

Mailing Date: October 30, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 13-1786
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
NEW OXFORD SOCIAL &	:	License No. CC-5284
ATHLETIC CLUB	:	
200 West Golden Lane	:	LID 2438
P.O. Box 55	:	
New Oxford, PA 17350-1310	:	

Representative for	Jeffrey Topper, Pro Se
Licensee:	New Oxford Social & Athletic Club
	200 West Golden Lane
	P.O. Box 55
	New Oxford, PA 17350-1310

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	Pennsylvania State Police,
	Bureau of Liquor Control Enforcement
	3655 Vartan Way
	Harrisburg, PA 17110

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") Felix Thau mailed July 8, 2014, wherein the ALJ dismissed three (3) of the six (6) charges of Citation No. 13-1786, issued against New Oxford Social & Athletic Club

("Licensee"). Because the ALJ improperly dismissed count six of the Citation, the Board reverses the decision of the ALJ as to that count.

The Bureau began its investigation on March 28, 2013, and completed it on July 29, 2013. (Ex. C-1). On August 14, 2013, the Bureau sent a letter ("Notice of Violation") to Licensee providing notice of the following four (4) alleged violations:

1. Failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding May 13, 2013 concerning the Local Option Small Games of Chance Act. (26007)
2. Awarded more than \$25,000.00 in prizes in any seven-day period. (26014)
08/19/12 thru 08/25/12, 09/09/12 thru 09/15/12,
10/14/12 thru 10/20/12, 11/11/12 thru 11/17/12,
12/09/12 thru 12/15/12, 01/13/13 thru 01/19/13,
02/03/13 thru 02/09/13, 03/17/13 thru 03/23/13, and
03/31/13 thru 04/06/13
3. Used funds derived from the operation of game of chance for purposes other than those authorized by law. (26011)
January 8, 2013 thru May 7, 2013
4. Failed to operate games small games of chance in conformity with the Small Games of Chance Act and Title 61 of the Pennsylvania Code. (26003)
January 4, 2012 thru April 17, 2013

(Ex. C-1).

On August 23, 2014, the Bureau issued the Citation to Licensee, charging it with six (6) counts. The first four (4) counts, listed under the heading "First Cause of Action: The Pennsylvania Local Option

Small Games of Chance Act,” alleged violations of the Local Option Small Games of Chance Act (“LOSGCA”) [10 P.S. § 328.101, *et seq.*] as follows:

1. During the periods August 19 through 25, September 5 through 15, October 14 through 20, November 11 through 17, December 9 through 15, 2012; January 13 through 19, February 3 through 9, March 17 through 23, and March 31 through April 6, 2013, you, by your servants agents or employees, awarded more than \$25,000.00 in prizes in any seven-day period, in violation of Section 328.302(b) of the Local Small Games of Chance Act, 10 P.S. §327,302(b).
2. During the period January 4 through April 17, 2013, you, by your servants, agents or employees, failed to operate Small Games of Chance in conformity with the Small Games of Chance Act and Title 61 of the Pennsylvania Code, in violation of Section 901.731 of the Department of Revenue Regulations, 61 Pa. Code §901.731.
3. During the period January 8 through May 7, 2013, you, by your servants, agents or employees, used funds derived from the operation of games of chance for purposes other than those authorized by law, in violation of Section 328.502(a) of the Local Option Small Games of Chance Act, 10 P.S. §328.502(a) and Section 901 of the Department of Revenue Regulations, 61 Pa. Code §901.
4. You, by your servants, agents or employees, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding May 13, 2013, concerning the Local Option Small Games of Chance Act, in violation of Section 328.503 of the Local Option Small Games of Chance Act, 10 P.S. §328.503 and Section 901 of the Department of Revenue Regulations, 61 Pa. Code §901.

(Ex. C-2).

