

Mailing Date: **AUG 28, 2014**

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

PENNSYLVANIA STATE  
POLICE, BUREAU OF  
LIQUOR CONTROL ENFORCEMENT.

IN RE Citation No.: 14-0660

BLCE Incident No.: W04-461309

v.

ERNIES OF BRACKENRIDGE, INC.  
T/A ERNIE'S TAVERN  
1102 BRACKENRIDGE AVE.  
BRACKENRIDGE, PA 15014-1504

PLCB LID No.: 33730

PLCB License No.: R-AP-1662

BEFORE: JUDGE RICHARD O'NEILL EARLEY  
BLCE COUNSEL: EMILY GUSTAVE, ESQUIRE  
LICENSEE COUNSEL: PAUL D. ZAVARELLA, ESQUIRE

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on April 11, 2014, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against Ernie's of Brackenridge, Inc., t/a Ernie's Tavern, License Number R-AP-1662, (hereinafter Licensee).

The citation contains three counts.

Count one of 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 May 28, 31, July 9, 30, December 13, 2013; January 7, February 27, and March 5, 2014, Licensee, by its servants, agents or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, pool-selling and/or bookmaking on its licensed premises.

Count two of the citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-493(2), alleging that on July 30, September 3, 9, October 1, 14, 21, 28, November 4, 11, 18, 19, 25, December 2, 9, 11, 15, 23, 29, 2013; January 5, 12, and 26, 2014, Licensee, by its



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servants, agents or employees, paid for purchases of malt or brewed beverages with other than Licensee's checks, cashier's checks or money orders.

Count three of the citation charges Licensee with violation of the Liquor Control Board Regulations at 40 Pa. Code §5.51(c), alleging that on March 5, 2014, Licensee, by its servants, agents or employees, failed to clean its malt or brewed beverage dispensing system at least once every seven days.

Licensee has executed a Statement of Admission, Waiver and Authorization in which Licensee: admits to the violation(s) charged in the citation, agrees that the Bureau complied with the applicable investigatory and notice requirements of the Liquor Code, authorizes the Administrative Law Judge to enter an Adjudication without a hearing based on a summary of facts as provided by the Bureau and prior citation history, and waives the right to appeal this Adjudication.

The Bureau submitted a letter-brief in support of its interpretation of the law in count two. Licensee declined to respond to the Bureau's legal arguments. Based upon the admission(s) of Licensee, the summary of facts provided by the Bureau, and the Bureau's letter-brief, I make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

Count one:

1. On May 28, 2013, Liquor Enforcement Officers entered Licensee's premises and observed three video gaming devices set up for play. A patron played one of the machines and accumulated 1,006 credits, and told the bartender he had "hit" on the machine. The bartender entered a five-digit button combination on the machine reducing the credits to zero, and gave the patron \$26.00 in cash. The Officer noted the machine on which the payout was made contained a distinguishing mark which could be used for future identification. Officers made subsequent visits to the premises on May 31, July 9, 30, December 13, 2013; January 7, and February 27, 2014, and observed the three video gaming devices set up for play, including the machine with the identifying mark.
2. On March 5, 2014, Officers entered Licensee's premises to serve a search warrant for gambling devices. The three video gaming devices observed on previous visits were set up for play, including the machine with the identifying mark. Next to the cash register, Officers found two slips of paper containing the accounting passwords and credit-clearing methods for each machine. Officers used these to access the machines' accounting functions and to clear credits from all three machines. During the search, Officers found an open cigar box inside a microwave in the back room containing \$585.00 and a video gaming machine payout rate sheet. The corporate president and Board-approved manager confirmed that the sheet was used to determine payout amounts for all three video gaming machines, and this money was



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used to make payouts on the machines. The three video gaming machines, two accounting sheets, a payout rate sheet, and \$585.00 were seized as evidence.

3. At a later date, Officers inspected the machines. All are video slot machines which require no skill to play, contain power-interrupt circuits and electronic accounting which tracks coins in and credits cleared, and permit credits to be cleared by pressing a button combination. The Bureau found \$72.00 inside the machines and entered it into evidence.
4. I find the machines to be gambling devices per se.

Counts two and three:

5. On July 30, 2013, an Officer entered Licensee's premises and observed a delivery person from Centre-Craig Distributing, Inc., inform the corporate president that the malt/beer beverage order totaled \$515.00. The president took \$515.00 cash from her purse and handed the money to the delivery person, who made a notation on the invoice and gave the president a copy.
6. On March 5, 2014, Officers conducted a routine inspection of the premises, and found that the beer taps were contaminated with a noticeable amount of debris. The manager said that he had not cleaned the taps for approximately two months. Officers also examined the delivery invoices from Centre-Craig Distributing, Inc. and observed that the words "paid cash" had been written at the bottom of each invoice for the dates of violation. The president and manager said they always pay cash for their beer deliveries and were not aware that paying cash could violate the Liquor Code.

