Mailing Date: July 15, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : : : : : :	Citation No. 06-0182C
vs.		
HARPER'S, INC. 2101-03 SOUTH 20TH STREET PHILADELPHIA, PA 19145-3602	: : : :	License No. R-1032

Counsel for Licensee: *Ex-Parte* (Hearing)

Gregory H. Quigley, Esquire (Appeal)
1822 S. Broad Street
Philadelphia, PA 19145

Counsel for Bureau: James E. Dailey, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

O P I N I O N

Harper's, Inc. ("Licensee") appealed *nunc pro tunc* from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), wherein the ALJ revoked the license.

The first count of the citation charged that on October 27, 2005, Licensee, by its servants, agents or employees, violated section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) female minor, nineteen (19) years of age.

The second count of the citation charged that on October 27, 2005, Licensee, by its servants, agents or employees, violated section 493(13) of the Liquor Code [47 P.S. § 4-493(13)], and section 5.32(d) of the Liquor Control Board Regulations [40 Pa. Code § 5.32(d)], by permitting a minor under eighteen (18) years of age to perform in the licensed premises.

The third count of the citation charged that Licensee violated section 493(12) of the Liquor Code [47 P.S. § 4-493(12)], in that Licensee, by its servants, agents or employees, failed to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding October 27, 2005.

The fourth count of the citation charged that, on October 27, 2005, Licensee, by its servants, agents or employees, violated section 493(10) of the Liquor Code [47 P.S. § 4-493(10)], by permitting lewd entertainment.

The fifth count of the citation charged that on October 27, 2005, Licensee, by its servants, agents or employees, violated of section 5.32(c) of the Liquor Control Board Regulations [40 Pa. Code § 5.32(c)], by permitting entertainers to contact or associate with patrons for a lewd purpose.

The sixth count of the citation charged that on October 27, 2005, Licensee, by its servants, agents or employees, violated section 5.32(c) of the Liquor Control Board Regulations [40 Pa. Code § 5.32(c)], by failing to display a copy of the restriction prohibiting entertainers, employees, servants, agents and/or event participants from having contact with patrons for a lewd, immoral or unlawful purpose.

The seventh count of the citation charged that on October 27, 2005, Licensee, by its servants, agents or employees, violated section 471 of the Liquor Code [47 P.S. § 4-471], and sections 5901 and 3127 of the Crimes Code [18 Pa. C.S. §§ 5901, 3127], by committing acts of public indecency and/or permitted such acts to be committed on the licensed premises.

The eighth count of the citation charged that on October 27, 2005, Licensee, by its servants, agents or employees, violated section 471 of the Liquor Code [47 P.S. § 4-471] and sections 5901 and 3127 of the Crimes Code [18

Pa. Code §§ 5901, 3127], by permitting persons to be improperly attired or engage in open lewdness on the licensed premises.

A review of the record in this matter reveals that in response to the citation in question, Licensee failed to attend the administrative hearing held before the ALJ on March 15, 2007.

On October 31, 2007, the ALJ mailed her Adjudication and Order sustaining counts one, two, seven and eight of the citation and imposing an Order revoking the license effective at 7:00 a.m. on Monday, November 26, 2007.

On November 14, 2007, Licensee submitted a timely Petition for Reconsideration to the ALJ.

On December 18, 2007, the ALJ issued a Response to Licensee's Petition for Reconsideration denying the request for reconsideration and stating "the Order for revocation remains in full force and effect."

Section 17.21(c) of the Board's Regulations [40 Pa. Code § 17.21(c)] sets forth that appeals from decisions of the ALJ shall be filed or post-marked within thirty (30) calendar days of the mailing date of the adjudication of the ALJ.

Therefore, Licensee had up to thirty (30) days after the December 18, 2007 date to file a timely appeal with the Board, i.e. until January 17, 2008.

On May 6, 2009, Licensee filed a document entitled Petition for Leave to File Appeal *Nunc Pro Tunc* From Order of Office of Administrative Law Judge for the Pennsylvania Liquor Control Board. ("*Nunc Pro Tunc* Petition" or "Petition").

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), has responded to the *Nunc Pro Tunc* Petition by stating that it is opposed based upon the Bureau's belief that the situation and facts set forth in the Petition fail to demonstrate that non-negligent circumstances prevented Licensee from filing a timely appeal.

The Pennsylvania Supreme Court has stated that "where an appeal is not timely because of non-negligent circumstances, either as they relate to appellant or his counsel, and the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, and the time period which elapses is of very short duration, and appellee is not prejudiced by the delay, the court may allow an appeal *nunc pro tunc*." Cook v. Unemployment Compensation Bd. of Review, 671 A.2d 1130, 1131 (1996).

The Board has reviewed Licensee's appeal in light of the Cook criteria to determine if Licensee has established the non-negligent circumstances necessary to justify a *nunc pro tunc* appeal.

