

Mailing Date: April 3, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 12-0639
ENFORCEMENT	:	
	:	
v.	:	
	:	
FRATERNAL ORDER OF EAGLES	:	License No. CC-3710
GETTYSBURG AERIE NO. 1562	:	
61 North 5 th Street	:	LID 1722
Gettysburg, PA 17325-2033	:	

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OPINION

Fraternal Order of Eagles Gettysburg Aerie No. 1562 (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge (“ALJ”) Felix Thau, mailed February 11, 2013, wherein the ALJ sustained the five (5) counts of

Citation No. 12-0639 (“the Citation”) and imposed a combined penalty of a fine and a license suspension.

On April 26, 2012, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation to Licensee, charging it with five (5) counts. The first count charged Licensee with violating sections 471 and 493(12) of the Liquor Code [47 P.S. §§ 4-471, 4-493(12)], section 311 of the Local Option Small Games of Chance Act (“LOSGCA”) [10 P.S. § 311]¹, and section 901 of the Pennsylvania Department of Revenue (“Revenue”) Regulations [61 Pa. Code § 901]² in that on December 31, 2011, Licensee, by its servants, agents, or employees, failed to maintain complete and truthful records covering the operation of the licensed premises for the preceding two (2) years. The second count charged Licensee with violating section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] and section 5.52 of the Board’s Regulations [40 Pa. Code § 5.52] in that during the period January 27, 2011, through January 26, 2012, Licensee, by its servants, agents, or employees, failed to maintain malt or

¹ Act 2 of 2012, which became effective in March of 2012, made numerous changes to the LOSGCA, including some renumbering and amending of the sections at issue herein. However, since the acts that resulted in the Citation occurred before the passage of Act 2 of 2012, this case was reviewed under the former version of LOSGCA in effect at the relevant times in question.

² Upon request by ALJ Thau, the Bureau submitted a memorandum to the ALJ and to Licensee’s counsel on January 18, 2013, identifying the specific subsections of section 901 of Revenue’s Regulations which the Bureau alleged Licensee had violated. The memorandum listed subsections 901.462(2) and 901.734(1)(i)(C) [61 Pa. Code § 901.462(2), 901.734(1)(i)(C)].

brewed beverage dispensing system cleaning records. The third count charged Licensee with violating section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] and sections 5.71 and 5.74 of the Board's Regulations [40 Pa. Code §§ 5.71, 5.74] in that during the period January 1, 2011, through December 31, 2011, Licensee, by its servants, agents, or employees, failed to maintain records in conformity with the provisions of the Liquor Code and Title 40 of the Pennsylvania Code. The fourth count charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471], section 314 of the LOSGCA [10 P.S. § 314], and section 901 of Revenue's Regulations [61 Pa. Code § 901] in that during the period January 1, 2011, through December 31, 2011, Licensee, by its servants, agents, or employees, used funds derived from the operation of games of chance for purposes other than those authorized by law. The fifth count charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 315(b) of the LOSGCA [10 P.S. § 315(b)] in that during the periods May 23 through 29, June 6 through 12, July 11 through 17, August 15 through 21, September 5 through 11, October 24 through 30, November 14 through 20, and December 5 through 11, 2011, Licensee, by its servants, agents, or employees, awarded more than five thousand dollars (\$5,000.00) in cash or merchandise in a seven (7)-day period.

The hearing was held on January 8, 2013. John H. Pietrzak, Esquire, appeared at the hearing as counsel for the Bureau. Frank C. Sluzis, Esquire, appeared on behalf of Licensee. By Adjudication and Order mailed February 11, 2013, the ALJ sustained all five (5) counts of the Citation and imposed a fine of three thousand three hundred dollars (\$3,300.00) and a license suspension of one hundred (100) days. The fine was due within twenty (20) days, and the suspension was to begin on April 1, 2013, and end on July 10, 2013. However, Licensee filed a timely appeal to the Pennsylvania Liquor Control Board (“Board”), which triggered an automatic supersedeas. [47 P.S. § 4-471(b)].

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. The Board may only reverse the decision of the ALJ if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. [47 P.S. § 4-471(b)]. The Commonwealth Court has 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, 484 A.2d 413 (Pa. Cmwlth. 1984). Furthermore, the Pennsylvania Supreme Court has defined an abuse of discretion as “not merely

an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 297, 602 A.2d 1300, 1305 (1992) (citations omitted).

In its appeal, Licensee contends simply that the ALJ’s findings of fact were not supported by substantial evidence and that the ALJ committed an error of law in sustaining the charges. It must be noted that section 17.21(b) of the Board’s Regulations [40 Pa. Code § 17.21(b)] provides that an appeal to the Board “shall be in the form prescribed by the Board.”³ It also requires, *inter alia*, that an appeal to the Board of a decision of the ALJ “shall include a concise enumeration and explanation, in the numbered paragraphs, as to each finding of fact which the appellant believes is not supported by substantial evidence.” [40 Pa. Code § 17.21(b)(4)] (emphasis added). Licensee’s appeal, while concise, does not enumerate or explain a specific finding of fact of the ALJ not supported by substantial evidence; nor does it specify how the ALJ committed an error of law.

³ The Board directs Licensee’s attention to section 7 of the Appeal Form, which requires that the appellant “specify how the Administrative Law Judge committed an error of law or abused his/her discretion or how his/her decision was not based on substantial evidence” (emphasis added).

Such failure to follow the proper appeal procedure, as prescribed by section 17.21 of the Board's Regulations [40 Pa. Code § 17.21], is grounds for dismissal at the discretion of the Board. Nonetheless, the Board has reviewed the certified record, including the ALJ's Adjudication and Order, Licensee's appeal, and the notes of testimony and exhibits from the hearing and concluded that the ALJ's decision was supported by substantial evidence and that it was not an error of law to sustain the violations charged.

