

AN EXPANSION OF AGENCY POWER: A SURVEY OF
*PENNSYLVANIA STATE POLICE BUREAU OF LIQUOR
CONTROL ENFORCEMENT V. PROGRESS FIRE CO. HOME
ASS'N*

I. INTRODUCTION

No two things go hand-in-hand quite like alcohol and gambling. From Atlantic City to Las Vegas, these two vices have combined to create a multi-billion dollar industry. The combination is not limited to huge casinos in big cities. It is present in smaller establishments across the country, such as the corner bar with a video poker machine. Pennsylvania is not without such places, which leads to the question of how these two industries should be governed.

While two separate agencies, the Pennsylvania Liquor Control Board (LCB) and the Pennsylvania Gaming Commission, regulate alcohol and gambling respectively, questions arise over whether one agency can investigate and prosecute violations of statutes normally under the control of the other agency. In the case of *Pennsylvania State Police Bureau of Liquor Control Enforcement v. Progress Fire Co. Home Ass'n*,¹ the courts wrestled with the question of whether the Pennsylvania State Police Bureau of Liquor Control Enforcement (Bureau) can investigate and prosecute violations of the Local Option Small Games of Chance Act (Chance Act).² In deciding this case, the court has expanded the Bureau's reach by allowing it to investigate and enforce violations of the Chance Act under the authority given to it by the Liquor Code.

This survey begins with Part II, which provides the relevant background information from previous cases decided by the Pennsylvania court system prior to *Progress Fire*, as well as the relevant statutory provisions governing the Bureau. Part III of this

¹ Pa. State Police Bureau of Liquor Control Enforcement v. Progress Fire Co. Home Ass'n, 55 A.3d 1270 (Pa. Commw. Ct. 2012).

² *Id.* at 1272.

survey provides an analysis of the *Progress Fire* case, including a detailed statement of the facts and procedural history. Part III also focuses on the court's treatment of this case with respect to the application of the Liquor Code's delegation of authority to the Bureau and how it uses that authority to investigate and prosecute violations of the Chance Act. Part IV of this survey provides the final analytical segment, including a personal critique of the case and concludes with final thoughts in Part V.

II. BACKGROUND

In order to gain an understanding of what the court was facing when deciding this case, the relevant statutes and prior cases need to be discussed. First, the relevant statutory provisions include the Chance Act and the Pennsylvania Liquor Code. Second, two cases are important to establish the precedent for the court's decision. These cases are *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Columbus Home Ass'n*³ and *Pennsylvania Liquor Control Board v. TLK, Inc.*⁴

A. *The Local Option Small Games of Chance Act*

The Chance Act⁵ was created by the Pennsylvania legislature to regulate "the playing of games of chance for the purpose of raising funds," and "for the promotion of charitable or civic purposes."⁶ The legislature has deemed these activities to be within the "public interest," and the "regulation of games of chance [is to] be strictly controlled."⁷ The Act provides that these games of chance be conducted by entities that have a license to do so and that all proceeds from the games be used for public interest purposes, purchase of future games, or for payment of license fees.⁸ It also requires license holders to maintain records from all

³ Pa. State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Columbus Home Ass'n, 989 A.2d 39 (Pa. Commw. Ct. 2009).

⁴ Pa. Liquor Control Bd. v. TLK, Inc., 544 A.2d 931 (Pa. 1988).

⁵ 10 PA. STAT. ANN. §§ 328.101-.3101 (West 2013).

⁶ *Id.* § 328.102.

⁷ *Id.*

⁸ *Id.* § 328.301.

gaming proceeds and invoices from games the licensee has purchased.⁹

The Chance Act also includes a thorough enforcement provision.¹⁰ The enforcement provision allows the licensing authority to investigate and enforce the Act.¹¹ This section also calls for licensees to be subject to random audits conducted by the Bureau.¹² There is one important provision, however, that does not limit the enforcement powers of the Act to the Bureau. Section 328.702(f) states, "[n]othing in this act may restrict or limit the power of a State, county or local law enforcement official to conduct investigations and file criminal charges under this act."¹³ This last provision is at the heart of Pennsylvania case law in determining the scope of when certain agencies can bring charges against licensees for violations of the Act.