CONCLUSION OF LAW:

Counts one and three: Sustained as charged.  
Count two: Dismissed.

DISCUSSION:

The sole issue for discussion in this case has to do with the interpretation of §493(2) in count two; in particular, whether §493(2)'s express prohibition against distributors accepting cash creates an implied, punishable, obligation for retail licensees (licensees) to not pay distributors cash. Although Licensee submitted a Waiver, effectively stipulating to the facts presented by the Bureau, Pennsylvania does not permit a stipulation to deprive a court of its normal judicial prerogatives. Commonwealth. DOT v. Brown, 576 A.2d 75 (Pa.Cmwlth.Ct. 1990). In this case, the judicial prerogative at issue is determining whether the stipulated facts, above, are capable of establishing a violation of §493(2) as alleged in count two.



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Section 493(2) generally governs the acceptable forms of payment for liquor, malt, or brewed beverages, and in particular, distributors' payment. It is a difficult section of the Liquor Code to parse because of unconventional use of punctuation. Here, the Legislature strung a series of independent clauses together in one 300-word sentence with individual concepts separated by colons rather than periods. Thus, §493(2) reads, in pertinent part, as follows:

It shall be unlawful ...

· For any licensee, his agent, servant or employee, to sell or offer to sell or purchase or receive any liquor or malt or brewed beverages except for cash, excepting credit extended by a hotel or club to a bona fide guest or member, or by railroad or pullman companies in dining, club or buffet cars to passengers, for consumption while enroute holding authorized credit cards issued by railroad or railroad credit bureaus or by hotel, restaurant, retail dispenser eating place, club and public service licensees, importing distributors or distributors to customers not possessing a license under this article and holding credit cards issued in accordance with regulations of the board or credit cards issued by banking institutions subject to State or Federal regulation: Provided further, That nothing herein contained shall be construed to prohibit the use of checks or drafts drawn on a bank, banking institution, trust company or similar depository, organized and existing under the laws of the United States of America or the laws of any state, territory or *possession* thereof, in payment for any liquor or malt or brewed beverages if the purchaser is the payor of the check or draft and the licensee is the payee: Provided further, That notwithstanding any other provision of this act to the contrary, it shall be unlawful for an importing distributor or distributor to accept cash for payment of any malt or brewed beverages from anyone possessing a license issued under this article, except it shall be permissible for the importing distributor or distributor to accept money orders or cashiers' checks for payment of any malt or brewed beverages in addition to any other type of payment authorized by the board from anyone possessing a license under this article.

(Emphasis added.) This dense sentence is best understood when broken into its component clauses. The first clause actually requires sales and purchases to take place with cash,<sup>1</sup> except for specific circumstances where credit may be used (hotels, clubs, rail cars). The second clause permits the use of checks so long as the account belongs to the licensee drafting the check. And then, the part relevant to the matter before me, clause three, specifies that distributors may not accept payment in cash, but may accept other types of payment. The final clause is the result of

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<sup>1</sup> Carpenter License. 41 Pa. D & C. 2d (Lebanon County, 1966).



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a fairly recent amendment of §493(2) that was implemented by passage of Act 239 of 2004<sup>2</sup> that became fully effective on February 6, 2005.

The Bureau argues that §493(2) specifies the types of financial instruments a licensee may use to purchase malt or brewed beverages, and cash is not among those specified. I disagree with the Bureau's statement that §493(2) enumerates the acceptable financial instruments a licensee must use when purchasing from a distributor. Section 493(2) (third clause) only describes the obligation for distributors to refuse payment in cash. It requires distributors to accept only (1) money orders, (2) cashiers' checks, and (3) "any other type of payment authorized by the board from anyone possessing a license under this article." Section 493(2) is silent regarding licensees' duty not to pay distributors in cash.

However, the Bureau argues that in specifying the type of financial instrument a distributor may accept as payment, the Legislature effectively limited the type of instruments a purchasing licensee may legally offer in payment. Unfortunately, there is no case precedent on this point from the Board or higher courts. Thus, the Bureau relies on one published adjudication from this court, BLCE v. Sara512 Inc., 09-2377 (ALJ 9/10/10),<sup>3</sup> in addition to multiple unpublished adjudications,<sup>4</sup> and three Advisory Opinions issued by the Office of Chief Counsel for the Board.<sup>5</sup>

In Sara512 this court found a hotel licensee in violation of §493(2) when it paid a distributor in cash for malt or brewed beverages. However, Sara512, and the unpublished adjudications supplied by the Bureau, are silent on the question of why the prohibition on distributors would give rise to an enforceable obligation on the part of other licensees to not pay with cash. I am mindful of our prior practice of finding violations in this type of circumstance, but without an analytical framework in our earlier cases, I cannot find that the practice-itself establishes a persuasive argument to guide my analysis. Therefore, I do not find the Bureau's cases helpful.

