

*Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
239 Causeway Street
Boston, MA 02114
Telephone: 617-727-3040
Facsimile: 617-727-1510*

Jean M. Lorizio, Esq.
Chairman

DECISION

**PVT. POIRIER POST #3260 V.F.W. OF U.S.
281 APPLETON ST.
NEW BEDFORD, MA 02745
LICENSE# 0778-00034
VIOLATION DATE: 6/27/2017
HEARD: 4/24/2018**

Pvt. Poirier Post #3260 V.F.W. of U.S. d/b/a Veterans of Foreign Wars of the U.S. Inc. (the "Licensee" or "Poirier VFW Post #4") holds an alcohol license issued pursuant to M.G.L. c. 138, § 12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, April 24, 2018, regarding an alleged violation of 204 CMR 2.05 (1) Devices which furnish anything besides merchandise of a quantity and quality commensurate with the price deposited therein are prohibited on licensed premises. Prior to the commencement of the hearing, the Licensee stipulated to the facts alleged in Investigator Lordan's Report.

The following documents are in evidence:

1. Investigator Lordan's Investigative Report;
2. Photo of Device #1 (3 pgs.);
3. Photo of Device #1 Showing 100 Tickets (1 pg.);
4. Printed Ticket from Device #1 (1 pg.);
5. Device #1 Receipts (5 pgs.);
6. Photo of Device #2 (1 pg.);
7. Device #2 Receipts (4 pgs.);
8. Search Warrant (3 pgs.); and
9. Licensee's Stipulation of Facts.

A. Report 11/3/2014 re: No Chance Game Suite I.

The Commission took Administrative Notice of the Licensee's Commission files.

There is one (1) audio recording of this hearing.

FINDINGS OF FACT

1. On Tuesday, June 27, 2017, at approximately 11:00 a.m., Investigator Lordan ("Investigator"), conducted an investigation of the business operation of Pvt. Poirier Post #3260 V.F.W. of U.S. d/b/a Veterans of Foreign Wars of the U.S. Inc. to determine the manner in which its business was being conducted.
2. Concurrently with Investigator Lordan, members of the Massachusetts State Police and the Federal Bureau of Investigations executed a search warrant on Pvt. Poirier VFW Post #3260.
3. Investigator Lordan inspected the bar area and observed two video gaming machines on the premises. One was a table top machine (NEXUS) and the other was a phone card machine (Nutel Machine).
4. Investigator Lordan then identified herself to Barbara Ribeiro, the manager, and asked Ribeiro where the winnings were paid out for the machines. Ms. Ribeiro showed Investigators payouts and reconciliation slips for the machines. Ms. Ribeiro stated that when a customer wins on the machines, the person brings the printed ticket to the bartender.
5. Investigator Lordan reviewed the payouts which contained U. S. Currency and numerous receipts which indicated date, time, and number of points. Some receipts were hand written while other receipts were printouts.
6. Investigators asked Ribeiro about the video gaming machines. Ribeiro stated the machines had been on the premises for six months. The club settles up with Brian, the contactor from the vendor management company, every week. The split is 50% for the club and 50% for the vendor. Ribeiro stated that each machine earned between \$800 and \$1600.
7. Investigator Lordan placed \$1.00 of U.S. Currency in the Nutel Machine which then printed a register type receipt. The receipt indicated "Up to 10 free 5-minute calls" along with a PIN number. Investigator Lordan observed the screen on the machine indicated 100 "Tickets" awarded for the \$1.00 placed into the device.
8. Massachusetts State Police officers had already placed evidence stickers on the two devices prior to Investigator Lordan's bet.
9. Investigator Lordan informed Ms. Ribeiro of the violations and that a report would be filed with the Chief Investigator for review.
10. Administrative review of the Licensee's file indicates Poirier VFW Post #3260 has held its license more than 50 years (since 1967) and has had no prior violations.
11. The license manager testified that the club was unaware the machines were illegal and stated that any money earned was reported as income and taxes were paid.

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm'n., 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975). The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in Chapter 138.

Chapter 138 gives the Commission the authority to grant, revoke and suspend licenses. Chapter 138 was "enacted . . . to serve the public need and . . . to protect the common good." M.G.L. c. 138, § 23. "[T]he purpose of discipline is not retribution, but the protection of the public." Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981) (emphasis supplied). The Commission is given "comprehensive powers of supervision over licensees." Connolly, 334 Mass. at 617.

Every violation the Commission finds must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n., 401 Mass. 526, 528 (1988). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Id. Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc., v. Comm'r of Ins., 420 Mass 707, 710 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

The Licensee is charged with a violation of 204 CMR 2.05(1), which provides that:

[s]lot machines or any other devices which furnish anything besides merchandise of a quantity and quality commensurate with the price deposited therein are prohibited on licensed premises. Gambling of any sort, except those games of chance authorized by the Legislature and/or local licensing authorities, shall not be permitted on any license premises. 204 CMR 2.05(1).

There must be substantial evidence that a violation of 204 CMR 2.05(1) has occurred. "Substantial evidence of a violation is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); accord Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm'n., 12 Mass. App. Ct. 879 (1981).

Furnishing Anything besides Merchandise of a Quantity and Quality Commensurate with the Price Deposited Therein

A Commission regulation promulgated at 204 CMR 2.05(1) provides in pertinent part, that "any . . . devices which furnish anything besides merchandise of a quantity and quality commensurate with the price deposited therein are prohibited on licensed premises." Investigator Lordan put one (1) dollar of U.S. Currency into the Nutel machine and received a piece of paper in return that stated it furnished "up to 10 free 5-minute calls" and a pin number. In addition, the screen on the device indicated that 100 points were awarded for inserting the one (1) dollar of U.S. Currency.

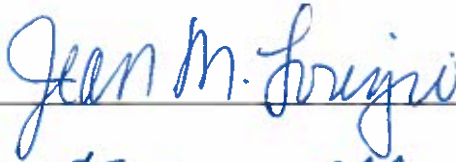
Investigator Lordan did not attempt to redeem the free phone calls. Investigator Lordan did not play a game on either of the devices. The Commission found no evidence of the devices furnishing anything besides merchandise of a quantity and quality commensurate with the price deposited therein.

CONCLUSION

Based on the evidence, the Commission finds NO VIOLATION of 204 CMR 2.05 (1) Devices which furnish anything besides merchandise of a quantity and quality commensurate with the price deposited therein are prohibited on licensed premises occurred.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: June 26, 2018

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

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cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Lisa (Lordan) Watson, Investigator
Administration, File