

Mailing Date: May 23, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-0219X  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

QUANTUM FOODS, INC. : License No. R-17956  
t/a Michael's Casual Dining & Spirits :  
6147 York Road :  
Spring Grove, PA 17362-9120 :

Counsel for Licensee: Ex-Parte (before ALJ)

Jack M. Seitz, Esquire (on Appeal)  
Lamm Rubenstone Lesavoy Butz & David LLC  
7535 Windsor Drive, Suite 200  
Allentown, PA 18195

Counsel for Bureau: Andrew J. Lovette, Esquire  
PENNSYLVANIA STATE POLICE,  
Bureau of Liquor Control Enforcement  
3655 Vartan Way  
Harrisburg, PA 17110

OPINION

Quantum Foods, Inc. ("Licensee") appealed nunc pro tunc from the Supplemental Orders of Administrative Law Judge Daniel T. Flaherty, Jr. ("ALJ"), wherein the ALJ imposed a suspension and then revoked the license for failure of Licensee to pay the fine.

The citation charged that Licensee violated section 493(26) of the Liquor Code [47 P.S. § 4-493(26)] by issuing checks or drafts dated November 23, 25 and December 8, 2005 in payment for purchases of malt or brewed beverages when it had insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks.

A review of the record reveals that Licensee failed to attend a hearing held before the ALJ on May 9, 2006.

On September 15, 2006, the ALJ mailed an Adjudication and Order, sustaining the citation and imposing a two hundred dollar (\$200.00) fine. (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 October 17, 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.<sup>1</sup> (Admin. Notice). The Order further stated that, in the event the fine was not paid within sixty (60) days from the

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<sup>1</sup> The suspension period imposed by the October 17, 2006 Opinion and Order was deferred pending renewal of Licensee's license. Licensee's license was placed in safekeeping with the Board on February 21, 2006. (Admin. Notice).

mailing date of October 17, 2006, the suspension would be reevaluated, and revocation of the license would be considered. (Admin. Notice).

On January 12, 2007, the ALJ mailed a Second Supplemental 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 January 12, 2007. (Admin. Notice).

On February 26, 2007, a request for reconsideration was filed from the Second Supplemental Order by COBA, Inc., assignee of Commerce Bank, N.A. ("Commerce"), Licensee's secured creditor. (Admin. Notice; Appeal Ex. A).

On March 5, 2007, the ALJ mailed a Third Supplemental Order stating the Office Administrative Law Judge ("OALJ") lacked jurisdiction to consider the reconsideration nunc pro tunc and denying the request for reconsideration. (Admin. Notice).

On March 14, 2007, COBA, Inc., acting on behalf of Licensee, filed an appeal with the Pennsylvania Liquor Control Board ("Board") seeking to have this matter heard nunc pro tunc. In support of its appeal, COBA, Inc. asserts that it was due to the administrative failure on the part of the Board to

notify it of the pending violation which caused the license to ultimately be revoked for nonpayment of fine. COBA, Inc. also asserts that the ALJ's revocation order amounts to an unjust and unfair forfeiture of COBA, Inc.'s rights in the license, and that the revocation violated the automatic stay in Licensee's bankruptcy case.

In support of its appeal, COBA, Inc. provides that, the subject liquor license secured a loan between Commerce and Licensee in February of 2004. (Appeal Ex. B). In 2006, Licensee defaulted on the loan and Commerce confessed judgment against Licensee, began foreclosure, and scheduled an asset sale. Commerce petitioned the Court of Common Pleas of York County, Pennsylvania for relief, which was granted on July 12, 2006. (Appeal Ex. D). Paragraph 6 of the Order provided:

Commerce Bank, N.A. is hereby authorized and permitted to sign all renewal application forms, late fee affidavits, tax documents and other papers, applications and forms as may be necessary to renew, validate, apply for, transfer or preserve the Liquor License, currently owned by the Defendants [Licensee].

(Appeal Ex. D).

By letter dated September 8, 2006 to the Board's Bureau of Licensing ("Licensing"), accompanied by the Order from the Court of Common Pleas of York County, the Board was notified that all correspondence relating to

Licensee should be directed to Commerce Bank, N.A., c/o Jack M. Seitz, Esquire, 7535 Windsor Drive, Suite 200, Allentown, PA 18195. Thereafter, on September 18, 2006, Licensing issued a letter to Commerce acknowledging Mr. Seitz's request, and notifying him that the license expired on February 28, 2006, and would need to be renewed before being transferred to a new entity. (Appeal Ex. F). Licensing's letter did not mention the ALJ Adjudication issued on September 15, 2006. (Appeal Ex. F).