The Bureau next turns to Advisory Opinions in support of its interpretation of §493(2). Often, Advisory Opinions are informative interpretation guides, and therefore potentially

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<sup>2</sup> Act of December 8, 2004, P.L. 1810, No. 239.

<sup>3</sup> I note that my own research did not reveal any other published case where a licensee was found in violation of §493(2) for paying a distributor with cash. Rather, all of the other published cases decided under §493(2) concern either licensees paying with someone else's checks, the improper use of credit, or distributors cited for accepting cash.

<sup>4</sup> The Bureau offers these cases only for demonstrating the practice in this court of finding licensees in violation of §493(2) when paying distributors cash. Bureau counsel does not suggest this is an exhaustive list of relevant cases: BLCE v. Lumanef Enterprises LLC 08-2964 (ALJ 4/16/09)(Waiver); BLCE v. William Marconi Beneficial Society, 09-2092 (ALJ 10/19/09)(Waiver); BLCE v. Highrollers Corporation, 09-1518 (ALJ 12/17/09)(Waiver); BLCE v. Eileen Schneider, 10-1020 (ALJ 7/13/10)(Waiver); BLCE v. Martin Finklestine, 10-1505 (ALJ 12/10/10)(Waiver); BLCE v. 7101 Frankstown Inc., 10-1796 (ALJ 12/27/10)(Waiver); BLCE v. Fat Daddys BBO Shak and Six Pack Shop, Inc., 11-0176 (ALJ 4/14/11)(Waiver); BLCE v. E & D 934 Broadhead Road Inc. 11-0681 (ALJ 8/3/11)(Waiver); BLCE v. Pantall Hospitality Group LLC, 11-0917 (ALJ 11/4/11); BLCE v. Kelly Lyn Hopkins & Amanda J. Elliott, 12-0233 (ALJ 6/27/12); BLCE v. Fulton C. Smith Post No. 165 V.F.W. of the U.S., 12-0365 (ALJ 7/11/12)(Waiver); BLCE v. J-Town Buoys, Inc., 11-1935 (ALJ 7/30/12)(Hearing); BLCE v. Anthony C. Torchia, 12-0266 (ALJ 8/7/12)(Waiver); PLCB v. Edmund A. Skwirut, 12-1090 (ALJ 5/9/13)(Waiver); BLCE v. Rumors Tavern, Inc., 13-1350 (ALJ 10/2/13)(Waiver); BLCE v. Jennifer L. Winter, 13-1001 (ALJ 3/18/14)(Waiver); and BLCE v. Chris' Bar, Inc., 14-0638 (ALJ 7/16/14)(Waiver).

Advisory Opinion Nos. 06-056; 07-431; and 09-455.



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valuable in questions such as the one before me. Hyland Enterprises, Inc. v. PLCB, 631 A.2d 789 (Pa.Cmwlth.Ct. 1993)("The construction given a statute by those charged with its execution and application is entitled to great weight and should only be disregarded or overturned for cogent reasons and if clearly erroneous."). Therefore, I am bound to pay special attention to Advisory Opinions on matters of interpretation.<sup>6</sup>

The Bureau offers Advisory Opinion No. 07-431 in support of its contention that §493(2) prohibits purchases *with* cash. The Office of Chief Counsel issued Advisory Opinion No. 07-431 in response to an inquiry from a licensee who sought guidance concerning "the laws regarding payment for beer purchases" and whether an escrow account, deposit, and payment timelines are mandatory. The opinion of the Office of Chief Counsel begins:

Liquor Code section 493(2) prohibits sales or purchases of malt or brewed beverages by licensees with cash or on credit. (47 P.S. § 4-493(2)). Therefore, any importing distributors or *distributors* who are selling malt or brewed beverages to a licensed individual or entity may accept only checks or debit cards. Importing distributors and distributors may not accept cash from a licensee (Id.).

Advisory Opinion No. 07-431 (emphasis added). The Bureau contends the opening sentence is evidence that §493(2) is best interpreted as prohibiting both the purchase and sale of malt or brewed beverages *with* cash.

