

Mailing Date: JAN 22 2016

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	IN RE Citation No.: 15-1543
LIQUOR CONTROL ENFORCEMENT	:	
	:	BLCE Incident No.: W08-495870
v.	:	
	:	
KANE COUNTRY CLUB	:	PLCB LID No.: 67360
6654 ROUTE 6	:	
PO BOX 387	:	PLCB License No.: PGR-AP-SS-347
KANE, PA 16735-4246	:	
	:	
MCKEAN COUNTY	:	

BEFORE: JUDGE RICHARD O'NEILL EARLEY
BLCE COUNSEL: NADIA VARGO, ESQUIRE
LICENSEE: ROGER J. KLAIBER, VICE PRESIDENT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on August 26, 2015, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Kane Country Club, License Number PGR-AP-SS-347 (Licensee). The citation charges Licensee with violating the Liquor Control Board regulations at 40 Pa. Code §3.52(a), alleging that during the period April 7 through July 25, 2015, Licensee, by its servants, agents or employees, permitted other persons to operate a business on the licensed premises.

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.

Based upon the admission(s) of Licensee and the summary of facts provided by the Bureau, I make the following Findings of Fact and reach the following Conclusions of Law:

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FINDINGS OF FACT:

1. Licensee holds a type of liquor license known as a “Privately-owned Public Golf Course.” From April 7 to July 25, 2015, Licensee’s premises included a restaurant called “Kelly’s On the Green.”
2. On June 9, 2015, a Liquor Enforcement Officer entered Licensee’s premises and met with Kelly J. Martin who operated the restaurant. The Officer asked Ms. Martin how the restaurant was operated. She stated that she leased the restaurant area from Licensee, Kane Country Club. However, she did not serve patrons alcohol. Ms. Martin stated that if alcoholic beverages were ordered, the Kane Country Club bartenders rang up the patron’s purchase and served the drinks to the table.
3. At that time, Licensee’s Board-approved manager, John Rook, arrived and discussed the restaurant operation with the Officer. Mr. Rook stated that Ms. Martin leased the restaurant area of the premises, which was within an area licensed by the Board. The Officer asked if he could see a copy of the lease, and Mr. Rook stated that it was at their attorney’s office. The record does not disclose whether the Officer made arrangements to view the lease on another date. Its contents were not made a part of this record by either party. Mr. Rook also noted that Ms. Martin was not an officer of the licensed organization, and that Licensee did not have Board approval to operate another business on the licensed premises. He further confirmed that Kelly’s On the Green had been operating on the premises every day since April 7, 2015.
4. On July 28, 2015, the Officer concluded his routine inspection of Licensee’s premises and met with the on-duty bar/kitchen manager, whose name is not part of the record before me. The manager told the Officer that Licensee decided to close Ms. Martin’s restaurant. The Officer observed a sign in the restaurant area which indicated that the restaurant was no longer open. The Officer obtained a statement from the kitchen manager, who confirmed that Kelly’s On the Green’s last date of operation was July 25, 2015.
5. The Board sent the Bureau certification verifying that Licensee did not have Board approval to permit another business to operate on the licensed premises from April 7 through July 25, 2015.

CONCLUSION OF LAW:

The Bureau has failed to establish that Licensee violated 40 Pa. Code §3.52(a) of the regulations by permitting Ms. Martin to operate Licensee’s restaurant. The citation is dismissed.

DISCUSSION:

Typically, where a licensee has an undisclosed arrangement with a third party operating a business on a licensed premises, there is cause to be concerned about possible violations of the Liquor Code's prohibition against undisclosed, shared pecuniary interests (47 P.S. §4-404), or the regulatory prohibition against allowing others to operate another business on the premises (40 Pa. Code §3.52(a)). However, in this case the Bureau did not charge Licensee with violating §4-404, and there are unique limitations on the reach of §3.52(a) on this Licensee.

