

## Franklin County Legal Journal

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Detrich-Brechbill Home Assoc. v. PA State Police, Bureau of Liquor Control Enforcement

DETRICH-BRECHBILL HOME ASSOCIATION v.  
PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT  
Court of Common Pleas of the 39th Judicial District,  
Franklin County Branch  
Civil Action No. 2011-3244; No 2011-3265

*Administrative Law and Procedure: Liquor Code: Scope of Review & Burden of Proof*

1. The courts of common pleas have statutory appellate jurisdiction to hear appeals in actions under the Liquor Code. 47 P.S. § 4-471(b).
2. In a Liquor-Code-enforcement appeal, the court of common pleas tries the case de novo.
3. In Liquor-Code-Enforcement appeal, the Bureau of Liquor Control Enforcement may rely on, or supplement, the record that was before the Liquor Control Board in proving its case.
4. In a Liquor-Code Enforcement appeal, the Bureau of Liquor Control Enforcement must provide a violation of the Liquor Code by a preponderance of the evidence.

*Administrative Law and Procedure: Liquor Code: Authority of Bureau of Liquor Control Enforcement*

1. The Bureau of Liquor Control Enforcement has jurisdiction to cite a licensee or revoke a liquor license for a violation of the Liquor Code, its attendant regulations, Pennsylvania law, federal tax law, or upon any other sufficient cause shown. 47 P.S. § 4-471(a).
2. Under the ‘any other sufficient cause shown clause,’ the Bureau has the authority to cite a licensee or revoke a license for violations of the Local Option Small Games of Chance Act, 10 P.S. § 311, et seq., superseded, now 10 P.S. § 328.101, et. seq.

**HEADNOTER’S NOTE: Under amendments to the Local Option Small Games of Chance Act effective March 5, 2012, the ability of the Bureau to punish a violation of the Act as a violation of the Liquor Code is limited. See 10 P.S. § 328.702**

3. Bureau agents are ‘law enforcement officials’ with the ability to investigate Local Option Small Games of Chance Act violations, 10 P.S. § 328.702(b).

*Administrative Law and Procedure: Liquor Code: Investigations*

1. Liquor licensees must keep records concerning the operation of their businesses. 47 P.S. § 4-493(12).
2. Local Option Small Games of Chance Act licensees must keep record concerning the operation of small games of chance. 10 P.S. § 317(f) superseded, now 10 P.S. § 328.503.
3. The Bureau of Liquor Control Enforcement is entitled to inspect the records of a liquor licensee during normal business hours without showing of cause.
4. If a liquor licensee also has a small games of chance license, the Bureau is entitled to inspect the licensee’s small games of chance records.

*Administrative Law and Procedure: Liquor Code: Due Process*

1. Due process applies equally in administrative proceedings as in judicial proceedings.
2. Upon discovery of a violation of the Liquor Code, the Bureau must send a show-cause letter to the licensee via registered mail within one year of the violation. No sooner than 10 nor more than 60 days after mailing the letter, the Bureau may send a citation requiring the licensee to appear at a violations hearing before an administrative law judge.
3. Because the Commonwealth has plenary power to regulate the control, use and sale of alcoholic beverages, the Bureau has wide latitude in crafting the language of its citations and the generality of its charges, so long as the citation gives the licensee notice of the alleged violation of the Liquor Code.
4. Where the conduct of a licensee violates both a general criminal statute and a specific regulatory provision, due process does not require the Bureau to cite the more specific provision in its notice to the licensee of a Liquor-Code violation.

### LEGAL POINTS

#### SCOPE AND STANDARD OF REVIEW FOR LIQUOR-CODE ENFORCEMENT APPEALS

The Liquor Code allows an aggrieved party to appeal an enforcement decision of the Liquor Control Board. The court of common pleas must try the case de novo. However, the parties may rely exclusively on the certified record that was before the Board, or they may supplement it with additional evidence. The Bureau of Liquor Control Enforcement bears the burden of proof by a preponderance of the evidence.

#### AUTHORITY OF THE BUREAU OF LIQUOR CONTROL ENFORCEMENT

Under the Liquor Code, the Bureau may sanction a licensee for a violation of the Code or its regulations, Pennsylvania law, federal tax law, or upon any other sufficient cause shown. A licensee’s violation of the Local Option Small Games of Chance Act (which permits licensees to conduct small games of chance) is such ‘other sufficient cause’ to allow the Bureau to initiate an enforcement action.

#### AUTHORITY OF THE BUREAU TO INSPECT RECORDS

The Liquor Code requires liquor licensees to keep accurate the truthful business records. The Local Option Small Games of Chance Act requires small-games-of-chance licensees to keep record concerning the operation of small games of chance. Because the Bureau is entitled to inspect a liquor licensee's records during normal business hours without a showing of cause, it may also inspect a liquor licensee's small-games-of-chance records.

#### DUE PROCESS IN LIQUOR CODE ENFORCEMENT ACTIONS

Due process applies in Liquor Code enforcement proceedings. The Bureau has wide latitude in crafting the language of its citations, but a citation must give a licensee notice of the Conduct that violates the Liquor Code. Where such conduct violates both a general criminal statute and a specific regulation, the Bureau need not provide the licensee with a citation of the specific regulation so long as the citation provides notice of the substance of the violation.

