Mailing Date: APR 02 2012

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

| | | |
|---|---|---|
| PENNSYLVANIA STATE<br>POLICE, BUREAU OF<br>LIQUOR CONTROL ENFORCEMENT | : | Citation No. 10-2291<br><br>Incident No. W09-401864 |
| v. | : | LID - 604 |
| FRATERNAL ORDER OF EAGLES<br>BETHLEHEM AERIE NO 284<br>428-430 WEST BROAD STREET<br>BETHLEHEM PA 18018-5529<br><br>LEHIGH COUNTY<br>LICENSE NO. C-487 | : | |

JUDGE SHENKLE
BLCE COUNSEL: Roy Harkavy, Esq.
LICENSEE COUNSEL: Charles R. Osinski, Esq.

## ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on October 22, 2010. There are four counts in the citation.

The first count alleges that Licensee violated §499(a) of the Liquor Code, 47 P.S. §4-499(a), on October 25, 2009, by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages.

The second count alleges that Licensee violated §499(a) of the Liquor Code, 47 P.S. §4-499(a), on October 25, 2009, by permitting patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 3:30 a.m.

The third count alleges that Licensee violated §§406(a)(4) and 493(16) of the Liquor Code, 47 P.S. §§4-406(a)(4) and 4-493(16), on October 25, 2009, by selling, furnishing and/or giving alcoholic beverages between 3:00 a.m. and 7:00 a.m.

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 December 3, 29, 2009, February 24, March 24, April 21, May 6, June 3, 19, July 15 and 21, 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 Friday, February 3, 2012, Allentown, Pennsylvania. The parties stipulated to the service of the notice letter and citation. The parties did not agree that the service of the notice letter was timely. The Bureau contended that the investigation was completed on September 10, 2010; Licensee contended that it was completed at a much earlier date.

FINDINGS OF FACT:

1. A notice of violation letter the Bureau mailed to Licensee on October 6, 2010, stated that an investigation of it was assigned on October 9, 2009, and completed on September 10, 2010. All of the counts in the notice cite October 25, 2009, as the earliest date of violation (Exhibit C-1).

2. A liquor enforcement officer entered the licensed premises at 12:40 a.m. on October 25, 2009. The bartender asked to see the officer's membership card, which she presented, proving that she was a genuine, full-fledged Eagle. There were about ten patrons. The officer saw two draw poker and two video slot machines, all of them operational, in the premises (N.T.6-7).

3. At 3:07 a.m. the officer purchased a bottle of beer. At 3:14 a.m. a patron purchased a draft beer. Both transactions were entered in the cash register. At 3:22 a.m. the officer purchased another bottle of beer. At 3:24 a.m. a bartender served a malt beverage to a patron for no charge. When the officer left the premises at 3:41 a.m. there were still five patrons inside (N.T. 8-9).

4. On November 21, 2009, the same officer went to the licensed premises with another officer at 1:30 a.m. The video machines previously observed were operational. (N.T. 9-10).

5. On December 3, 2009, the same officer went to the licensed premises at 10:05 p.m. The video machines previously observed were operational. A man called Jeffrey was playing one of the video slot machines. He accumulated 1,024 points, and then spoke to the bartender. The bartender went to the slot machine and then returned to the bar and took a zippered bag from a drawer underneath the cash register. He took some money from the bag and gave it to Jeffrey. The officer went to the machine Jeffrey had played and saw that the number of accumulated credits was now zero (N.T. 10-12).

6. On December 29, 2009, the officer who was an Eagle went to the licensed premises at 4:05 p.m. The video machines previously observed were operational (N.T. 12).

7. On January 22, 2010, the officer who was an Eagle went to the licensed premises at 3:35 p.m. The video machines previously observed were operational (N.T. 12-13).

8. On February 24, 2010, the officer who was an Eagle went to the licensed premises at 6:40 p.m. The video machines previously observed were operational. Jeffrey was playing one of the video slot machines. He spoke to the bartender, who went to the slot machine and then returned to the bar. The bartender gave money from the zippered bag to Jeffrey, as before. (N.T. 13-15).

9. On March 24, 2010, the officer who was an Eagle went to the licensed premises at 7:50 p.m. She played the video slot machine that she had seen Jeffrey playing on two previous visits. She accumulated 600 points on the machine, and then spoke to the bartender, who took something from the bag and went to the machine. He came back and gave the officer $30 (N.T. 15-16).

10. On April 21, 2010, the officer who was an Eagle went to the licensed premises at 7:20 p.m. The video machines previously observed were operational (N.T. 16-17).