Licensee states in its Petition that its counsel contacted Judge Wright's chambers on July 1, 2008 to inquire about the status of the ALJ's decision regarding the Motion for Reconsideration. It was at that time that Licensee was advised that a decision dated December 18, 2007 had been mailed to Licensee's counsel, Greg H. Quigley, at his former law office address at 2501 S. 11th Street. Licensee avers that the ALJ's staff acknowledged that they had no record of Mr. Quigley's new office at 1822 S. Broad St., in Philadelphia, even though that address was listed on Attorney Quigley's letterhead on his November 8, 2007 Motion for Reconsideration.

Licensee further avers that as Attorney Quigley believed that he may be a necessary witness in the case, the matter was referred to outside counsel, who later decided not to accept the case.

Licensee also contends that on October 10, 2008, Attorney Quigley was told by an unnamed person to file the instant matter in the Prothonotary's Office and did then file a Petition under docket number October Term, 2008; No. 001826. Following a series of contacts with the Prothonotary's office,

Attorney Quigley and James Dailey, Assistant Counsel for the Bureau, agreed that the Court of Common Pleas was not the proper forum for said appeal. As a result thereof, Licensee filed the instant appeal.

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 Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was January 17, 2008. Accordingly, Licensee's instant appeal of this matter on May 6, 2009 was more than fifteen (15) months late. (Admin. Notice). As stated earlier, 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 if 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 at 1131.

In applying the standards set forth in the Cook case to the instant case, the Board finds that Licensee has failed to adequately satisfy the first factor of the Cook criteria. Licensee has not set forth circumstances surrounding the lateness of this appeal which establishes fraud or breakdown in the operations of the OALJ; nor has it established that the appeal was late because of non-negligent conduct by Licensee or its attorney.

While the filing of a timely Motion for Reconsideration does not in and of itself toll the thirty (30) day statute of limitations for the filing of an appeal to the Board in the instant case, since the ALJ issued an Order considering, then denying the motion, an appeal from the decision of the ALJ should have been filed by January 17, 2008. [40 Pa. Code § 17.21(c)].

Had Licensee filed a timely appeal to the Board concurrently with its Motion for Reconsideration, and had the reconsideration been granted, the ALJ's Reconsideration Order would have automatically rendered inoperative

the appeal to the Board. [40 Pa. Code § 15.56; 1 Pa. Code § 35.241]. Regardless, having not heard whether the ALJ had accepted the motion should have prompted Licensee to file a precautionary appeal by November 30, 2007.

At a minimum, Licensee should have contacted the ALJ's office to ascertain the status of the Motion for Reconsideration prior to November 30, 2007 and not on July 1, 2008, some seven and a half (7 ½) months after filing the Motion.

The Board also finds that Licensee has failed to satisfy the second factor of the Cook criteria; that the appeal is filed within a short time after Licensee or his counsel learned of and had the opportunity to address the untimeliness. On July 1, 2008, upon learning of the ALJ's December 18, 2007 Response to Licensee's Petition for Reconsideration, Licensee failed to take any specific action until three (3) months later when it filed an appeal in the Court of Common Pleas' Prothonotary's office. Licensee's counsel has failed to adequately explain the reason for the delay in fling any appeal until on or about October 10, 2008. The passage of more than three (3) months from the date Licensee's counsel learned of the adverse decision by the ALJ is not within a short period of time and, thus, Licensee does not meet the second Cook factor.

Similarly, the Board finds that Licensee has failed to adequately satisfy the third factor of the Cook criteria; that the time period which elapsed was a very short duration. The appeal filed in the Prothonotary's office on or about October 10, 2008 was filed three (3) months after Licensee learned of the final disposition of its Motion for Reconsideration and almost a full year after the last day in which to have filed a timely appeal from the December 18, 2007 Adjudication of the ALJ. The appeal to the Board was not filed until May 6, 2009, some fifteen (15) months after issuance of the October 31, 2007 ALJ's Response to the Motion for Reconsideration.

As to the fourth Cook factor, the Bureau further claims that it would be prejudiced by the granting of Licensee's Petition as there would then be no finality to the administrative enforcement process. In furtherance of its claim, the Bureau avers that to allow this Petition to proceed based on the clearly negligent circumstances would be against public policy and would not effectuate judicial economy.

The Board finds some merit to the Bureau's concerns given the lapse of time between issuance of the ALJ Adjudication on the merits of the case and final attempt by Licensee to direct an appeal to the proper forum. Accordingly, the circumstances set forth by Licensee as to the late filing of its appeal and its

failure to adequately address the long periods of inactivity do not sufficiently meet all of the criteria in the Cook case and, therefore, do not warrant acceptance of this untimely appeal.[1]

[1] The Board notes that Licensee did not raise any substantive issues as to the merits of the underlying appeal.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-1032 remains revoked as of November 26, 2007.

Licensee must adhere to all conditions set forth in the ALJ's Orders in this matter.

_____

Board Secretary