Mailing Date: NOV 21 2011

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 11-0741 Incident No. W09-423872
v.	:	LID - 2905
SAFETY FIRST VOLUNTEER FIRE CO 307 6th ST EASTON PA 18042-6124	:	
NORTHAMPTON COUNTY LICENSE NO. CC-296	:	

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 May 4, 2011. There are four counts in the citation.

The first count alleges that License violated §§471 and 493(12) of the Liquor Code, 47 P.S. §§4-471 and 4-493(12), §311 of the Local Option Small Games of Chance Act, 10 P.S. §311, and §901 of the Department of Revenue Regulations, 61 Pa. Code §901, by failing to maintain complete and truthful records covering the operation of the licensed business for a period of two years immediately preceding February 13, 2011.

The second count alleges that Licensee violated §5.51(c) of the Liquor Control Board Regulations, 40 Pa. Code §5.51(c), during the period August 8, 2010, through February 18, 2011, by failing to clean its malt or brewed beverage dispensing system at least once every seven days.

The third count alleges that Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §315(b) of the Local Option Small Games of Chance Act, 10 P.S. §315(b), during each of the seven-day periods beginning December 27, 2010, and ending February 20, 2011, by offering and/or awarding more than $5,000.00 in cash or merchandise.

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 February 18, 2011, 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 October 7, 2011, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On February 18, 2011, liquor enforcement officers visited the licensed premises at about 2:30 p.m. They identified themselves to the bartender and told him they were there to do a routine inspection. At the conclusion of the inspection they seized four Draw Poker video poker machines and a box containing $1,975.00. The officers also provided Licensee's manager with copies of two documents prepared that day: (1) a "Property Record" describing the items seized and (2) a "Gambling Device Questionnaire" (N.T. 7-12, Exhibit C-3).

2. Liquor enforcement officers returned to the premises on February 23, 2011. They obtained a document kept in the licensed premises as a record of coil cleaning. This record showed that during the period August 1, 2010, through February 19, 2011, the malt or brewed beverage dispensing system was cleaned intermittently. In this 21-week period only six cleanings were made on the required seven-day schedule. On one occasion the interval was 21 days. The average time between cleanings during this period was ten days (N.T. 13-14, Exhibit C-4).

3. The club provided Small Games of Chance operating week records for the one-week periods commencing December 27, 2010, and ending February 20, 2011. There were no other records provided. The records provided show the following results (N.T. 16, Exhibits 6a & 6b):

Start	End	Gross	Expenses	Prizes	Net
Monday, December 27, 2010	Sunday, January 02, 2011	$26,561.00	$2,422.75	$19,692.00	$4,446.25
Monday, January 03, 2011	Sunday, January 09, 2011	25,636.00	2,678.20	18,479.00	4,478.80
Monday, January 10, 2011	Sunday, January 16, 2011	30,748.00	2,797.60	22,207.00	5,743.40
Monday, January 17, 2011	Sunday, January 23, 2011	24,800.00	1,256.00	18,567.00	4,977.00
Monday, January 24, 2011	Sunday, January 30, 2011	27,276.00	2,783.05	21,478.00	3,014.95
Monday, January 31, 2011	Sunday, February 06, 2011	29,192.00	2,731.90	20,955.00	5,505.10
Monday, February 07, 2011	Sunday, February 13, 2011	27,972.00	3,468.10	19,108.00	5,395.90
Monday, February 14, 2011	Sunday, February 20, 2011	26,051.00	3,093.00	18,024.00	4,934.00

4. The Bureau investigated Licensee during the period December 17, 2010, through March 14, 2011, and sent it written notice of the results on April 8, 2011. The notice states that the investigation resulted in information relevant to three alleged violations, which are the violations alleged in the first three counts of this citation. The notice did not mention the violation charged in the fourth count (Exhibit C-2).

5. Licensee's manager admitted to a liquor enforcement officer that the club did pay out on the machines, and showed him where the money used to do this was kept. He also explained the method by which points accumulated on the machines could be "knocked off" or instantly reduced to zero (N.T. 33-34).

DISCUSSION:

The weight of the Bureau's evidence was diminished somewhat by the testimony of one of the liquor enforcement officers, who initially objected to revealing the identity of the person who complained to the Bureau, but then stated that he did not know that person's name. It is difficult to credit this officer's testimony, since a candid witness would not have made a show of needing to protect the identity of someone whose identity he does not know.

There was testimony in this case about a switch said to have been operated by a bartender surreptitiously when the liquor enforcement officers announced that they were conducting a routine inspection. The evidence on this was incoherent, and ultimately not relevant to the result.

I am unable to credit the testimony presented by Licensee to the effect that the coil cleaning records might have been deficient, but the coils were in fact cleaned every Thursday. This is not a complicated record-keeping requirement, and I think that a person who is able to clean the malt or brewed beverage dispensing system is also likely to be able to keep an accurate record. I find that the record kept in this case was accurate (although incomplete) and substantiated the allegation that the apparatus was not being cleaned as frequently as the law requires.