On October 3, 2006, Commerce assigned its rights to Licensee's loan to COBA, Inc. (Appeal Ex. A). On December 11, 2006, Licensee filed a Chapter 7 bankruptcy case. (Appeal Ex. G). COBA, Inc. obtained relief from the automatic stay on December 29, 2006. (Appeal Ex. H). COBA, Inc. proceeded to schedule a sheriff's sale of Licensee's property on February 23, 2007. (Appeal Ex. I). COBA, Inc. claims that it first learned of the ALJ's revocation of the subject license on February 23, 2007, in response to which it immediately filed a request for reconsideration with the ALJ, paid the fine, and notified Licensing of its action. (Appeal Exs. J, K).<sup>2</sup>

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<sup>2</sup> Both the letter to the ALJ, and the notice to Licensing are, however, dated January 23, 2007, rather than February 23, 2007.

On March 5, 2007, the ALJ issued its Third Supplemental Order denying COBA, Inc.'s request for reconsideration. COBA, Inc. filed a request for leave to appeal nunc pro tunc to the Board on March 14, 2007. (Admin. Notice). COBA, Inc. asserts that, had it received a notice of the fine, it would have paid it, just as it paid other fees of which it was notified.

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 Second Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was February 11, 2007. Accordingly, Licensee's appeal was more than twenty-eight (28) days 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, 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 in the Board's operation which caused a non-negligent failure on the part of Licensee or its representative to file a timely appeal. Licensing was notified by letter dated September 8, 2006, and the accompanying Order from the Court of Common Pleas of York County, Pennsylvania, that all correspondence relating to Licensee should be directed to Commerce Bank, N.A., c/o Jack M. Seitz, Esquire. Thereafter, on September 18, 2006, the Board issued a letter to Commerce Bank, N.A.

acknowledging Mr. Seitz's request, and notified him that the license in question expired on February 28, 2006 and would need to be renewed before being transferred to a new entity. [The Board letter in question failed to mention the ALJ Adjudication issued on September 15, 2006.]

In light of the circumstances of Commerce's exercise of its rights pursuant to its petition for relief in the foreclosure action, it is not unreasonable to presume that COBA, Inc. would rely upon any and all information from the Board to determine the legal status of the liquor license issued to Licensee. Upon learning that the license was subject to a citation, and that the ALJ had ordered revocation of the license, COBA, Inc. sought reconsideration. Following receipt of the ALJ's Third Supplemental Order denying COBA, Inc.'s request for reconsideration, COBA, Inc. filed a request for leave to appeal nunc pro tunc to the Board.

The Board finds that there is sufficient evidence in the instant matter to suggest that, had COBA, Inc. been notified of the pending ALJ Adjudication and Order at the time it was notified of other license renewal insufficiencies, it would have paid the fine on or before the end of the grace period set forth in the ALJ's Supplemental Order dated October 17, 2006. Moreover, the

Board was put on notice on September 8, 2006 that all correspondence related to the license should be addressed to Commerce's counsel.

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 was filed within a short time after appellant or his counsel learned of and had the opportunity to address the untimeliness. On September 8, 2006, when COBA, Inc. first notified Licensing that all correspondence should be forwarded to Mr. Seitz, there remained seven (7) days before the ALJ issued its Adjudication, and twenty-seven (27) days before the fine was due to be paid. Had the ALJ been aware of Licensee's circumstances, it is reasonable to assume that the fine would have been timely paid, and that the October 17, 2006 Supplemental Order would not have been issued. Despite contact with Licensing, COBA, Inc. did not receive notice of the citation action until February 23, 2007. COBA, Inc. reacted immediately, by filing its request for reconsideration with the ALJ and, when that was denied, it reacted within nine (9) days to file this appeal.

Since the appeal in question was filed within days after COBA, Inc. learned of the Second Supplemental 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. As the time period which elapsed between issuance of the January 12, 2007 Second Supplemental Order and the March 14, 2007 appeal letter submitted to the Board from COBA, Inc. 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. In fact, the Bureau has indicated that the grant of this appeal nunc pro tunc is warranted under the circumstances. Further, given the circumstances involving the Board’s failure to inform COBA, Inc. 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 two hundred dollar (\$200.00) fine 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 Order mailed October 17, 2006, and Second Supplemental Order mailed January 12, 2007.

ORDER

The ALJ's Supplemental Order issued October 17, 2006, and the ALJ's Second Supplemental Order issued January 12, 2007 are reversed.

Licensee's appeal is granted.

The ALJ's Adjudication and Order, issued September 15, 2006, remains in effect.

Licensee paid the two hundred dollar (\$200.00) fine on February 26, 2007.

Licensee must adhere to all other terms and conditions of the ALJ's Order dated September 15, 2006.

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Board Secretary