

Mailing Date: November 13, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 05-1691
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
	:	License No. R-4215
M.D. MASON, L.L.C.,	:	
t/a Doc Watson's Pub	:	
216 South 11 th Street	:	
Philadelphia, PA 19107-5501	:	

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OPINION

Americal Financial Corporation (“Appellant”), holder of the right to apply for the transfer of Restaurant Liquor License No. R-4215 issued to M.D. MASON, L.L.C., t/a Doc Watson’s Pub (“Licensee”), filed a *nunc pro*

tunc appeal on September 6, 2007, from the Second Supplemental Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ revoked the license for failure to pay a fine.

The citation contained six (6) counts. Count one (1) charges Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] on March 19, 2005, and divers other occasions within the past year, in that Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to eighty-four (84) minors, seventeen (17) to twenty (20) years of age.

Count two (2) charged Licensee with violating section 493(14) of the Liquor Code [47 P.S. § 4-493(14)] on March 19, 2005, and divers other occasions within the past year, in that Licensee, by its servants, agents or employees, permitted one hundred twenty-five (125) minors, seventeen (17) to twenty (20) years of age to frequent the licensed premises.

Count three (3) charged Licensee with violating section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] on May 25, 2005, in that Licensee, by its servants, agents or employees, failed to keep on the licensed premises and/or provide an authorized employee of the Pennsylvania State Police Bureau of Liquor Control Enforcement (“Bureau”) access to, or the

opportunity to copy, complete and truthful records covering the operation of the licensed business.

Count four (4) charged Licensee with violating section 473 of the Liquor Code [47 P.S. § 4-473] in that Licensee, by its servants, agents or employees, refused and/or failed to provide the Board with information regarding the involvement of Daniel Flynn in the operation of the licensed premises from August 2004 to May 25, 2005.

Count five (5) charged Licensee with violating section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] on May 25, 2005, in that Licensee, by its servants, agents or employees, refused an authorized employee of the Bureau access to records covering the operation of the licensed premises when the request was made during business hours.

Finally, Count six (6) charged Licensee with violating section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] on May 25, 2005, in that Licensee, by its servants, agents or employees, failed to keep records on the licensed premises.

The record reveals that Edward B. McHugh appeared as counsel for Licensee before the ALJ on March 9, 2006. All facts were stipulated to during the hearing. On May 1, 2006, the ALJ mailed an Adjudication and

Order, sustaining the citation and imposing a thirteen thousand five hundred dollar (\$13,500.00) fine and a period of twenty-one (21) days suspension deferred pending reactivation of the license. (Admin. Notice). The ALJ's Order provided that, "[i]n the event . . . the fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked." (Admin. Notice).

On August 1, 2006, the fine having not been paid, the ALJ mailed a Supplemental Order imposing a one (1)-day license suspension to continue thereafter until the fine was paid.¹ (Admin. Notice). The Order further stated that, in the event the fine was not paid within sixty (60) days from the mailing date of August 1, 2006, the suspension would be reevaluated, and revocation of the license would be considered. (Admin. Notice).

On October 26, 2006, the ALJ mailed a Second Supplemental Order acknowledging that the sixty (60)-day period had elapsed and that Licensee failed to pay the thirteen thousand five hundred dollar (\$13,500.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective November 20, 2006. (Admin. Notice).

¹ The suspension period imposed by the August 1, 2006 Order was deferred pending reactivation of Licensee's license, which was in safekeeping with the Board. (Admin. Notice).

In its appeal, Appellant indicated that it purchased the license at a Sheriff's sale conducted by the Dauphin County Sheriff of Harrisburg on August 13, 2007 and, upon attempting to renew it, learned that the license had been revoked.

On September 11, 2007, Appellant filed an application for Leave to Appeal *nunc pro tunc* from the ALJ's Second Supplemental Order with the Pennsylvania Liquor Control Board ("Board"). In support of the appeal, Appellant provides that it made a loan to the licensee and had a security interest in the license. Appellant maintains that it provided the Office of Administrative Law Judge with this information on August 8, 2006 and requested that it be advised of any developments in this matter in order that it could forestall any premature revocation of the license.

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 that 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).

In this case, Appellant notified the ALJ of its interest in the license on August 8, 2006 and requested that it be advised of any developments in this matter in order that it could forestall any premature revocation of the license. On October 25, 2006, the ALJ, via Second Supplemental Order, ordered revocation of the license effective November 20, 2006. Appellant obtained, *inter alia*, the right to apply for transfer of Licensee's liquor license at Dauphin County Sheriff's sale on August 13, 2007, pursuant to the bill of sale signed by the Dauphin County Sheriff. Thus, August 13, 2007 is the earliest possible date that Appellant could have had standing to appeal any decision of the ALJ with regard to this license, absent the filing and granting of a petition to intervene. There is no record of a petition to intervene having been filed by the Appellant in this matter. On September 6, 2007, Appellant filed a substantially delayed application for Leave to Appeal *nunc pro tunc* from the ALJ's Second Supplemental Order with the Pennsylvania Liquor Control Board ("Board").