B. Pennsylvania Liquor Code

The relevant portions of the Liquor Code are limited to its enforcement provisions.¹⁴ The code permits the Bureau to investigate and enforce violations of not only the Liquor Code but also any other laws of the Commonwealth or federal government that relate to the sale of liquor.¹⁵ The Liquor Code also permits investigating agencies to enter the licensee's premises without a warrant to conduct its investigation of potential Liquor Code violations.¹⁶

The other relevant provision from the Liquor Code comes from section 4-471, which deals with the revocation or suspension of liquor licenses.¹⁷ The important language of this section describes when the Liquor Control Board may use its authority under the Liquor Code to enforce other violations of law.¹⁸ This

⁹ *Id.* § 328.503.

¹⁰ *Id.* § 328.702.

¹¹ tit. 10, § 328.702(a).

¹² *Id.* § 328.702(c).

¹³ *Id.* § 328.702(f).

¹⁴ 47 PA. STAT. ANN. § 2-211 (West 2013).

¹⁵ *Id.*

¹⁶ *Id.* § 2-211(3).

¹⁷ *Id.* § 4-471.

¹⁸ *Id.* § 4-471(a).

section states: "Upon learning of any violation of this act or any laws . . . by any licensee within the scope of this article, [or] his officers . . . *or upon any other sufficient cause shown*, the enforcement bureau may . . . cite such licensee."¹⁹ The emphasized language from this section has been interpreted to mean that the Bureau may cite a licensee for violations of other acts, and not just violations of the Liquor Code.²⁰

C. Pennsylvania State Police, Bureau of Liquor Control
Enforcement v. Harrisburg Knights of Columbus Home Ass'n

The Harrisburg Knights of Columbus Home Association (licensee) was cited for multiple violations, including failing to maintain complete and truthful financial records of its business and awarding more than \$5,000 in cash prize money for approximately twenty-nine consecutive weeks.²¹ The president of the licensee signed a waiver admitting the allegations.²² Part of this waiver included waiving the licensee's right to a hearing, the right to appeal the penalties, and authorized the Administrative Law Judge (ALJ) to make a determination on the penalties that should be assessed to the licensee.²³

Subsequent to the signed waiver, the ALJ imposed a \$2,000 fine on the licensee and suspended its liquor license for ten days.²⁴ The licensee appealed these penalties, claiming that the Bureau did not have jurisdiction to administer penalties under the Chance Act and that responsibility rested in the hands of the Department of Revenue (Department).²⁵ This was one of three issues the licensee took to the Commonwealth Court of Pennsylvania on appeal.²⁶

The court handled the issue of whether or not the Bureau had jurisdiction to issue its citation by looking to the language of the

¹⁹ *Id.* (emphasis added).

²⁰ *See infra* Part II.D.

²¹ Pa. State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Columbus Home Ass'n, 989 A.2d 39, 40 (Pa. Commw. Ct. 2009).

²² *Id.* at 41.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 43.

Chance Act.²⁷ The licensee argued that the Bureau was not given express authority under the Chance Act to impose penalties for violating the Act.²⁸ The court pointed to section 328.702(f) of the Chance Act, which states, "[n]othing in this act shall be interpreted to restrict the power of . . . law enforcement officials."²⁹ The court held that the Bureau constitutes a law enforcement official because it is a subset of the Pennsylvania State Police Department, effectively eliminating the licensee's first claim on appeal.³⁰

