tab games as required by section 910.464(9) of the Department of Revenue Regulations [61 Pa. Code § 901.464(9)], and failed to provide the annual records that showed weekly activity for the gross receipts in the conduct of its games of chance as required by section 910.461 of the Department of Revenue Regulations [61 Pa. Code § 901.461]. [N.T. 70-71, 73-74, 76-77]. The record makes it clear that Licensee violated sections 471 and 493(12) of the Liquor Code, section 311 of the LOSGCA, and section 901 of the Department of Revenue Regulations. [47 P.S. §§ 4-471, 493(12); 10 P.S. § 311; 61 Pa. Code § 901].

With regard to count three, the record shows that Licensee was selling raffle tickets for a John Deere riding mower that did not conform to the requirements of sections 901.743(b) and 901.745(4) of the Department of Revenue Regulations [61 Pa. Code §§ 901.743(b), 901.745(4)] because the raffle tickets did not have the appropriate numbering and Licensee did not have the special raffle permit number. [N.T. 28-29, 39-45; Ex. C-4]. Thus, it is clear to the Board that Licensee violated section 471 of the Liquor Code and sections 901.743(b) and 901.745(4) of the Department of Revenue Regulations. [47 P.S. § 4-471; 61 Pa. Code §§ 901.743(b), 901.745(4)].

With regard to count four, the record shows a John Deere riding mower, which was purchased for one thousand four hundred and ninety-nine dollars (\$1,499.00), was awarded on June 2, 2010 at Licensee's raffle drawing. [N.T. 30, 46-47; Ex. C-5]. It is clear to the Board that Licensee violated section 471 of the Liquor Code and section 315(a) of the LOSGCA because the mower's value is more than the section 315(a)'s regulatory maximum of five hundred dollars (\$500.00). [47 P.S. § 4-471; 10 P.S. § 315(a)].

As to count five, the record shows that Licensee used funds from its games of chance for its operational costs at the club. [N.T. 49-52; Exs. C-6, C-7]. Section 314 of the LOSGCA [10 P.S. § 314] requires that "[a]ll proceeds of games

of chance shall be used exclusively for public interest purposes or for the purchase of games of chance permitted by this act.” It is clear to the Board that Licensee violated section 471 of the Liquor Code and section 314 of the LOSGCA because Licensee’s use of the net proceeds from its small games of chance to cover its operating costs violates the clear language of LOSGCA. [47 P.S. § 4-471; 10 P.S. § 314].

Lastly, Licensee argues in its appeal that it believes the ALJ committed an error when he assessed fines that were excessive and not appropriate penalties. The imposition of penalties is the exclusive prerogative of the ALJ. The Board may not disturb penalties that are within the parameters set forth in section 471(b). Section 471(b) of the Liquor Code specifically prescribes a penalty of license suspension or revocation or a fine of fifty dollars (\$50.00) to one thousand dollars (\$1,000.00), or both, for the types of violation contained in counts one, two, three, four, and five. [47 P.S. § 4-471(b)]. Also, the statute does not set an upper limit to the number of days a license can be suspended. Thus, the ALJ’s fine of one thousand dollars (\$1,000.00) for each of the five (5) counts and a one hundred fifty (150)-day suspension is clearly permissible and well within the scope of section 471(b).

In conclusion, for the reasons set forth above, the Board affirms the decision of the ALJ and the imposition of the five thousand dollar (\$5,000.00) fine and one hundred fifty (150)-day license suspension.

ORDER

The decision of the ALJ in regard to Citation 10-1906 is affirmed.

The appeal of Licensee is denied.

The fine of five thousand dollars (\$5,000.00) has been paid.

It is hereby ordered that Licensee's Catering Club Liquor License No. CC-5257 be suspended for a period of one hundred fifty (150) days beginning at 7:00 a.m. on Monday, October 3, 2011 and ending at 7:00 a.m. on Thursday, March 1, 2012.

Licensee is directed on Monday, October 3, 2011 at 7:00 a.m., to place a Notice of Suspension placard (Form No. PLCB-1925) in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from outside of the licensed premises, and to remove said license from the wall and place it in a secure location.

Licensee is authorized on Thursday, March 1, 2012 at 7:00 a.m. to remove the Notice of Suspension placard and return its license to its original wall location.

Licensee must adhere to all other conditions set forth in the ALJ's Order mailed June 21, 2011.

The case is hereby remanded to the ALJ for enforcement of the one hundred fifty (150)-day license suspension.

Board Secretary