#### Appearances:

John H. Pietrzak, Esq., Counsel for Pennsylvania State Police, Bureau of Liquor Control Enforcement  
P. Richard Wagner, Esq., Counsel for Detrich-Brechbill Home Association, Inc.

#### OPINION AND ORDER

Walsh, J.

These cases concern two of the world's oldest vices: alcohol and gambling. The cases are consolidated appeals from the Pennsylvania Liquor Control Board. Both involve a single enforcement action by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (BLCE or Bureau) against the Detrich-Brechbill Home Association, Inc. (The Club). The Bureau prosecuted the Club for violations of the Local Option Small Games of Chance Act.<sup>1</sup> An administrative law judge upheld the two-count citation against the Club. On appeal, the Liquor Control Board dismissed the first count, finding that the wording of the citation failed to give the Club proper notice of its violation. The Board affirmed the ALJ's finding as to the second count, rejecting the Club's various arguments regarding the Bureau's ability to enforce the Small Games of Chance Act. In No. 3244, the Bureau appeals the Board's dismissal of the first count and in No. 3265, the Club appeals the Board's affirmation of the second.

For the following reasons, this Court finds that the Bureau met the Liquor Code's notice requirement. We further find that the Bureau can bring an enforcement action against the Club based on a Small Games of Chance Act violation. Therefore, we will affirm in No. 3265 and reverse in No. 3244.

#### BACKGROUND

The facts of these appeals are not disputed, and the Parties have submitted the case on the record of the proceedings below. The record includes the March 4, 2011 hearing before Administrative Law Judge Felix Thau and the exhibits introduced at that proceeding (including the citation), and the Pennsylvania Liquor Control Board's opinion. This Court has received briefs, and we heard argument on October 4, 2012.

The Bureau, appellant in No. 3244 and appellee in No. 3265, is an arm of the Pennsylvania State Police charged with enforcing the Liquor Code. 47 P.S. § 2-211. To accomplish its goal, Bureau agents have the ability to initiate investigations, institute criminal proceedings, and make arrests in certain situations. *Id.* Its officers have the ability to perform undercover investigations, to conduct inspections, and to initiate citations against licensees accused of violating the Liquor Code. *Id.*

Detrich-Brechbill Home Association, Inc. is a private club located on Lincoln Way West, in St. Thomas. The Club has catering club liquor license number 06291. Under the Liquor Code, a catering-club licensee has special privileges and responsibilities relative to a commercial license holder. For example, club licensees may sell alcohol only to club members, unless the club is catering a special event. 47 P.S. § 4-406(a)(1). In contrast, hotels and restaurants may serve alcohol to any willing buyers (provided, of course, that they are neither visibly intoxicated nor a minor, *see id.* § 4-493(1)). On the other hand, club licensees may sell alcohol until 3:00 a.m. (or, in the Liquor Code's famously contemporary terminology, "antemeridian") while hotels and restaurants must cease sales at 2:00 a.m.<sup>2</sup> *Id.* § 4-406(a)(4).

On October 7, 2007, John Deuter, a Bureau enforcement officer, visited the Detrich-Brechbill Home Association while undercover. Tr. 6-7<sup>3</sup>. During his visit, Deuter noticed a dry-erase board with notations that led him to believe that the Club was conducting small games of chance with progressive jackpots. Tr. 8. At that time,

1. (LOSGCA or Small Games of Chance Act), 10 P.S. §§ 311-27, superseded by Act of February 2, 2012, Pub. L. 7, No. 2, and recodified at 10 P.S. §§ 328.101-328.707. As noted by our citation, the LOSGCA has been revamped by the Legislature, effective March 5, 2012. The amendments clarify most of the provisions at issue here, which places the Court in the unenviable position of construing a dead statute.

2. Evidently, private clubs have the privilege and honor of playing Semisonic's Closing Time an hour later each night.

3. Citations of "Tr." are of the transcript of the March 4, 2011 hearing held before Judge Thau. The transcript of the hearing is part of the record of both cases.

progressive jackpots were illegal. Deuter returned on November 3 and 19 and saw further evidence of progressive jackpots. Tr. 11-13.

On December 19, 2007, Deuter visited the club a fourth time. This time, he was not undercover, and displayed ID and a badge for the bartender. Although the Club was not yet open for business (it was 2:30 p.m.), she let Deuter inside to perform a routine inspection. Tr. 13. The bartender called the Club steward<sup>4</sup>, Kevin Gillian, so that he could speak with Deuter. *Id.* The steward told Deuter how the Club altered the jackpot payout for the pull-tab games.<sup>5</sup> The games were designed to award two prizes: a \$100.00 prize and a \$50.00 prize. It was possible for the same number ticket to be awarded both prizes. However, if that was not the case, the Club did not award the \$50.00 prize, and instead placed the money into a jackpot. Tr. 14-20. Deuter reviewed the Club's records, provided to him by the manager.

