

Mailing Date: APR 16 2014

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

PENNSYLVANIA STATE : In Re Citation No.: 13-1908
POLICE, BUREAU OF :
LIQUOR CONTROL ENFORCEMENT :
 : BLCE Incident No.: W04-455422
v. :
 : PLCB LID No.: 35220
B. A. MAR, INC. :
13610 LINCOLN WAY : PLCB LICENSE NO.: R-SS-10400
NORTH HUNTINGDON TWP. :
NORTH HUNTINGDON, PA 15642-2155 :
 :
 :
 :
 :

BEFORE: JUDGE RICHARD O'NEILL EARLEY

APPEARANCES:

BLCE COUNSEL: EMILY GUSTAVE, ESQUIRE
LICENSEE COUNSEL: ROBERT GOLDMAN, ESQUIRE

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on September 23, 2013, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against B. A. Mar, Inc., License Number R-SS-10400, (hereinafter Licensee).

The citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-471 and the Crimes Code at 18 Pa. C.S. §5513, alleging that on April 12, 2013¹, Licensee, by its servants, agents or employees, possessed or operated gambling devices or

¹ Citation No. 13-1908 dates were amended on February 20, 2014.

paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises.²

An administrative hearing was conducted on Tuesday, February 25, 2014, at Two Parkway Center, Suite G-8, in Pittsburgh, Pennsylvania. The Bureau was represented by Emily Gustave, Esquire. Licensee was represented by Robert A. Goldman, Esquire.

Licensee stipulated that the Bureau satisfied notice requirements under §4-471 of the Liquor Code. (N.T. p. 6)

I make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. Liquor Enforcement Officer Cone testified that on April 12, 2013, he visited the licensed premises in an undercover capacity. While there, he watched an individual playing a video gaming device called a Cherry Master video slot machine. (N.T. pp. 11-12) The patron put money in the game twice. (N.T. p. 12)
2. When the patron was done playing the machine, the patron signaled to the bartender. At that time, Officer Cone noted the Cherry Master machine indicated the patron had accumulated 300 credits. (N.T. p. 13)
3. The bartender looked at the machine and said, "Three hundred?" (N.T. pp. 12-15) The bartender then grabbed a device which she used to remotely erase the credits on the machine. (N.T. p. 15)
4. Next, the bartender walked out of sight into a backroom before returning and handing the patron an undetermined amount of money. (N.T. p. 16)

DISCUSSION:

In pertinent part, §5513 of the Crimes Code provides for the following:

- (a) *Offense defined.* --A person is guilty of a misdemeanor of the first degree if he:

(2) allows persons to collect and assemble for the purpose of unlawful gambling at any place under his control;

² The Liquor Code permits an Administrative Law Judge to find a violation of the Liquor Code where Licensee violates other laws of the Commonwealth, including the Crimes Code.

(4) being the owner, tenant, lessee or occupant of any premises, knowingly permits or suffers the same, or any part thereof, to be used for the purpose of unlawful gambling.

18 Pa. C.S. §5513 (emphasis added). Thus, among other things, §5513 prohibits gambling and prohibits individuals from permitting gambling on property they control.

The Bureau has the burden of proving a violation by a clear preponderance of the evidence. Omicron Enterprises, 449 A.2d 857 (Pa.Cmwlth. 1982). Pennsylvania courts have long held that “substantial evidence” necessary to support either a violation of law or a defense is relevant evidence that a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc., v. WCAB (Hogue), 876 A.2d 1098 (Pa.Cmwlth. 2005).

The Commonwealth Court in PLCB v. PPC Circus Bar, 506 A.2d 521 (Pa.Cmwlth. 1986), held under similar circumstances that a violation of §5513 of the Crimes Code can be proven by a preponderance of substantial evidence based entirely on observation of a person playing a game, receiving payment, and clearing the credits they accumulated. In PPC Circus Bar the facts were as follows:

A Board undercover agent testified before the trial court that, upon his arrival at PPC’s premises at approximately 7:00 p.m. on July 16, 1983, he witnessed the barmaid playing an electronic poker machine (machine) and observed that the machine reflected that a “score” of between thirty to forty “free” games had been accumulated. The barmaid continued to play for approximately fifteen minutes, occasionally leaving the machine to serve patrons and then resuming play. Upon accumulating a total of eighty “free” games, the barmaid reached her hand to the right side of the machine and performed an operation which cleared the eighty games off the machine. Next, she recorded a \$20 win in the cash register, removed a \$20 bill from an envelope therein and made a notation on the envelope. She then placed the \$20 in her pocket.

