

Mailing Date: June 20, 2001

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 99-2069  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

INTERNATIONAL HOTEL, INC. : License No. H-825  
t/a Shooters :  
1173-75 Island Avenue :  
McKees Rocks, PA 15136 :

Counsel for Licensee: Peter J. King, Esquire  
King & King  
Twenty Chatham Square  
Pittsburgh, PA 15219

Counsel for Bureau: Richard Parker, Esquire  
PENNSYLVANIA STATE POLICE  
Bureau of Liquor Control Enforcement  
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OPINION

International Hotel, Inc., t/a Shooters ("Licensee"), appealed from the  
Adjudication and Order of Administrative Law Judge Robert F. Skwaryk

("ALJ"), wherein the ALJ sustained the three-court citation against Licensee and imposed an aggregate penalty consisting of a 14-day license suspension and a fine of \$2,000.00.

The first count of the citation charged Licensee with violating section 5513 of the Crimes Code [18 Pa. C.S. §5513], which is incorporated by reference in Liquor Code section 471 [47 P.S. §4-471] as "other sufficient cause", in that on April 22 and May 20, 1999, 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.

The second count charged Licensee with violating section 493(12) of the Liquor Code [47 P.S. §4-493(12)] on November 9, 1999, in that Licensee, by its servants, agents, or employees, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two years immediately preceding this date.

The third count charged Licensee with violating section 493(12) of the Liquor Code [47 P.S. §4-493(12)] on November 9, 1999, in that Licensee, by its servants, agents, or employees, failed to maintain records on the licensed premises.

Pursuant to section 471 of the Liquor Code [47 P.S. §4-471], the appeal in this case must be based solely on the record before the ALJ. Where the decision of the ALJ is based upon substantial evidence, the Board must affirm the decision.

The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion requiring something more than a scintilla creating mere suspicion of the fact to be established. Johnson v. Pennsylvania Board of Probation and Parole, 706 A.2d 903 (Pa. Cmwlth. 1998); Chapman v. Pennsylvania Board Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal Licensee argues that the ALJ's findings of fact are not supported by substantial evidence and constitute errors of law. Further, Licensee argues that the ALJ failed to make any findings of fact dealing with certain testimony presented at the hearings. Specifically, Licensee contends that Cherry Master circuit board produced at the ALJ hearing was not the same Cherry Master circuit board that was examined by Officer Holland.

The Board has reviewed the record and the ALJ's Adjudication and Order with Licensee's allegations in mind. On April 22, 1999, Kevin Joos, of the Pennsylvania State Police, Bureau of Liquor Control Enforcement

("Bureau") entered the licensed establishment at 8:30 P.M. (N.T. 8-2-00 at 11, 14). At that time, he observed a female bartender, Kristen Frazier, rendering service to approximately ten patrons. (N.T. 8-2-00 at 14). He also observed a tabletop Cherry Master slot machine and a full size Cherry Master video slot machine on the premises. (N.T. 8-2-00 at 14). At 10:15 p.m., Officer Joos began to play the tabletop Cherry Master Video slot machine. (N.T. 8-2-00 at 14). His initial play was \$10.00 and he accumulated 600 credits and asked the bartender to be paid out. (N.T. 8-2-00 at 15). The bartender gave Officer Joos \$30.00 from the cash register in denominations of one \$20.00 bill and one \$10.00 bill. (N.T. 8-2-00 at 15-16). The bartender wrote down Officer Joos' name on a sheet of paper located to the left of the cash register. (N.T. 8-2-00 at 15). After the bartender paid Officer Joos, she turned the machine around, turned around to the back of the bar, pressed a sequence of buttons, and turned the machine back around. (N.T. 8-2-00 at 15). When she turned the machine back around, the machine was blank and then the screen reappeared with zero credits registered on it. (N.T. 8-2-00 at 15).

On May 20, 1999, Officer Joos returned to the licensed premises, served a search warrant on Max Homer, the manager, president, secretary,

treasurer, and stockholder of the corporate licensee, and seized the two slot machines. (N.T. 8-2-00 at 7-8, 16). The slot machines were seized, taken to a warehouse storage facility, and logged into evidence. (N.T. 8-2-00 at 16-17).

