

Mailing Date: FEB 28, 2020

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

PENNSYLVANIA STATE :
POLICE, BUREAU OF : IN RE Citation No.: 19-1407
LIQUOR CONTROL ENFORCEMENT :
 : Incident No.: PA 2019-247978
v. :
 :
B P O E CORRY LODGE NO 769 : PLCB LID No.: 2887
129 N CENTER ST :
CORRY PA 16407-1646 : PLCB License No.: CC-249
 :
ERIE COUNTY :
 :
 :
 :

BEFORE: JUDGE RICHARD O'NEILL EARLEY
BLCE COUNSEL: MICHAEL C. NICKLES, ESQ.
LICENSEE: KATELIN ELLSWORTH, BAR MANAGER/SECRETARY

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on September 11, 2019, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against B. P. O. E. Corry Lodge No. 769, License Number CC-249 (hereinafter Licensee).

The citation contains two counts.

Count one of the citation charges Licensee with violation of the Liquor Code at 47 P.S. §4-471.1(g), alleging that during the period February 4 through March 26, 2019, Licensee, by its servants, agents or employees, failed to have its Board-approved manager complete RAMP training within 180 days of the Board's approval of the appointment.

Count two 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. §§5512 and/or 5513, alleging that during the periods February 15 through April 20 and April 22 through June 25, 2019, Licensee, by 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.

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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:

FINDINGS OF FACT:

Count one:

1. On August 7, 2018, Katelin Ellsworth became Licensee's Board-approved manager, but had not completed RAMP owner/manager training within the preceding two years. Licensee's manager was required to complete RAMP owner/manager training within 180 days of being approved by the Board, by February 3, 2019.
2. Board records show that Licensee's manager completed RAMP owner/manager training on March 27, 2019.

Count two:

3. On June 25, 2019, a Liquor Enforcement Officer conducted a routine inspection of Licensee's premises and observed that Licensee's Local Option Small Games of Chance (LOGSOC) license had expired on February 14, 2019. The manager stated she was unaware the license was expired. She provided a written statement admitting that the club conducted daily and weekly drawings and sold pull-tab tickets on each date since the LOGSOC license expired, except April 21, 2019. On that date, the club was closed for the Easter holiday.
4. The Erie County Bureau of Revenue confirmed that Licensee's LOGSOC license expired on February 14, 2019. Licensee did not renew the license until June 26, 2019.

CONCLUSION OF LAW:

Count one: Licensee operated from February 3, 2019, to March 27, 2019, a period of 52 days, without completing RAMP owner/manager training. Sustained.

Count two: Licensee knew or should have known gambling was offered on its premises between February 14 and June 25, 2019 and took no, or inadequate steps, to prevent it. Sustained.

PRIOR RECORD:

Licensee has been licensed since January 1, 1934, and has had three prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

IN RE:

Citation No. 96-1266. Fine \$350.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on a licensed premises during a period when its Small Games of Chance license had expired.

Citation No. 13-2400. Fine \$1,400.00.

1. Sales after the license expired and had not been renewed and/or validated. August 1 through September 5, 2013.

Citation No. 17-0580. Fine \$1,200.00.

FIRST CAUSE OF ACTION

1. Failed to operate Small Games of Chance in conformity. October 16, 2016, through February 13, 2014.

SECOND CAUSE OF ACTION

2. Failed to maintain malt or brewed beverage dispensing system cleaning records. November 20, 2016, through February 13, 2017.
3. Failed to clean malt or brewed beverage dispensing system at least once every 7 days. April 6 through November 18, 2016.

DISCUSSION:

This case involves a catering club liquor licensee in Erie County which, at all times relevant to this matter, offered small games of chance after its LOSGOC license had expired. The Board has held that under those circumstances the LOSGOC does not confer subject matter jurisdiction on the Bureau to cite clubs under the LOSGOC. BLCE v. Fulton Athletic Club, Citation 18-0477 (PLCB 4/17/19), and BLCE v. Labor Temple Assn of Canonsburg Penna., Citation 17-1579 (PLCB 5/15/19). However, on appeal, the Erie County Court of Common Pleas, reversed the Board's decision on Fulton Athletic on this question¹ holding that the Bureau has discretion to choose which statute to charge under—the LOSGOC or the Crimes Code—in Erie County. Having some questions about the scope of the trial court's decision I requested a phone conference to discuss whether the present case is affected by the Fulton Athletic decision.

In this case the Bureau issued its citation after the Board's decision in Fulton Athletic, but before the trial court's decision. The Bureau, following the Board's Fulton Athletic decision

¹ The Bureau is pursuing a similar appeal of the Board's Labor Temple decision, but at this time the Washington County Court of Common Pleas has not rendered a decision.

charged Licensee for violating the Crimes Code. However, Counsel noted that it was the Bureau's original preference to charge Licensee under the LOSGOC and inquired whether the court would permit it to amend its citation in light of the Fulton Athletic trial court decision. I informed the parties that if I received a motion to amend the citation to charge Licensee under the LOSGOC I would ask the parties to submit legal briefs addressing the impact of Department of Revenue regulations at 61 Pa. Code § 901.25 on the scope of the Fulton Athletic trial court's ruling.