Officer Deuter reviewed the "tip jar sales report," a computer record-keeping program for small games of chance. Tr. 20. Officer Deuter looked at a year's worth of electronic records, and had the steward print hard copies of two weeks' worth. *Id.* at 21. The records, however did not list the payout amounts for the individual pull-tab games. *Id.* at 30. So, the steward provided Officer Deuter with the flare cards for those games. *Id.* The back of the flare card lists the total payout for each tab-game to which it belongs. *Id.* To calculate the weekly payout, Officer Deuter multiplied the number of times per week a game was played by the payout. *Id.* at 30-31. With Gillian's assistance, Officer Deuter then added the weekly game payouts together to calculate the total amount of prizes paid out in one calendar week. *Id.* at 33-34. For the week of July 2-8, 2007, the Club paid a total of \$27,675.00 in prizes. And for the week of November 19-25, 2007, the Club paid \$23,205.00 in prizes. *Id.* at 35.

Therein lay the problems. The Club's practice of altering the payout structure of the pull-tab games to create progressive jackpots was illegal, or so the Bureau claimed. The Club was also paying out jackpots far in excess of the weekly \$5,000.00 payout limit.<sup>6</sup> Officer Deuter concluded his investigation, and on January 8, 2008, the Bureau mailed a Notice of Violation letter to the Club. The letter notified the Club of two Liquor Code violations: (1) illegally paying out progressive jackpots for the pull-tab games; and (2) exceeding the weekly payout limit. On February 18, 2008, the Bureau mailed a Citation to the Club restating the two counts it initially raised in the Notice of Violation letter. The language of the first count is crucial:

On December 19, 2007, you, by your servants, agents, or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises, in violation of Section 471 of the Liquor Code, 47 P.S. § 4-471 and Sections 5512 and/or 5513 of the Crimes Code, 18 Pa. C.S. § 5512 and/or 5513.

Bureau's Ex. C-2, entered into evidence at 3/4/11 administrative hearing.

At the hearing before Judge Thau on March 4, 2011, the Club vigorously disputed the charges. The Club argued that altering the payout structure of pull-tab games was not illegal. The Club presented the testimony of several witnesses who said that, in 2006, Liquor Control Enforcement Officer Jerome Botchie informed a meeting of the group of Franklin and Fulton Counties' private-club representative that progressive jackpots were permissible, so long as the payouts did not exceed the weekly limit. Tr. 75-80, 87-90, 92-93.

The Bureau countered, and argued that the pertinent Department of Revenue regulation, 61 Pa. Code § 901.731, prohibits altering the payout structure of a pull-tab game. Tr. 52-55. It argued that the relevant regulation prohibits altering a flare card<sup>7</sup> except to substitute merchandise of equal value for a cash prize. 61 Pa. Code § 901.731(b)(2). Thus, by altering the prize structure, the Bureau argued that the Club violated the regulation and therefore engaged in illegal gambling. Officer Botchie denied that he told the Franklin/Fulton club managers that progressive jackpots were illegal. He claims that he could not have said so, because he had been citing clubs for conducting illegal progressive jackpots since 2006. Tr. 99-100.

In a written Adjudication mailed on May 6, 2011, Judge Thau sustained both charges. Judge Thau found as a matter of fact that the Club had altered its pull-tab games to create progressive jackpots. He found as a matter of law that the BLCE satisfied the Liquor Code's notice requirement, 47 P.S. § 4-471. He further found that progressive jackpots are illegal gambling under the Crimes Code, 18 Pa. C.S. § 5513, and that they violate the LOSGCA regulations, 61 Pa. Code § 901.731(b)(1). Judge Thau rejected the Club's arguments that a violation of the LOSGCA is not

4. Generically, a steward is a person appointed to manage the affairs of another. Black's Law Dictionary 1549 (9th ed. 2009). Historically, the Lord High Steward was a medieval office of great importance (so much so that the High Stewards of Scotland eventually became rulers of Scotland and England as the House of Stuart). Relevantly, a steward is the club manager required by Liquor Code regulations. See 40 Pa. Code § 5.23.

5. A "pull-tab game" is "[a] single folded or banded ticket or a strip ticket or card with a face covered to conceal one or more numbers or symbols, where one or more of each set of tickets or cards has been designated in advance as a winner." 10 P.S. § 313, superseded and recodified at 10 P.S. § 328.103.

6. 10 P.S. § 315, superseded and recodified at 10 P.S. § 328.302.

7. A "flare" is a card or graphic that lists a pull-tab game's prizes and other key information. 61 Pa. Code §§ 901.1, 901.608.

criminal and that the violation could not be sustained because the citation contained no reference to the regulation. The Judge found that references to a regulation or statute are irrelevant: “If a licensee sells beer to a minor and the citation refers to the Code of Hammurabi, I will nevertheless sustain the charge as a violation of the Liquor Code.” Adjudication at 8 n.10. Finally, Judge Thau rejected the Club’s argument that the Bureau was estopped because of Officer Botchie’s supposed representations at the 2006 meeting. Instead, he chose to mitigate the penalty.

On the second count (exceeding the weekly prize limitations) Judge Thau relied on the evidence provided by the Club’s steward to Officer Deuter. He found that the Club had actually paid out the prizes listed on the flare cards, which exceeded the payout limit.