With respect to count one, section 493(12) of the Liquor Code makes it unlawful for a licensee to fail to keep complete and truthful records covering the operation of the licensed business for the preceding two (2) years. [47 P.S. § 493(12)]. Licensees that are also licensed to operate small games of chance must therefore abide by the recordkeeping requirements under the LOSGCA and its attendant regulations. LOSGCA licensees must maintain records which include "[t]he full details of the expenses related to the conduct of games of chance." [61 Pa. Code § 901.462(2)]. Licensees operating pull-tab games must also maintain records including, *inter alia*, the "form number" for each game put in play. [61 Pa. Code § 901.734(1)(i)(C)].

Here, Licensee's counsel signed a document titled "Stipulations of Fact" dated January 8, 2013, the date of the hearing, and the document was admitted

as “joint exhibit C-3.” [N.T. 7, 12; Ex. C-3]. The stipulations contained in Exhibit C-3 were incorporated by reference in the ALJ’s adjudication and served as his findings of fact. Paragraph 4 of the exhibit states, “During the period charged, the Licensee’s Small Games of Chance recordkeeping was deficient in that the Licensee did not list the form number for each game played, the cost of each game, and did not maintain a daily record of payouts. (Count 1)[.]” [Ex. C-3, p. 3]. Thus, Licensee clearly admitted violating section 493(12) of the Liquor Code and section 901 of Revenue’s Regulations, as charged in count one.

With respect to count two, licensees must maintain and keep a record of the date of each cleaning of the malt or brewed beverage dispensing system and the method utilized. [40 Pa. Code § 5.52(b)].

In paragraph 5 of the Stipulations of Fact, Licensee admitted that its records pertaining to the cleaning of its dispensing system were deficient. Specifically, Licensee agreed, “During the period of January 27, 2011 to January 26, 2012, the Licensee failed to maintain records of the cleaning of its malt or brewed beverage dispensing system. The Licensee’s records show that the lines were cleaned every eight weeks as recommended by the manufacturer of the BLM 2000 cleaning system, but did not show when the tap heads or spigots were cleaned. (Count 2)[.]” [Ex. C-3, p. 3]. Therefore, Licensee

admitted the violation of section 5.52 of the Board's Regulations charged in count two.

With respect to count three, licensed clubs must maintain a minute book containing all of the following:

- (1) The minutes of all regular and special meetings.
- (2) The names and dates of applicants for membership and the dates the members were admitted and whether ballots were taken.
- (3) The financial reports of the treasurer.
- (4) Parties, banquets, socials and the like given to members free of charge, and the costs involved.
- (5) Elections and appointments of officers and committees, and the term for which they are elected, and customary entries in a record of this nature.

[40 Pa. Code § 5.74].

In paragraph 6 of the stipulations, Licensee admitted, "During the period charged, the Licensee did not include or attach a treasurer's report to its meeting minutes. The meeting minutes also did not reflect the date of application for proposed new members. (Count 3)[.]" [Ex. C-3, p. 3]. Licensee thus admitted the violation of section 5.74 of the Board's Regulations charged in count three.

With respect to count four, section 314 of the LOSGCA, which was in effect at the time of the alleged violations, provided that "[a]ll proceeds of

games of chance shall be used exclusively for public interest purposes or for the purchase of games of chance as permitted by this act.” [10 P.S. § 314].

Paragraph 7 of the Stipulations of Fact states, “During the period charged, the Licensee directed some funds gained from its small games of chance operation to its operating expenses. The amount of net small games of chance revenue used for unlawful purposes (*sic*) during this period charged \$283,982.97. (Count 4)[.]” [Ex. C-3, p. 3]. Licensee thus admitted that not all of the 2011 proceeds from its small games of chance were used for public interest purposes in violation of section 314 of the then-current LOSGCA.

Finally, as for count five of the Citation, section 315(b) of the LOSGCA, which was in effect at the time of the alleged violations, provided that LOSGCA licensees were limited to awarding no more than five thousand dollars (\$5,000.00) in cash or merchandise in any seven (7)-day period. [10 P.S. § 315(b)].

Paragraph 8 of the stipulations provides a chart identifying the amount paid out by Licensee in prizes during each of the eight (8) weeks in 2011 identified in count five of the Citation. [Ex. C-3, p. 3-4]. The amounts range from thirty-two thousand five hundred forty-five dollars (\$32,545.00) to sixty-one thousand sixty-three dollars (\$61,063.00), and all are well in excess of the

five thousand dollar (\$5,000.00) seven (7)-day limit that was in effect in 2011. Therefore, Licensee clearly violated section 315(b) of the then-current LOSGCA.

Based on the foregoing review, the Board finds the ALJ's conclusion to be amply supported by the record. The Bureau's exhibits establish that Licensee committed the violations charged in counts one through five of the Citation. Moreover, aside from restating the standard of review, Licensee provided no arguments for the Board to consider on appeal. Therefore, having found substantial evidence to support the decision and no error of law, the Adjudication and Order of the ALJ is affirmed.

ORDER

The appeal of Licensee is denied.

The decision of the ALJ is affirmed.

The fine of three thousand three hundred dollars (\$3,300.00) has been paid.

The one hundred (100)-day license suspension ordered by the ALJ has not been served. The license shall be suspended for one hundred (100) days, beginning Monday, May 13, 2013, at 7:00 a.m., and ending on Wednesday, August 21, 2013, at 7:00 a.m.

The case is hereby remanded to the ALJ to ensure compliance with this Order.

Board Secretary