On November 9, 1999, Officer Joos returned to the licensed premises with Officer Khalil to conduct an open inspection of the licensed premises. (N.T. 8-2-00 at 17). The officers arrived at 11:40 a.m., conducted the inspection, and found that the licensed premises maintained no business records of any kind, no beer invoices, and no employee records. (N.T. 8-2-00 at 17). Further, the licensed premises contained no records indicating the withholding of taxes of employees and contained no food receipts or beer invoices, but it did have liquor invoices from the Board. (N.T. 8-2-00 at 17-19). At that time, Mr. Homer stated to Officer Khalil that he does not keep any employment records. (N.T. 8-2-00 at 74, N.T. 11-8-00 at 9-10).

Gary Holland, who is an enforcement supervisor with the Bureau's Special Investigations Unit and an expert in the field of gambling, in particular, video poker machines and slot machines, examined the two slot machines seized from the licensed premises. (N.T. 8-2-00 at 91-95). Officer Holland found both machines to be similar in characteristics. (N.T.

8-2-00 at 95). The two electronic video slot machines were the electronic equivalent of a mechanical slot machine and used buttons instead of a handle and did not contain a hopper for dispensing coins paid out. (N.T. 8-2-00 at 96-97, 113-114). The two machines displayed nine stylized icons in the nine windows in a tic-tac-toe type pattern or grid, which when played appeared to spin on a horizontal axis. (N.T. 8-2-00 at 96-97). The two machines accepted U.S. currency of one \$5.00, one \$10.00, and one \$20.00 bill, which awarded five cents per credit. (N.T. 8-2-00 at 97-98).

Play was initiated by betting up to 64 credits, or 8 lines times 8 credits per line, and pressing a start button which caused the reels to role for approximately three to five seconds before stopping. (N.T. 8-2-00 at 97, 104). At the end of the play, the nine icons would be displayed in the grid and credits would be awarded depending on where three icons lined up in a row. (N.T. 8-2-00 at 96-98). Credits were awarded by chance, not skill, with the chance of winning electronically preset at 55%. (N.T. 8-2-00 at 104). Both machines had a “double-up” feature which allowed the player to double-up winning credits from previous plays and to hold over and play them double or nothing with the risk of loosing all credits on one play. (N.T. 8-2-00 at 105). Both machines contained an electronic module and knock-

off circuitry which when enabled by a user's code or electrical wire patch, caused the credits to be erased from the display screens and the number of erased credits to be recorded. (N.T. 8-2-00 at 98-103, 112-126, 132-134; Ex. C-5).

Kristen Frazier testified that she was employed as a bartender with Licensee for the period of March through May 1999. (N.T. 11-8-00 at 14-15, 26-27). She was given instructions by Licensee to pay out on the machines only to people known by her. (N.T. 11-8-00 at 15, 32). The machines were cleared of credits by the placement of a code that was changed daily by Mr. Homer. (N.T. 11-8-00 at 15-16). The code was kept in the kitchen under an appliance. (N.T. 11-8-00 at 16). Ms. Frazier kept track of pay-offs on a sheet of paper that referenced "t-shirts and sweatshirts." (N.T. 11-8-00 at 16-17). The "t-shirt" designation indicated a \$10.00 pay-off and the "sweatshirt" designation indicated a \$20.00 pay-off. (N.T. 11-8-00 at 17). Licensee did not sell t-shirts or sweatshirts. (N.T. 11-8-00 at 17). Ms. Frazier testified that she was hired by Mr. Homer and paid weekly in cash at the rate of \$50.00 per shift with no taxes withheld from her pay. (N.T. 11-8-00 at 17-18, 20). Ms. Frazier recognized

Officer Joos and testified that it was possible that she made a payout to him on April 22, 1999. (N.T. 11-8-00 at 18-19).

Heather Micklos testified that she was hired by Mr. Homer and worked for the period of May through September 1996. (N.T. 11-8-00 at 37). She testified that she was given instructions as to how to make payoffs on the machines and how to remove the credits as part of her employment by Mr. Homer. (N.T. 11-8-00 at 38). She was also paid cash and had no taxes withheld. (N.T. 11-8-00 at 43-44). Ms. Micklas now works for the Bureau in its Philadelphia office. (N.T. 11-8-00 at 45-47).

