

Mailing Date: OCT 01 2014

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	In Re: Citation No. 13-0582
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	BLCE Incident No. W01-453069
	:	
NICKELS TAVERN INC.	:	
T/A NICKELS TAVERN	:	PLCB LID - 28462
2653-55 S. 2 <sup>ND</sup> ST.	:	
PHILADELPHIA PA 19148	:	
	:	PLCB License No. R-AP-SS-4583
	:	
PHILADELPHIA COUNTY	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

**ERIK S. SHMUKLER, ESQ.**

FOR THE LICENSEE:

**EDWARD TARASKUS, ESQ.**

**BEFORE: JUDGE WRIGHT**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on April 2, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Nickels Tavern, Inc., t/a Nickels Tavern, License Number R-AP-SS-4583 (hereinafter "Licensee").

Nickels Tavern, Inc.  
t/a Nickels Tavern  
In Re: Citation No. 13-0582

An Administrative hearing was held on Thursday, November 21, 2013, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

The citation charges Licensee with violation of Section 471 of the Liquor Code, 47 P.S. §4-471, and Section 5514 of the Crimes Code, 18 Pa. C.S. §5514, in that on October 11, 25, November 1 and 5, 2012, Licensee, by its servants, agents or employes, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises.

FINDINGS OF FACT:

1. An officer from the Bureau of Enforcement conducted a routine inspection of the licensed premises on November 5, 2012, along with two other officers from the Bureau and a detail from the Philadelphia Police Department and Citywide Vice Unit. The Bureau officers found no food on the premises and could not, at that time, find a Food Preparation License (health permit). The Licensee was not cited for failing to have a health permit. The officer contacted the owner, Mr. Nickels, who resolved the issue of the health permit (N.T. 7-9).

2. The officers from the Bureau of Enforcement conducted the routine inspection. The Citywide Vice Unit dealt with the gambling aspects of the investigation (N.T. 10).

3. Officer Stanley Kaluza from the Philadelphia Police Department is an investigator with the Citywide Vice Enforcement Unit of the Philadelphia Police Department. He has been a police officer for nineteen years and has been a member of the Vice Unit for approximately fourteen years. The Vice Unit investigates prostitution, illegal lottery, speakeasies, narcotics, human trafficking, horse betting, illegal poker machines and pool selling (N.T. 11-12).

4. Officer Kaluza was part of a detail of officers that investigated the licensed premises. The officer visited the premises on October 2, 2012. The officers were greeted by a male bartender, who was later identified as John Slivinski, Jr. Once greeted by the bartender, the officers sat down and ordered an alcoholic beverage. The officers held a conversation about the upcoming Eagles game (N.T. 13-14).

5. The bartender came over and engaged in conversation with the two officers. One of the undercover police officers asked the bartender if he knew what the point spread was for the Eagles game. The bartender told him to hold on, went to the cash register, pulled out a cigar box and removed a pack of paper strips. After looking at the paper strips, the bartender indicated that the Eagles were favored by four points. From his thirteen years of experience and training, the officer concluded that the paper strips (poolslip) were football pool bets. The officer explained that the narrow strips of paper contain games and dates and indicates who is favored and by how many points. The bettor places money on the team who he/she hopes will win and retains part of the paper (N.T. 15-21).

6. The bartender told the undercover officers that the Eagles were favored by four points. The officer noted that the bartender had the betting slips in his hand. The officer asked if he could buy a pool slip. The bartender immediately put them back in the box and indicated that he does not handle them and that the officer would have to see if one of the other bartenders would sell him one. The officer did not pursue the purchase of the pool slip (N.T. 22).

7. On October 2, 2012, the officer was not able to examine the contents of the cigar box, but retrieved the contents later, when he had a search warrant (N.T. 25).

8. Officer Nicholas DiDonato is assigned to the Philadelphia Police Department Citywide Vice Enforcement Unit. He has been a Philadelphia Police Officer for eighteen years and served a total of ten years with Citywide Vice. During that time, he handled gambling investigations, underage drinking, speakeasies, illegal lotteries and prostitution (N.T. 27-28).

9. Officer DiDonato first visited the licensed premises on October 2, 2012, along with his partner, Officer Kaluza. He confirmed that Officer Kaluza had a conversation with the bartender, which resulted in his asking about the point spread for the upcoming Eagles game, and that the bartender removed information from a cigar box under the cash register and told them that there was a four point favor for the Eagles (N.T. 28-29).

