

Mailing Date: MAR 22 2001

[Appeal](#)

PUBLICATION

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 99-2069
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W4-191018
	:	
v.	:	
	:	LID - 6147
	:	
INTERNATIONAL HOTEL INC : 1173-75	:	
ISLAND AVENUE : MCKEES ROCKS PA	:	
15136 :	:	
	:	
: ALLEGHENY COUNTY :	:	
LICENSE NO. H-AP-SS-825	:	

BEFORE: JUDGE ROBERT F. SKWARYK

APPEARANCES:

For Bureau of Enforcement
Richard G. Parker, Esquire

For Licensee
Max Homer, President,
Manager, Pro se

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on February 16, 2000, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter Bureau) against International Hotel, Inc., License Number H-AP-SS-825 (hereinafter Licensee).

The citation contains three counts.

Count one of the citation charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 5513 of the Crimes Code [18 Pa. C. S. §5513], in that on April 22 and May 20, 1999,

Licensee, by its servants, agents or employes, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises.

Count two of the citation charges Licensee with violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)], in that Licensee, by its servants, agents or employes, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two years immediately preceding November 9, 1999.

Count three of the citation charges Licensee with violation of Section 493(12) of the Liquor Code [47 P.S. §4-493(12)], in that on November 9, 1999, Licensee, by its servants, agents or employes, failed to keep records on the licensed premises.

The investigation which gave rise to the citation began on November 22, 1998 and was completed on November 22, 1999; and notice of the violation was sent to Licensee by Certified Mail on December 2, 1999. The notice of violation was received by Licensee on December 4, 1999.

Evidentiary hearings were held on this matter on August 2, 2000, and November 8, 2000, in Pittsburgh, Pennsylvania.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. Licensee is a corporation trading as Shooter's Bar located in Allegheny County, Pennsylvania and holds Hotel Liquor License Number H-AP-SS-825. (N.T., 8/2/00 at 4, 29-30)
2. On April 22, 1999 and May 20, 1999, Licensee's Board approved corporate set up was: Michael Homer – President, Secretary, Treasurer, Stockholder; Max Homer – Manager, Steward. (N.T., 8/2/00 at 7, 11/8/00 at 5-6)
3. On February 14, 2000, the corporation adopted a resolution appointing Max Homer as Secretary/Treasurer and on March 17, 2000 Max Homer purchased all the corporate stock. (N.T., 8/2/00 at 7-8, 11/8/00 at 5-6)
4. The investigation was initiated by a complaint alleging illegal gambling and employing a known felon at the licensed premises. (N.T., 8/2/00 at 33-34, 50-53, 11/8/00 at 111-113, 119-120)
5. Between May to September 1966, Heather Micklos was hired by Max Homer to work as a bartender at Shooter's Bar and instructed to make gambling payoffs on video machines and to knock-off points using a remote control device. (N.T., 11/8/00 at 38-44, 49-50, 52, 57-58, Exhibits C-11 and C12)

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6. Between March and May 1999, Kristen Frazier was hired by Max Homer to work as a bartender at Shooter's Bar. (N.T., 11/8/00 at 14-18, 21, 23-29, 35-36, Exhibits C-9 and C-10)
7. Kristen Frazier and Heather Micklos were paid in cash once per week with the wages delivered in an envelope held in the cash register. (N.T., 11/8/00 at 14-18, 21, 23-29, 35-36 - Exhibits C-9 and C-10)
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8. No taxes were taken out of the cash wages paid to either Kristen Frazier and Heather Micklos. (N.T., 11/8/00 at 19-20, 44)
9. Kristen Frazier was trained by Melanie Stein and Max Homer on the procedures to pay off winnings on video gambling machines located on the premises. (N.T., 11/8/00 at 14-19, 23-25, 30-32, 87-93)
10. Kristen Frazier was instructed that Shooter's rules for gambling payoffs was to pay off in even increments of credits and for amounts of \$10.00 or more. (N.T., 11/8/00 at 4-19)
11. Max Homer instructed Kristen Frazier to pay off only people she knew and she called Melanie Stein for approval to pay patrons she didn't know. (N.T., 11/8/00 at 30-33)
12. Credits were erased or "knocked off" by pressing a sequence of buttons on the video gambling machines and entering a code. (N.T., 11/8/00 at 14-17, 23-25)
13. Max Homer changed the knock-off code daily and kept it on a small piece of paper hidden in the grease pan under the fryer. (N.T., 11/8/00 at 16, 29)
14. During her shift, Kristen Frazier was instructed to keep the paper with the daily "knock-off" code on her at all times. (N.T., 11/8/00 at 16)
15. Gambling payoffs were recorded by a tally mark on a sheet of paper with columnar headings labeled "T-shirts" and "Sweatshirts" signifying \$10.00 and \$20.00 payments, respectively. (N.T., 11/8/00 at 17, 41-42, 49)
16. As part of the investigation, Enforcement Officer Joos visited Shooter's Bar on November 22, 1998, February 8, 1998, January 15, 1999, February 11, 1999, March 2, 1999 and April 1, 1999, and observed no gambling payoffs. (N.T., 8/2/00 at 24-26, 36-37, 68)
17. On April 22, 1999 at 8:30 p.m., Officer Joos entered the licensed premises and found a female bartender, Kristen Frasier, rendering service of alcoholic beverages to approximately ten patrons. (N.T., 8/2/00 at 13-14, 11/8/00 at 19, 29-30)
18. During this visit, Officer Joos observed a tabletop Cherry Master video slot machine and a full size Cherry Master video slot machine set up inside and operational. (N.T., 8/2/00 at 14)

