

Mailing Date:

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-1425
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

LA TIERRA DE CARIBE, INC. : License No. R-AP-SS-7472
119 E. Tioga Street :
Philadelphia, PA 19134-1040 :

Counsel for
Licensee:

Ex-Parte (before ALJ)

John J. McCreesh, III, Esquire
McCREESH, McCREESH, McCREESH and
CANNON
7053 Terminal Square
Upper Darby, PA 19082

Counsel for Bureau:

Erik S. Shmukler, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

OPINION

La Tierra De Caribe, Inc. (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright (“ALJ”), wherein the ALJ sustained the citation and imposed a one thousand three hundred

fifty dollar (\$1,350.00) fine and assessed five (5) points against the record of Licensee.

The first count of the citation charged that, on April 27 and May 11, 2005, Licensee, by its servants, agents or employees violated sections 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2) and 4-493(16)] by selling alcoholic beverages after the Restaurant Liquor License expired on October 31, 2004 and had not been renewed and/or validated.

The second count of the citation charged that, on May 11, 2005, Licensee, by its servants, agents or employees violated section 102 of the Liquor Code, [47 P.S. § 1-102], by maintaining insufficient food items, eating utensils and dishes.

A further review of the record reveals that, in response to the citation in question, Licensee submitted a waiver on March 3, 2006.

On March 20, 2006, the ALJ mailed an Adjudication and Order, sustaining the citation and imposing a thirteen hundred and fifty dollar (\$1,350.00) fine, to be paid within twenty (20) days. (Admin. Notice).

On May 8, 2006, the fine having not been paid, the ALJ mailed a Supplemental Order imposing a one (1)-day suspension to continue

thereafter until the fine was paid. The Order further stated that, in the sixty (60) days from the mailing date of March 20, 2006, the suspension would be reevaluated and revocation of the license would be considered. (Admin. Notice).

On July 20, 2006, the ALJ mailed a Second Supplemental Opinion and Order acknowledging that the sixty (60) day period had elapsed and that Licensee failed to pay the two hundred dollar (\$200.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective August 21, 2006. (Admin. Notice).

On August 22, 2007, Attorney John McCreesh filed an appeal to the Board in the name of Licensee and on behalf of Herb Zaylon, as proposed intervenor/appellant.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers'

Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005);
Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49,
484 A.2d 413 (1984).

The thirty (3) day filing deadline for an appeal from the ALJ's Second Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was August 19, 2006. Accordingly, Licensee's appeal was more than one (1) year late. (Admin. Notice).

Herb Zaylon, acting on behalf of Licensee, is seeking to intervene and have appeal allowed nunc pro tunc.

The appellate courts in Pennsylvania have held that the delay in filing an appeal is excusable if: (1) it was caused by extraordinary circumstances involving fraud or breakdown in the court's operation or non-negligent conduct on the appellant, appellant's attorney or his/her staff, (2) the appeal is filed within a short time after appellant or his counsel learns of and has the opportunity to address the untimeliness, (3) the time period which elapses is of very short duration, and (4) Appellee is not prejudiced by the delay. Cook v. Unemployment Compensation Bd. Of Review, 671 1130, 1131 (Pa. 1996).

In applying the standards set forth in the Cook case, the Board finds that Licensee failed to adequately satisfy the first factor of the Cook criteria.

Licensee has not set forth circumstances surrounding the lateness of this appeal which suggest fraud or breakdown in the operation of the OALJ, nor has it alleged that the appeal was late because of non-negligent conduct by Licensee or its attorney. A review of the record reveals that Herb Zaylon, in exercising its authority on Licensee's behalf, offers only that he, as judgment creditor should be permitted to intervene in this action pursuant to Pa. R.C.P. 2327(2) and (4). Licensee's attorney provided no reason for its failure to file a timely appeal. Rather, Licensee avers that "Petitioner has just learned that Restaurant Liquor License R-7472...was revoked...". Licensee offers no explanation for why it believes its failure to act for more than a year after the effective date of the ALJ's Revocation Order dated July 20, 2006, constitutes non-negligence on its behalf. Licensee offers no specific facts as to exactly how and when and under what circumstances Mr. Zaylon became aware of the Supplemental Orders that were issued on May 8, 2006 and July 26, 2006 and what if any formal steps had been taken by Mr. Zaylon to effectuate his security interest in Liquor License R-7472.

Unfortunately, due to the lack of specified compelling circumstances, Licensee has failed to provide any explanation sufficient to rise to the level of non-negligent circumstances as described in the Cook case. Accordingly, the appeal of Licensee must be dismissed.

ORDER

The decision of the ALJ is affirmed.

The appeal is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-7472 remains revoked as of Tuesday, August 21, 2007.

Licensee must adhere to all other terms and conditions of the ALJ's Order dated March 20, 2006.

Board Secretary