10. Officer DiDonato saw what he believed to be football pools in the cigar box from a distance of approximately five feet. He recognized them primarily by the format. This officer concluded that there were football type sports betting pools, based on his ten years in Vice, hundreds of investigations, twenty or thirty of which involved football pools and sports pools (N.T. 29-30 and 32-34).

11. Officer DiDonato made a second visit to the premises on October 10, 2012. The officer went to the licensed premises with a female officer and purchased a drink. The two undercover officers engaged in conversation with the female bartender, Dana. Officer DiDonato requested a football pool. Dana examined the cigar box and indicated that there were no pools remaining. Dana then made a call on her cell phone, referring to the person on the phone as John. After speaking to the person on the phone, she advised the officers to return to the premises for the football pools (N.T. 35-37).

12. The officer visited the premises again on October 11, 2012 around 6:15 in the evening. He was greeted by Dana, the female bartender, who went to the cigar box, pulled it out and handed the officer three football pools. The officer purchased three pools for a total of \$9.00. The bottom portion of the ticket and retained the top portion. According to the officer, you choose four teams for every dollar you bet (N.T. 42, 47-49 and Exhibits B-3 and B-4).

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13. After the officer purchased the ticket, the bartender placed the stubs in a cigar box and placed the box back on the shelf underneath the cash register (N.T. 58).

14. The officer purchased the football pools on the eleventh for the game on October 13 and 14, 2012. He purchased three tickets at five dollars a piece for a total of fifteen dollars. The tickets remained in his possession, until he could verify whether or not he was a winner, but subsequently placed the tickets on the property receipt. The property receipt was then prepared on October 15, 2012 (N.T. 54-55, 58 and Exhibits B-3 and B-4).

15. The officer visited the premises on October 19, 2012 and engaged in conversation with the bartender (Andrea). He asked if the previous bartender had left any football pools for him and she responded that she had not (N.T. 60-62 and 64).

16. The officer returned to the licensed premises Thursday, October 24, when Dana was present. The officer engaged in conversation with her stating that he had stopped in on the previous Friday, but there were no pools. Again, she indicated that there were no pools. The officer said he would return the next day to see if there were any football pools (N.T. 60-65).

17. The officer visited the premises on Friday, October 25, 2012 in the evening. John, who had been the bartender on a prior occasion, was seated at the bar, as a patron, four stools from the officer. The officer ordered a drink and asked Dana for football pools. Prior to giving him the pools, she went over to John, who had gotten up from his seat and gone over to a Dodge City poker machine. Dana approached John at the poker machine and then returned to the officer. After the officer circled his pools, he gave the \$9.00 to Dana. Dana put the \$9.00 in an envelope and placed it in front of the area where John had previously been seated, where there were also other envelopes and money. When John came back and sat down in the seat, Dana indicated to him that she had put something there for him. John reached over, pulled out another envelope with money and stubs and placed the officer's money and stub in that same envelope (N.T. 65-68).

18. The officer saw John get up from his seat and go outside the bar and engage in a cell phone conversation. The officer decided to walk out near John, to see if he could get an idea of the nature of the conversation. John told the person on the phone that he had pools for him/her (N.T. 68-70).

19. On the evening of October 24, 2012, Officer DiDonato thought that the manager, Mr. Paoloca, was seated at the end of the bar (N.T. 70-71).

20. Mr. Paoloca, who the officers identified as the manager, was at the bar at various times over the course of the investigation (N.T. 39-40).

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21. The officer made a visit to the premises on Friday, November 1, 2012. After purchasing a beer, the officer engaged in conversation with Andrea, the bartender. The officer asked her if there were any pools. She gave him six, which she retrieved from a cigar box. The officer spent thirty dollars, paying five dollars for each football pool (N.T. 92-93).

22. Officer DiDonato visited the premises on Friday, November 2, 2012 around 3:43 in the afternoon accompanied by another officer. Another officer came in independent of Officer DiDonato, sat at another section of the bar and did not act as though they knew one another. Both officers were in an undercover capacity. Andrea was the female bartender on this occasion. John, the bartender/patron seen by the officer on an earlier occasion, inquired of Andrea as to whether there were any pools. Andrea stated that "Nick bought them all yesterday and there were none left." The bar personnel knew Officer DiDonato as "Nick." Andrea indicated to John that Nick's money was still in the cigar box (N.T. 105-106).