Id. 506 A.2d at 522 (footnotes omitted). Based on these facts, the Commonwealth Court found a violation of §5513 of the Crimes Code.

[T]he Board’s evidence had to show that the three elements of gambling were present in the barmaid’s activities, i.e.,

consideration, chance and reward. The Board's witness did this. On the other hand, PPC presented no evidence whatsoever to the trial court. We believe, therefore, that the Board met its burden of proving the occurrence of gambling on PPC's premises and that the trial court erred in concluding otherwise.

Id. (Citation omitted). Thus, PPC Circus Bar stands for the proposition, generally, that observing a person playing a video gaming machine, erasing accumulated credits, and receiving cash is substantial evidence adequate to conclude a licensee permitted gambling in violation of §5513 of the Crimes Code. The court's decision did not require confiscation of the gaming device or the "knock-off" device used to erase accumulated credits, or questioning of the parties to determine the reason for the payment.

Rather than relying on the standard set forth in PPC Circus Bar, Licensee urges me to consider several other cases addressing the nature of substantial evidence.³ However, none are directly on point with the issue presented here in the way PPC Circus Bar is. When invited to distinguish this case from PPC Circus Bar, Licensee failed to offer any legal authority, but merely asserted PPC Circus Bar was an old case based largely on "credibility findings." (N.T. pp. 47, 54) I find these reasons inadequate to justify ignoring PPC Circus Bar, and thus, I conclude it must guide my analysis of the case before me.

In this case, the Bureau presented evidence that Licensee, through its agent, permitted a patron to play a Cherry Master video slot machine, and that Licensee's agent paid the patron cash in conjunction with erasing the game's accumulated credits. Pursuant to PPC Circus Bar the Bureau has established a violation of §5513 of the Crimes Code with a clear preponderance of the evidence.

In response, Licensee offered substantial analysis of this matter, focusing ultimately on the risks of finding a violation based solely on "motivated observations" of a single Liquor Enforcement Officer, imperfect memories, and a lack of incontrovertible evidence for the reasons Licensee's agent paid the patron. Regarding memories, Licensee suggests that science has advanced significantly since PPC Circus Bar and urges me to ponder the fallibility of Officer Cone's observations concerning the events of April 12, 2013. Licensee would have me consider that Officer Cone may be inherently biased because of his training, and that there is a risk he confused observations from multiple investigations.

However, Licensee offered no evidence that Officer Cone's memory or motive was faulty. Instead, the record discloses that Officer Cone took reasonable and timely

³ On the subject of substantial evidence Licensee specifically cites Smith v. Bell Telephone Co. of PA, 153 A.2d 477 (Pa. 1959); Irey v. Commw. Dept. of Transp., 72 A.3d 762 (Pa.Cmwlt. 2013); SSEN v. Eddystone, 810 A.2d 200 (Pa.Cmwlt. 2002); Van Zandt v. Holy Redeemer Hosp., 806 A.2d 879 (Pa.Super. 2002); First v. Zem Zem Temple, 686 A.2d 18 (Pa.Super. 1996); Cade v. McDanel, 679 A.2d 1266 (Pa.Super. 1996); K&K Enterprises, Inc. v. PLCB, 602 A.2d 476 (Pa.Cmwlt. 1992).

steps to memorialize his investigation observations. He testified that he writes notes about each visit to a licensed premises as soon as he departs, and then prepares a formal report within seven to ten days. (N.T. p. 43) In contrast, Licensee offered no evidence contradicting Officer Cone's testimony of the events of April 12, or revealing flaws with his memory. Licensee's only witness was not an employee until approximately November, 2013, and was not present there on April 12. (N.T. pp. 52-53) Additionally, Licensee's attempts to test Officer Cone's memory on cross-examination were ineffective because there was no evidence offered to contradict his testimony.⁴ Thus, I find no basis in the record to question the accuracy of Officer Cone's uncontradicted testimony. I find him to be credible, and, under PPC Circus Bar his testimony amounts to substantial evidence of a violation of §5513 of the Crimes Code.

Licensee counters that there is insufficient evidence in the record to establish the reason for Licensee's payment to the patron on April 12. "[I]t would be an injustice for this Court to find a violation if you are not presented with incontrovertible evidence that a violation occurred." (N.T. p. 59)⁵ Thus, according to Licensee, so long as there is a possible explanation for Licensee's agent paying the patron money that does not involve a violation of §5513 of the Crimes Code, I am constrained to give Licensee the benefit of the doubt. I disagree.

