

Mailing Date: May 9, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-1756
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

PASCO'S TIKI BAR, INC. : License No. R- 6216
t/a Tiki Bar :
501 South Main Street :
Scranton, PA 18504 :

Counsel for Licensee: Ex-Parte (before ALJ)

Daniel L. Penetar, Jr., Esquire (on appeal)
Suite 2A, Kane Building
116 North Washington Avenue
Scranton, PA 18503

Counsel for Bureau: Craig A. Strong, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
8320 Schantz Road, Second Floor
Breinigsville, PA 18031

OPINION

Pasco's Tiki Bar, Inc. t/a Tiki Bar ("Licensee") appealed from the
Supplemental Opinion and Order of Administrative Law Judge Felix Thau

("ALJ"), wherein the ALJ revoked the license effective September 15, 2006.

The citation in this case was issued on September 7, 2005. The citation charged that, on April 10, 2005, Licensee violated section 471 of the Liquor Code [47 P.S. § 4-471], by operating the licensed establishment in a noisy and/or disorderly manner.

On March 27, 2005, Licensee submitted an Admission, Waiver and Authorization to the Office of the Administrative Law Judge ("OALJ"). (Admin. Notice). On April 5, 2006, the ALJ mailed an Adjudication and Order, sustaining the citation and imposing a fine in the amount of five hundred dollars (\$500.00). (Admin. Notice). The Order provided that if 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 May 25, 2006, the fine having not been paid, the ALJ mailed an Opinion and Order Upon Failure To Pay A Fine imposing a one (1)-day license suspension to continue thereafter until the fine was paid.¹ (Admin. Notice). The Order further stated that, if the fine was not paid within sixty (60) days from the mailing date of May 25, 2006, the suspension would be

¹ The suspension period imposed by the May 25, 2006 Opinion and Order was deferred pending renewal of Licensee's license. (Admin. Notice).

reevaluated and revocation of the license would be considered. (Admin. Notice).

On August 7, 2006, the ALJ mailed a Supplemental Opinion and Order acknowledging that a sixty (60)-day period had elapsed, and that Licensee had failed to pay the five hundred dollar (\$500.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective September 15, 2006. (Admin. Notice).

On March 14, 2007, Pennstar Bank received copies of the Adjudication, Opinion and Order and Supplemental Opinion and Order. (Licensee's Appeal Ex. F). On March 15, 2007, an appeal was filed from the Supplemental Opinion and Order by Pennstar Bank, N.A., assignee and secured creditor of Licensee ("Pennstar"), on Licensee's behalf. (Admin. Notice).

On appeal, Pennstar contends that it never received any notices of any pending violation, of any pending fine, of any Adjudication, Opinion or Order regarding the revocation for the nonpayment of the fine. Pennstar asserts that the Board's failure to notify Pennstar of the pending citation violation caused the license to ultimately be revoked for nonpayment of fine. It further asserts that, had it received a notice of the fine, it would have paid

it, just as it paid all of Licensee's other fees of which it was notified. Pennstar avers that it stands ready, willing and able to still pay the subject fine.

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 (30)-day filing deadline for an appeal from the ALJ's Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was September 6, 2006. Accordingly, Licensee's appeal of this matter was more than five (5) months late. (Admin. Notice). 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).

In applying the standards set forth in the Cook case to the instant case, the Board finds that Licensee has adequately satisfied the first factor of the Cook criteria. Specifically, Licensee has established that its failure to file a timely appeal was caused by a breakdown at the Board which caused a non-negligent failure on the part of Licensee to file a timely appeal. Licensee, in its *nunc pro tunc* appeal, asserts that, by letter dated June 22, 2006, received by the Board's Bureau of Licensing on June 26, 2006, the Board was put on written notice that all correspondence relating to Licensee should be directed to Pennstar Bank, N.A., c/o Daniel L. Penetar, Jr., 116 North Washington Avenue, Suite 2A, Scranton, Pennsylvania 18503. (Admin. Notice; Licensee Appeal Ex. B). Thereafter, a Correction Sheet for Application and Permits dated June 26, 2006, originally issued by Licensing to Linda M. Pasco, Licensee's president, was subsequently sent to Daniel L.

Penetar, Jr., Esquire, Licensee's authorized agent. (Licensee Appeal Exs. C-3, D-3). All items called for on the Correction Sheet, including a late fee of one hundred dollars (\$100.00), were sent to Licensing on July 17, 2006, and were received by Licensing on July 19, 2006. (Admin. Notice; Licensee Appeal Exs. C-1, C-2, C-3).