23. Officer DiDonato returned to the premises on Monday, November 5, 2012, along with officers from the Philadelphia Police Department and Bureau of Enforcement and served a search warrant. They visited the premises about 5:00 p.m. on November 5. The officer actually entered the premises at approximately 3:39 p.m. and had conversations with John and others concerning a block pool. John was bartending on this occasion. Blocks on the block pool were being sold for five dollars, but the officer was unable to purchase one because all of them had been sold. The officer again asked for football pools and was told that an individual would be bringing in the pools later that evening (N.T. 110-111).

24. The money from the cigar box was never mingled with the money from the cash register, in the officer's presence (N.T. 113).

25. An individual identified as Richard Nottis entered the premises during the raid and several items were confiscated from him, including a white PNC bank envelope with "Super Bowl Money" written on it, an Eagles and New Orleans black book for the Monday night football game and numerous blank college and football pools dated Saturday, November 10, 2012 (N.T. 114-117, 131-136 and Exhibits B-7, B-8, B-9 and B-10).

26. The officers visited the premises on October 2, 10, 11, 17, 19, 24, November 1, 2 and 5, 2012 (N.T. 166-168).

27. The officers never received payouts for any winning pools (N.T. 172).

28. Once the pool tickets were determined not to be winners, the officer placed them on property receipts and submitted them to 1716 City Hall in Philadelphia (N.T. 81-84, 90-91 and Exhibits B-5 and B-6).

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29. James Nickels is the sole corporate officer of Nickels Tavern, Inc. and the sole stockholder. He indicated that Nickels Tavern had been at the same location for eighty years and was previously owned by his father and his father's family. Mr. Nickels indicated that he fired all parties who were involved in the gambling. He indicated that he did not know Richard Nottis (N.T. 188-189).

30. Mr. Nickels indicated that he has always had a cigar box under the cash register and didn't know that it was being used for an illegal purpose (N.T. 190).

#### CONCLUSIONS OF LAW:

On October 11, 25, November 1 and 5, 2012, Licensee, by its servants, agents or employes, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises, in violation of Section 471 of the Liquor Code, 47 P.S. §4-471, and Section 5514 of the Crimes Code, 18 Pa. C.S. §5514.

#### PRIOR RECORD:

Licensee has been licensed since April 21, 1992, and has a record of prior violations as follows:

In Re:

Citation No. 03-0304. \$300.00 fine.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises.  
January 11 and 27, 2003.

Citation No. 06-0159. \$600.00 fine.

1. Operated the licensed establishment without a valid health permit or license.  
December 28 and 29, 2005.
2. Sold malt or brewed beverages for consumption off premises.  
December 28, 2005.
3. Failed to clean coils at least once every 7 days.  
July 11 through December 19, 2005.
4. Sold and/or served more than one alcoholic beverages at one time to one person for the price of one drink.  
December 29, 2005.

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Citation No. 07-1181. \$300.00 fine and Verification conditions corrected.

1. Failed to adhere to the conditions of the agreement entered into with the Board placing additional restrictions on the license.  
May 30, 2006 through May 2, 2007.

Citation No. 09-2723. \$500.00 fine.

1. Possessed or operated gambling devices or permitted gambling on the licensed premises.  
June 15, September 2, 12, 13 and 16, 2009.

#### DISCUSSION:

In *PLCB v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988), the Court held that, when violations of the Liquor Code and its attendant laws and regulations are not the conduct under review, a licensee is liable only if he knew or should have known of the illegal activity and if he fails to prove substantial affirmative measures to eliminate a known pattern of illegal activity. The Supreme Court of Pennsylvania has mandated that when a licensee has been found to have committed a violation which is classified as “other sufficient cause,” some element of scienter must be present before the penalties set forth in Section 471 of the Liquor Code may be applied. The test set forth by the Court is as follows:

- Whether the licensee knew or should have known of the illegal activities by an employee or patron.
- A licensee may defend his license by demonstrating he took substantial, affirmative steps to guard against a known pattern of illegal activities.