The violations were the Club’s first. Therefore, Judge Thau assessed fines only: \$200.00 for the progressive-jackpot count and \$500.00 for the weekly payout limit. The Club appealed to the Liquor Control Board.

In an opinion mailed on July 6, 2011, the Board dismissed the progressive-jackpot count and upheld the weekly-payout count. On the first count, the Board found that the Bureau failed to properly give notice under 47 P.S. § 4-471. The citation references only 18 Pa. C.S. §§ 5512-13 generally, and not the specific Department of Revenue regulation which progressive jackpots offend, 61 Pa. Code § 901.731(b)(1). LCB Op. 12-15. 18 Pa. C.S. §§ 5512-13 make gambling illegal by default in Pennsylvania, unless otherwise authorized. The Board referenced no applicable law, but held that the Bureau cannot cite a general statute (the criminal gambling statute) when a more specific one (the LOSGCA regulation) is available. The Board noted that before the administrative law judge, the Club repeatedly asked the Bureau to point to the specific regulation violated, and the Bureau never amended the citation.

The Board upheld the second count, finding that the Bureau met its factual burden of proof. Officer Deuter determined weekly payout amounts by calculating the amounts from the flare cards. The Board noted that the Club never disputed Officer Deuter’s calculations, nor did it put forth contrary evidence.

Finally, the Board rejected the Club’s argument that the Bureau lacks jurisdiction to investigate and impose penalties under the LOGSGA. It also rejected the Club’s argument that the Bureau lacked a reasonable belief of a LOGSCA violation triggering its right to investigate. The Bureau was authorized to inspect the Club’s records as part of a routine inspection, the Board held.

On August 2 and 4, 2012, respectively, the Bureau and Club filed appeals to this Court. On October 4, 2012, the Court heard oral argument.

## DISCUSSION

We have jurisdiction over Liquor Code enforcement actions appealed from the Liquor Control Board under 42 Pa. C.S. § 933(a)(1)(v) and 47 P.S. 4-471(b). Our standard of review is plenary. BLCE v. Cantina George’s Lounge, Inc., 639 A.2d 14 (Pa. 1994). To support its case, the Bureau may rely on, or supplement, the record below. BLCE v. Kelly’s Bar, Inc., 639 A.2d 440 (Pa. 1994); Two Sophia’s, Inc. v. Pa. Liquor Control Bd., 799 A.2d 917 (Pa. Cmwlth. 2002). As the Court noted above, the Parties have relied solely on the record before the Liquor Control Board, and have presented to us only legal arguments. We will address the two citations in reverse order: the weekly-payout violation first, then the progressive-jackpot violation.

### I. The Weekly-Payout Violation

In an attempt to overturn the weekly-payout-violation count, the Club advances several arguments. First, it contends that the Bureau failed to carry its burden of proof. Second, the Club argues that the Bureau does not have authority to enforce the LOSGCA. Third, it argues that the Liquor Code does not vest the Bureau with authority to enforce the LOSGCA. (This argument is similar to the second.) Finally, the Club argues that the Bureau must have probable cause to request records in a LOSGCA investigation.

#### A. Burden of Proof

The Club first claims that the Bureau cannot meet its burden that the Club violated the LOSGCA’s weekly jackpot payout limit. We disagree.

In an enforcement action, the Bureau bears the burden of proving a violation of the Liquor Code by a preponderance of the evidence.<sup>8</sup> In re Speranza, 206 A.2d 292, 294 (Pa. 1965); Liquor Control Bd. v. Am. Legion Home Ass’n of Cresson, 474 A.2d 68, 70 (Pa. Cmwlth. 1984). Thus, the Bureau must prove by the greater weight of evidence that the conduct that violated the Liquor Code occurred.

8. Somewhat confusingly, the term “substantial evidence” is used in Liquor Code enforcement appeals. “Substantial evidence,” however, is not a standard of proof. It is a standard of review, in which an appellate court views the evidence in the light most favorable to the party that prevailed in the court below. Agostino v. Township of Collier, 968 A.2d 258, 269 (Pa. Cmwlth. 2009). Although this Court sits as an appellate court, our standard of review is de novo, which means that we give no evidentiary weight to the party that prevailed before the Liquor Control Board. Rather, we must evaluate and weigh the evidence anew.

We have no trouble concluding, as both Judge Thau and the Board did, that the Bureau proved that the Club paid out winnings in excess of the \$5,000.00 weekly payout limit. Officer Deuter calculated the weekly payouts from the tip jar sales report and the flare cards. The calculations indicate that from July 2-8, 2007 and November 19-25, 2007, the club paid aggregate jackpots more than four times the allowable amount: \$27,675.00 in July and \$23,205.00 in November.

The Club argues that the evidence is insufficient. It claims that Officer Deuter never asked anyone at the Club whether it actually paid out the prize amounts listed on the flare cards. And the Club never admitted that it paid out the amounts consistent with the flare cards.