Licensee's position is a misapplication of the burden of proof used in this court. It is not necessary for the Bureau to disprove every possible alternative explanation to prevail on a preponderance-of-the-evidence standard. Rather, the Bureau may prevail so long as the evidence presented, including reasonable inferences drawn therefrom, make an Administrative Law Judge conclude it is slightly more likely that the Bureau's allegations are more probable than their nonexistence. A.B. v. Slippery Rock Area School District, 906 A.2d 674 (Pa.Cmwlth. 2006). This is reflected in the Commonwealth Court's ruling in PPC Circus Bar, where, like here, no explanation for a payout was established except that someone accumulated credits, received money, and cleared the credits. There, as in this case, the facts give rise to a reasonable inference that the payment was related to playing the video game. (See A.B. v. Slippery Rock Area School District 906 A.2d at 678, fn. 8 ("The inference from which the conclusion is derived 'is simply a clear, logical, reasonable and natural conclusion which the trier of fact may embrace or reject based on the evidence in the case.'") (Citation omitted).) Therefore, the Bureau has established a violation of §5513 of the Crimes Code pursuant to the standards set forth in PPC Circus Bar.

Next, I must address two remaining points that arose during the consideration of this case. Licensee devoted considerable effort to analyzing issues associated with gambling devices per se. However, at the hearing the Bureau and Licensee agreed this case did not require discussion of per se devices because, in accordance with Commonwealth v. Hauck, 474 A.2d 322 (Pa.Super. 1984), the Bureau was pursuing only

⁴ For example, Officer Cone's descriptions of other patrons and the bartender present on April 12 (N.T. pp. 29-32) were never challenged by Licensee's witness. (N.T. pp. 48-52)

⁵ A similar theme of argument ran through Licensee's discussion of substantial evidence and Licensee's concerns about the largely non-verbal activity that occurred in this case.

a violation for the act of gambling, not the presence of gambling devices. (N.T. p. 41) Therefore, Licensee's arguments on gambling devices per se are now moot.

Finally, I turn to Licensee's hearsay argument. Licensee objected to the admission of Officer Cone's testimony describing Licensee's agent as stating "Three hundred?" upon viewing the Cherry Master and before clearing the credits. At the hearing, I permitted the Officer's testimony as a statement against interest. (N.T. pp. 13-15) However, I conclude now that the statement is more properly admissible as a present sense impression pursuant to Pennsylvania Rule of Evidence 803(1). I note that Officer Cone's testimony indicates that he independently observed the same number of credits on the machine.

Accordingly, pursuant to PPC Circus Bar, the Bureau has established with uncontradicted evidence that Licensee permitted gambling on the premises in violation of §5513 of the Crimes Code.

CONCLUSIONS OF LAW:

Notice provisions of the Liquor Code at 47 P.S. §4-471 have been satisfied.

Count one: The Licensee violated the Liquor Code at 47 P.S. §4-471 and the Crimes Code at 18 Pa. C.S. §5513, on April 12, 2013, when its servants, agents or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises.

PRIOR RECORD:

Licensee has been licensed since November 7, 1994, and has two prior violations:

IN RE:

Citation No. 04-1343. Fine \$550.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises (machines).

Citation No. 06-0973C. Fine \$1,250.00.

1. Sales to a minor.

PENALTY:

The Liquor Code at 47 P.S. §4-471 prescribes a penalty of license suspension, revocation, and/or 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.

B. A. MAR, INC.
IN RE CITATION NO. 13-1908

For the foregoing reasons, a penalty shall be imposed in the amount of \$900.00.

ORDER:

THEREFORE, it is hereby ordered that B.A. Mar, Inc., License No. R-SS-10400, pay a fine of \$900.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

Jurisdiction is retained.

Dated this 1ST day of APRIL, 2014.



Richard O'Neill Earley, J.

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NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER IN 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 CHIEF COUNSEL'S OFFICE AT 717-783-9454.

B. A. MAR, INC.
IN RE CITATION NO. 13-1908

Detach Here and Return Stub with Payment

The fine must be paid by a check drawn on the business or trust account of your attorney, who must be licensed in this Commonwealth, a treasurer's check, cashier's check, or money order. **Personal and business checks are not acceptable unless they are certified by your bank.** Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail, along with any required documentation (please use the Return Stub when mailing payment or write your citation number on the check).

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

In Re Citation No. 13-1908
B. A. Mar, Inc.