*Pa. Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

In 2003 and 2009 Licensee was cited for gambling. The 2003 violation involved sports pools and the 2009 violation involved possession of gambling machines. Despite this history, Licensee took no steps to prevent future violations of this nature. Here, Licensee is charged with gambling, specifically selling football pools. An undercover police officer from Philadelphia City-Wide Vice made approximately nine visits to the licensed premises.

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On each occasion there were discussions regarding football or block pools. Football pools were purchased on at least three separate occasions. An undercover officer purchased football pools from two different bartenders, but a third individual, an employee of the premises, John, was intimately involved in the receipt of money and tickets. The transactions were not particularly surreptitious and on one or more occasions, the manager or owner was present when the sales were made. The cigar box containing betting pools and money was maintained in a location under the cash register, where only employees would have access. It is clear that given the open notorious nature of the pool selling, License should have been aware of the illegal activity, even if he was not directly involved with it.

Licensee challenged the chain of custody regarding the tickets in that they were held by the officer for several days, while determining if any of them were winners, prior to placing them on a property receipt and retained at City Hall. The Court did not exclude this evidence, but gave it its relative weight considering all circumstances. Gaps in the chain of custody go to the weight to be given the testimony, not as admissibility. *Commonwealth of Pennsylvania v. Arnold Bolder*, 406 A.2d 333 (Pa. 1979). The officers testified credibly to the transactions, and the Court gave great weight to the testimony. Based upon the officers' training and many years of experience, they were able to identify the papers as illegal football betting slips, i.e. football pools. The Court found nothing circumspect about the manner in which the football pools were maintained, and the pools slips were presented to the Court in virtually the same condition as they were when sold to the police officer. There were no fatal flaws in the chain of custody.

After careful consideration of the facts and prior record of offenses, a monetary penalty and period of suspension shall be imposed.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$50.00 or more than \$1,000.00, or both, for violations of the type found in this case.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, Nickels Tavern, Inc., t/a Nickels Tavern, License Number R-AP-SS-4583, pay a fine of Seven Hundred Dollars (\$700.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

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IT IS FURTHER ORDERED that the Restaurant Liquor License of Nickels Tavern, Inc., t/a Nickels Tavern, License Number R-AP-SS-4583 (including all permits and Licensee Discount Card), be suspended for a period of one (1) day **BEGINNING** at 7:00 a.m. on Monday, January 12, 2015 and **ENDING** at 7:00 a.m. on Tuesday, January 13, 2015.

Licensee is directed on Monday, January 12, 2015 at 7:00 a.m. to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

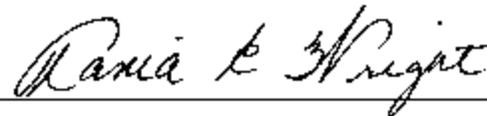
Licensee is advised if a replacement placard is needed for any reason they are available at all Pennsylvania Liquor Stores/Fine Wine and Good Spirits Stores.

The "Bureau of Enforcement" is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

The Licensee is authorized on Tuesday, January 13, 2015 at 7:00 a.m. to remove the placard of suspension and return the license to its original wall location.

**Jurisdiction of this matter is retained.**

Dated this 30<sup>TH</sup> day of September, 2014.



Tania E. Wright, J.

**NOTE:** MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.

**If you wish to appeal the decision of the Administrative Law Judge's Order, the appeal must be filed within 30 days of the mailing date of the Order. Please contact the Office of the Chief Counsel of the Pennsylvania Liquor Control Board at 717-783-9454.**

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**Detach Here and Return Stub with Payment - Note Citation Number on Check**

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The fine must be paid by Treasurer's Check, Cashier's Check, Money Order or a check drawn on the account of an attorney, who must be licensed in Pennsylvania. **Personal and business checks are NOT acceptable unless they are certified by your bank.** If you are paying by guaranteed check, please make it payable to the Commonwealth of Pennsylvania and mail, along with any required documentation, to:

PLCB - Office of Administrative Law Judge  
Brandywine Plaza  
2221 Paxton Church Road  
Harrisburg, PA 17110-9661

**Credit/Debit Cards may be used:** visit [www.lcb.state.pa.us](http://www.lcb.state.pa.us) and look under LEGAL/Office of ALJ for instructions.

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