

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

St. Tropez Tobacco Outlet, LLC,	:	
Joseph Nataloni, Owner,	:	
Petitioner	:	
	:	
v.	:	No. 997 C.D. 2012
	:	Submitted: November 9, 2012
Pennsylvania Department of	:	
Revenue, Pennsylvania Lottery,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON**

**FILED: January 28, 2013**

St. Tropez Tobacco Outlet, LLC (St. Tropez), and its owner, Joseph Nataloni (collectively Petitioner), petitions for review of a determination of the Department of Revenue, Pennsylvania Lottery (Lottery), which terminated Petitioner’s license to sell Lottery tickets. We now reverse the Lottery’s decision.

The State Lottery Law (Law)<sup>1</sup> governs the licensing of lottery dealers. The Law authorizes the Secretary of Revenue to refuse to grant a license to sell lottery tickets and to suspend or revoke a license. Section 7 of the Law provides:

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<sup>1</sup> Act of August 26, 1971, P.L. 351, *as amended* by the Act of November 21, 1996, P.L. 741, 72 P.S. §§ 3761-101–3761-2103.

The secretary . . . may suspend or revoke a license . . . if it shall determine that:

- (1) Any officer . . . of such corporation applying for a license . . . or [who] participates in the management of the affairs of such applicant:
  - (i) has been convicted of a crime involving moral turpitude;
  - (ii) has engaged in bookmaking or other forms of illegal gambling;
  - (iii) has been found guilty of any fraud or misrepresentation in any connection; or
  - (iv) has violated any rule, regulation or order of the secretary.

(2) The experience, character, or general fitness of any officer . . . is such that the participation of such person as a lottery sales agent would be inconsistent with the public interest, convenience or necessity . . . .

72 P.S. § 3761.305(c).

By letter dated April 11, 2012, the Lottery sent a notice to Petitioner that the Lottery was suspending Petitioner's license to sell tickets at St. Tropez because of "recent law enforcement attention" relating to that establishment. Thereafter, the letter advised Petitioner:

Please be advised recent law enforcement attention on one or more of the retail establishments at which you are licensed to sell Lottery tickets is cause for suspension of your Lottery license. Lottery law . . . and corresponding regulation . . . provide that Lottery licensure can be suspended when the character and general fitness of a retailer are inconsistent with public interest.

. . .

This suspension is effective as of March 22, 2012 and will remain in force for the next 15 days from the date of this letter. You have until Thursday, April 26, 2012, to provide information to the Lottery to justify

reinstatement as a licensed retailer. This information may include a written statement or any rebuttal evidence you wish the Lottery to consider during your suspension period. This information should be forwarded to my attention. Additionally, you have the right to request a meeting with Lottery representatives at the Lottery's headquarters in Middletown, Pennsylvania.

If you fail to respond to this request for information within the time frame specified, the Lottery will consider the allegations concerning your retail location(s) to be undisputed and will take appropriate action.

At the end of the initial suspension period, the Lottery will issue a written determination to you that will lift the suspension, increase the term of the suspension or permanently revoke your license. Please be advised that your failure to submit information in support of your position regarding the suspension will result in the waiver of any right to present additional information to the Lottery after the suspension period.

During the suspension period, all Lottery tickets have been removed from your possession. Please contact me as soon as possible if you have any questions regarding this letter.

(Reproduced Record (R.R.) at 2a.) The Lottery sent another letter, dated April 27, 2012, informing Petitioner that the Lottery had terminated its license:

We took this action because of recent law enforcement attention on your retail establishment, St. Tropez . . . and because you failed to respond to our April 11, 2012 letter temporarily suspending your lottery license and giving you 15 days, or by yesterday, April 26, 2012, to provide us with information to justify reinstatement as a licensed retailer. Additionally, you failed to request a meeting with us here at our Lottery headquarters . . . .

Title 72 P.S. [§] 3761-305 provides that the . . . Secretary of Revenue or his designee may suspend or revoke a license if it is determined that licensure of the

agent in question is inconsistent with the public interest.  
72 P.S. [§] 3761-305; 61 Pa. Code [§] 805.17.

The recent law enforcement action in connection with you or your retail store . . . is inconsistent with the public interest for you to continue selling Lottery tickets and such law enforcement attention has impacted your reputation to continue as our agent selling Lottery tickets.

(R.R. at 13a.)