However, it is better understood as a summary of the topics covered in §493(2). I cannot conclude the Office of Chief Counsel's opening sentence in this Advisory Opinion was intended as an interpretation of §493(2) because, when read literally, it is only "right" in a qualified sense. For example, stating that §493(2) prohibits sales of malt or brewed beverages with cash is true only when describing the practices of distributors, but false when dealing with other licensees who are perfectly free to take cash as payment. Similarly, stating that §493(2) prohibits purchases of malt or brewed beverages with cash is contradicted by the first clause of §493(2) which presumes the legitimacy of the use of cash. Further, stating that it prohibits purchases of malt or brewed beverages with credit is both supported and contradicted by the law depending on particular circumstances. Thus, I cannot read Advisory Opinion No. 07-431 as an interpretation of the law, but only as a general summary of the issues covered in §493(2). Furthermore, nothing contained in the remainder of Advisory Opinion No. 07-431 provides guidance for the issue before me.

Likewise, I do not find the other Advisory Opinions offered by the Bureau helpful in determining whether §493(2) creates an affirmative obligation barring licensees from paying distributors with cash. Advisory Opinion No. 06-056 concerns the details of selling malt or brewed beverages on credit. I understand its relevance here to be for the proposition that licensees may only do what is specifically permitted. Because I conclude the law only specifies

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<sup>6</sup> Furthermore, the Office of Chief Counsel, like the judges of this court and all higher reviewing courts, must interpret the Liquor Code liberally (that is, broadly) to best protect the "public welfare, health, peace and morals of the people of the Commonwealth and to prohibit forever the open saloon." (47 P.S. §1-104(a) of the Liquor Code)



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obligations that attach to distributors) I do not find guidance for other licensees in Advisory Opinion No. 06-056. Next, the Bureau offers Advisory Opinion No. 09-455 for the proposition that §493(2), as amended, was intended to protect distributor drivers from the risks associated with carrying large quantities of cash. That purpose, however, is not impeded by finding no citable offense against a licensee paying cash. That is, the obligation on the part of the distributor to decline cash still exists. This interpretation has the additional benefit of placing the burden of protecting distributor drivers in a more logical place: on the distributors rather than on licensees. Thus, I do not find the Bureau's cited authorities persuasive to my interpretation of §493(2).

Other Advisory Opinions offer more guidance in this case. Multiple Advisory Opinions confirm the interpretation that §493(2) merely prohibits distributors from accepting cash,<sup>7</sup> and one Advisory Opinion expressly states a restaurant licensee paying in cash would not be subject to a penalty under §493(2) for doing so. On February 1, 2005, in Advisory Opinion No. 05-032, the Office of Chief Counsel addressed a question from an importing-distributor about §493(2). In offering the Board's interpretation of the then newly-amended, but-not-yet-effective §493(2), the Chief Counsel expressly stated it does not give rise to a violation against a licensee who pays a distributor in cash. "It should be noted that if a cash transaction for malt or brewed beverages occurs, it will be the selling distributor or importing distributor who will be cited since Act 239 prohibits the acceptance of cash." Advisory Opinion No. 05-032 (emphasis in original). Thus, the most direct, relevant interpretation of the issue before me finds no violation for licensees paying distributors cash, even in light of the expansive rule of interpretation required under the Liquor Code.

The Bureau correctly notes that Advisory Opinion No. 05-032 actually interprets the amending act rather than the Liquor Code. However, the Liquor Code adopted the language in Act 239, verbatim.<sup>8</sup> I can find no basis from this distinction to attribute less weight to the persuasive authority of Advisory Opinion No. 05-032.

As such, I conclude that a licensee who pays a distributor with cash for *malt* or brewed beverages does not violate §493(2). The Bureau has not established that Licensee, here, violated §493(2) on the dates charged. Accordingly, count two of the Citation is dismissed.

PRIOR RECORD:

Licensee has been licensed since January 25, 1994, and has had one prior violation:

IN RE:

Citation No. 96-2345. Fine \$450.00.

1. Possessed or operated gambling devices or permitted gambling on the licensed premises (machines).

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<sup>7</sup> See Advisory Opinions Nos. 04-628, 05-002, 05-003, 05-007, 05-010, 05-020, 05-031, and 05-087.

<sup>8</sup> "Provided further, That notwithstanding any other provision of this act to the contrary, it shall be unlawful for an importing distributor or distributor to accept cash for payment of any malt or brewed beverages from anyone possessing a license issued under this article." Act 239 of 2004.



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PENALTY:

The Liquor Code prescribes a penalty of license suspension or revocation 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 (47 P.S. §4-471).

Upon review of the factual summary presented by the Bureau, and in light of my dismissal of count two; I impose a penalty of \$750.00 for count one, and \$150.00 for count three.

ORDER:

THEREFORE, it is hereby ordered that Ernies of Brackenridge, Inc., t/a Ernie's Tavern, License Number R-AP-1662, 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 15<sup>th</sup> day of August, 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.



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

The fine must be paid by cashier's check, money order, or a check drawn on the business or trust account of an attorney licensed in Pennsylvania. Personal and business checks are NOT acceptable unless bank certified. Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail it, along with any required documentation to:

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

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