The second assertion the licensee made focused on the Liquor Code's delegation of authority to the Bureau.³¹ The licensee claimed that the language of the section stating, "such other sufficient cause" applied only to the ALJ's imposed penalty and did not give the Bureau authority to enforce violations of other acts.³² The court disagreed with the licensee, stating that "[i]t is well established that 'violations of criminal laws other than the Liquor Code may constitute sufficient cause for revocation or suspension of a liquor license.'"³³ The court also noted that other courts have interpreted the Liquor Code to provide authority in other situations that are not limited to conduct expressly prohibited by the Liquor Code, instead giving authority over conduct that is reasonably related to the sale of alcohol, including gambling.³⁴

The court quickly dismissed the third claim the licensee raised.³⁵ The licensee claimed that the violation of the Chance Act should not lead to a suspension of its liquor license.³⁶ The licensee argued that a violation of the Chance Act was a separate penalty that was not included as a penalty for violating the Liquor Code.³⁷ The court held the waiver signed by the licensee's president met the notice requirements of the Liquor Code and that the waiver

²⁷ *Harrisburg Knights of Columbus*, 989 A.2d at 43.

²⁸ *Id.*

²⁹ *Id.* (quoting 10 PA. STAT. ANN. § 323(b) (West 1999)).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Harrisburg Knights of Columbus*, 989 A.2d at 44 (quoting *Pa. Liquor Control Bd. v. TLK, Inc.*, 544 A.2d 931, 933 (Pa. 1988)).

³⁴ *Id.*

³⁵ *Id.* at 45.

³⁶ *Id.*

³⁷ *Id.*

clearly spelled out the potential penalties the licensee was facing.³⁸ By signing this waiver, the licensee's president allowed the ALJ to impose the license suspension.³⁹

D. Pennsylvania Liquor Control Board v. TLK, Inc.

The licensee owned an establishment that contained a restaurant known as Peter P's.⁴⁰ The licensee's violations occurred when its doorman, Ron Jacobs, arranged to sell heroin to an undercover police officer.⁴¹ The two, along with a police informant, made the arrangements for the sale inside the restaurant, but carried out the actual transaction at another location.⁴² After the police ended their involvement in the case, the LCB revoked the licensee's license on the basis of the heroin transaction by Jacobs.⁴³

On appeal, the court addressed the standard that should be applied when determining whether a liquor license may be revoked due to illegal activities unknown to the licensee, or "whether the licensee must have knowledge of the misconduct."⁴⁴ The standard that is imposed by the Liquor Code in section 4-471 is a strict liability standard, meaning the license may be suspended or revoked regardless of the licensee's level of knowledge.⁴⁵ The court declined to extend this standard to incidents involving criminal activity, instead settling on a slightly more lenient standard for licensees.⁴⁶ The new standard the court applied to determine the knowledge required to justify the suspension or revocation of a liquor license included two principles.⁴⁷ First, if the "licensee knew or should have known" there was illegal activity present at the licensed establishment, the licensee is subject to

³⁸ *Id.*

³⁹ *Harrisburg Knights of Columbus*, 989 A.2d at 45.

⁴⁰ *Pa. Liquor Control Bd. v. TLK, Inc.*, 544 A.2d 931, 932 (Pa. 1988).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *TLK, Inc.*, 544 A.2d at 933.

⁴⁷ *Id.*

discipline.⁴⁸ The second principle allows the licensee to defend itself against claims of knowledge of criminal activity by proving it took "substantial affirmative steps to guard against a known pattern of illegal activities."⁴⁹

This decision is important in the overall scope of enforcement because it sets the standard for allowing violations of laws outside of the Liquor Code to be enforced under the authority of the Liquor Code. This case also puts liquor license holders on alert that those who enter the business are entering at their own risk and with knowledge that the LCB and the Liquor Code will scrutinize their actions.⁵⁰

III. ANALYSIS: *Pennsylvania State Police Bureau of Liquor Control Enforcement v. Progress Fire Co. Home Ass'n*

On April 1, 2010, the Progress Fire Company Home Association (licensee) received a citation from the Bureau for violations of the Liquor Code.⁵¹ The citation included charges for three violations: "(1) failing to keep records on licensed premises; (2) awarding more than \$5,000 in cash . . . in a seven-day period; and (3) refusing to provide access to records to Bureau officials."⁵² The "licensee challenged the citation and requested a hearing" in front of an ALJ.⁵³