Two (2) additional correction sheets dated July 20, 2006 and August 21, 2006 were also sent to Daniel L. Penetar, Jr., Esquire. (Admin. Notice; Licensee Appeal Ex. D). As per those correction sheets, Form 1136 and the one hundred and fifty dollar (\$150.00) late fee were sent to Licensing on August 28, 2006, and were received by Licensing on August 31, 2006. (Admin. Notice; Licensee Appeal Ex. D).

By letter dated September 6, 2006, Licensing notified Attorney Penetar that the subject license had been renewed, and that the license would continue to be held in safekeeping. (Admin. Notice; Licensee Appeal Ex. E). Pennstar learned of the citation violation, and the penalties assessed therefor, only when it contacted the Board about a new buyer for the subject license.

Since the facts of this case support that the delay in Licensee filing this appeal was caused by extraordinary circumstances involving a breakdown of

the Board's administrative system, the Board accepts that this matter meets the first factor of the Cook criteria.

The Board also finds that Licensee has adequately satisfied the second factor of the Cook criteria; that the appeal is filed within a short time after appellant or his counsel learned of and had the opportunity to address the untimeliness. Upon learning of the Adjudication, the Opinion and Order Upon Licensee's Failure to Pay A Fine, and the Supplemental Opinion and Order on March 14, 2007, Licensee filed a *nunc pro tunc* appeal to the Board on March 15, 2007. Since the appeal in question was filed within one (1) day after Appellant's counsel learned of the Supplemental Opinion and Order of the ALJ, the Board accepts the time period as sufficient to meet the second factor of the Cook criteria.

The Board also finds that Licensee has adequately satisfied the third factor of the Cook criteria; that the time period which elapsed was of very short duration. In light of the circumstances, it is not unreasonable to presume that Pennstar, in exercising its authority on Licensee's behalf, would rely upon any and all information from the Board to determine the legal status of the liquor license issued to Licensee. There is sufficient evidence in the instant matter to suggest that, had Pennstar been notified of the pending

Supplemental Opinion and Order at the time it was notified of other license renewal insufficiencies, it would have paid the fine prior to the end of the grace period set forth in the ALJ's Opinion and Order Upon Failure to Pay Fine dated May 24, 2006. On June 26, 2006, when Licensing was first notified that all correspondence should be forwarded to Mr. Penetar, there remained forty-six (46) days before the Supplemental Opinion and Order revoking the license effective September 15, 2006 was issued. As the time period which elapsed between issuance of the May 24, 2006 Opinion and Order upon Failure to Pay A Fine and the June 22, 2006 letter to the Board from Pennstar was a relatively short period of time, the Board accepts this time period as sufficient to meet the third factor of the Cook criteria.

Relative to the final factor of the Cook criteria, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") has not claimed prejudice by the delay in filing of this appeal. Further, given the circumstances involving the Board's failure to inform Pennstar of the pending citation action, it shall not claim to be prejudiced by the delay in filing of this appeal.

The circumstances set forth by Licensee as to the late filing of its appeal and its failure to pay the five hundred fine (\$500.00) sufficiently meet all of

the criteria in the Cook case and, therefore, warrant acceptance of the appeal *nunc pro tunc*, and support a decision to reverse the ALJ's Supplemental Opinion and Order dated August 7, 2006 and to reinstate the Opinion and Order Upon Failure to Pay A Fine.²

² Board records show that, at the time the Board received the letter dated June 22, 2006 from Pennstar requesting all correspondence for Licensee, the ALJ had already issued its Opinion and Order Upon Failure to Pay A Fine imposing a one (1)-day suspension with thereafter conditions pending renewal of the liquor license. The Board takes Administrative Notice that the license was not renewed until September 6, 2006. In keeping with the conditions set forth in that Order, Licensee shall be issued a one (1)-day suspension in compliance with the May 25, 2006 Order.

ORDER

The Supplemental Opinion and Order issued by the ALJ on August 7, 2006 is reversed.

Licensee's appeal is granted.

The May 25, 2006 Opinion and Order Upon Failure to Pay A Fine shall be reinstated. Therefore, it is hereby ordered that Licensee pay the fine in the amount of five hundred dollars (\$500.00) within twenty (20) days of the mailing date of this Order. Failure to do so will result in license suspension and/or revocation.

It is further ordered that Licensee's Restaurant Liquor License No. R-6216 be suspended for a period of one (1) day beginning at 7:00 a.m. on Monday, June 25, 2007 and ending at 7:00 a.m. on Tuesday, June 26, 2007.

Licensee is directed on Monday, June 25 , 2007 at 7:00 a.m. to place a Notice of Suspension placard (Form No. PLCB-1925) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee may not resume operation of the licensed premises until further Order of the ALJ.

Licensee must adhere to all other terms and conditions of the ALJ's Order dated May 24, 2006.

Board Secretary