Petitioner filed a petition for review<sup>2</sup> of the termination decision, and now argues on appeal<sup>3</sup> that the Lottery violated Petitioner's due process rights by failing to conduct a hearing before terminating Petitioner's Lottery license. Petitioner also argues that substantial evidence of record does not exist to support the Lottery's decision, because the criminal charges that appear to have formed the basis for the Lottery's action were dismissed.<sup>4</sup> Because we conclude that

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<sup>2</sup> In its Petition for Review, Petitioner asserted:

The Pennsylvania Secretary of Revenue erred in suspending Petitioner's Lottery License because Petitioner's due process rights were violated in that Petitioner was not afforded a hearing prior to the suspension of his Lottery License. Further, Petitioner's Lottery License was suspended on the basis of pending criminal charges lodged against him. Petitioner has not been convicted of such charges, and, as such, a determination that licensure of the agent in question is against the public interest was made in error.

(Petition for Review, ¶ 3.)

<sup>3</sup> This Court's review is limited to considering whether necessary factual findings are supported by substantial evidence, whether any constitutional rights were violated, and whether any error of law was committed. 2 Pa. C.S. § 704.

<sup>4</sup> Although Petitioner did not specifically include a substantial evidence claim in its petition for review, Petitioner did claim that the termination was in error because alleged charges against him had been dropped. Because Petitioner raised the question of whether an error of law was committed by virtue of a lack of factual support, we consider the substantial evidence **(Footnote continued on next page...)**

Petitioner is correct in asserting that the record does not contain substantial evidence to support the Lottery's termination of Petitioner's license, we need not address Petitioner's due process claim.

The Lottery's April 27, 2012 letter-notice terminating Petitioner's license provides as follows:

We took this action because of recent law enforcement attention on your retail establishment . . . and because you failed to respond to our April 11, 2012 letter temporarily suspending your lottery license and giving you 15 days . . . to provide us with information to justify reinstatement as a licensed retailer. Additionally, you failed to request a meeting with us here at our Lottery headquarters . . . .

[The Law] provides that the . . . Secretary of Revenue or his designee may suspend or revoke a license if it is determined that licensure of the agent in question is inconsistent with the public interest . . . .

The recent law enforcement action in connection with you or your retail store . . . is inconsistent with the public interest for you to continue selling Lottery tickets and such law enforcement attention has impacted your reputation to continue as our agent selling Lottery tickets.

(Petitioner's Br. Appendix B.)

In accordance with our standard of review of a determination of the Lottery, we will affirm such a determination if substantial evidence supports all necessary factual findings, and then, only if the factual findings, in turn, support the ultimate legal conclusions underpinning the agency's action.

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**(continued...)**

question as being subsumed within the larger question Petitioner presents in its petition for review.

Because the Lottery did not conduct a hearing on the matter, the only source for factual findings and legal conclusion is found in the actual letters the Lottery sent to Petitioner. The Superior Court has noted that “allegations of a pleading do not constitute part of a trial record unless made part of it by offer and admission or court direction.” *Churilla v. Barner*, 409 A.2d 83, 86 n.6 (Pa Super. 1979). Nevertheless, Petitioner’s failure to respond to any factual averments in the Lottery’s letters could result in admissions that might support the Lottery’s ultimate termination decision. We note, however, that while a party’s failure to respond to averments in a complaint permit an administrative adjudicator to deem the averments admitted,<sup>5</sup> there are no factual averments in the Lottery’s letters that could support the Lottery’s legal conclusions. In this case, the only factual averment was that Petitioner had “recent law enforcement attention.” That isolated admission is insufficient as a matter of law to support the Lottery’s decision to terminate Petitioner’s license under the Law and pertinent regulations, which permit the termination of a license when such a license is inconsistent with the public interest under Section 7 of the Law.<sup>6</sup>

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<sup>5</sup> *DeGregorio v. Pennsylvania Pub. Util. Comm’n*, 481 A.2d 1241, 1243 (Pa. Cmwlth. 1984) (citing 1 Pa. Code § 35.35, which is part of general rules of practice and procedure applicable to administrative agency proceedings).

<sup>6</sup> Had the Lottery asserted in its letters that Petitioner had purchased and sold materials commonly marketed, sold, and used as synthetic marijuana, as it asserts in its brief, and Petitioner failed to respond to such an averment, the Lottery could have relied upon Petitioner’s resulting admission for support for a legal conclusion regarding Petitioner’s suitability under the Law to maintain its license, but the Lottery made no such factual assertions in its letters.

Accordingly, we reverse the Lottery's decision.

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P. KEVIN BROBSON, Judge

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Pennsylvania Department of	:	
Revenue, Pennsylvania Lottery,	:	
Respondent	:	

**ORDER**

AND NOW, this 28<sup>th</sup> day of January, 2013, the order of the Pennsylvania Department of Revenue, Pennsylvania Lottery, is REVERSED.

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P. KEVIN BROBSON, Judge