The last sentence of 47 P.S. §4-471(b) provides: "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 this case the notice given by the Bureau pursuant to this law did not include the fourth count of this citation, due to administrative error. According to the Bureau's letter brief an amended notice was mailed to Licensee on April 25, 2011, but this was more than thirty days after the completion of the investigation on March 14.

The Bureau argues that there is no requirement that the notice be in writing, and that Licensee had actual notice of the allegation made in the fourth count because of the seizure of the machines and money and the preparation and delivery on the date of seizure of a "Property Record" and a "Gambling Device Questionnaire."

In support of this argument the Bureau cites *Greenspan Liquor License Case*, 264 A.2d 690 (Pa. 1970). On May 7, 1966, officers of the Philadelphia Police Department found numbers paraphernalia in the licensed premises and arrested the licensee. On June 25, 1966, Philadelphia police officers saw sales of alcoholic beverages in the licensed premises after the legal closing hour, and arrested the licensee.

The PLCB learned of the criminal proceedings and issued citations on January 4, 1967. After hearing, the Board ordered the licensee to pay fines totaling $350. The Court of Quarter Sessions affirmed the Board's order. Superior Court reversed. On appeal to the Supreme Court the issue was whether notice as specified by the statute must be given when the Board makes no independent investigation of its own but rather issues citations solely on the basis of information supplied by other agencies.

Superior Court had relied on *Elfman, Point Bar, Liquor License Case*, 240 A.2d 395 (Pa. Super. 1968), which held that the arrest was a criminal proceeding and "although notice of the criminal action may have gotten to the Board and the licensee, this does not fulfill the requirement

of the legislature that notice be given, as required by the amendment, to the licensee so that he is made fully aware that his license is about to be endangered by the issuance of a citation." 264 A.2d at 691.

The Supreme Court held that the arrest warrant or the information filed after the arrest furnished the notice that the statute requires the licensee be given, and therefore the Board need not follow the requirements of §471 when (a) the licensee or his employee is arrested for a crime that is also a violation of the Liquor Code and (b) the Board and its officers make no independent investigation of the facts surrounding the incident, but only rely on reports and materials supplied by other agencies.

The Bureau also cited *Faber v. Com. PLCB,* 309 A.2d 65 (Pa. Cmwlth. Ct. 1973), but it follows *Greenspan* without adding anything to it.

It is my opinion that *Greenspan* is not on point because (1) in this case no one was arrested and (2) this investigation was initiated by the Bureau, not by an outside police department. I find that the documents left at the premises on the date of the seizure are not equivalent to the notice required by 47 P.S. §4-471(b)(last sentence).

One wonders why, if the Bureau believed that its "Property Record" and "Gambling Device Questionnaire" were adequate notice to Licensee under §471, it bothered to send an amended notice on a date clearly beyond the 30-day deadline.

One wonders why, if verbal notice or the leaving of an investigative report at the licensed premises were adequate notice to Licensee under §471, the Bureau would bother, in all other cases I have seen so far, to produce and mail out the notice of violation letter.

CONCLUSIONS OF LAW:

License violated §§471 and 493(12) of the Liquor Code, 47 P.S. §§4-471 and 4-493(12), §311 of the Local Option Small Games of Chance Act, 10 P.S. §311, and §901 of the Department of Revenue Regulations, 61 Pa. Code §901, by failing to maintain complete and truthful records covering the operation of the licensed business for a period of two years immediately preceding February 13, 2011.

Licensee violated §5.51(c) of the Liquor Control Board Regulations, 40 Pa. Code §5.51(c), during the period August 8, 2010, through February 18, 2011, by failing to clean its malt or brewed beverage dispensing system at least once every seven days.

Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §315(b) of the Local Option Small Games of Chance Act, 10 P.S. §315(b), during each of the seven-day periods beginning December 27, 2010, and ending February 20, 2011, by offering and/or awarding more than $5,000.00 in cash or merchandise.

Licensee violated §471 of the Liquor Code, 47 P.S. §4-471, and §5513 of the Crimes Code, 18 Pa. C.S. §5513, on February 18, 2011, by permitting gambling on the licensed premises. However, no penalty may be imposed for this violation because the Bureau did not notify the Licensee of the result of the investigation within thirty days after its completion.

PRIOR RECORD:

Licensee has been licensed since January 1, 1934, and has had prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, as follows:

Citation No. 08-2402. $700.00 fine.

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

Citation No. 09-2460. $400.00 fine.

1. Failed to maintain complete and truthful records covering the operation of small game of chance games for a period of two years. September 9, 2009.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the $50.00 to $1,000.00 range, or both, for violations of this type.

Penalties are assessed as follows:

Count 1 – a fine of $500.00.
Count 2 – a fine of $200.00.
Count 3 – a fine of $500.00
Count 4 – DISMISSED.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, Safety First Volunteer Fire Co., License No. CC-296, shall pay a fine of one thousand two hundred dollars ($1,200.00) 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 9TH day of November, 2011.

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

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Safety First Volunteer Fire Co.