As to the first count, one Licensee is charged with possessing or operating gambling devices or paraphernalia or permitting gambling or lotteries, poolselling and/or bookmaking on the licensed premises on April 22 and May 20, 1999. The basis for the charge is that Officer Joose received a gambling payoff from Licensee's bartender, Kristen Frazier, for credits won on an electronic slot machine on April 22, 1999, and whether Licensee maintained gambling devices *per se* which were seized on May 20, 1999.

The determination of whether a machine is a gambling device per se requires analysis of the three elements necessary to gambling, i.e., consideration, a result determined by chance rather than skill, and a reward.

If each of the elements is displayed by the machine, it is a gambling device per se. Commonwealth v. Twelve Dodge City Video Poker Machines, 517 Pa. 363, 537 A.2d 812 (1988); Commonwealth v. Two Electronic Poker Game Machines, 502 Pa. 186, 465 A.2d 973 (1983). Although a free game itself does not constitute a reward, it may be considered a reward when coupled with other characteristics of the machine. The ability to knock off free games, the presence of meters to enable the owner to determine how many games were knocked off, the ability to hold a part of one's previous play over to the next game in order to increase one's chances of winning on a higher payoff on the next game, and the extremely short playing time involved compels the conclusion that the reward of a free game constitutes a thing of value. Commonwealth v. Twelve Dodge City Video Poker Machines, 517 Pa. 363, 537 A.2d 812 (1988); Commonwealth v. Nine Mills Mechanical Slot Machines, 62 Pa. Cmwlth. 397, 437 A.2d 67 (1981).

The Board finds all those features were present on the two machines seized from the licensed premises and thus, agrees with the ALJ that they were gambling devices per se.

Finding the aforesaid violation of criminal law, our next analysis is whether the Licensee knew or should have known of the illegal activity and

failed to take measures to eliminate the illegal activity. 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. Pennsylvania Liquor Control Board v. T.L.K., Inc., 518 Pa. 500, 544 A.2d 931 (1988).

The testimony of Licensee's bartenders, Kristen Frazier and Heather Micklos, clearly establish that Licensee knew or should have known of the illegal activity and failed to take measures to eliminate the activity. Both bartenders testified that they were given instructions by Mr. Homer as part of their employment on the procedures to make payouts from the machines. Moreover, Mr. Homer changed the code for the machines daily. Licensee did nothing to stop the gambling and instead, encouraged the gambling practices on the premises. Thus, the Board finds that there is substantial evidence on the record to support the ALJ's decision to sustain the first count of the citation.

As to the second and third counts, section 493(12) of the Liquor Code provides as follows:

It shall be unlawful

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- (12) 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 employee 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.

[47 P.S. §4-493(12)].

Officers Joos and Khalil testified that an open inspection of the licensed premises was conducted on November 9, 1999, during which time they found no business records except the receipts for liquor purchases. The two bartenders, Kristen Frazier and Heather Micklos, testified that they were employed at the licensed premises without taxes being withheld.

The Board concludes that Licensee did not keep any employment records for the two of its employees or business records such as food and beer purchase invoices for a two-year period on its premises as required by

the Liquor Code. Thus, the Board finds that the ALJ's decision sustaining the second and third counts of the citation is supported by substantial evidence.

Finally, upon review of the evidence presented, the ALJ determined that the testimony of the Bureau's witnesses were credible and rejected the testimony of Licensee's witnesses. Matters of witness credibility are the sole prerogative of the ALJ as fact-finder. Borough of Ridgway v. Pennsylvania Public Utility Commission, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984).

Based on the foregoing, there is substantial evidence to support the decision of the ALJ.

## ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee is ordered to pay the fine in the amount of \$2,000.00 within 20 days of the mailing date of this Order. Failure to do so will result in a suspension or revocation of this license.

It is further ordered that Licensee's Hotel Liquor License No. H-825, be suspended for a period of 14 days beginning at 7:00 a.m. on Thursday, August 2, 2001 and ending at 7:00 a.m. on Thursday, August 16, 2001.

Licensee is directed on Thursday, August 2, 2001 at 7:00 a.m. to place the enclosed placard of Notice of Suspension (Form No. PLCB-1925) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from the outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is authorized on Thursday, August 16, 2001 at 7:00 a.m. to remove the suspension placard and return the license to its original wall location.

Licensee must adhere to all other conditions set forth in the ALJ's order.

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Board Secretary