Section 3.52(a) of the regulations states, in pertinent part, "licensee may not permit other persons to operate another business on the licensed premises." The sole question in a §3.52(a) case is whether the operations in question are "part and parcel" of licensee's business model. Mag Enterprises Inc. v. PLCB, 806 A.2d 521 (Pa.Cmwlth. 2002); BLCE v. Price Kine South, Inc., 03-0384 (PLCB 5/5/2004) (overruling BLCE v. Freddy's Restaurant and Lounge, Inc., 95-0324 (PLCB 5/2/96) (citing Mag Enterprises)). The Bureau contends that Licensee violated §3.52(a) by allowing Ms. Martin to operate its restaurant.

However, this analysis misses the larger issue in this case: Licensee is statutorily permitted to use someone else to run its restaurant operations. Our regulatory system includes a type of license known as a Privately-owned Public Golf Course Liquor License, or a PGR, and Licensee holds one. Although a PGR is a type of "restaurant" licensee, a PGR is treated differently under the Liquor Code than a typical restaurant because of the widely differing demands of running a golf course with a restaurant. As a consequence, PGRs have certain privileges that are not enjoyed by other licensees. Most significant in this case is the privilege found at 47 P.S. §4-461(e.1) of the Liquor Code giving PGRs the option to allow someone to run its restaurant operations:

"PRIVATELY-OWNED PUBLIC GOLF COURSE" as used in this section shall mean the restaurant facilities at any privately-owned golf course open for public accommodation. The license may be issued to the operator of the privately-owned public golf course. The license holder may designate a concessionaire to provide food, alcoholic beverage and nonalcoholic beverage service at the restaurant facility.

47 P.S. §4-461(e.1) of the Liquor Code (emphasis added). Thus, a PGR license holder is permitted to have someone else run its restaurant. This statutory privilege forms a critical backdrop for the charge brought against Licensee in this case.

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In this case, the Bureau's citation raises a question of law that cannot be waived by the parties¹: whether the stipulated facts, above, are capable of establishing a violation of 40 Pa. Code §3.52(a) when Licensee is statutorily entitled to utilize a concessionaire to provide food and drink services pursuant to 47 P.S. §4-461(e.1) of the Liquor Code.

The Bureau's argument would make it a violation of the Board's regulations for a PGR to exercise its concessionaire privilege under the Liquor Code. Pennsylvania courts have long held that a regulation may not be interpreted in a manner that conflicts with its enabling statute. Popowsky v. Pennsylvania Public Utility Commission, 910 A.2d 38, 52 (Pa. 2006). Thus, §3.52(a) of the regulations may not be interpreted so broadly as to eliminate a PGR's privilege to designate a concessionaire under §4-461(e.1) of the Liquor Code. Therefore, I cannot conclude that §3.52(a) prohibits a PGR from allowing another entity to run its restaurant.

However, the Bureau notes that the Board has repeatedly and consistently concluded that §3.52(a) prohibits leasing restaurant operations to another. Specifically, the Bureau directs my attention to three Advisory Opinions by the Board that interpret §3.52(a) of the regulations as prohibiting the type of arrangement found in this case. Advisory Opinion Nos. 15-291, 12-139, and 12-061. Advisory Opinion No. 15-291 specifically concerns the present Licensee and its operations. In all three documents the Board suggests that PGRs are not permitted to use a concessionaire and that such privilege is limited only to other types of liquor licenses. "This privilege is limited to the holders of public venue, club or catering club, municipal golf course, private-owned private golf club or performing arts facility licenses. [47 P.S. §§ 1-102, 4-412, 4-413, 4-461; 40 Pa. Code §§ 5.81, 5.82]." Advisory Opinion Nos. 15-291, 12-139, and 12-061. (Citations and brackets in originals.)