The fifth and sixth counts were listed under the heading "Second Cause of Action: Pennsylvania Liquor Code." The substance of the charges was identical to the third and fourth charges recounted above; however, the second cause of action contained the following prefatory language:

WHEREAS, the Pennsylvania Liquor Control Board has issued to you the above-referenced license and related permit(s) for the licensed terms ending February 28, 2013 and February 28, 2014; and

WHEREAS, Section 328.702(g) of the Local Option Small Games of Chance Act, 10 P.S. § 328.702(g), states that when a club licensee has committed three or more violations of the Local Option Small Games of Chance Act, the Bureau of Liquor Control Enforcement may enforce a third or subsequent violation of the Local Option Small Games of Chance Act as a violation of the Liquor Code; and

WHEREAS, the Bureau of Liquor Control Enforcement is in possession of facts which leads it to believe that you have committed a third or subsequent violation of the Local Option Small Games of Chance Act, the Act of December 19, 1988 P.L. 1262, No. 156, as reenacted and amended, 10 P.S. § 328.101, et seq[.], and the rules and regulations adopted pursuant thereto, and that such violation constitutes a violation of the Liquor Code, the Act of April 12, 1951, P.L. 90, as reenacted and amended 47 P.S. § 101, et seq[.], and the rules and regulations adopted pursuant thereto, in the following manner:

(Ex. C-2).

Licensee submitted an Admission, Waiver, and Authorization form ("Waiver") to the Office of Administrative Law Judge ("OALJ") on

or about May 5, 2014, admitting the charges and, *inter alia*, waiving the right to a hearing and to appeal the ALJ's decision. Nonetheless, the ALJ refused to accept the Waiver¹, and a hearing was held on May 20, 2014. Jeffrey Topper, Licensee's president, appeared on its behalf, and John Pietrzak, Esquire, appeared on behalf of the Bureau. The parties proceeded by stipulation of the facts. By Adjudication and Order mailed July 8, 2014, the ALJ sustained counts one, three, and four, and dismissed counts two, five, and six. He imposed a combined penalty of a fine of two thousand four hundred dollars (\$2,400.00) and a fifteen (15)-day suspension of Licensee's Small Games of Chance license. The Bureau filed a timely appeal with the Board on August 7, 2014, regarding the dismissal of counts five and six.

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.

¹ It is within the discretion of the ALJ to accept a waiver submitted by a licensee. [40 Pa. Code § 15.45(a)].

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).

The Bureau raises two (2) issues on appeal, both alleging an error of law. First, the Bureau argues the ALJ erred in concluding that the Bureau failed to comply with the notice provision of section 471 of the Liquor Code as to counts five and six.² Second, the Bureau contends the ALJ erred in holding, as a second basis for dismissing counts five and six, that the Bureau lacked the authority to cite Licensee twice for the same misconduct, under both the Liquor Code and the LOSGCA. Having reviewed the record, the Bureau's appeal,

² The Bureau is not appealing the ALJ's dismissal of count two.

and the Bureau's brief³, the Board will address each argument, in turn, beginning with the notice issue.

Subsection 471(a) provides that, "[u]pon learning of any violation of this act . . . or upon any other sufficient cause shown," the Bureau may cite a licensee to appear before an ALJ to defend against a suspension or revocation of the license or a fine, or both. [47 P.S. § 4-471(a)]. As to the notice the Bureau must give a licensee, subsection 471(a) provides that the citation must be sent by registered mail to the licensee at the licensed premises ". . . within one year from the date of such violation or cause appearing . . ." and that the hearing must be ". . . not less than ten nor more than sixty days . . ." from the date the citation was sent. *Id.* Further, the Board's Regulations require the citation to contain, *inter alia*, a "brief description of the types and dates of alleged violations with separate counts if separate charges." [40 Pa. Code § 15.41(b)(3)].

In enforcement matters, a licensee's due process rights are protected so long as the citation informs the licensee as to the type and date of the alleged violation. Pennsylvania Liquor Control Bd. v. Reda, 463 A.2d 108, 109 (Pa. Cmwlth. 1983). The courts have long permitted some latitude in the generality of charges by the Board, and

³ Licensee did not file a reply brief in this matter.

now the Bureau, as the legislature decreed the Liquor Code must be construed liberally as an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace, and morals. In re Hankin, 195 A.2d 164, 166 (Pa. Super. 1963).