We reject the Club's argument. First, the Club ignores the fact that the steward provided records to Officer Deuter to perform his calculations. Although Deuter never asked Gillian whether Deuter's calculations were correct, an express confession is not *sine qua non* evidence of illegality. Confessions or inculpatory statements are not required to secure a criminal conviction. It follows that confessions are unnecessary to prove an administrative violation, where the burden is mere preponderance.

Second, we find it unsurprising that the Club had no easily accessible records of its weekly payouts. Prior to the 2012 amendments, the LOSGCA clearly limited payouts to \$5,000.00 per week. Here, the Club paid out jackpots over four times that amount. The Club's LOSGCA records are subject to inspection upon request. By keeping complete records of payouts, the Club would have created a record of its illegal activity.

Third, as Judge Thau astutely noted, we must assume that the Club actually paid the prizes listed on the flare cards. Otherwise, it would have violated a separate LOSGCA regulation. Thus, the Club is in a catch-22. Either it paid the amounts on the flare cards and violated the LOSGCA weekly payout limit, or it did not pay the amounts listed on the flare cards, and violated the LOSGCA regulations. We will not allow the Club to avoid liability for one act by confessing to another.

Fourth, we give some weight to the Gillian's silence while Officer Deuter compiled the payout figures. The evidence shows that Gillian knew that Officer Deuter was looking for LOSGCA violations. He provided the relevant records. He did not challenge and said nothing to contradict the Officer's calculations. The steward's actions constitute a tacit admission, because if the Club had not violated the LOSGCA, he would have defended his employer. We give less weight to this factor, however, because there may be other reasons that the steward remained silent. See Burton v. Horn & Hardart Baking Co., 88 A.2d 873, 875 (Pa. 1952) (noting the problems with tacit-admission evidence). But see McIntyre v Unemp. Comp. Bd. of Review, 687 A.2d 416, 418 (Pa. Cmwlth. 1997) (accepting an employee's silence in the face of a positive drug test as evidence that the test results were true).

The Club complains that the Bureau did not produce enough evidence. Judge Thau rejected this argument. The Board rejected this argument. For the reasons above, this Court does, as well.

#### **B. The Bureau's Authority to Cite a Licensee for LOSGCA Violations**

The Club's next two arguments are similar, so we will take them together. The Club contends that the neither the enforcement section of the Liquor Code (which created the Bureau), 47 P.S. § 2-211, nor the LOSGCA itself grant the Bureau the power to enforce the LOSGCA. It further argues that the Bureau cannot enforce the LOSGCA under § 4-471 of the Liquor Code.

The Bureau enforces the Liquor Code and its attendant regulations. 47 P.S. § 2-211(a). Furthermore, the Liquor Code allows the Bureau to cite a licensee:

Upon learning of any violation of this act or any laws of this Commonwealth relating to liquor, alcohol or malt or brewed beverages, or of any regulations of the board adopted pursuant to such laws, or any violation of any laws of this Commonwealth or of the Federal Government relating to the payment of taxes on liquor, alcohol or malt or brewed beverages by any licensee within the scope of this article, his officers, servants, agents or employes, or *upon any other sufficient cause shown*. . .

47 P.S. § 4-471(a) (emphasis added).

The Commonwealth Court has previously addressed the Bureau's jurisdiction to investigate and enforce LOSGCA violations. In BLCE v. Harrisburg Knights of Columbus Home Association, Inc., the Bureau brought an enforcement action against a club licensee, alleging that it failed to keep proper LOSGCA records and that it exceeded the weekly payout limit. 989 A.2d 39, 40 (Pa. Cmwlth. 2009). The administrative law judge sustained the violations, and the Board and the court of common pleas upheld the violations on appeal.

The Knights of Columbus argued that the Bureau lacked authority to investigate and enforce the LOSGCA.

The Commonwealth Court rejected that argument. The LOSGCA allows law enforcement officials to investigate and enforce the Act. The Commonwealth Court held that Bureau agents are “law enforcement officials” within the meaning of former 10 P.S. § 323(b) Knights of Columbus, 989 A.2d at 43. “[A]s the Bureau is a subdivision and member of the Pennsylvania State Police, it is a law enforcement official.” Id.

Here, the Club argues that Bureau agents are not “law enforcement officials,” relying on Fraternal Order of Police v. PLRB, 454 A.2d 686 (Pa. Cmwlth.), aff’d mem., 467 A.2d 323 (Pa. 1983). But that case concerned Liquor Control Board<sup>9</sup> enforcement officers’ status for purposes of collective bargaining. Id. at 687 (“[T]he only question properly before this [c]ourt for review is whether the PLRB erred in finding that LCB Enforcement Officers are not ‘police’ for purposes of Act 111.”) (internal footnotes omitted); see also 47 P.S. § 2-211(e) (clarifying BLCE agents’ labor classification for the purpose of collective bargaining). Fraternal Order of Police had nothing to do with the Board’s investigative or enforcement authority.

The Knights of Columbus further argued that a LOSGCA violation was not “other sufficient cause shown” under § 471 of the Liquor Code. The court rejected that argument, too. Violations of criminal laws other than the Liquor Code can lead to a license suspension or revocation under Liquor Code § 471. Knights of Columbus, 989 A.2d at 44 (quoting Pa. Liquor Control Bd. v. TLK, Inc., 544 A.2d 931, 933 (Pa. 1988)). “Courts have interpreted Section 471 of the Liquor Code as providing similar authority for the imposition of penalties for a variety of conduct not expressly prohibited by the Liquor Code, but reasonably related to the sale and use of alcoholic beverages, including gambling.” Id. That impermissible gambling is cause to sanction a licensee is a long-established proposition. See V.J.R. Bar Corp. v. Liquor Control Bd., 390 A.2d 193 (Pa. 1978) (sanctioning licensee after a finding that the licensee had permitted gambling on premises); In re I.B.P.O.E. of W. Vall. Lodge, No. 294, 62 A.2d 68 (Pa. Super. 1948) (same); In re Catering Club License No. CC-4837 Issued to Fulton Post, Inc., 438 A.2d 662, 663 (Pa. Cmwlth. 1981) (“Although gambling is not a specific violation, a license can be revoked if gambling is conducted on the premises[.]”).

The Club argues that statutory construction forecloses the Bureau from punishing a licensee for a LOSGCA violation. It notes that 47 P.S. § 2-211 (the section of the Liquor Code creating the Bureau) postdates the passing of the LOSGCA. Therefore, the Club contends, the Court must presume that the General Assembly intended that the Bureau not have the power to investigate LOSGCA violations by liquor licensees.

The Club misconstrues the relevant statutes. 47 P.S. § 2-211 gives the Bureau the power to investigate and enforce violations of the Liquor Code and its regulations. 47 P.S. § 4-471(a) allows the Bureau to begin an enforcement action against a licensee for a violation of the Liquor Code or, inter alia, “upon any other sufficient cause shown.”<sup>10</sup> Per Knights of Columbus, a LOSGCA violation is such other sufficient cause. We therefore find no conflict between the pertinent sections of the Liquor Code. The Club’s statutory construction argument fails.

In sum, it is Knights of Columbus that hurts the Club’s case. Indeed, Knights of Columbus is directly on point, and it is binding authority.<sup>11</sup> In Knights of Columbus, the Commonwealth Court rejected the same arguments that the Club raised in this case.<sup>12</sup> Furthermore, the courts of common pleas (including this Court) and the Commonwealth Court have, to a man, rejected the Club’s arguments every single time that they have been raised. See BLCE v. Progress Fire Co. Home Ass’n, No. 18 CD 2011, 2012 WL 5286127, --- A.3d --- (Pa. Cmwlth. Oct. 26, 2012)<sup>13</sup>; BLCE v. Home Ass’n Charles Nitterhouse Post 1599, No. 2009-3515, Opinion sur Pa. R.A.P. 1925(a), at 9-10 (Pa. C.P. Frank. Aug. 16, 2011), aff’d mem., 46 A.3d 833 (Pa. Cmwlth. 2012); Am. Legion Club of Gettysburg v. BLCE, No 2010-S-1982, 2010 WL 6755735 (Pa. C.P. Adams Jan 19, 2010), aff’d mem., 12 A.3d 498 (Pa. Cmwlth. 2011). At oral argument, the Club urged us to distinguish Knights of Columbus. We find that case indistinguishable. In both cases, there was a LOSGCA violation discovered by a Bureau agent; an enforcement action brought before an administrative law judge; a violation sustained by the judge and upheld by the Board; and the same legal arguments made and rejected by the court of common pleas. Knights of Columbus is dispositive.

### **C. The Bureau’s Ability to Request LOSGCA Records Under the Liquor Code**

Finally, the Club argues that the Bureau must reasonably believe that the Club violated the LOSGCA before

9 . Prior to 1987 amendments to the Liquor Code which created the Bureau, the Liquor Control Board was in charge of investigation and enforcement. Knights of Columbus, 989 A.2d at 43.

10 . The “sufficient cause shown” language is ancient. It predates the current Liquor Code. See Commonwealth v. Lyons, 15 A.2d 851, 852 (Pa. Super. 1940) (quoting identical language from § 410 of the Liquor Control Act of 1937). The language even predates Prohibition. See In re Dolan, 108 Pa. 564, 566 (Pa. 1885) (quoting identical language from an 1867 law).

11 . When the Commonwealth Court renders a published decision under its jurisdiction to hear appeals from courts of common pleas, 42 Pa. C.S. § 762, that decision is binding on us. See Hutchinson ex rel. Hutchinson v. Luddy, 946 A.2d 744, 748 n.1 (Pa. Super. 2008).

12 . The Club neither cited nor distinguished Knights of Columbus in its brief, though it attempted to do so at oral argument. The Club’s decision is puzzling, given that the same counsel who represented the Knights of Columbus in the Commonwealth Court represents Detrich-Brechbill here.

13 . Progress Fire Co. was decided on October 26, 2012, after oral argument in these cases. We note that the parties in Progress Fire Co. were represented by the same counsel as in this case.

it could inspect the Club's records. In support, the Club cites 61 Pa. Code § 901.28(a)(2).

The Club, however, overlooks the crucial fact that, in requesting the records, the Bureau was enforcing the Liquor Code—not the LOSGCA. The Code requires a licensee to maintain “complete and truthful records covering the operation of [its] licensed business” on premises. 47 P.S. § 4-493(12). The LOSGCA and its regulations require a small-games licensee to maintain records. 10 P.S. § 317(f), superseded and recodified, 10 P.S. § 328.503; 61 Pa. Code § 901.461, et seq. Thus, the small-games-of-chance records here are part of the business records required by § 493(12). Further, a licensee must allow the Bureau access to the records without any showing of cause during normal business hours. The relevant LOSGCA regulation requiring reasonable belief of a LOSGCA violation simply does not apply to a Bureau Liquor Code investigation.

The present case is a civil administrative action brought under the authority of the Liquor Code and implicates Licensee's liquor license. It is not an action brought by the Department of Revenue under the [LOSGCA]. For this reason, none of the jurisdictional, investigative or procedural sections of the [LOSGCA] or its attendant regulations apply, much less govern, the actions of Bureau officers conducting an investigation of a liquor licensee pursuant to the Liquor Code.

Progress Fire Co., 2012 WL 5286127, at \*2, --- A.3d at ---.

Once again, the applicable governing law forecloses the Club's arguments. The LOSGCA regulations requiring reasonable belief of a current or imminent violation did not apply to Officer Deuter when he inspected the Club's records. He was enforcing the Liquor Code—not the LOSGCA.

## **II. The Progressive-Jackpot Violation**

The Court now turns to the Bureau's appeal. The Bureau contends that the Board erred in dismissing count 1 on a due-process notice violation. We agree.

The requirements of due process apply as equally in administrative proceedings as they do in judicial proceedings. Pa. Banker's Ass'n v. Pa. Dep't of Banking, 956 A.2d 956, 965 (Pa. 2008). The Liquor Code contains statutory due process requirements for enforcement actions. Within a year of discovering a violation, the Bureau must send a show-cause letter to the licensee via registered mail. 47 P.S. § 4-471(a). No sooner than 10 nor more than 60 days after the mailing date of the notice, the Bureau may send a citation requiring the licensee to appear at a hearing before the administrative law judge. Id.

The Bureau has wide latitude in crafting the language of its citations and the generality of its charges. Liquor Control Bd. v. Reda, 463 A.2d 108, 109 (Pa. Cmwlth. 1983) (citing Liquor Control Bd. v. Camiel's Beverage Co., 300 A.2d 834 (Pa. Cmwlth. 1973)). “Where a citation informs the licensee as to the type and date of the alleged violation, it comports with the due process notice requirement.” Id.; see also In re Concord Ranch, Inc., 578 A.2d 1339, 1344 (Pa. Cmwlth. 1990).

The Bureau's wide latitude stems from the Commonwealth's plenary power to regulate alcohol. “There is perhaps no other area of permissible state action within which the exercise of the police power of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages.” In re Tahiti Bar, Inc., 150 A.2d 112, 115 (Pa. 1959), abrogated on other grounds by 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). Thus, for example, in In re Harkin, the Superior Court upheld a license suspension for an illegal Sunday sale even though the citation did not state that the licensee permitted “an illegal Sunday sale.” 195 A.2d 164, 166 (Pa. Super. 1953). The citation merely stated that the seller had sold liquor “during hours when you are prohibited by the Liquor Code from selling liquor.” Id. at 165. The court held that the citation placed the licensee on sufficient notice that his actions were being challenged as illegal. Id. at 166.

Our appellate courts have repeatedly affirmed the Board's (and later, the Bureau's) authority in crafting the language of citations. In In re Parkway Distributing Co., the court held that a licensee could be sanctioned even if the citation referenced the wrong statute, so as long as the citation gave notice of the facts of the violation. 205 A.2d 662-63 (Pa. Super. 1964). In Liquor Control Bd. v. Reda, the Commonwealth Court found that a citation stating that “[t]he licensed establishment operated by the licensees was maintained in an insanitary condition, on July 25, 1981 . . .” was sufficiently specific to satisfy due process. 463 A.2d 108, 109 (Pa. Cmwlth. 1983).

In opposition, the Club argues that “[i]t is a well-settled principle of law that where there is a specific provision of law that serves as the basis for a violation, that specific provision should be cited, not a general provision.” Club's Br. 6. The Club, however, like the Liquor Control Board, cites no authority in support. If the principle is well-settled, we would expect some supporting authority. We are aware of none, just as we are aware of no principle requiring

the Bureau to cite a licensee using the most specific statutory or regulatory provision available.

As the Bureau noted at oral argument, the requirement of citing a specific provision of the more general one was once a valid doctrine in criminal law. The doctrine emanated from the Statutory Construction Act's codification of the maxim that where two statutes conflict, the specific controls the general. 1 Pa. C.S. § 1933. That doctrine has been explicitly abrogated in criminal law. 42 Pa. C.S. § 9303; *In re N.W.*, 6 A.3d 1020 (Pa. Super. 2010).

Furthermore, the maxim does not apply in this case. 1 Pa. C.S. § 1933 requires conflict between the specific and general statutes. Here, the specific (61 Pa. Code § 901.731(b)(1)) and the general (18 Pa. C.S. § 5512) do not conflict. The LOSGCA regulations prohibit progressive jackpots. The Crimes Code provision prohibits unlawful lotteries, defined as those "not specifically authorized by law." 18 Pa. C.S. § 5512(d).<sup>14</sup> Those two provisions say the same thing. The LOGSGA allows for certain small games of chance, but the regulations do not permit progressive jackpots. Therefore progressive jackpots are "not specifically authorized by law" and are illegal.<sup>15</sup> The Club attempted to argue that technical violations of LOSGCA regulations do not rise to criminal conduct. We do not know what else such violations could be. Progressive jackpots are illegal; therefore, awarding them must be a crime. There is no grey, twilight zone where conduct violates LOSGCA regulations but is not criminal.

Finally, the Club cannot argue that it had no notice of the alleged violation. At the hearing before Judge Thau, the Club vigorously disputed the progressive-jackpot citation. It cross-examined Officer Deuter. The Club also produced two witnesses from a meeting at which a Bureau agent supposedly told club managers from Franklin and Fulton Counties that progressive jackpots were permitted. In all, the Club suffered no prejudice, because it was able to mount a defense against the citation.

In this case, the Bureau charged the Club with conducting illegal gambling. Nothing required the Bureau to cite the more specific provision of the LOSGCA and state that the illegal gambling was the use of progressive jackpots for pull-tab games. At the hearing, the Club vigorously defended against the charge. The Bureau's general reference to the Crimes Code, as opposed to LOSGCA regulations, did not violate due process. The Club was sufficiently apprised of its illegal conduct, and it suffered no prejudice thereby. Therefore, this Court must reverse the Board's decision, and reinstate the first violation count.

### CONCLUSION

After reviewing the entire record of these proceedings, the Court must uphold both citations against Detrich-Brechbill Home Association. In No. 3265, we affirm the decision of the Liquor Control Board. The Court finds that the Bureau of Liquor Control Enforcement has the power under § 471(a) of the Liquor Code to investigate the Club for violations of the Small Games of Chance Act, and to bring an enforcement action against the Club. We further find that the Bureau met its burden of proving that the Club exceeded the LOSGCA's weekly payout limit of \$5,000.00 for the weeks of July 2-8, 2007 and November 19-25, 2007. In No. 3244, we reverse the Board's decision. The Bureau's citation issued to the Club satisfied the Liquor Code's due process notice requirements, and the Club was not prejudiced by the citation's reference to the general prohibition on gambling, as opposed to the more specific LOSGCA regulation.

### ORDER OF COURT

November 13, 2012, the above-captioned matters having been filed as appeals from the Adjudication and Order of the Office of Administrative Law Judge (May 2, 2011) and the Opinion and Order of the Pennsylvania Liquor Control Board (July 6, 2011), upon de novo review of the record, and upon consideration the briefs and arguments of the parties,

THE COURT CONCLUDES as follows:

1. In Count 1, Appellee/ Appellant Detrich-Brechbill Home Association Inc., conducted progressive pooling of prizes for pull-tab games, in violation Section 471 of the Liquor Code, 47 P.S. §4-471, by and through its violation of Local Option Small Games of Chance Regulation 61 Pa. Code § 901.731(b)(1) and therefore Section 5512 of the Crimes Code, 18 Pa. C.S § 5512.
2. In Count 2, Appellee/ Appellant paid more than \$5,000.00 in prizes during the seven-day periods of July 2-8, 2007 and November 19-25, 2007, in violation of Section 471 of the Liquor Code, 47 P.S. §§ 4-471 by and through its violation of the Local Option Small Games of Chance Act, former 10 P.S. § 315.

**IT IS THEREFORE ORDERED** that the July 6, 2011 order of the Liquor Control Board is REVERSED with regard

<sup>14</sup> . The citation referenced § 5512 and/or § 5513. Section 5513, which penalizes use, possession, etc. of gambling devices, is inapplicable.

<sup>15</sup> . As strange as it may seem gambling in Pennsylvania is per se illegal unless otherwise provided. 18 Pa. C.S. §§ 5512-14; *Commonwealth v. Kratsas*, 764 A.2d 20, 26 (Pa. 2001). The "otherwise provided" laws include the State Lottery (benefits older Pennsylvanians), 72 P.S. § 3761-101, et seq.; the Bingo Law, 10 P.S. § 301 et seq.; the LOSGCA; and the Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101, et seq.

to Citation 08-0058 Count 1. Count 1 is reinstated, and Appellee Detrich-Brechbill Home Association, Inc. shall pay the \$200.00 fine as originally ordered by the administrative law judge, if it has not already done so.

IT IS FURTHER ORDERED that the July 6, 2011 order of the Liquor Control Board as to Citation 08-0058 Count 2 is AFFIRMED.

*Pursuant to the requirements of Pa. R.C.P. 236 (a)(2), (b), (d), the Prothonotary shall immediately give written notice of the entry of this Order, including a copy of this Order, to each party's attorney of record, or if underrepresented, to each party; and shall note in the docket the giving of such notice and the time and manner thereof.*