

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.

Mailing Date: November 19, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 13-2597
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

LEGION POST 304 HOME ASS'N : License No. CC-4972
20 West 6th Street :
Jim Thorpe, PA 18229 : LID 2288
:

Representative for Licensee: Keith McQuait, President, *Pro se*

Counsel for Bureau: Craig A. Strong, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
2936 Airport Road
Bethlehem, PA 18017

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") appeals from the Adjudication and Order of Administrative Law Judge Felix Thau ("ALJ"), mailed July 15, 2014, wherein the ALJ dismissed both counts of Citation No. 13-2597 ("the Citation") issued by the Bureau.

On January 13, 2014, the Bureau issued the Citation against Legion Post 304 Home Association ("Licensee"). The Citation included two (2) charges:

- (1) During the period April 5 through August 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 Sections 328.103 and 328.307(a) of the Local Option Small Games of Chance Act, 10 P.S. §§ 328.103 and 328.307(a), and Section 901.1 of the Department of Revenue Regulations, 61 Pa. Code § 901.1.
- (2) During the periods April 28 and August 21 through 26, 2013, you, by your servants, agents or employees, failed to operate bingo in conformity with Title 10 of the Bingo Law, in violation of Section 471 of the Liquor Code, 47 P.S. § 4-471 and Sections 303 and 304 of the Bingo Law, 10 P.S. §§ 303 and 304.

[Ex. C-2].

A hearing was held on June 5, 2014, in which Craig A. Strong, Esquire, appeared as counsel for the Bureau, and Keith McQuait, president of Licensee, appeared *pro se* on behalf of Licensee. By Adjudication and Order mailed July 15, 2014, the ALJ dismissed both counts of the Citation. The Bureau filed a timely appeal with the Pennsylvania Liquor Control Board ("Board") on August 13, 2014.

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 A2d 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 his conclusions of law, the ALJ concluded that the wording of Counts 1 and 2 offended due process/notice. The ALJ also concluded that Count 2 failed to comply with the notice requirements of section 471 of the Liquor Code. Finally, the ALJ concluded that the Bureau failed to prove that Licensee did not operate bingo in conformity with Title 10 of the Bingo Law.

On appeal, the Bureau contends that the ALJ committed three (3) errors of law when he held that the Notice of Violation Letter failed to notify the Licensee of the violations alleged in Count 2¹, the wording of Count 1 and Count 2 of the citation offends due process/notice, and the "Bonanza Bingo"² game operated by Licensee falls under the definition of bingo under Title 10 of the Bingo Law.

The Board has reviewed the certified record, including the Notes of Testimony and Exhibits from the hearing held on June 5, 2014, the ALJ's Adjudication and Order, and the Bureau's Appeal and brief. Licensee did not submit a response to the Bureau's brief. The Board concludes that the ALJ did commit an error of law in dismissing both counts of the Citation.

The ALJ erred as a matter of law in dismissing the Citation because the arguments for dismissal were not raised by Licensee. It was the ALJ who, *sua sponte*, raised the question about the sufficiency of the wording of the charges and whether the Citation provided Licensee with sufficient notice as to the charges against it. [N.T. 14-20, 39-40, 57-60]. As stated in a law review article, "[T]he concept of

¹ Actually, the ALJ's decision referred to the inadequacy of the notice pertaining to the violation of the Bingo Law, which was Count 2 in the Citation. The Bureau's reference to the Notice of Violation letter, where Count 1 referenced the violation of the Bingo Law, is inaccurate.

² In its appeal, the Bureau erroneously refers to the game as "Bar Bingo."

'sua sponte' is an important exception to two basic principles of our adversary system of adjudication: (1) that the parties will control the litigation, and (2) that the decision maker will be neutral and passive."³ Milani and Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245, 248 (2002).

The ALJ's dismissal was based on issues relating to the adequacy of the notice and whether that notice provided Licensee with sufficient due process. These types of issues fall under the category of personal jurisdiction. In the case of Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982), the United States Supreme Court explained that a judge may, *sua sponte*, raise issues of subject matter jurisdiction, but not personal jurisdiction:

The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties. The concepts of subject-matter and personal jurisdiction, however, serve different purposes Subject-matter jurisdiction . . . is an Art. III as well as a statutory requirement....Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court [T]he consent of the parties is irrelevant, principles of

³ The ALJ in this matter was far from neutral and passive. Of seventy-seven (77) pages of sworn testimony, fully twenty-five (25) pages contain not even one line of witness testimony. Another eighteen (18) pages have two (2) lines or fewer of witness testimony. Only twenty-one (21) pages – or twenty-seven percent (27%) of the transcript – contain testimony regarding the merits. The other seventy-three percent (73%) consist of the ALJ pontificating about various issues with occasional responses by the Bureau's counsel and Licensee's witness.

estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.

* * *

None of this is true with respect to personal jurisdiction. The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest....**Because the requirement of personal jurisdiction represents...an individual right, it can, like other such rights, be waived.**

Id. at 701-703 (emphasis added, citations omitted). See also Wagner v. Wagner, 768 A.2d 1112 (Pa. 2001).