In addition, subsection 471(b) states that “[n]o 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.” [47 P.S. § 4-471(b)]. While not expressly requiring that the Bureau send a *separate* notice, apart from the citation, the provision clearly requires that the licensee be given timely notice of the nature of the allegations against it, *i.e.* within thirty days from the close of the Bureau’s investigation. The provision is meant to “give warning to the licensee that his activities have been under investigation and that his license is about to be endangered.” Pennsylvania Liquor Control Bd. v. Greenspan, 438 Pa. 129, 132, 264 A.2d 690, 691 (Pa. 1970).

In this case, the ALJ dismissed counts five and six based on his conclusion that the “thirty days letter,” *i.e.* the Notice of Violation, was defective. [Adjudication, p. 5]. Specifically, the notice was defective according to the ALJ because, whereas the Citation contained six counts, the Notice of Violation preceding it “alleges four violations,

none of which is identified as a Liquor Code or Small Games of Chance violation.” [Adjudication, p. 6].

However, the Bureau is correct in that it is the citation which is the formal document which must satisfy due process. While the Bureau has chosen to satisfy the thirty-day notice requirement of subsection 471(b) with a separate document, the Notice of Violation letter, this notice is not governed by the same standard as a citation. The notice mandated by subsection 471(b) must simply notify the licensee of the nature of any alleged violations within thirty days of the completion of the Bureau’s investigation.⁴

The Notice of Violation letter in this case satisfies this minimal standard. It identified the nature of the four alleged violations within thirty days of the Bureau’s investigation closing. The fact that the fifth and sixth counts of the Citation derived from counts three and four need not have been laid out in the Notice of Violation because the alleged misconduct was already stated in counts three and four of the Notice of Violation. The Bureau’s thirty-day notice letter served to give Licensee warning that, *inter alia*, it “used funds derived from the operation of games of chance for purposes other than those authorized

⁴ In fact, the thirty-day notice requirement is not always applicable, as in cases in which a licensee is cited based not upon an independent investigation by the Bureau, but upon information supplied by other agencies such as the local police department. See Greenspan, supra.

by law” and “failed to operate small games of chance in conformity with the [S]mall [G]ames of [C]hance [A]ct and Title 61 of the Pennsylvania Code.” Therefore, the ALJ committed an error of law in holding the Notice of Violation letter defective on due process grounds.⁵

The second averment raised by the Bureau takes issue with the ALJ’s application of the “Enforcement” section of the LOSGCA. In dismissing counts five and six, aside from the aforementioned due process concern focusing on the Notice of Violation, the ALJ appears to have found two additional deficiencies with the Citation, one based on double jeopardy principles and the other on statutory interpretation.

Regarding the first, in subsection 328.702(b) of the LOSGCA [10 P.S. § 328.702(b)], the Bureau is expressly granted authority to enforce the LOSGCA against club licensees, in accordance with the following rules:

(1) Except as provided in paragraph (2), a violation of this act by a club licensee shall not constitute a violation of the Liquor Code.

(2) If a club licensee has committed three or more violations of this act, the Bureau of Liquor Control

⁵ Because the Board finds that Licensee received proper notice in this case, there is no need to address the Bureau’s assertion that even if the notice was defective, subsection 471(b) requires the ALJ to refrain from imposing a penalty but not to dismiss the charges altogether.

Enforcement may enforce a violation of this act as a violation of the Liquor Code.

(3) A violation of this act shall not constitute a violation of the Liquor Code for the purposes of section 471(c) of the Liquor Code.

[10 P.S. § 328.702(g)]. The ALJ, citing fundamental fairness principles, interpreted the above provision as preventing “double dipping.” While the ALJ’s reasoning is not entirely clear, it appears he concluded that a club licensee cannot face penalties under both the Liquor Code and the LOSGCA for the same underlying violation. [Adjudication, pp. 9-10].