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 of 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 A.2d 1130, 1131 (Pa. 1996); J.C. v. Pennsylvania Department of Public Welfare, 720 A.2d 193 (Pa. Cmwlth. 1998).

In applying the standards set forth in the Cook case, the Board finds that Appellant did not adequately satisfy the first factor of the Cook criteria; that Appellant's failure to file a timely appeal was caused by a breakdown in the Board's operation which caused a non-negligent failure on the part of Licensee, Appellant or their representatives to file a timely appeal.

In a letter dated September 5, 2007, Judge Shenkle, the ALJ who issued the order revoking the license, advised the Appellant through counsel that:

“When I read your letter yesterday I reviewed my file and saw that you had, indeed, written me on August 8, 2006, to advise of your representation of a company with a security interest in the license held by MD Mason, L.L.C.”

In addition, Judge Shenkle advised:

“It is my opinion that my failure to honor your request to be advised of developments concerning this citation constitutes a breakdown of the administrative process. A copy of the letter noting your interest should have been forwarded to Harrisburg, and this would have resulted in an entry on the docket, which would have resulted in actual notice to you on the license revocation.

It is also my opinion that the circumstances of this case satisfy the criteria set forth in Cook v. Unemployment Compensation Bd. of Review, 671 A.2d 1130, 1131 (Pa. 1996) for granting an appeal *nunc pro tunc*.”

Despite the ALJ’s willingness to take blame for a misplaced letter in this case, Appellant did not have standing to participate in the proceedings or to receive information about the status of the license at the time of Appellant’s request for status updates from the ALJ on August 8, 2006. Even in a light most favorable to Appellant, where notice/status is given to Appellant as requested, no preventative action could have been taken by Appellant to prevent revocation because Appellant lacked standing to take action and did not attempt to intervene in the matter. Appellant never gained standing

until, at the earliest, August 13, 2007 after the Sheriff's sale, when the license had already ceased to exist for almost nine (9) months.

Despite the fact that counsel for Appellant provided notification of a security interest in the license on August 8, 2006, such filing does not obligate Licensing or the Office of Administrative Law Judge to direct all future correspondence to such counsel. Nor can Appellant be relieved of its obligation to diligently monitor the status of a license of interest by shifting such obligation to a third party governmental unit. Therefore, Appellant cannot point to a breakdown in the operation of these entities as a circumstance excusing its untimely appeal.

The Board also finds that Licensee did not adequately satisfy the second factor of the Cook criteria; that the appeal was filed within a short time after appellant or its counsel learned of and had the opportunity to address the untimeliness. Appellant was clearly aware of the citation prior to the ALJ's imposition of the fine but did not seek to intervene so as to permit itself standing to appeal the penalty imposed by the ALJ. Instead, Appellant filed its appeal to the ALJ's Second Supplemental Order on September 6, 2007, twenty-four (24) days after purchasing the license at Sheriff's sale on August 13, 2007. Since the appeal in question was not filed within a short time

after Appellant learned of the imposition of the penalty or even a short time after purchasing the license, the Board does not accept the time period as sufficient to meet the second factor of the Cook criteria.

The Board also finds that Appellant has not adequately satisfied the third factor of the Cook criteria; that the time period which elapsed was of very short duration. Pursuant to section 471(b) of the Liquor Code, an appeal from a decision of an ALJ on a citation matter must be filed within thirty (30) days of the mailing date of the Adjudication and Order. [47 P.S. § 4-471(b)]. The thirty (30)-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 November 25, 2006. The appeal was filed on September 11, 2007. Accordingly, Licensee's appeal was two hundred ninety (290) days late. As the time period which elapsed between issuance of the October 25, 2006 Second Supplemental Order and the September 11, 2007 appeal submitted to the Board by Appellant was not a relatively short period of time, the Board does not accept it as sufficient to meet the third factor of the Cook criteria.

Relative to the final factor of the Cook criteria, Bureau has not claimed prejudice by the delay in filing of this appeal. As the Bureau has not set forth

that it would be prejudiced if the Board were to accept Appellant's appeal *nunc pro tunc*, the Board finds that Appellant has met the final factor of the Cook criteria.

The circumstances set forth by the parties as to the late filing of Appellant's appeal fail to sufficiently meet all of the criteria in the Cook case. Therefore, the appeal *nunc pro tunc* is dismissed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Appellant is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-4215 remains revoked as of November 20, 2006.

Board Secretary