11. On May 6, 2010, the officer who was an Eagle went to the licensed premises at 8:30 p.m. She played a video poker machine and accumulated 150 points, for which she received $35 for 140 credits worth 25¢ each. The officer also saw a woman called Paula, who had been playing the video slot machine previously used by Jeffrey and the officer. Paula received money from the zippered bag in the same manner described previously (N.T. 17-18).

12. On July 15, 2010, the officer who was an Eagle went to the licensed premises at 10:35 p.m. The video machines previously observed were operational (N.T. 18-19).

13. On July 21, 2010, the officer who was an Eagle went to the licensed premises at 12:00 noon. She played a different video slot machine, accumulated 260 points, and was paid $13 in the same manner described previously (N.T. 19).

14. On August 17, 2010, the officer who was an Eagle went to the licensed premises at 12:00 noon. The video machines were no longer in the premises (N.T. 20).

15. On August 26, 2010, the officer who was an Eagle went to the licensed premises at 9:50 p.m. The video machines were no longer in the premises (N.T. 20).

16. On September 22, 2010, the officer who was an Eagle went to the licensed premises at 8:15 p.m. and rang a buzzer for admission. She displayed her membership card to the person who answered the door, as always. The person who answered the door looked at the card and said that they were not accepting out-of-town members anymore (N.T. 20).

17. The officer who was an Eagle had become such more than 10 years earlier, before she was an officer of the Bureau. She had never visited Licensee's premises prior to October 25, 2009. The investigation began on the basis of an anonymous complaint about gambling machines and a trustee of the club taking home money from them (N.T. 21-22).

18. During the 14 visits described above, the officer who was an Eagle never identified herself as an officer of the Bureau. Because of the reciprocity policy of the Eagles organization (and state law), the officer could have obtained admission to any aerie in the state. She did not, however, use her membership to investigate any aerie other than this one (N.T. 23-25).

19. When she became an Eagle, the officer took an oath which promised in part "never to take unfair advantage of an Eagle on business matters and never to let him suffer loss of any kind" if it can be prevented. The officer does not consider that her actions in this case violated that oath, because Licensee was breaking the law. The officer decided on her own to proceed as she did, without advice from a supervisor regarding the legality of the investigation (N.T. 27-29).

20. The officer remained under cover during her visit of July 21, 2010, when other officers of the Bureau entered the premises openly. The decision on that date as to whether to seize the video machines described above was the responsibility of a corporal of the Pennsylvania State Police, who had been assigned to duty with the Bureau. As of July 21, 2010, the undercover officer had obtained "everything you needed to write a citation on this club…" Asked if she needed

anything more, the officer responded, "My investigation was still open." Asked in what way, she responded, "It just was not closed yet." (N.T. 30-31).

21. The unit in which the corporal works investigates and tracks the vendors of video machines, and this was his reason for an interest in the facts of this case (N.T. 33).

22. The undercover officer was asked, "isn't it true that because this sting operation didn't work, that you went and you had the bartender arrested and you had the steward arrested and charged with gambling offenses; isn't that true?" She replied, "I arrested two bartenders for paying me out for gambling, yes." She denied that the arrests were done in retaliation for the failure of the club to cooperate in any sting operation (N.T. 34).

23. The officers of this licensed club conduct regular training of the club's bartenders, to insure among other things that they are aware of the laws concerning the times during which alcoholic beverages may be sold or delivered, and the time for vacating the premises. Licensee's cash register tapes record the sales of all items, including liquor and beer, and note the times the items were sold. During the 15 years preceding October 25, 2009, these tapes had never reflected a sale of an alcoholic beverage after 3:00 a.m., but the tape did show such a sale on that date. This was the only such after-hours sale by the bartender who was on duty on that date since her initial part time employment with the club in 1989 until October 25, 2009, or since (N.T. 36-40).

24. The state police corporal to whom reference was made in findings 19 and 20 above asked to speak with Licensee's trustee on July 21, 2010. The corporal asked who owned the machines. The trustee said it was Flack Video, and gave the number they were given to call for repairs. The corporal said he thought the owner was somebody else, and he wanted the trustee to give him the name of "the pick up man." The trustee denied any other knowledge about the machines, and said he had no idea who the pick up man is or when they do it. The corporal shook his hand and said, "okay, we have a deal." (N.T. 41-44).

25. A few days later the corporal called the trustee, who testified that the corporal said he was coming down the next day "and we're going to set this up and I said set what up? And he said you're going to give me the vendor and I said I already gave you the vendor, I said, and furthermore, it doesn't make any difference what you come down for, they came in over the weekend and took the machines out." (N.T. 44-45).