The trial court's decision was based in part on its conclusion that a lapsed LOSGOC license does not deprive a formerly-licensed club of a property interest in offering small games of chance, and thus exposes it to enforcement under the LOSGOC for periods it does not hold a valid LOSGOC license. Specifically, the trial court held that a "Club Licensee continued to retain its proprietary interest in its State LOSGOC License despite a short gap in renewal." Trial court, p. 10. The trial court observed that in some circumstances a lapsed license can still confer a property interest subjecting a former licensee to enforcement action against the lapsed license. The trial court relied upon Nicoletti v. State Bd. of Vehicle Mfrs., Dealers and Salespersons, 706 A.2d 891 (Pa. Cmwlth. 1998) and Garner v. Bureau of Professional and Occupational Affairs, State Bd. of Optometry, 97 A.3d 437 (Pa. Cmwlth. 2014). Based upon that precedent, the trial court made the following conclusion of law about the "lingering" property rights that exist under the LOSGOC.

[The Respondent, Club Licensee] acquired its proprietary interest to operate small games of chance for non-profit purposes when initially issued its State LOSGOC License for fundraising. Respondent retained said proprietary interest for fundraising in its State LOSGOC License throughout the forty-seven (47) day gap prior to renewal. Respondent's proprietary interest was not extinguished by this brief lapse. Instead, by paying its renewal fee and completing any renewal application, the Erie County Department of Revenue permitted Respondent immediately to continue to conduct small games of chance again according to the law.

Trial court, p. 13. Thus, the trial court held that the LOSGOC creates a property right that can exist after a LOSGOC license expires. Because formerly-licensed clubs possess a property interest under the LOSGOC, the trial court reasoned that they are entitled to the protections of the LOSGOC and that the Bureau had subject matter jurisdiction to charge licensees under the LOSGOC when they sell games of chance after their LOSGOC license expires.

However, there is some tension with this conclusion and Department of Revenue regulations for the LOSGOC at §901.25. There, the regulation states that "A [LOSGOC] certificate or license confers only a privilege on the holder. A certificate or license confers no vested right in the privilege so conferred." Id. Thus, to the extent that §901.25 prohibits lingering property rights between LOSGOC licensing periods, then the LOSGOC does not confer lingering protections to formerly-licensed clubs or jurisdiction to the Bureau. The trial court did not address this legal authority. Therefore, it is not possible to know whether the trial court considered §901.25 before reaching its conclusion in Fulton Athletic. Thus, if the Bureau sought to amend this citation

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to charge Licensee under the LOSGOC, I would request briefs exploring § 901.25's impact on the Bureau's legal theory.

The Bureau ultimately chose not to seek an amendment to the citation. I have not been made aware whether §901.25 factored into the Bureau's decision.²

PENALTY:

For violations of the type found in this case, the Liquor Code permits any of the following penalties: (1) a license revocation, (2) a fine in the range of \$50.00 to \$1,000.00, (3) a license suspension, or (4) any combination of a fine and suspension. (47 P.S. §4-471) In mitigation, some consideration shall be given to the fact that Licensee has admitted to the violation(s) as charged in this citation, and has waived the right to a hearing and appeal.

For the foregoing reasons, a fine of \$550.00 shall be imposed as an appropriate penalty in this case. Accordingly, I impose a penalty of \$250.00 for count one, and \$300.00 for count two.

ORDER:

THEREFORE, it is hereby ordered that B. P. O. E. Corry Lodge No. 769, License Number CC-249, pay a fine of \$550.00 within 20 days of the mailing date of this Order. In the event the 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 28TH day of FEBRUARY, 2020.



Richard O'Neill Earley, J.

NOTE: IF YOU WANT THE ADMINISTRATIVE LAW JUDGE TO RECONSIDER THIS ADJUDICATION, YOU MUST SUBMIT A WRITTEN APPLICATION AND A NONREFUNDABLE \$25.00 FILING FEE. BOTH MUST BE RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE, (PLCB - OFFICE OF ADMINISTRATIVE LAW JUDGE, BRANDYWINE PLAZA, 2221 PAXTON CHURCH ROAD, HARRISBURG, PA 17110-9661) WITHIN 15 DAYS OF THIS ADJUDICATION'S MAILING DATE. YOUR APPLICATION

² However, if § 901.25 did not factor into the Bureau's decision and the Bureau is merely exercising its discretion, then Licensee should be aware that the Bureau has previously represented to this court that where a choice to charge under the LOSGOC or the Crimes Code is available, it believes Crimes Code charges are appropriate only where there is "no intention to follow" the LOSGOC. Fulton Athletic, Citation 18-0477 (OALJ 11/19/18), p. 9. This is not how the Board interprets the LOSGOC or the Crimes Code, but it may reflect the thinking of the Erie County Court of Common Pleas.

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MUST DESCRIBE THE REASONS FOR RECONSIDERATION. THE FULL REQUIREMENTS FOR RECONSIDERATION CAN BE FOUND IN TITLE 1 PA. CODE §35.241.

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 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

Credit/Debit Cards may be used: If you have registered with PLCB+ you may pay by Credit/Debit card at www.lcb.pa.gov by following the PLCB+ link. If you have not registered with PLCB+ you may obtain the information on how to register by sending an email message to: RA-LBLICENSINGMOD@pa.gov.

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