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19. At 10:15 p.m., Enforcement Officer Joos began playing the tabletop Cherry Master video slot machine. (N.T., 8/2/00 at 14-15, 11/8/00 at 30-32)
20. At 10:40 p.m., Enforcement Officer Joos placed \$10.00 into the video slot machine and received 200 credits. (N.T., 8/2/00 at 15, 11/8/00 at 30-32, 11/8/00 at 66-67, 71-72)
21. At 10:45 P.M., Officer Joos accumulated 600 credits and gave notice to the bartender, Kristen Frasier, that he would like to be paid. (N.T., 8/2/00 at 14-15, 54-55, 11/8/00 30-32)
22. The bartender, Kristen Frazier, turned the tabletop video slot machine around and cleared the 600 credits from the display screen to zero. (N.T., 8/2/00 at 15, 11/8/00 at 30-32)
23. Officer Joos wrote his first name, Kevin, on a sheet of paper located to the left of the cash register; and the bartender wrote his last name down. (N.T., 8/2/00 at 15, 11/8/00 at 30-32)
24. The bartender, Kristen Frazier, gave the officer a \$20.00 bill and a \$10.00 bill taken from the cash register. (N.T., 8/2/00 at 14-15, 11/8/00 at 30-32)
25. During the three hour visit to the premises, Officer Joos had four beers. (N.T., 8/2/00 at 56)
26. At 11:25 p.m., Officer Joos departed the premises with 25 patrons remaining. (N.T., 8/2/00 at 57)
27. In May 1999, Kristen Frazier quit her job at Shooter's after receiving a letter from Max Homer complaining about a patron receiving too many gambling payoffs, and her leaving the lights on; subsequently he reduced her scheduled work hours. (N.T., 11/8/00 at 19)
28. On May 20, 1999, Officer Joos assisted by a detail of officers conducted a routine inspection of the licensed premises, served a search warrant and seized the two video slot machines. (N.T., 8/2/00 at 16, 143, 11/8/00 at 107-108, 116-117)
29. During the seizure of the two video slot machines, Licensee's manager, Max Homer and a bartender, Mary Kay O'Donnell, were present. (N.T., 8/2/00 at 16)
30. During the inspection, Officer Joos asked Max Homer who owned the gambling machines and he stated that he did. (N.T., 8/2/00 at 60)
31. The two seized video slot machines were kept under lock and alarm at a State Police Evidence Warehouse and accessible only through the evidence custodian. (N.T., 8/2/00 at 107-112, 137-138, 143-153, 158-160, 11/8/00 at 120-121)

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32. On May 23, 1999, Officer Joos examined the two electronic video slot machines and found a total of \$4.00 in U.S. currency. (N.T. 8/2/00 at 140-141-142, 151-152, 156)
33. Officer Joos used a pry bar to open the machines because he did not have the keys. (N.T., 11/8/00 at 135-136)
34. Officer Gary Holland is an expert in the field of video gambling machines. (N.T., 8/2/00 at 91-95, 134-138, 11/8/00 at 73-74)
35. On September 3, 1999, Officer Holland examined the full sized stand up electronic video slot machine seized from the licensed premises on May 20, 2000. (N.T. 8/2/00 at 95-96, 98-99, 128, 156, 160, 11/8/00 at 62-74)

