Mailing Date: January 14, 2015

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 12-1745
v.	:	
WALT'S CIRCLE TAVERN, INC. t/a Walt's Circle Tavern 5818 Castor Avenue Philadelphia, PA 19149-3713	:	License No. R-11243 LID 14818

Counsel for Licensee (on appeal): Edward B. McHugh, Esquire
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OPINION

Walt's Circle Tavern, Inc. ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") David Shenkle mailed August 29, 2014, wherein the ALJ sustained both counts of Citation No. 12-1745 and ordered revocation of the license effective October 27, 2014. Having considered Licensee's appeal, the Board affirms the decision of the ALJ.

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee on December 24, 2012, charging it with the following two (2) counts:

1. On November 12, 2012, you, by your servants, agents or employees, aided, abetted or engaged in the traffic in, or sale of, a controlled substance on your licensed premises and/or permitted the use of the licensed premises in the furtherance of the traffic in, or use of, a controlled substance, in violation of Sections 471 and 493(31) of the Liquor Code [47 P.S. §§ 4-471, 4-493(31)] and Section 780-101, et seq[.], of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act [35 P.S. § 780-101].

2. On November 12, 2012, you, by your servants, agents or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises, in violation of Section 471 of the Liquor Code [47 P.S. § 4-471] and Sections 5513 and/or 5514 of the Crimes Code [18 Pa. C.S. §§ 5513, 5514].

(Ex. B-2).

On June 24, 2013, the Bureau issued Licensee an amended Citation.[1] While Count 2 remained unchanged, the conduct alleged in Count 1 was amended, with the new language emphasized, as follows:

1. On November 12, 2012, you, by your servants, agents or employees, **possessed and/or sold a controlled substance on the licensed premises**, in violation of Sections 471 and 493(31) of the Liquor Code [47 P.S. §§ 4-471, 4-493(31)] and Section 780-101, et seq[.], of the

[1] Licensee raised no objection to the amendment of the Citation.

> Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act [35 P.S. § 780-101].

(Ex. B-2).

A hearing was held on May 22, 2014, in which Andrew Britt, Esquire, appeared as counsel for the Bureau. No one appeared on behalf of Licensee, and thus the hearing proceeded *ex parte*.

By Adjudication and Order mailed August 29, 2014, the ALJ sustained both counts of the Citation and revoked the license effective October 27, 2014. Licensee filed a timely appeal with the Board on September 26, 2014, 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 if the ALJ committed an error of law or abuse of 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).

On appeal, Licensee essentially restates the Board's standard of review in alleging merely that the ALJ committed an error of law and that none of the ALJ's Findings of Fact is supported by substantial evidence.[2] Because Licensee did not provide any further explanation for the basis of its appeal, the Board has conducted a general administrative review of the certified record, including the ALJ's Adjudication and Order, Licensee's appeal, the Bureau's reply, and the Notes of Testimony and Exhibits from the hearing. Based upon its review, the Board has concluded the ALJ did not commit an error of

[2] 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." It also requires, *inter alia*, that an appeal to the Board of an ALJ's decision "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. The 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.

law or abuse of discretion in sustaining the Citation, and further, the ALJ's Findings of Fact were supported by substantial evidence.

Section 471 of the Liquor Code authorizes the Bureau to cite a licensee for any violation of a law of the Commonwealth relating to liquor, alcohol, or malt or brewed beverages. [47 P.S. § 4-471(a)]. It is "well established that 'violations of criminal laws other than the Liquor Code may constitute sufficient cause for revocation or suspension of a liquor license' pursuant to Section 471 of the Liquor Code." Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Colombus Home Ass'n, 989 A.2d 39, 44 (Pa. Cmwlth. 2009).

In the first count of the Citation, Licensee was cited under section 471 for a violation of The Controlled Substance, Drug, Device and Cosmetic Act [35 P.S. § 780-101, *et seq.*], in that on November 12, 2012, Licensee's employees possessed and/or sold a controlled substance on the licensed premises. In addition, the conduct was alleged to be a violation of subsection 493(31) of the Liquor Code [47 P.S. § 4-493(31)], which, *inter alia*, prohibits a licensee from possessing, furnishing, selling, or offering to sell any controlled substance on the licensed premises.

At the hearing, the Bureau presented uncontroverted testimony from law enforcement officials indicating that:

> On November 12, 2012, officers of the Citywide Vice unit of the Philadelphia Police executed a search warrant at the licensed premises. They seized the two video poker machines, notes of gambling transactions, $483, seven containers of prescription medicine (six of which had the patient's name scratched off), and four containers of cocaine. The drugs were in a locked closet in the kitchen to which Mr. Potok had the key.

(Adjudication, Finding of Fact No. 10). "Mr. Potok" is Licensee's manager and secretary, Andrew J. Potok. (Adjudication, Finding of Fact No. 6).