CONCLUSIONS OF LAW:

Licensee violated §499(a) of the Liquor Code, 47 P.S. §4-499(a), on October 25, 2009, by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages.

Licensee violated §499(a) of the Liquor Code, 47 P.S. §4-499(a), on October 25, 2009, by permitting patrons to possess alcoholic beverages in that part of the premises habitually used for the service of alcoholic beverages after 3:30 a.m.

Licensee violated §§406(a)(4) and 493(16) of the Liquor Code, 47 P.S. §§4-406(a)(4) and 4-493(16), on October 25, 2009, by selling alcoholic beverages between 3:00 a.m. and 7:00 a.m.

Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5513 of the Crimes Code, 18 Pa. C.S. §5513, on December 3, 29, 2009, February 24, March 24, April 21, May 6, July 15 and 21, 2010, by possessing or operating gambling devices and permitting gambling on the licensed premises.

The Bureau assigned this investigation to an officer on October 9, 2009. The officer closed the investigation on September 10, 2010. Therefore the Bureau's notice, mailed October 6, 2010, was within the thirty-day period allowed by 47 P.S. §4-471(b).

DISCUSSION:

Licensee's defense has two parts. In the first place, it is argued that the Bureau's investigation actually ended on July 21, 2010, because they had at that point all of the information needed to prosecute this citation, and therefore I could not impose a penalty in this case because the Bureau's notification, dated October 6, 2010, would have been untimely under 47 P.S. §4-471(b).

Licensee's second argument is that the evidence should be suppressed because it was obtained in violation of Licensee's constitutional rights, based on the decision of the Court of Common Pleas of Northampton County in *Northend Wanderers Athletic Association v. Pennsylvania State Police*[*], *Bureau of Liquor Control Enforcement*, No. C-48-CV-2010-3484.

Timeliness of Bureau's Notice of Violation

Licensee asked me to find that the investigation in this case actually concluded on July 21, 2010, because the officer testified that she had at that point all of the information needed to prosecute the citation (N.T. 31).

Counsel argued that since officers of the Bureau knew, as of that date or shortly afterwards, that the gambling devices had been removed from the premises, the unproductive visits of August 17, August 26, and September 22, 2010, did not operate to extend the time within which the Bureau was obliged to notify Licensee of its findings.

It is my responsibility to determine as a factual matter when an investigation commences and when it is completed. *Commonwealth, PLCB v. The Gatling Saloon and Dance Hall Corp.*, 98 Pa. Cmwlth. 377, 511 A.2d 272 (1986).

Prior to the amendment of June 29, 1987, P.L. 32, No. 14, §471(b) of the Liquor Code, 47 P.S. §4-471(b), read in pertinent part:

> …. No penalty provided by this section shall be imposed by the board or any court for any violations provided for in this act unless the enforcement officer

[*] The license is held by the North End Wanderers Athletic Association, styled "Northend" in the opinion of the court.

> or the board notifies the licensee of its nature and of the date of the alleged violation within ten days of the completion of the investigation which in no event shall exceed ninety days.

As the Supreme Court of Pennsylvania observed in *Greenspan Liquor License Case*, 438 Pa. 129, 264 A.2d 690, 691 (1970), "The purpose of this provision is to give warning to the licensee that his activities have been under investigation and that his license is about to be endangered." Act 14 of 1987 rewrote §471, and the same provision now reads:

> …. No penalty provided by this section shall be imposed for any violations provided for in this act unless the bureau notifies the licensee of its nature within thirty days of the completion of the investigation.

In *Gatling*, enforcement officers visited the premises on June 22 and 29, 1983, and found the same violation each time. The officer supervising the investigation was removed from her position shortly after the second violation, and the case was not reassigned until more than a month later. The next event was a visit to the premises on August 16, 1983, at a time when the establishment was closed. The enforcement officer caused notice of the violations of June 22 and 29, 1983, to be send to the licensee on August 19, 1983.

Commonwealth Court held that the dates of an investigation are a proper factual inquiry, that an unproductive visit was not conclusive evidence of the continuation of an investigation, and that the record supported the trial court's conclusion that the investigation ended well before a date which would have made the August 19 notice timely. The court inferred from the evidence of no further visits after the unproductive August 16 visit that the investigation had in fact terminated earlier. The essence of the holding was this:

> The trial court's finding as to the date on which the investigation ended was a proper factual determination and does not represent a legal rule that Board investigations terminate on the date a violation was last observed. The facts in this case strongly support such a finding, and it appears to be the better course to disallow here an enforcement officer's visit to closed premises as conclusive evidence of the ongoing nature of an investigation. Otherwise, the Board could, solely to satisfy the ten day rule, readily "revive" a completed investigation through the expediency of such a visit.
>
> --511 A.2d at 274.