The stipulated facts stated that a Bureau enforcement officer inspected the licensee's premises on February 3, 2010 and the licensee provided the officer with all financial records, except the records pertaining to the small games of chance.⁵⁴ The officer informed the licensee that he would be returning to the premises on March 1, 2010, expecting the licensee to turn over the financial records from the small games of chance.⁵⁵ When the licensee did

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *Bates v. Commonwealth*, 397 A.2d 851, 852-53 (Pa. Commw. Ct. 1979)).

⁵¹ *Pa. State Police Bureau of Liquor Control Enforcement v. Progress Fire Co. Home Ass'n*, 55 A.3d 1270, 1271 (Pa. Commw. Ct. 2012).

⁵² *Id.* at 1271-72.

⁵³ *Id.* at 1272.

⁵⁴ *Id.*

⁵⁵ *Id.*

not turn over the documents to the officer on March 1, the officer reviewed "reconciliation documents" related to the small games of chance.⁵⁶ These documents confirmed to the reviewing officer that the licensee "awarded prizes for three distinct seven-day periods between August 2009 and January 2010 in the amounts of \$33,085, \$27,414, and \$32,907."⁵⁷

On the basis of these facts, the ALJ concluded that the licensee committed two of the three alleged violations of the Liquor Code: "fail[ure] to keep records on licensed premises and awarding more than \$5,000 in cash or merchandise in a seven-day period."⁵⁸ The ALJ ruled that the citation was valid, imposed a \$1,100 fine and suspended the licensee's liquor license for fifteen days.⁵⁹ The licensee appealed to the LCB, which denied the appeal, affirming the ALJ's ruling.⁶⁰ The licensee then appealed to the trial court, which also affirmed the ALJ's ruling following a *de novo* review.⁶¹ The licensee's appeal to the Commonwealth Court of Pennsylvania is where this decision originates.

The first issue on appeal was whether the Bureau is authorized to enforce violations of the Chance Act.⁶² The licensee claimed the Chance Act is outside the jurisdiction of the Bureau.⁶³ The court relied on its earlier decision in *Harrisburg Knights of Columbus Home Ass'n*, which interpreted the phrase "upon any other sufficient cause shown" from section 4-471(a) of the Liquor Code to mean that the Bureau does, in fact, have the authority to investigate and issue citations for any violation of the Chance Act.⁶⁴ The court continued its explanation by saying that section 4-471 of the Liquor Code allows the ALJ to impose penalties for "conduct not expressly prohibited by the Liquor Code, but reasonably related to the sale and use of alcoholic beverages,

⁵⁶ *Id.*

⁵⁷ *Progress Fire Co. Home Ass'n*, 55 A.3d at 1272.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Progress Fire Co. Home Ass'n*, 55 A.3d at 1272.

⁶⁴ *Id.* at 1272-73 (quoting 47 PA. STAT. ANN. § 4-471(a) (West 2013)).

including gambling.' "⁶⁵ The court reasoned that it was the legislature's intent for the Liquor Code to have a broad application to allow the Commonwealth to review the actions of a licensee and make a determination whether or not disciplinary action is required.⁶⁶ Based on this reasoning, the court held that the Bureau does have the authority to investigate and enforce provisions of the Chance Act under the Liquor Code.⁶⁷

The second issue on appeal was if the Bureau was authorized to enforce the Chance Act, must it comply with the Department regulations.⁶⁸ The licensee claimed that since the Bureau was dealing with regulating and collecting funds from businesses, it should be held to the same standards as the Department.⁶⁹ The court distinguished the need to follow the Department's regulations in this case because it was not the Department that was conducting the investigation.⁷⁰ Only when the Department, or an authorized representative, is investigating a licensee for possible violations of the Revenue Code will the regulations of the Department come into play.⁷¹ Since the Bureau, under the authority of the Liquor Code, conducted this investigation, the Bureau did not have to adhere to the Department's regulations.⁷²