However, the plain language of subsection 328.702 does not comport with the ALJ’s view. For violations of the LOSGCA by a club a licensee, an ALJ is permitted to impose (1) a civil penalty, or (2) suspension or revocation of the small games of chance license. [10 P.S. §§ 328.702(b), 328.702(d)]. The first and second such violations cannot be charged by the Bureau as violations of the Liquor Code⁶, but third or subsequent violations by a club licensee will imperil the club’s liquor license, in addition to those penalties provided in subsection 328.702(d). [10 P.S. § 328.702(g)].

⁶ Prior to Act 2 of 2012 taking effect, the Bureau was authorized to bring citations against club licensees under section 471 of the Liquor Code for any violations of the LOSGCA because such violations of other criminal laws were reasonably related to the sale and use of alcoholic beverages. Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Columbus Home Assoc., 989 A.2d 39 (Pa. Cmwlth. 2009).

Moreover, well-settled legal principles contradict the ALJ's constitutional-sounding "double dipping" concern. Although the Double Jeopardy Clause of the Fifth Amendment, as well as the Pennsylvania Constitution, protects against multiple punishments for the same offense, it does not apply to administrative proceedings which are civil, not criminal, in nature. Commonwealth v. CSX Transp., Inc., 708 A.2d 138, 140 (Pa. Cmwlth. 1998); Ponce v. Dep't of Transp., Bureau of Driver Licensing, 685 A.2d 607 (Pa. Cmwlth. 1996), *appeal denied*, 548 Pa. 641, 694 A.2d 625 (1997). The Liquor Code is remedial civil legislation [Hyland Enterprises, Inc. v. Pennsylvania Liquor Control Bd., 631 A.2d 789, 792 (Pa. Cmwlth. 1993)], and penalties affecting a liquor license "have always been considered civil/administrative and not criminal in nature." Harrisburg Knights of Columbus, 989 A.2d at 46.

As such, a club licensee may be subject to a civil penalty for violating the LOSGCA, endangering the small games of chance license, and in the event of a third or subsequent violation, may face an additional civil penalty under the Liquor Code, jeopardizing the liquor license. Therefore, the Bureau was free to bring a second cause of action against Licensee alleging violations of the Liquor Code based upon Licensee's third and fourth LOSGCA violations.

The second question, raised by the ALJ in his “double dipping” analysis, is whether the Bureau improperly brought charges five and six, alleging Liquor Code violations, before the underlying LOSGCA violations alleged in counts three and four of the Citation, had been adjudicated. The provision at issue permits the Bureau to “enforce a violation” of the LOSGCA as a violation of the Liquor Code if a club licensee “has committed three or more violations” of the LOSGCA. [10 P.S. § 328.702(g)(2)].

The ALJ read this language as tacit approval by the legislature of the OALJ’s long-standing interpretation of subsection 471(c) of the Liquor Code, which requires an ALJ to consider an offending licensee’s prior citation history and impose a mandatory suspension or revocation in certain cases. The provision is triggered when a “violation in question is a third or subsequent violation” of a number of enumerated offenses. [47 P.S. § 4-471(c)]. When imposing a penalty for an adjudicated violation, an ALJ will not consider the subject violation as triggering a mandatory suspension or revocation under subsection 471(c) unless the licensee has two or more *prior adjudicated violations*. This policy is consistent with the Commonwealth Court’s reasoning in Ball Park’s Main Course, Inc. v. Pennsylvania Liquor Control Bd., 641 A.2d 713 (Pa. Cmwlth. 1994), in

which the Board, in determining whether to renew a licensee's liquor license, was prohibited from considering an alleged Liquor Code violation because the violation had yet to be adjudicated.

The ALJ applied the above reasoning to this case and held that Licensee did not yet have "three or more violations" of the LOSGCA because Licensee had no prior adjudicated LOSGCA violations. Thus, he dismissed counts five and six as a matter of law.

However, the Bureau argues that subsection 471(c) of the Liquor Code and subsection 328.702(g)(2) of the LOSGCA must be applied differently due to the different function each provision serves. Subsection 471(c) of the Liquor Code is a sentencing provision, whereas subsection 328.702(g)(2) of the LOSGCA is a jurisdictional directive. To wit, the latter removes the Bureau's jurisdiction to cite a club licensee to appear before an ALJ for a violation of the LOSGCA unless and until the licensee has committed three or more violations of the LOSGCA.