*In re: Concord Ranch, Inc. d/b/a Encore Theater & Restaurant & Pulsations Nightclub*, 134 Pa. Cmwlth. Ct. 131, 578 A.2d 1339 (1990), was a case in which Commonwealth Court distinguished *Gatling* because the last visit to the premises in that case was unproductive (and followed the last productive visit by almost two months), and the officer made no further attempt to return. In *Concord Ranch*, by contrast, there was a productive visit on June 5, and notice of violation sent two days later was therefore timely.

In *PSP, BLCE v. Edward A. Prekop & Howard G. Massung t/a Chez Lounge*, 156 Pa. Cmwlth. Ct. 250, 627 A.2d 223 (1993), the licensee argued that notice was untimely where it was given longer than 30 days past the date of violation and that the notice requirement should be understood as applying to the completion of an investigation *of a specific violation*, relying on

*Gatling*. Commonwealth Court affirmed the finding below that the notice was timely because there was substantial evidence in the record to support the administrative law judge's finding that the investigation was a continuing one. The court noted that the legislature could have made the requirement applicable to a specific violation but chose not to. Commonwealth Court expressed the view that "it would be inappropriate to hold that any initial viewing of a violation requires immediate notification to the licensee. While *Gatling* instructed the PLCB not to procrastinate in issuing notice of violations, we do not wish to hamper the Bureau in its investigatory efforts." 627 A.2d at 226.

*PSP, BLCE v. David H. McCabe, Karen G. McCabe, t/a Olde Keg Lounge*, 163 Pa. Cmwlth. Ct. 11, 644 A.2d 1270 (1993), was an appeal by the Bureau from an order of a common pleas court sustaining the dismissal of a citation in a case in which the administrative law judge found that the Bureau had not complied with 47 P.S. §4-471(b) where there was a gap in investigatory activity between February 20 and September 8, 1991.

According to the investigating officer's testimony, she visited the premises on January 26 and February 20, 1991, but neither of these visits uncovered violations. She intended to close the investigation after the second visit, but additional complaints were received. Sometime after February 20, 1991, the officer, who had a caseload of about 60 investigations at the time, lost the file. She did not find it again and resume work on the investigation until approximately one week before her final visit to the premises on September 8, 1991, when she observed a violation. Between February 20 and September 8, 1991, the only work performed on the investigation were unsuccessful attempts by the officer to contact some of the complainants.

Commonwealth Court reversed and observed:

> We are mindful in construing Section 471(b) that the object of statutory interpretation and construction is to ascertain the intention of the legislature and to give effect to all the statute's provisions. Section 1921(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921(a). In ascertaining legislative intent, we may consider the consequences of a particular interpretation, 1 Pa. C.S. §1921(c); and we may presume that the legislature did not intend a result that is absurd or unreasonable. 1 Pa. C.S. §1922.
>
> The Liquor Code does not define the term "investigation" or explain when an investigation is deemed complete for purposes of Section 471(b). However, for the reasons discussed below, the notice provision makes sense only if the "investigation" refers to the activity of the Bureau which uncovered the violation of which the licensee must be notified. Thus, in the present case, the "investigation" corresponding to the alleged violations uncovered on September 8, 1991, could not have ended prior to that date, and the trial court erred in holding that it did.
>
> --644 A.2d at 1272-1273.

Commonwealth Court characterized the trial court's reading of the law as requiring the Bureau to prove continuous investigatory activity from the beginning of the investigation until thirty days before notice is served, and observed that there is nothing in the law to support this view. The court concluded that the legislature did not intend to regulate the Bureau's investigatory procedures in this manner.

Commonwealth Court's most recent case involving an interpretation of *Gatling* is *The Orchards Corporation*[*] v. PSP, BLCE, 816 A.2d 1233 (Pa. Cmwlth. Ct. 2003). There was support in the record for the ALJ's determination that the investigation was continuous and ongoing. The court cited *McCabe* and *Prekop* approvingly, and once again found the appellant's reliance on *Gatling* to be misplaced.