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36. On September 8, 1999, Officers Holland, George and Joos examined the tabletop electronic video slot machine and found it contained similar characteristics. (N.T., 8/2/00 at 95-96, 98-99, 128, 156, 160-161, 11/8/00 at 62-74)
37. The two electronic video slot machines were the electronic equivalent of a mechanical stop machine and used buttons instead of a handle to activate play and did not contain a hopper for dispensing coins paid out. (N.T., 8/2/00 at 113-114, 11/8/00 at 62-74)
38. The two electronic video slot machines displayed nine stylized icons in nine windows in a tic-tac-toe type pattern or grid which when played appear to spin on the horizontal axis. (N.T., 8/2/00 at 96-98, 11/8/00 at 62-74)
39. The two electronic video slot machines accepted U.S. currency of one, five, ten and twenty dollar bills which awarded five cents per credit. (N.T., 8/2/00 at 97-98, 113, 11/8/00 at 62-74)
40. A play was initiated by betting up to 64 credits, or eight lines times eight credits per line, and pressing a start button which caused the reels to roll for approximately five seconds before stopping. (N.T., 8/2/00 at 97, 104-105, 11/8/00 at 62-74)
41. At the end of a play, the nine icons would be displayed in the grid and credits would be awarded dependent on where three icons lined up in a row. (N.T., 8/2/00 at 96-98, 11/8/00 at 62-74)
42. Credits were awarded by chance not skill with the chance of winning electronically preset at 55 percent. (N.T., 8/2/00 at 104, 11/8/00 at 62-64)
43. No coins were dispensed into "hoppers" on the two electronic video slot machines. (N.T. 8/2/00 at 97, 113, 11/8/00 at 62-74)

44. Both electronic video slot machines contained an internal electronic module and knock-off circuitry which when enabled by a user's code or electrical wire patch caused the credits to erase from the display screens and the number of erased credits to be recorded. (N.T., 8/2/00 at 98-103, 112-125, 132-134, 11/8/00 at 62-74, 76, 85-86 - Exhibit C-5)
45. Officer Holland did not have the user's code for either machine and used an electrical wire patch to by-pass the module and activate the knock-off circuitry. (N.T., 8/2/00 at 112-125, 132-134, 11/8/00 at 62-74)
46. Both electronic video slot machines had a double up feature which allowed the player to double up winning credits from previous hands and to hold over and play them double or nothing with the risk of losing all credits on one play. (N.T., 8/2/00 at 105, 11/8/00 at 62-74)
47. The Bureau's investigation was continuous and ongoing throughout the investigation period and Officer Joos delayed closing the investigation after he received a gambling payoff because of additional allegations against the licensed premises including employing a known felon, Max Homer. (N.T., 8/2/00 at 50-53, 60)
48. Licensee was not the subject of selective prosecution, and the Bureau has filed similar charges for illegal gambling against other licensed premises in Allegheny County. (N.T., 8/2/00 at 6364, 11/8/00 at 11-112, 119-120)
49. On November 9, 1999 at 11:30 a.m., Enforcement Officers Joos and Khalil conducted an open inspection of the licensed premises and found no business records except liquor purchases, no beer or food purchase invoices and no employe records including W-2 withholding tax forms. (N.T., 8/2/00 at 17-18, 70-71, 73-89, and 11/8/00 at 9-10)
50. On November 9, 1999, during the routine inspection, Officers Joos and Khalil asked Max Homer about information on the whereabouts of Kristen Frazier and was told she only worked there a couple of days. (N.T., 8/2/00 at 55, 74-76)
51. On November 15, 1999, Enforcement Officer Joos spoke with Licensee's accountant and found he had no employe records, only sales tax records. (N.T., 8/2/00 at 19-20)

CONCLUSIONS OF LAW:

Counts one, two and three – Sustained as charged.

DISCUSSION:

On August 2, 2000, an initial evidentiary hearing was held with the case being bifurcated and continued.

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On August 9, 2000, counsel for Licensee filed a motion for my recusal; on September 8, 2000, I denied the Motion for Recusal by a Preliminary Order¹.

On November 8, 2000, a second evidentiary hearing was held.

On December 21 and 22, 2000, respectively, Counsels for the Bureau and Licensee filed posthearing briefs in the case.

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. Pa. Liquor Control Board v. PPC Circus Bar, Inc., 506 A.2d 521 (Pa. Cmwlth. 1986); In Re: Omicron Enterprises, 449 A. 2d 857 (Pa. Cmwlth. 1982).

The phrase, “preponderance of evidence” has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. Black’s Law Dictionary, Fifth Edition, West Publishing Company, Copyright 1979, Page 1064.

1. Licensee’s Attorney Peter J. King filed the Motion for Recusal and the post-hearing brief; he did not represent Licensee at either hearing.