The Bureau therefore contends that this case is distinguishable from Ball Park's, which equated a "violation" under section 471 to an adjudicated violation. It argues that rather than requiring prior adjudicated LOSGCA violations in subsection 328.702(g)(2), the legislature instead intended to use the term "violation" according to its

dictionary definition, i.e. meaning “an infraction or breach.” Bureau’s Brief, p. 8. According to the Bureau, the Supreme Court’s analysis in Whalen v. Dep’t of Transp., Bureau of Driver Licensing, 613 Pa. 64, 32 A.3d 677 (2011) is controlling on the meaning of the term “violation.” In Whalen, the Court refused to equate “violation,” as used in section 3805 of the Vehicle Code [75 Pa.C.S.A. § 3805], with a conviction, noting:

The definitions of violation and conviction are not the same. Violation is defined as “[a]n infraction or breach of the law [or t]he act of breaking or dishonoring the law.” Conviction is defined as “[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty.” Black’s Law Dictionary, 8th Ed. (2004).

Id. at 64 n.5.

Turning to the matter at hand, the Board believes the Bureau is correct in that the term “violation” as used in subsection 328.702(g) of the LOSGCA must be construed as conferring jurisdiction upon the Bureau when it has evidence of three or more unlawful acts. Subsection (b) of the same section grants the Bureau jurisdiction to enforce the LOSGCA against a club licensee “in accordance with subsection (g).” 10 P.S. § 328.702(b)]. Subsection (g) provides that once a licensee has “*committed* three or more violations” of the LOSGCA, the Bureau may enforce a violation of the LOSGCA as a

violation of the Liquor Code. [10 P.S. § 328.702(g)(2)]. Violations brought before an ALJ under the Liquor Code will be secondary to the underlying LOSGCA violations, since the permissible penalties are distinct: first and second violations threaten only the small games of chance license, while third or subsequent violations threaten the liquor license.

Here, the Bureau chose to cite Licensee to appear before the ALJ once it had observed Licensee commit at least three violations of the LOSGCA. For violations brought under the LOSGCA, the ALJ was authorized to impose penalties in accordance with subsection 328.702(d). [10 P.S. §§ 328.702(d), 323.702(b)]. For those brought under the Liquor Code, Licensee was subject to the penalties under section 471. [47 P.S. § 4-471].

Of course, the dismissal of count two required the dismissal of count five as a matter of law, because at the time Licensee committed the violation charged in count three (under the LOSGCA) and count five (under the Liquor Code), Licensee had committed only two LOSGCA infractions (counts one and three). That leaves count four as Licensee's third violation of the LOSGCA, and hence, it was an error of law for the ALJ to dismiss count six for lack of jurisdiction.

Beginning on August 25, 2012, Licensee exceeded the permissible payout per week at count one. Beginning on January 8, 2013, Licensee used small games of chance funds for unlawful purposes at count three. On May 13, 2013, Licensee failed to maintain complete and truthful records for the preceding two years at count four. As this third LOSGCA violation triggered subsection 328.702(g)(2), the Bureau charged Licensee with a violation under section 471 of the Liquor Code at count six. Since Licensee stipulated to all four of these violations, it must receive an appropriate penalty at count six of a suspension or revocation of its club liquor license and/or a fine of between fifty dollars (\$50.00) and one thousand dollars (\$1,000.00). [47 P.S. § 4-471(b)].

Therefore, for the foregoing reasons, the Adjudication and Order of the ALJ is reversed in part, and the case is remanded to the ALJ for the imposition of an appropriate penalty.

ORDER

The appeal of the Bureau is granted.

The decision of the ALJ is reversed as to count six.

The decision of the ALJ is affirmed as to count five.

Licensee has paid the fine imposed by the ALJ of two thousand four dollars (\$2,400.00) and has served the small games of chance license suspension imposed by the ALJ of fifteen (15) days.

The case is hereby remanded to the ALJ for the imposition of an appropriate penalty as to count six.

Board Secretary