The Pennsylvania Supreme Court held that it was error for a trial judge to introduce theories not raised by the parties: "While he must crystallize the issues raised by the litigants and explain the relevant principles of law, he may not assume the advocate's function of introducing theories not raised by the parties." Hrivnak v. Perrone, 372 A.2d 730, 733 (Pa. 1977).

Indeed, it is ironic that the ALJ, by making notice and due process an issue at the hearing, violated the due process rights of the Bureau. The Bureau was not given notice that the ALJ considered the adequacy of the Citation to be an issue, was not given an opportunity to correct any deficiency, and was not able to present witness

testimony regarding the development of the Citation. Clearly, the ALJ erred as a matter of law when he dismissed the Citation based on the wording and the due process/notice issues.⁴

Therefore, the Bureau's appeal with regard to these issues is granted. Since the uncontroverted testimony presented at the hearing established that during the period from April 5 to August 17, 2013, Licensee offered small games of chance after its license had expired on April 4, 2013, the ALJ upon remand should consider an appropriate penalty for Licensee's violation of the Small Games of Chance Act

Because this case is being remanded to the ALJ for consideration on the merits, the Board must address the final issue raised on appeal by the Bureau, which pertains to the ALJ's conclusion that the "Bonanza Bingo" game operated by the Licensee falls under the definition of bingo under Title 10 of the Bingo Law. Because of this conclusion, the ALJ dismissed Count 2 of the Citation on the merits, holding that "Licensee's method of playing bingo, however untraditional, is lawful." [Adjudication at 4].

⁴ The Board has upheld an argument by a licensee that a citation did not provide the licensee with adequate due process but only because such argument was raised by the licensee. See Bureau of Liquor Control Enforcement v. Detrich-Brechbill Home Assn., Inc., Citation No. 08-0058. When the licensee has failed to raise this issue, the Board has noted the adequacy of the citation would not be considered. See Bureau of Liquor Control Enforcement v. Fraternal Order of Eagles Littlestown Aerie No. 2226, Citation No. 10-1688.

In the instant matter, patrons of Licensee purchased cards that were sealed, with covering over the numbers. [N.T. 33, 41-42]. The patron then broke the seals and opened the card to reveal the numbers on the card. [N.T. 42] The patron then compared the numbers on the card to the numbers that were previously drawn by Licensee and recorded on a map. [N.T. 41-42]. If the patron's card had the same numbers as those that were preselected, the patron won a prize.

This version of bingo does not involve the traditional call of bingo letters and numbers that are announced to several players until one of the players yells, "Bingo!" The Bureau argues, therefore, that this game does not fit the statutory definition of bingo found in section 303 of the Bingo Law:

A game in which each player has a card or board containing five horizontal rows all but the central one containing five figures. The central row has four figures with the word "free" marked in the center thereof. Any preannounced combination of spaces when completed by a player constitutes bingo. In the absence of a preannouncement of a combination of spaces, any combination of five in a row whether horizontal or vertical when completed by a player constitutes bingo when its numbers are announced and covered. A wheel or other mechanical device may be used by any person conducting the game of bingo, and any such person may award a prize to any player or players first completing any combination constituting bingo.

[10 P.S. § 303]. The Bureau focuses on the repeated phrase “when completed by a player,” asserting that the “statute was intended to authorize traditional call bingo.” [Bureau’s Brief at 10].

The Bureau overlooks a critical phrase: “Any ***preannounced combination of spaces*** when completed by a player constitutes bingo.” The type of game offered by Licensee involves a preannounced combination of spaces. The phrase “completed by a player” is satisfied when the player opens the card to reveal the numbers in each lettered box.

The Bureau argues that statutory intent supports only the traditional “call and cover” style of bingo play. However, the legislative history of the Bingo Law does not support this proposition. Representative Don Dorr, who supported the House Bill that eventually became the Bingo Law, spoke on the floor of the House in opposition to an amendment that would have altered the above definition of bingo:

Mr. Speaker, there are a lot of things that we could put into this bill that designate various ways to play bingo. It is my judgment that we should not do that. We should define the game of bingo broadly as we have done in the bill and not get into the esoterics of how it is played at particular places.

Commonwealth of Pennsylvania Legislative Journal, House of Representatives, March 31, 1981, at 504. The proposed amendment to the definition of "bingo" was defeated; the definition remained unchanged throughout the legislative process.

Because of the intentionally broad definition of the word "bingo," the Board concludes that the ALJ did not err when he concluded that the "Bonanza Bingo" game did constitute bingo.⁵ Therefore, Licensee did not violate the Bingo Law on April 28, 2013, when it offered the Bonanza Bingo game in accordance with its Bingo license. However by August 20, 2013, the game was no longer lawful because Licensee's Bingo license had expired. Thus, the ALJ should consider an appropriate penalty for any games played after that date.⁶

⁵ Licensee should be aware that Pennsylvania's definition of "bingo" differs from the definition utilized by the Internal Revenue Service, and therefore proceeds garnered from "Bonanza Bingo" may have tax implications for Licensee. See 26 U.S.C. § 513.

⁶ The testimony reveals that the only day in this period when bingo was played was August 25, 2013.

ORDER

The appeal of the Bureau is granted.

The decision of the ALJ to dismiss both counts of the Citation is reversed.

This matter is remanded to the ALJ for an adjudication in accordance with this decision.

John K. Starks

Board Secretary