Considering these precedents collectively, it may be inferred that *Gatling* is nothing more than an empty shell meant to be distinguished on every occasion. My research has brought to light no cases, other than *Gatling*, in which a court has found an investigation to have been closed on a date earlier than the date stated by the Bureau of Liquor Control Enforcement. In other words, every case which has cited *Gatling* has found it distinguishable on the facts.

Given the apparent state of the law, an investigation by the Bureau of Liquor Control Enforcement begins when it is assigned to an officer and ends when that officer says it does. In this case the officer testified that her investigation "was still open" in the sense that "[i]t just was not closed yet." (N.T. 30-31). The Bureau's notice in this case was therefore timely.

In the alternative, however, if my diagnosis of *Gatling's* lack of vitality is incorrect, I wish to point out that there is no restraint on the Bureau's scope of investigation of a licensed premises. In this case they found late-night violations and documented the presence of the video machines on October 25, 2009, but nothing limited any continuing investigation the Bureau might choose to these topics. The Bureau might have continued to investigate for other violations, and the removal of the video machines, possibly a result of the enforcement activities of July 21, 2010, did not oblige them to wrap up their investigation at that time.

In any event, it is clear that the undercover officer had an investigatory purpose in going to the premises on September 22, 2010, and therefore there is sufficient evidence for me to conclude that the investigation was ongoing at that time, making the Bureau's notice in this case timely.

## Licensee's Motion to Suppress Evidence

I construe Licensee's argument as if it were a suppression motion, despite the absence of an administrative procedure for such motions, because the authority cited, *Northend Wanderers, supra*, is framed in that way.

In *Northend Wanderers* a liquor enforcement officer obtained a key to a private club from a member who was "tired of seeing people lose all their money in the poker machines." The officer used the key to enter the premises repeatedly, and in the course of his visits he witnessed gambling. The Honorable Stephen G. Baratta, Judge of the Court of Common Pleas of Northampton County, held that the undercover visits were warrantless searches regulated by 40 Pa. Code §5.85, which provides that "[a]uthorized representatives of the Board shall, upon presentation of their credentials, be admitted immediately to the clubhouse or club quarters and permitted without hindrance or delay

[*] Originally Citation No. 99-2039, issued to The Orchard Corporation. The Honorable Daniel T. Flaherty, Jr., found that the investigation was ongoing and continuous until November 15, 1999, and therefore the notice of violation letter mailed December 1, 1999, was timely. Licensee had argued that no new information was obtained by the Bureau after July 24, 1999, and therefore the investigation was completed on that date.

to inspect completely the premises at any time during which the club is open for the transaction of business."

Reasoning that this was the only method by which Bureau officers could enter licensed club premises, the court found that the undercover entries were unlawful, and suppressed the fruits of those visits on the basis that the evidence was obtained in violation of the club's rights under the 4th Amendment to the United States Constitution.

*Northend Wanderers* is distinguishable on the facts. The officer involved in this case was a *bona fide* member of the licensed organization. Under the rules and custom of the organization, she was entitled to enter the club, and her entry was therefore lawful. The oath she took upon becoming an Eagle was not the equivalent of an oath of *Omertà*, such as to bar her from testifying about the illegal activities she observed.

I must point out as well that *Northend Wanderers* is the decision of a court of a different county, and therefore not applicable to Lehigh County cases.

PRIOR RECORD:

Licensee has been licensed since January 1, 1934, has had one prior violation since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

Citation No. 08-3085. $550.00 fine.

1. Gambling (machines). December 10, 2008.
2. Sales to nonmembers. December 10, 2008.

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 this type. For violations of the type found in the third count, any fine must be in the $1,000.00 to $5,000.00 range. For violations of the type found in the other counts, any fine must be in the $50.00 to $1,000.00 range. Penalties are assessed as follows:

Count Nos. 1 and 2 (penalty merged) – a fine of $300.00.
Count No. 3 – a fine of $1,000.00.
Count No. 4 – a fine of $700.00.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Fraternal Order of Eagles, Bethlehem Aerie No. 284, License No. C-487, shall pay a fine of two thousand dollars ($2,000.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license must be suspended or revoked. Jurisdiction is retained.

Dated this 27TH day of MARCH, 2012.

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.**

**WHETHER OR NOT RECONSIDERATION HAS BEEN REQUESTED, AGGRIEVED PERSONS MAY APPEAL TO THE PLCB, NORTHWEST OFFICE BUILDING, HARRISBURG, PA 17124 WITHIN 30 DAYS AFTER THE MAILING DATE OF THIS ORDER.**

**THE PLCB CHIEF COUNSEL'S TELEPHONE NUMBER IS 717-783-9454.**

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