As to Count one, Licensee is charged with possessing or operating gambling devices or paraphernalia or permitting gambling on the licensed premises on April 22 and May 20, 1999. The basis for the charge is whether Enforcement Officer Joos received a gambling payoff from Licensee's bartender, Kristen Frazier, for credits won on an electronic video slot machine on April 22, 1999, and whether Licensee maintained two gambling devices per se which were seized on May 20, 1999.

The general rule is that violations of criminal laws other than the Liquor Code may constitute "sufficient cause" for the purpose of invoking penalties under Section 471 of the Liquor Code, but only if the Licensee knew or should have known of the illegal activity and failed to take measures to eliminate a known pattern of illegal activity. Pa. Liquor Control Board v. T.L.K., Inc., 544 A.2d 931 (Pa. 1988); Primo's Bar, Inc., Liquor License Case, 48 Pa. Commonwealth Ct. 1988, 409 A.2d 1369 (1979).

The Bureau presented testimony of Enforcement Officers Joos, Khalil, Holland and Sandrovich and bartenders Heather Micklos and Kristen Frasier.

Officer Joos testified that he received a gambling payoff from Kristen Frazier on April 22, 1999. Kristen Frazier testified that she made the gambling payoff pursuant to instructions from Max Homer and Melanie Stein. Heather Micklos testified that she worked as a bartender at Shooter's Bar in 1999 and was instructed by Max Homer to make gambling payoffs on the video gambling machines located at the premises. Officer Joos testified that he put \$10.00 into the tabletop video slot machine, won 600 credits and was paid off \$30.00 by Kristen Frazier who erased the credits from the machine.

Officers Joos, Khalil and Holland testified to the seizure, chain of custody, and inspection of the two electronic video slot machines seized on May 20, 1999, and that they met the criteria as gambling devices per se.

Max Homer and Melanie Stein testified that no gambling payoffs were made, and argued that Officer Joos unfairly targeted Shooter's Bar because Ms. Stein refused to socially date him.

In his brief, counsel for Licensee argued that the two slot machines were tampered with and not the same machines seized from the premises, and that Licensee is the subject of selective prosecution.

As fact-finders, it is our responsibility to resolve conflicts in the evidence and to determine witness credibility and evidentiary weight. Willard Agri-Service, Inc. v. Department of Agriculture, 554 A.2d 596 (Pa. Cmwlth. 1989); Commonwealth of Pa. State Correctional Institute at Dallas v. Robison, 561 A.2d 82 (Pa. Cmwlth. 1989). We may give testimony such consideration as it may deserve, and accept it or reject it in whole or in part. McFarland Landscape Service v. Workmen's Compensation Board of Appeal, 557 A.2d 816, 817-18 (Pa. Cmwlth. 1989); Hollenbach v. North Wales Foundry Company, 136 A.2d 148, 150 (Pa. Super. 1957); Las Vegas Supper Club, Inc. v. Pa. Liquor Control Board, 237 A.2d 253 (Pa. Super. 1967).

It is proper for fact-finders to consider a witness' bias in weighing his/her testimony. Kearns by Kearns v. DeHaas, 546 A.2d 1226 (Pa. Super. 1988); Panczak v. Com. Unemployment Compensation Board of Review, 409 A.2 929, 931 (Pa. Cmwlth. 1980).

I give great weight to the testimony of Kristen Frazier. She explained in detail how she was trained by Max Homer and Melanie Stein to make gambling payoffs on the two electronic video slot machines at Shooter's Bar. Her testimony was corroborated by a former bartender, Heather Miklos, and Officer Joos. This far outweighs the blanket denials by Mr. Homer and Ms. Stein. I find that Ms. Frazier did make a gambling payoff to Officer Joos on April 22, 1999 and that Licensee knew that such illegal activity was taking place on its premises.

Also, I find that the two electronic video slot machines seized from Shooter's Bar on May 20, 1999 met the criteria as gambling devices per se. At the time of seizure, they accepted U.S. currency to play, awarded credits by chance rather than skill, and contained internal circuitry for knocking off credits and accounting for the number of credits knocked off. Commonwealth v. Twelve Dodge City Video Poker Machines, 537 A.2d 812 (Pa. 1988); Commonwealth v. Two Electronic Poker Game Machines, 465 A.2d 973 (Pa. 1983).

As such, Count one is sustained as charged.

As to Counts two and three, Section 493(12) of the Liquor Code provides as follows:

SECTION 493. UNLAWFUL ACTS RELATIVE TO LIQUOR, MALT AND BREWED BEVERAGES AND LICENSEES.

