

Mailing Date: FEB 25 2016

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

PENNSYLVANIA STATE	:	In re Citation No. 14-2531
POLICE, BUREAU OF	:	
LIQUOR CONTROL ENFORCEMENT	:	BLCE Incident No. W09-478091
	:	
v.	:	PLCB LID No. 46791
	:	
BROOKE DEREK, INC., T/A RILEY'S	:	PLCB License No. H-AP-SS-1074
4505 MAIN ST.	:	
WHITEHILL, PA 18052-1902	:	Lehigh County

JUDGE SHENKLE
BLCE COUNSEL: Roy Harkavy, Esq.
LICENSEE: Albert Charlie III

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on January 7, 2015. There are five counts in the citation.

The first count alleges that Licensee violated the Liquor Code, 47 P.S. §4-471, and the Crimes Code, 18 Pa. C.S. §5513, on August 13, 2014, by possessing or operating gambling devices or paraphernalia or permitting gambling or lotteries, poolselling and/or bookmaking on the licensed premises.

The second count alleges that Licensee violated the Liquor Code, 47 P.S. §4-467, on August 13 and October 14, 2014, by failing to constantly and conspicuously expose its hotel liquor license under a transparent substance on the licensed premises.

The third count alleges that Licensee violated the Liquor Code, 47 P.S. §4-493(21), on August 13, 2014, by refusing enforcement officers the right to inspect completely the entire licensed premises at a time during which the premises were open for the transaction of business or when patrons or guests or members were in that portion of the licensed premises wherein alcoholic beverages are sold.

The fourth count alleges that Licensee violated the Liquor Code, 47 P.S. §4-471, and the Clean Indoor Air Act, 35 P.S. §637.6(a)(2), on October 14, 2014, by smoking and/or permitting smoking in a public place where it is prohibited.

The fifth count alleges that Licensee violated the Liquor Code, 47 P.S. §4-471, and the Clean Indoor Air Act, 35 P.S. §637.6(a)(1), on August 13, 2014, by failing to post signage as required.

A hearing was held on November 24, 2015, in Allentown, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. Uniformed liquor enforcement officers visited the licensed premises at 12:52 p.m. on October 14, 2014. An officer identified himself to a bartender, who contacted Licensee's president, who was upstairs in his residence. While waiting, an officer saw that Licensee's liquor license, health license, and smoking exemption were all posted in a wooden case with a glass front, with the smoking exemption partially obstructing the liquor license. The case was behind a television which was sitting higher up, on top of a cooler of some sort (N.T. 6-7).

2. An officer noticed that a door separating the bar area from the dining area was propped open. This was a problem because the premises has a Type 2 exemption, which allows a premises to have both smoking and nonsmoking areas provided there is either a permanent wall between the areas, or if there is a door, that it be kept permanently closed (N.T. 8-9).

3. The officer's recollection regarding the posting of "smoking" or "no smoking" signs in the premises was not good, and was not able to be refreshed. Therefore the Bureau's motion to withdraw the fifth count of this citation was granted (N.T. 17).

4. Uniformed liquor enforcement officers visited the licensed premises on August 13, 2014. An officer saw that the wooden case with a glass front was in the same condition as described by the officer who visited on October 14. There were other licenses and certificates inside the case also, and the liquor license was covered approximately one third and in the far right of the case, so that a view of it was obstructed by the television in front of it (N.T. 18-20).

5. The officers asked to inspect a locked room in the premises, which they knew to be a licensed liquor storage closet or room, based on PLCB records. The bartender and Licensee's president both said that they were unable to open the room, and when pressed again, Licensee's president later said that he refused to do so (N.T. 20-23).

6. The officers were looking for evidence of gambling or an illegal gambling device, which they had been told about. It was said to be capable of reducing accumulated credits instantly to zero through the use of a remote control device. They found a drawer behind the bar which contained a number of remote control devices, but could not make any of them work on the Queen Bee brand video slot machine which was in the licensed premises. They tried a number of other common "knock off" methods but were not successful in getting the machine to respond by eliminating points. Rather than seize the machine and then have to return it because it was legal, the officers took the machine into a back room (N.T. 23-25).

7. When they plugged it back in the officers saw that the credits previously displayed were still displayed, so they knew the machine was equipped with a power interrupt circuit. Inside the machine they found a remote control receiver, and also wires which, when pressed together, accessed the machine's internal accounting. Based on their conclusion that this was a *per se* gambling device, the officers seized the machine (N.T. 26-27).

CONCLUSIONS OF LAW:

Licensee violated the Liquor Code, 47 P.S. §4-471, and the Crimes Code, 18 Pa. C.S. §5513, on August 13, 2014, by possessing a gambling device on the licensed premises.

Licensee violated the Liquor Code, 47 P.S. §4-467, on August 13 and October 14, 2014, by failing to conspicuously expose its hotel liquor license under a transparent substance on the licensed premises.

Licensee violated the Liquor Code, 47 P.S. §4-493(21), on August 13, 2014, by refusing enforcement officers the right to inspect completely the entire licensed premises at a time during which the premises were open for the transaction of business or when patrons or guests or members were in that portion of the licensed premises wherein alcoholic beverages are sold.

The evidence did not prove that Licensee violated the Liquor Code, 47 P.S. §4-471, and the Clean Indoor Air Act, 35 P.S. §637.6(a)(2), on October 14, 2014, by smoking and/or permitting smoking in a public place where it is prohibited.