The third and final issue on appeal was whether the Bureau officer is a "law enforcement official" for the purposes of investigating the Chance Act.⁷³ The licensee contended that a Bureau officer is not included within the definition of "law enforcement official" under section 323(b) of the Chance Act.⁷⁴ To resolve this issue, the court looked to its earlier decision in *Harrisburg Knights of Columbus Home Ass'n*, which held that the Bureau is a subdivision of the Pennsylvania State Police, making it

⁶⁵ *Id.* at 1273 (quoting Pa. Liquor Control Bd. v. TLK, Inc., 544 A.2d 931, 933 (Pa. 1988)).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Progress Fire Co. Home Ass'n*, 55 A.3d at 1273.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

and its officers law enforcement officials, and therefore, those officials are authorized to enforce the Liquor Code.⁷⁵

The court consolidated its reasoning in this case to form a three-part holding. First, the Bureau was authorized to investigate and discipline a licensee for violations of the Liquor Code, or any other laws relating to liquor.⁷⁶ Second, the Bureau was authorized to arrive at a licensee's establishment absent a warrant to conduct a full, routine inspection.⁷⁷ Finally, the Bureau was authorized to discipline a licensee for not complying with the Chance Act under the authority of the "other sufficient cause shown" clause in section 4-407 of the Liquor Code.⁷⁸

IV. EVALUATION

The court's decision in *Progress Fire* should not be an unexpected one. It is a continuation of the court's previous decisions allowing the Bureau and other state agencies to have the authority to investigate and prosecute violations based on the Liquor Code. This holding represents a clarification of existing law and an expansion of the Bureau's reach by allowing it to investigate and enforce violations of the Chance Act. Although this is a relatively narrow holding, it has broad and far-reaching implications across Pennsylvania administrative law because it gives agencies more power.

This expansion of agency power may lead to some problems in the future. Agencies are supposed to be made up of experts in their respective fields, so there would be no problem with the LCB enforcing the Liquor Code or the Gaming Commission enforcing the Chance Act. But what happens when the Department of Health and Safety go in to a licensee's restaurant to do a routine health inspection? Should this agency be permitted to attempt to investigate and enforce violations of the Chance Act? Should the health inspector be asking the licensee for financial records that

⁷⁵ *Progress Fire Co. Home Ass'n*, 55 A.3d at 1274 (quoting Pa. State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Columbus Home Ass'n, 989 A.2d 39, 43 (Pa. Commw. Ct. 2009)).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

may or may not make any sense to that individual? This could become a problem if multiple agencies are trying to interpret violations of acts that are beyond their expertise.

With that being said, it is fully understandable why the court ruled this way. It is in the best interest of the Commonwealth for administrability purposes to allow the Bureau to enforce violations of the Chance Act because so often alcohol and gambling go hand-in-hand. In this particular case, this holding should have a beneficial effect on agency law because it allows the agencies to operate more efficiently. The courts should simply consider setting some restrictions on what agencies can enforce what laws to ensure that the agencies are not overwhelmed with cases. This surplus of cases will, in turn, make its way to the court system where the courts will be forced to adjudicate these claims, adding to an already expansive docket.

V. CONCLUSION

The court's decision in *Progress Fire* represents both a clarification of existing law and a subtle expansion of the agency's power to adjudicate claims. It allows the Bureau to use the authority given to it by the Liquor Code to investigate violations of the Chance Act and enforce applicable regulations. It also allows investigating officials to enter the licensee's premises without a warrant to conduct any such investigation, and issue citations for any violations they uncover. After this decision, the agency is afforded great deference to adjudicate claims relating to the sale of liquor, which includes gambling. The courts should be cautioned, however, to limit this deference to agencies that have a substantial relationship to one another, similar to the Bureau and the Gaming Commission, for fear that agencies will step outside of their respective expertise to investigate and prosecute claims that they have little business being involved in.

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