The term "licensee," when used in this section, shall mean those persons licensed under the provisions of Article IV, unless the context clearly indicates otherwise.

It shall be unlawful -

(12) **Failure to have records on premises.** For any liquor licensee, or any importing distributor, distributor or retail dispenser, to fail to keep on the licensed premises for a period of at least two years complete and truthful records covering the operation of his licensed business, particularly showing the date of all purchases of liquor and malt or brewed beverages, the actual price paid therefor, and the name of the vendor, including State Store receipts, or for any licensee, his servants, agents or employes, to refuse the board or an authorized employe of the board or the enforcement bureau access thereto or the opportunity to make copies of the same when the request is made during business hours.

Officers Joos and Khalil testified as to the open inspection held on November 9, 1999 during which they found no business records except receipts for liquor purchases. The two bartenders, Kristen Frazier and Heather Micklos, testified that they were employed at the licensed premises and paid in cash without taxes being withheld.

I find that Licensee did not keep any employment records for these two bartenders, or most business records including food and beer purchase invoices for a two year period on the premises as required by the Liquor Code.

As such, Counts two and three are sustained as charged.

PRIOR RECORD:

Licensee has been licensed since October 6, 1988, and has had six prior violations, to wit:

Citation No. 92-1962. Fine \$450.00. Waiver of hearing.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on the licensed premises (machine).

Citation No. 95-1080. Fine \$1,000.00. Waiver of hearing.

1. Sales between 2:00 a.m. and 7:00 a.m
March 21 and 30, 1995.
2. Failed to require patrons to vacate the premises not later than one-half hour after the required time.
March 21 and 30, 1995.
3. Permitted patrons to possess and/or remove liquor or malt or brewed beverages after 2:30 a.m. March 21 and 30, 1995.

Citation No. 95-2304. Fine \$1,500.00 and two days' suspension. Waiver of hearing.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on the licensed premises (machines). August 19, 1995.
2. Sales between 2:00 a.m. and 7:00 a.m. August 19, 1995.

Citation No. 96-1821. Fine \$750.00 and three days' suspension.

Licensee's appeal to Board dismissed. Licensee's appeal to Common Pleas Court sustained. Bureau's appeal to Commonwealth Court reversed lower court order. Licensee's appeal to Supreme Court denied.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on the licensed premises (machines). April 14 and June 25, 1996.

Citation No. 97-1436. Fine \$1,000.00 and three days suspension.

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Licensee's appeal to Board dismissed. Licensee's appeal to Common Pleas Court sustained. Bureau's appeal to Commonwealth Court pending.

1. Sales between 2:00 a.m. and 7:00 a.m. June 19, 1997.
2. Failed to require patrons to vacate the premises not later than one-half hour after the required time. June 19, 1997.
3. Permitted patrons to possess and/or remove alcoholic beverages after 2:30 a.m. June 19, 1997.

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Citation No. 98-0710. Fine \$600.00 and three days' suspension.
Licensee's appeal to Board dismissed.

1. Possessed or operated gambling devices or paraphernalia
or permitted gambling or lotteries, poolselling and/or
bookmaking on the licensed premises (machines).
March 10, 1998.

Licensee shall be treated as a repeat offender under Count one.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] 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 types found in this case.

Section 471(c) of the Liquor Code requires that I impose a suspension or revocation of the liquor license under each count.

After due consideration of the circumstances giving rise to the citation, the following penalty will be imposed:

Count one - \$1,000.00 fine and one week suspension;

Count two - \$500.00 fine and four days' suspension; and

Count three - \$500.00 fine and three days' suspension.

ORDER:

THEREFORE, it is hereby ordered that Licensee, International Hotel, Inc., pay a fine of \$2,000.00 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.

IT IS FURTHER ORDERED that the hotel liquor license of International Hotel, Inc., License No. H-AP-SS-825, be suspended for a period of fourteen days **BEGINNING** at 7:00 a.m. on Monday, June 11, 2001 and **ENDING** at 7:00 a.m. on Monday, June 25, 2001.

Licensee is directed on Monday, June 11, 2001 at 7:00 a.m. to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and 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/Wine & Spirits Shoppes.

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The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized on Monday, June 25, 2001 at 7:00 a.m. to remove the placard of suspension and return the license to its original wall location.

The fine must be paid by Treasurer's Check, Cashier's Check, Certified Check or Money Order. **Personal checks, which include business-use personal checks, are not acceptable.** Please make guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

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

Dated this 16th day of March, 2001.

Robert F. Skwaryk, J.

cbm

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO 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.