The Bureau's motion to withdraw the fifth count, relating to the alleged failure to post signage as required, was granted at the hearing.

DISCUSSION:

There was no evidence of actual gambling uncovered by this investigation, and the Bureau's case is based on the status of the machine found in the premises as a "gambling device *per se*." A device fits that definition if it is so designed and constructed that it can be readily used for gambling. Among the factors affecting that determination are: that the device requires a deposit of money, the result is determined by chance, and the device has the capability of instantly reducing accumulated credits to zero.

The last factor, the "knock off" device, was shown to be present by the existence within the machine of a receiver to accept commands from a remote control device which was not found. I find that the failure to locate the remote control device is not fatal to the government's case, because the machine itself was equipped to receive commands from the missing or hidden remote.

In this case as well as in re Citation No. 13-2267, which was heard on the same date, there was evidence that Licensee's president believes that officers of the Bureau had no right to inspect the licensed premises without having obtained a search warrant. The law cited for the third count of this citation ought to dispel this notion. Licensee did not have the right to refuse entry to its licensed liquor storage closet when Bureau officers requested it.

The statutory reference provided in the fourth count says that it is a violation to "permit smoking in a public place where smoking is prohibited" but there was no evidence in this case that anyone smoked in the premises or that Licensee permitted anyone to do so.

Perhaps there is a rule or regulation enforced by the Pennsylvania Department of Health which requires "Type 2" premises to have permanently separated "smoking" and "no smoking" areas but, if so, the Bureau has not cited it as authority. The authority they did cite was not supported by evidence of a violation.

PRIOR RECORD:

Licensee has been licensed since October 24, 2000, and has had prior violations as follows:

In re Citation No. 01-1886. \$300.00 fine.

1. Loudspeakers could be heard outside. June 9, 2001.

In re Citation No. 01-2592. \$350.00 fine.

1. Loudspeakers could be heard outside. Sept. 4, 2001.

In re Citation No. 02-1623. \$1,500.00 fine.

1. Loudspeakers could be heard outside. May 27, 2002.
2. Permitted lewd, immoral or improper entertainment. June 13, 2002.

In re Citation No. 04-1791. \$2,050.00 fine.

1. Sold, furnished or gave liquor for consumption off premises.
May 22, June 3, July 16, 17 and August 21, 2004.
2. Loudspeakers could be heard outside. June 3, 2004.
3. Sales to a visibly intoxicated person. August 21, 2004.
4. Noisy and/or disorderly conduct. May 8, June 3, 13, July 11, 21 and 25, 2004.

In re Citation No. 06-2572. \$150.00 fine.

1. Failed to notify Board within 15 days of change of manager. January 28, 2003.

In re Citation No. 12-0308C. \$1,250.00 fine and RAMP certification mandated.

1. Sales to a minor. January 12, 2012.

In re Citation No. 12-0823. \$1,250.00 fine.

1. Sales to a visibly intoxicated person. February 18, 2012.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine, or both, for violations of this type. For violations of the type found in the third count, any fine must be in the \$1,000.00 to \$5,000.00 range. For violations of the type found in the other counts of this citation, any fine must be in the \$50.00 to \$1,000.00 range.

Since the first count is Licensee's third violation in a four-year period of a provision of the Crimes Code or a provision mentioned in 47 P.S. §4-471(b), the law requires that the penalty for that count include license suspension or revocation. Since the second count is Licensee's third violation in a four-year period of a provision mentioned in 47 P.S. §4-471(b), the law requires that the penalty for that count include license suspension or revocation. Penalties are assessed as follows:

- Count No. 1 – suspension of license for one day.
- Count No. 2 – suspension of license for one day.
- Count No. 3 – suspension of license for two days.
- Count No. 4 – DISMISSED.
- Count No. 5 – WITHDRAWN BY BUREAU.

ORDER

THEREFORE, it is hereby ORDERED that the Hotel Liquor License of Licensee, Brooke Derek, Inc., t/a Riley's, License No. H-AP-SS-1074, shall be suspended for a period of four (4) days (including all permits and Licensee Discount Card) BEGINNING at 7:00 a.m. on Friday, April 8, 2016, and ENDING at 7:00 a.m. on Tuesday, April 12, 2016.

Licensee is directed on Friday, April 8, 2016, at 7:00 a.m. to place the enclosed notice of suspension (Form No. PLCB-1925 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 replacement placards are needed for any reason they are available at all Pennsylvania Liquor Stores/ Fine Wine & Good Spirits stores.

The Bureau is directed to visit and monitor the premises for compliance with this order.

Licensee is authorized on Tuesday, April 12, 2016, at 7:00 a.m. to remove the suspension placard and return the license to its original wall location.

Dated this 22ND day of February, 2016.



David L. Shenle, J.

jb

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.

WHETHER OR NOT RECONSIDERATION HAS BEEN REQUESTED, AGGRIEVED PERSONS MAY APPEAL TO THE PLCB, NORTHWEST OFFICE BUILDING, HARRISBURG, PA 17124 WITHIN 30 DAYS AFTER THE MAILING DATE OF THIS ORDER.

THE PLCB CHIEF COUNSEL'S TELEPHONE NUMBER IS 717-783-9454.