The second count of the Citation alleged another violation of section 471 as a result of criminal activity committed by Licensee's employees on the licensed premises. Namely, Licensee was charged with violating sections 5513 and/or 5514 of the Crimes Code [18 Pa. C.S. §§ 5513, 5514] in that on November 12, 2012, Licensee's employees possessed or operated gambling devices, or permitted unlawful gambling, pool selling, or bookmaking on the licensed premises. Section 5513 of the Crimes Code prohibits, *inter alia*, an owner, tenant, lessee, or occupant of any premises from knowingly permitting any part thereof to be used for the purpose of unlawful gambling. [18 Pa. C.S. § 5513]. Section 5514 prohibits, *inter alia*,

owners, lessees, and occupants of any premises from engaging in pool selling or bookmaking on any part of the premises, or knowingly permitting the premises to be used for such purposes. [18 Pa. C.S. § 5514].

In this case the ALJ found, based on uncontroverted police testimony, that on November 12, 2012, law enforcement officers entered the licensed premises to execute a search warrant and found two (2) video poker machines. (Adjudication, Finding of Fact No. 4). Licensee's manager admitted to the officers that the machines were used for gambling, with the profits being split "50-50" with the owner of the machines. (Adjudication, Finding of Fact. No. 5). On a prior visit, an undercover officer observed a woman receive a payout from Licensee's manager after handing an employee a piece of paper on which was written "Kathy, poker, 120 points." (Adjudication, Finding of Fact. No. 6). An undercover officer also observed patrons place bets with Mr. Potok on televised horse races. (Adjudication, Finding of Fact Nos. 8, 9).

Given these undisputed facts, there is no question that the decision of the ALJ was supported by substantial evidence. On November 12, 2012, law enforcement officials found cocaine and unlabeled prescription drugs, as well as video poker machines on the

licensed premises. Mr. Potok, Licensee's manager, had the key to the locked kitchen closet where the cocaine and pills were found, and he admitted that the poker machines were used for a profitable gambling operation by Licensee. Therefore, the ALJ did not abuse his discretion or commit an error of law in sustaining both counts of the Citation.

In determining an appropriate penalty, the ALJ is guided by section 471, which permits the ALJ to impose a license suspension or revocation and/or a fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00) for each of the violations charged in counts one and two. [47 P.S. § 4-471(b)]. In addition to present facts, the ALJ may consider a licensee's prior citation history when imposing a penalty. [47 P.S. § 4-471(c)].

In this case the ALJ, considering the present facts as well as Licensee's record, which includes four (4) prior gambling citations, decided to impose a revocation of the liquor license. Because the penalty is within the statutory guidelines for the violations charged, the ALJ did not commit an error of law or abuse his discretion with regard to the penalty.

Therefore, for the foregoing reasons, the Adjudication and Order is affirmed, and the appeal of Licensee is dismissed.

ORDER

The appeal of Licensee is dismissed.

The decision of the ALJ is affirmed.

The supersedeas provided by section 471 is vacated, and Restaurant Liquor License No. R-11243 is hereby REVOKED (including all permits and Licensee discount cards), effective February 20, 2015.

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

John K. Stark

Board Secretary

NOTICE OF RIGHT TO APPEAL

In the event the Bureau of Liquor Control Enforcement or the licensee shall feel aggrieved by the decision of the Board, there shall be a right to appeal to the Court of Common Pleas in the same manner provided by the Liquor Code for appeals from refusals to grant licenses. Section 471 of the Liquor Code, which sets forth the provisions for appeal from refusal to grant licenses, permits an appeal within thirty (30) days of the Mailing Date of the Board's decision to the Court of Common Pleas of the county in which the premises is located.

If you file a timely appeal to the Common Pleas Court, you may be entitled automatically to a supersedeas (or stay) of the Order of suspension, revocation or fine which has been issued in connection with your case. If the appeal to Common Pleas Court would not operate as an automatic supersedeas, you may appeal to the Court for a stay.

Section 471 of the Liquor Code sets forth the circumstances under which an appeal to the Court of Common Pleas (as reviewing authority) shall not act as a supersedeas, for example:

> . . . . . if the license has been cited and found to have violated section 493(1) insofar as it relates to sales to minors or sales to a visibly intoxicated person, section 493(10) insofar as it relates to lewd, immoral or improper entertainment or section 493(14), (16) or (21), or has been found to be a public nuisance pursuant to section 611, or if the owner or operator of the licensed premises or any authorized agent of the owner or operator has been convicted of any violation of "The Controlled Substance, Drug, Device and Cosmetic Act," or of 18 Pa. C.S. §§ 5902 or 6301, at or relating to the licensed premises, its appeal shall not act as a supersedeas unless the reviewing authority determines otherwise upon sufficient cause shown . . . . .

Notice of the Board's Order has been sent to the Bureau of Liquor Control Enforcement of the Pennsylvania State Police and the licensee.

If a licensee files an appeal, it is the licensee's responsibility to make certain that the Bureau of Liquor Control Enforcement of the Pennsylvania State Police, 3655 Vartan Way, Harrisburg, PA 17110-9758; the Liquor Control Board, Office of Chief Counsel, 401 Northwest Office Building, Capital and Forster Streets, Harrisburg, PA 17124-0001 and the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pa 17110-9661, receive notice of the filing of a timely appeal.