The Bureau properly notes that the Board's interpretation of its own regulations is entitled to deference. Orner v. Dept. of Public Welfare, 404 A.2d 452 (Pa.Cmwlth. 1972). However, in this case all three Advisory Opinions offer an analysis that is inadvertently in conflict with the Liquor Code. Section 4-461(e.1) specifically permits PGRs to do what these Advisory Opinions suggest they cannot.² Therefore, §4-461(e.1) and Popowsky preclude me from taking guidance from these Advisory Opinions on this question.

Ultimately this case is determined based on the language of §4-461(e.1) of the Liquor Code and the requirement under Popowsky that regulations cannot be interpreted to conflict with enabling legislation. For this reason, the Bureau's remaining arguments about the meaning of "another business" and whether Licensee had permission from the Board to do what it did, are irrelevant. Whether or not running a restaurant is "another"

¹ Foley Brothers, Inc. v. Commonwealth, Dept. of Highways, 163 A.2d 80 (Pa. 1976); Commonwealth, DOT v. Brown, 576 A.2d 75 (Pa.Cmwlth.Ct. 1990).

² The other cited authorities in the Advisory Opinions (47 P.S. §§ 1-102, 4-412, 4-413; 40 Pa. Code §§ 5.81, 5.82) concern different types of liquor licenses and do not inform the immediate question presented here.

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business,³ it is statutorily permitted. Whether or not §4-461(e.1) requires Board approval,⁴ Licensee was not charged with violating §4-461(e.1). Whether or not §3.52(a) requires Board approval⁵, Popowsky does not permit me to find a violation of the regulations resulting from the exercise of a statutory privilege. And finally, if Licensee ran afoul of pecuniary interest rules while exercising its statutory privilege, that should give rise to a charge under §4-404 of the Liquor Code, not under §3.52(a) of the regulations.

Accordingly, I cannot interpret §3.52(a) as the Bureau requests. Popowsky precludes establishing a §3.52(a) regulatory violation based on the exercise of a statutory right under the Liquor Code. Furthermore, the limited language of §3.52(a)'s prohibition makes it a poor substitute for policing §4-404 pecuniary concerns or §4-461(e.1) issues. Therefore, the Bureau has not established that Licensee violated §3.52(a) of the regulations when it exercised its privilege under §4-461(e.1) of the Liquor Code to permit Ms. Martin to run its restaurant.

ORDER:

THEREFORE, the citation is dismissed.

Dated this 19TH day of January, 2016.



Richard O'Neill Earley, J.

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³ An interesting proposition in this case where the Bureau would have to prove that operating a restaurant—a core function of being a restaurant licensee—is something that is not “part and parcel” of the licensee’s normal business operation. Mag Enterprises, and Price Kine South.

⁴ There appears to be no formal process required to designate a concessionaire. I could find no provision of the Liquor Code or the Board’s regulations that require PGRs to notify or seek approval from the Board when a PGR designates a concessionaire. The only regulation mentioning concessionaires is limited to Catering Club licensees (40 Pa. Code §5.82), but it does not expressly require approval by, or notice to, the Board to use concessionaires. This lack of regulation is in contrast with the detailed rules surrounding utilizing a “management company.” (47 P.S. §1-102, 40 Pa. Code §§3.141-2.143) Management companies, unlike concessionaires, appear to be an operational choice available to all food-serving licensees.

⁵ I note that there is no provision under §3.52(a) for a licensee to secure approval for a third party to conduct another business on licensed premises. (Compare §3.52(a) to 40 Pa. Code §3.52(c) of the regulations, which permits licensees to receive prior Board approval for the licensee to operate another business on the premises.) This is more evidence that the only question under §3.52(a) cases is the “part and parcel” analysis.

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NOTICE ABOUT REQUESTS FOR RECONSIDERATION: YOU MUST SEND YOUR WRITTEN REQUEST FOR RECONSIDERATION TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITH A \$25.00 FILING FEE SO THAT IT IS RECEIVED BY THE COURT WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER.