

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL
ENFORCEMENT,

Petitioner/Appellant

Vs.

LEGION POST 304 HOME
ASSOCIATION,

Respondent/Appellee

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No. 14-2862

Craig Strong, Esquire
Drew Zelonis, Esquire

Counsel for Petitioner/Appellant
Counsel for Respondent/Appellee

MEMORANDUM OPINION

Matika, J. - February 17, 2016

The Appellant, Pennsylvania State Police, Bureau of Liquor Control Enforcement (hereinafter "Bureau") has appealed from the Order of this Court which affirmed the decision of the Pennsylvania Liquor Control Board (hereinafter "PLCB"). As it relates to this instant appeal, the decision of the Pennsylvania Liquor Control Board, in affirming the adjudications of Administrative Law Judge Felix Thau, found that the bingo game offered by the licensee, Legion Post 304 Home Association (hereinafter "Legion"), fell within the definition of bingo as set forth in §303 of the Bingo Law¹.

By Opinion and Order dated December 11, 2015, this Court likewise found that the Bonanza Bingo Game offered by the Legion

¹ 10 P.S. §303

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on its licensed premises fell within the definition of bingo as set forth in §303 of the Bingo Law. Due to the fact that the PLCB found that Administrative Law Judge Thau erred on a separate issue which dismissed the second citation for a different reason, it remanded the matter to him for adjudication consistent with its ruling. As a result of this Court's decision affirming the PLCB, the matter was likewise subject to such a remand. On January 11, 2016, the Bureau filed a timely appeal of this Court's December 11, 2015 Order.

In accordance with Pennsylvania Rule of Appellate Procedure 1925(b):

If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

Pa.R.A.P. 1925(b). Pursuant to subsection (2) of Pennsylvania Rule of Appellate Procedure 1925(b),

The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed.

Pa.R.A.P. 1925(b)(2). "Appellant shall file of record the Statement and concurrently shall serve the judge[,] with service upon the judge to "be in person or by mail as provided in Pa.R.A.P. 121(a)." Pa.R.A.P. 1925(b)(1).

An examination of the docket entries in this matter establishes that this Court directed the Bureau to file a concise statement which was dated and docketed on January 12, 2016. Additionally, the docket entries verify that said order was mailed to counsel for the Bureau by the Carbon County Prothonotary by way of first class mail on the same date. The consequence of such was that the Bureau had until February 2, 2016, that being the twenty-first day following the issuing, docketing, and mailing of this Court's Order directing the Bureau to file a concise statement, to serve upon the Court such statement of matters complained of. The Bureau failed to file their concise statement by February 2, 2016 and only did so on February 9, 2016².

As the Supreme Court of this Commonwealth has ruled, in order for an appellant to preserve his or her claims for appellate review, appellant must comply with a trial court's order requiring appellant to file a statement of matters complained of on appeal in a timely manner. *Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005). Any issues not raised in an appellant's concise statement will be deemed waived. *Hess v. Fox Rothschild, LLP.*, 925 A.2d 798, 803 (Pa. Super. Ct. 2007). "Since the Rules of Appellate Procedure apply to criminal and civil cases alike, the principles enunciated in criminal cases construing those rules are equally applicable in civil cases." *Kanter v. Epstein*, 866 A.2d

² This Court acknowledges that a copy of the concise statement was received in Chambers via first class mail, but only after the February 2, 2016 date.

394, 400 n.6 (Pa. Super. Ct. 2004), *appeal denied*, 880 A.2d 1239 (Pa. 2005).

As stated previously, "any issues not raised in a 1925(b) statement will be deemed waived." *Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998). However, there are caveats to a finding of waiver as delineated in *Forest Highlands Community Association v. Hammer*, 879 A.2d 223 (Pa. Super. Ct. 2005). To determine that appellant has waived such issues the *Hammer* Court stated:

First, the trial court must issue a Rule 1925(b) order directing an Appellant to file a response within [twenty-one] days of the order. Second, the Rule 1925(b) order must be filed with the prothonotary. Third, the prothonotary must docket the Rule 1925(b) order and record in the docket the date it was made. Fourth, the prothonotary shall give written notice of the entry of the order to each party's attorney of record, and it shall be recorded in the docket the giving of notice. See Pa.R.C.P. 236. If any of the procedural steps set forth above are not complied with, Appellant's failure to act in accordance with Rule 1925(b) will not result in a waiver of the issues sought to be reviewed on appeal.

Id. at 227.

In the case at bar, this Court issued an order on January 12, 2016 directing the Bureau to file a concise statement within twenty-one days from the date Prothonotary docketed said order. The order was filed, docketed, and made a part of the record in the dockets by the Carbon County Prothonotary on January 12, 2016. The docket entries make evident that the Prothonotary provided notice of the order to the Bureau's counsel, via first class mail, on January 12, 2016. In view of the fact that the Bureau has

failed to timely file a concise statement as prescribed by this Court's Order of January 12, 2016, the Bureau has not complied with said order. Consequently, this Court believes the Bureau has waived its right to appellate review. Accordingly, this Court respectfully recommends that the Honorable Commonwealth Court quash the Bureau's appeal.

In the event the Appellate Court finds that the Bureau has not waived its right to appellate review, this Court believes affirmance is still required as to the sole issue raised in the 1925(b) statement. In this statement, the Bureau raises one issue, that being: " . . . the Trial Court committed an error of law by affirming the decision of the Pennsylvania Liquor Control Board by finding that the bingo game offered by the [Legion] fell within the definition of bingo as set forth in §303 of the Bingo Law."

In reviewing Appellant's Rule 1925 Statement, the Court believes that the issue of the definition of bingo raised therein has been fully and adequately addressed in its Memorandum Opinion³ of December 11, 2015. Rather than repeating the reasons for our denial of Appellant's Petition, for the convenience of the Commonwealth Court and to evidence our compliance with Pa. R.A.P. 1925(a), a copy of this Memorandum Opinion, is attached as an

³ There were two issues raised by Appellant at the trial level. For purposes of this Appeal, one issue was apparently abandoned; the other issue, relative to the definition of "Bingo" is fully explained beginning on page 10 of the Opinion attached hereto.

Appendix to this Opinion.

For the reasons stated in this Opinion, this Court respectfully requests that the Bureau's Appeal be quashed or alternatively, that our decision be affirmed.

BY THE COURT:



Joseph J. Matika, J.

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PENNSYLVANIA STATE POLICE,
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Vs.

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MEMORANDUM OPINION

Matika, J. - December 11, 2015

"B4" the Court is the "Petition From Action of Pennsylvania Liquor Control Board" filed by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (hereinafter "Bureau") appealing the decision of the Pennsylvania Liquor Control Board (hereinafter "Board") involving a citation issued by the Bureau to the Legion Post 304 Home Association (hereinafter "Legion"). For the reasons stated herein, this Court denies the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

This action began as a result of an undercover surveillance operation of the licensed premises on or about April 28, 2013¹ by Officer Rosenstock of the Bureau's Liquor Enforcement Section. At

¹ Officer Rosenstock was assigned to investigate the licensed premises on January 30, 2013 based upon an anonymous tip regarding sales to non-members and loud noise. His visit to the licensed premises on this date was his first. He was allowed entry and served alcohol despite not being a member of the Legion.

that time, Officer Rosenstock purchased two (2) Bonanza Bingo tickets, which were sold at the bar of the Legion. The bartender told Officer Rosenstock how these tickets operated. It was explained to Officer Rosenstock that "There's a master sheet which was sitting at the bar. You compare your tickets compared (sic) to the master sheet, your numbers, and you win the corresponding . . . prizes."² After playing these tickets and determining that he had not won, Officer Rosenstock left the premises.

On August 26, 2013, Officer Rosenstock again arrived at the licensed premises, waited until it opened, and went in. This time the Officer was not acting in an undercover capacity, but was there to conduct a routine inspection. During the course of this inspection, the Officer learned that the Legion's Small Games of Chance License had expired. The Small Games License on the wall of the licensed premises denoted an expiration date of April 4, 2013 and the Bingo License had an expiration date of August 20, 2013. Officer Rosenstock also testified that paperwork he had recovered from the Legion showed that despite the expiration of the Small Games of Change License, the Legion had operated small games of chance on various dates from April 5, 2013 through the date of his inspection. Also, Rosenstock testified that the Legion operated a type of "Bingo" not permitted under the license

² Notes of Testimony June 5, 2014, hearing p 33.

in effect on April 28, 2013.^{3,4}

Upon the completion of his investigation, Officer Rosenstock issued a multi-count citation, #13-2097, to the Legion. Count 1 of the citation was issued claiming that the Legion violated two sections of the Local Option Small Games of Chance Act and one section of the Department of Revenue Regulations. Count 2 claimed that the Legion violated a section of the Liquor Code as well as two sections of the Bingo Law.

Specifically, as to Count 1, the Bureau claimed that: "During the period of April 5, 2013 through August 17, 2013, you [the Legion], by your servants, agents, or employees, failed to operate small games of chance in conforming with the Small Games of Chance Act⁵ and Title 61 of the Pennsylvania Code.⁶" Count 2 specifically alleges that "During the periods of April 28 and August 21, through August 26, 2013, you [the Legion], by your servants, agents, or employees, failed to operate Bingo in conformity with Title 10 of the Bingo Law" which in turn also violated the Liquor Code.

A hearing was held before Administrative Law Judge Felix

³ Notes of Testimony June 5, 2014, p. 45-47.

⁴ It should be noted that the issue sub judice is not whether on April 28, 2013 the Legion was operating "Bingo" without a valid license, as they in fact had one until it expired on August 20, 2013. The allegation is, as set forth in the Appeal, that the "Bingo Bonanza" was not a bingo as that term was defined and therefore, the Legion did not operate "bingo" in conformity with the license involving the tickets purchased by Officer Rosenstock.

⁵ 10 P.S. §§328.103 and 328.307(a).

⁶ 61 Pa. Code §901.1

Thau. Officer Rosenstock testified to the facts outlined above and Keith McQuait (hereinafter "McQuait"), President of the Legion, also testified. McQuait testified as to how the game they call Bingo Bonanza or Bar Bingo is played. In this type of game, played on Tuesdays and Sundays, twenty-four (24) numbers are randomly drawn in public from a deck of bingo cards, 5 "B's", 5 "I's", 4 "N's", 5 "G's", and 5 "O's". These numbers represent the numbers that are then placed on a "master" card located at the end of the bar. As patrons purchase sealed cards, they then open them to reveal their numbers, compare them to the numbers on the master board, and mark the matching numbers accordingly. Depending upon how those numbers match up, they may or may not have "Bingo." Various combinations result in that patron winning a monetary prize.

On July 11, 2014, Administrative Law Judge Thau issued an adjudication in which he dismissed the citation in its entirety. Initially, Administrative Law Judge Thau dismissed both counts of the citation by concluding that the wording of each count "offends due process/notice." Additionally, Administrative Law Judge Thau found that the citation as to Count 1 violated the notice requirements of 47 P.S. §4-471. Alternatively, Administrative Law Judge Thau concluded that Count 2 should be dismissed on the basis that the Bureau failed to prove that the Legion failed to operate Bingo in conformity with the Bingo Law.

From this adjudication, the Bureau filed a timely Appeal to the Board. The Bureau determined that the Administrative Law Judge erred as a matter of law by dismissing the citation in its entirety on the basis of a violation of the Legion's due process and notice rights related thereto simply because the Administrative Law Judge raised these issues *sua sponte*. The Board also addressed these issues of whether or not the "Bingo" game offered by the Legion fell within the definition of §303 of the Bingo Law. The Board concluded that it did fall under the definition and affirmed the Administrative Law Judge's determination relative to the Legion offering a game of bingo in conformity with the statute.

However, that did not end the inquiry as the Board made a determination that while this Bonanza Bingo Game was offered by the Legion and played by its patrons in conformity with the act on the date of April 28, 2013, it [the Legion] violated the Bingo Law by offering this game after August 20, 2013, the date the Bingo License expired. The Board also reversed the Administrative Law Judge's decision as to Count 1, finding that the Legion violated the Small Games of Chance Act by offering such games from April 5, 2013 through August 17, 2013, the period during which their license was expired.⁷ Accordingly, the Board remanded this matter

⁷ The Administrative Law Judge never addressed the merits of Count 1 of the citation as he had dismissed to in the due process/notice grounds referred to earlier in this opinion.

back to the Administrative Law Judge for an adjudication consistent with the Board's November 19, 2014 decision.⁸

On December 4, 2014, the Bureau filed a request of the Board to reconsider its decision of November 19, 2014 insofar as the Bureau requested the Board to conclude that the citations did in fact, satisfy due process and that the Bonanza Bingo Game was not a bingo game that fell under the definition set forth in §303 of the Bingo Law. The Board rejected reconsideration.

On December 18, 2014, the Bureau filed a timely Appeal to this Court. On June 18, 2015, this Court conducted a hearing, at which time the Bureau relied upon Bureau Exhibit 1 in support of its Appeal⁹. McQuait testified on behalf of the Legion. This Appeal appears limited to two issues: 1) Whether citation 13-2597 as issued by the Bureau to the Legion satisfied due process; and 2) Whether the Bonanza Bingo Game offered by the Legion and played by its patrons is the type of bingo game falling within the definition of §303 of the Bingo Law. After giving both sides an

⁸ It appears from the record that the Board was remanding this case back to the Administrative Law Judge for him to make a determination as to whether the Legion was guilty of violating count 1 insofar as operating small games of chance at a time it did not have a valid license to do so (period from April 5, 2013 - August 17, 2013) as well as a determination of whether the Legion was guilty of violating the Bingo Law as alleged in Count 2 of the citation regarding operation of a bingo game at a time when that license had expired (period from August 20, 2013 - August 26, 2013).

⁹ Bureau Exhibit 1 consisted of a variety of documents including, inter alia, the notes of testimony before the Administrative Law Judge, the opinion of the Pennsylvania Liquor Control Board, the citations issued to the Legion, and related documents.

opportunity to brief¹⁰ these issues, they are now ripe for disposition.

LEGAL DISCUSSION

When an appeal is taken from the Board's decision, the trial court hears the matter *de novo* and must make its own findings of fact and conclusions of law. *Two Sophia's Inc. v. Pennsylvania Liquor Control Board*, 799 A.2d 917, 919 (Pa. Commw. Ct. 2002). Those findings and conclusions must be based upon the record of the proceedings below, if offered and introduced by the Board, together with any other evidence properly submitted at the *de novo* hearing. *Id.* at 921. "A trial court is not permitted to substitute its findings of fact for those of the Board, when the evidence before the two tribunals is substantially the same." *PLCB v. Can, Inc.*, 664 A.2d 695, 698 (Pa. Commw. Ct. 1995) citing *Beach Lake United Methodist Church v. Pennsylvania Liquor Control Board*, 558 A.2d 611 (Pa. Commw. Ct. 1989).

The Bureau has proffered two errors in the Board's adjudication: 1) That the Board failed to find that the citations issued by the Bureau to the Legion satisfied due process; and 2) that the "Bonanza Bingo" Game offered by the Legion to be played by its patrons did not fall under the definition of bingo as set forth in §303 of the Bingo Law. This Court will address each *seriatim*.

¹⁰ The Bureau lodged its brief on June 18, 2015, however, the Legion did not lodge any brief.

A) Due Process/Notice

The Bureau appealed the ruling by the Board which, while finding that the Administrative Law Judge abused his discretion when he *sua sponte* raised a due process/notice violation regarding the citation issued by the Bureau and adjudicated the Legion not guilty as a result, failed to find that the Bureau's citation did in fact provide sufficient notice and opportunity to be heard. The Bureau appears to argue that the Board should have found that the Bureau did in fact give sufficient notice and provide due process to the Legion based upon the wording of the notice and verbiage utilized in the two counts of the citation.

In his adjudication, Administrative Law Judge Thau concluded that:

1. The Bureau has complied with the applicable notice requirements of Liquor Code Section 471 [47 P.S. §4-471], as incorporated by reference in the Local Option Small Games of Chance Act [10 P.S. §702(b)], with respect to Count No. 1;

2. The Bureau has failed to comply with the notice requirements of Liquor Code Section 471 [47 P.S. §4-471], with respect to Count No. 2;

3. The wording of Count No. 1 offends due process/notice; and

4. The wording of Count No. 2 offends due process/notice.

In making these conclusions, the Administrative Law Judge adjudicated the citation in favor of the Legion, finding that the Legion's rights were violated. These adjudications are the subject of this Appeal; however, the Board concluded that due to the Administrative Law Judge's *sua sponte* raising of the due process/notice issue, he was effectively violating the due process of the Bureau. In either event, this Court agrees it was an error of law for the Administrative Law Judge to raise these issues *sua sponte* and the Board was correct in so ruling.

"The Trial Judge is charged with the responsibility of defining all pertinent questions of law and clarifying the issues to be resolved by the Jury. This responsibility however, does not cast him in the role of an advocate." *Hrivnak v. Perrone*, 372 A.2d 730, 733 (Pa. 1977). Further, the Courts are not permitted to *sua sponte* raise issues that do not involve the Court's subject matter jurisdiction. *Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh*, 721 A.2d 43 (Pa. 1998). "*Sua Sponte* consideration of an issue deprives counsel of the opportunity to brief and argue the issues and the Board the benefit of Counsel's advocacy." *Orange Stones Co. v. Borough of Hamburg Zoning Hearing Board*, 991 A.2d 996, 999 (Pa. Commw. Ct. 2010). Since the issues of due process and notice regarding the notice sent and citation issued to the Legion do not invoke subject matter jurisdiction, they cannot be raised *sua sponte* by the Administrative Law Judge.

This Court agrees with the Board that it was error for the Administrative Law Judge to rule on issues not presented to him. (See *Com., Dept. of Transp. Bureau of Traffic Safety v. Searer*, 413 A.2d 1157, 1158 (Pa. Commw. Ct. 1980). Since the Administrative Law Judge decided this matter primarily based upon *sua sponte* procedural defects in the process, the Board properly remanded this matter back for an appropriate adjudication on the merits. See *Com., Somerset Mutual Retardation Unit v. Sanders*, 483 A.2d 1018 (Pa. Commw. Ct. 1984).

However, this does not end our analysis of the Bureau's Appeal of the Board's decision as the Bureau also proffered that the Board erred by not finding that the notice sent to the Legion and the citation passed constitutional muster regarding due process and notice. This Court finds that since the Administrative Law Judge erred as a matter of law in *sua sponte* raising these issues and in light of this Court's affirming the decision of the Board regarding this issue, it is improper for this Court to address the sufficiency of the notice and citation in much the same way the Board refused to address it.¹¹

B) Definition of Bingo

Since this matter is being remanded to the Administrative Law Judge, it now becomes proper to address the second issue subject

¹¹ While the Board did not expressly refuse to address this issue, it implicitly refused to do so by simply remanding this matter to the Administrative Law Judge without reference to the sufficiency of the notices or verbiage contained in the citation.

to this Appeal. The second issue presented by the Bureau in its Appeal focused on the Board's conclusion that the Bonanza Bingo Game offered by the Legion and played by its members did in fact fall within the definition of bingo and accordingly, to the extent that such game was played while the Legion possessed a valid bingo license, the Legion conducted these games in conformity with the Bingo Law.

The Bureau argues that the Bonanza Bingo Game is not a "traditional" bingo game and therefore, does not meet the definition of bingo as set forth in §303 of the Bingo Law and the Board erred in concluding that it does fall within the definition.

Section 303 defines bingo as: A game in which each player has a card or board containing five horizontal rows all but the central one containing five figures. The central row has four figures with the word "free" marked in the center thereof. Any preannounced combination of spaces when completed by a player constitutes bingo. In the absence of a preannouncement of a combination of spaces, any combination of five in a row whether horizontal or vertical when completed by a player constitutes bingo when its numbers are announced and covered. A wheel or other mechanical device may be used by any person conducting the game of bingo, and any such person may award a prize to any player or players first completing any combination constituting bingo.

As the record indicates, at the beginning of a day when the game is being played, twenty-four (24) "numbers" are chosen at random and placed on a master board.¹² This master board contains "five horizontal rows, all but the center one containing five figures." The center row has four numbers with the word "free"

¹² An example of such a master board is part of the Bureau's Exhibit 1.

marked in the center. On the periphery of this master card are eighteen (18) different preannounced combinations of spaces when completed by a player would constitute bingo. This master card further explains that if a player was fortunate enough to "have" any one or more combination, they will win that corresponding monetary prize or prizes.

Any player who desires to play this game purchases a sealed card. They are then tasked with comparing the numbers on their respective game boards with the numbers on the master card. If their numbers match any of the preannounced combinations outlined on the master card: BINGO, THEY WIN!

The Bureau argues that this game is more akin to a strip ticket than a bingo game. A strip ticket is defined as part of a global definition of a "pull-tab" in 10 P.S. §228.103 as that which has "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." The Court agrees that the bingo card purchased by the patron is sealed whereby the numbers are covered to conceal numbers, however, a strip ticket is distinguishable from the bingo cards in question in several respects. First, a strip ticket is part of a set of tickets or cards where a winner in that set is designated in advance as the winner, whereas the bingo cards do not always result in prizes being awarded as the games begin and end each day they are played.

Second, the winning combinations in the bingo games change each time a new day dawns and new numbers are chosen and placed on the master card. In comparison, strip tickets are played until the entire set is used up and guaranteed winners are established. Lastly, strip tickets, by their very nature, do not require a comparison of its numbers or symbols to determine whether it is a winner . . . when you see a winner, you know it. In the bingo card game, a player must "compare" his card numbers with a master card to figure out whether they match the preannounced combinations. Lastly, to suggest that a bingo card should be opened as opposed to sealed would lead to patrons "shopping" for cards with winning combinations beforehand and openly comparing the numbers with the master card before buying them simply by looking at the cards. These distinctions evidence that the Bonanza Bingo is not a pull tab or strip ticket as suggested by the Bureau, but rather fall under the definition of bingo as set forth in §303.

CONCLUSION

The Court finds that the Board was correct in affirming the conclusion of the Administrative Law Judge that the game offered by the Legion and played on Tuesdays and Sundays conform to the Bingo Law. Since this Court makes no findings different from the Board, nor does it find an abuse of discretion on the part of the

Board, this Court affirms the Board's decision in toto and issues the following order:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

PENNSYLVANIA STATE POLICE, :
BUREAU OF LIQUOR CONTROL :
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ASSOCIATION, :
Respondent/Appellee :

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No. 14-2862

Counsel for Petitioner/Appellant
Counsel for Respondent/Appellee

BY:

CARBON COUNTY
PROthonotary

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ORDER OF COURT

AND NOW, this 11TH day of December, 2015, upon consideration of the "Petition From Action of Pennsylvania Liquor Control Board" filed by the Pennsylvania State Police, Bureau of Liquor Control Enforcement and after hearing and written argument thereon, it is hereby ORDERED and DECREED as follows:

- 1) The Petition is DENIED;
- 2) The decision of the Pennsylvania Liquor Control Board is AFFIRMED; and
- 3) This matter is remanded to the Administrative Law Judge for an adjudication on the merits in accordance with the decision of the Pennsylvania Liquor Control Board.

BY THE COURT:


Joseph J. Matika, J.