

MAILING DATE: November 13, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-0793X
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :
 :
 :
 vs. :
 :
 : License No. R-21217
YANKEE DOODLE, INC. :
t/a Yankee Doodle Diner and :
Restaurant :
5000 Milford Road :
East Stroudsburg, PA 18301-9246 :

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OPINION

Yankee Doodle, Inc. (“Licensee”) by Penn Stroud Hotel, Inc., its attorney-in-fact and holder of Restaurant Liquor License No. R-21217, filed a nunc pro tunc appeal, from the Supplemental Order of Administrative Law

Judge Felix Thau (“ALJ”), wherein the ALJ revoked the license for failure to pay a fine.

The citation charged Licensee with violating section 493(26) of the Liquor Code [47 P.S. § 4-493(26)] on January 27, 2006, in that Licensee, by its servants, agents or employees, made 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.

On June 21, 2006, Licensee executed a Statement of Waiver, Admission and Authorization in which Licensee admitted the violation charged in the citation, and that the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) complied with the applicable investigatory and notice requirements of the Liquor Code. (Admin. Notice). On August 4, 2006, the ALJ mailed an Adjudication and Order to Licensee’s business address 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 6, 2006, the fine having not been paid, the ALJ mailed an Opinion and Order Upon Licensee's Failure to Pay a Fine to Licensee's business address, imposing a one (1)-day license suspension to continue thereafter until the fine was paid. (Admin. Notice). The Order further stated that, in the event the fine was not paid within sixty (60) days from the mailing date of October 6, 2006, the suspension would be reevaluated, and revocation of the license would be considered. (Admin. Notice).

On December 19, 2006, the ALJ mailed a Supplemental Opinion and Order to Licensee's business address 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 29, 2007. (Admin. Notice).

On September 28, 2007, Licensee, by its attorney-in-fact, Penn Stroud Hotel, Inc., filed with the Board an application for Leave to Appeal Nunc Pro Tunc from the ALJ's Supplemental Opinion and Order of December 19, 2006.

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).

Licensee’s appeal nunc pro tunc provides that, on April 19, 2004, Penn Stroud Hotel, Inc. conveyed possession of the premises known as “Yankee Doodle Diner” to John A. Dimitrion, Athanasios Giakoumidis and Valilis Ketikidis pursuant to an installment agreement of sale. (Appeal Nunc Pro Tunc). As a part of the same deal, in December of 2004, Penn Stroud Hotel, Inc. conveyed the Restaurant Liquor License No. R-21217 to Licensee. (Appeal Nunc Pro Tunc). Licensee defaulted under the installment agreement of sale by failing to make regular payments. (Appeal Nunc Pro Tunc). Licensee closed for business in September of 2006. (Appeal Nunc Pro Tunc). Penn Stroud Hotel, Inc. filed a Confession of Judgment for money judgment and possession against John A. Dimitrion, Athanasios Giakoumidis and Vasilis Ketikidis, received a judgment and evicted Licensee

from the premises on October 10, 2006. (Appeal Nunc Pro Tunc). Licensee failed to validate the subject license in August of 2006, resulting in the license being suspended as of September 30, 2006. (Admin. Notice). At the time of the eviction, Licensee had failed to file various necessary reports and tax forms with the Department of Labor and the Department of Revenue in order to maintain its liquor license. (Appeal Nunc Pro Tunc).

On May 23, 2007 Licensee's president made Penn Stroud Hotel, Inc. its attorney-in-fact relative to Restaurant Liquor License No. R-21217. (Appeal Nunc Pro Tunc). After extensive remodeling, Penn Stroud Hotel, Inc. opened the premises as a diner without a liquor license in June of 2007. (Appeal Nunc Pro Tunc). Penn Stroud Hotel, Inc. paid Licensee's accountant to file the necessary reports so it would be in a position to pay the Department of Labor and Department of Revenue and have the license remain active. (Appeal Nunc Pro Tunc). Penn Stroud Hotel, Inc. claims it then became aware that there were outstanding citations, and that Licensee failed to pay the fine which resulted in the revocation of the subject. (Appeal 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 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 Licensee or Penn Stroud Hotel, Inc. did not adequately satisfy the first factor of the Cook criteria; that its failure to file a timely appeal was caused by extraordinary circumstances involving a breakdown in the Board's operation, or a non-negligent failure on the part of licensee, or its representatives to file a timely appeal.

Licensee admitted the violation on June 21, 2006, and executed a waiver agreeing to have a penalty imposed, but failed to pay the fine. The ALJ's Adjudication and Order, the Opinion and Order Upon Licensee's Failure to Pay a Fine, and Supplemental Opinion and Order were mailed to Licensee's business address of record. Penn Stroud Hotel, Inc. gained

possession of the premises on October 10, 2006, which was after the Opinion and Order Upon Licensee's failure to pay the fine was issued, but before the Supplemental Order was issued.

Penn Stroud Hotel, Inc. cannot be relieved of its obligation to diligently monitor the status of the license in its possession. Whether or not Penn Stroud Hotel, Inc. received Licensee's mail at its business address, it was not diligent, and was therefore negligent, in failing to appeal the ALJ's Supplemental Order within the thirty (30)-day appeal period, which expired on March 1, 2007. The May 23, 2007 document making Penn Stroud Hotel, Inc. Licensee's attorney-in-fact provided Penn Stroud Hotel, Inc. no more rights than Licensee had before the agreement.

Since Penn Stroud Hotel, Inc. as Licensee's attorney-in-fact, has failed to show that its failure to file a timely appeal was caused by extraordinary circumstances involving a breakdown in the Board's operation, or a non-negligent failure on its part or on the part of Licensee, the Board finds that it has failed to meet the first factor of the Cook criteria.

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 filed its appeal to the ALJ's Supplemental Order on September 28, 2007, two hundred eighty-three (283) days after receiving notice on December 19, 2006 that the license was subject to Citation No. 06-0793X. Since the appeal in question was not filed within a short time after Penn Stroud Hotel, Inc. learned of the Supplemental Order of the ALJ, the Board does not accept the time period as sufficient to meet the second factor of the Cook criteria.

The Board also finds that Penn Stroud Hotel, Inc. 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 Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was January 19, 2007. The appeal was filed on or about September 28, 2007. Accordingly, Licensee's appeal was two hundred fifty-two (252) days late. As the time period which elapsed between issuance of the December 19, 2006 Supplemental Order and the September 28, 2007 appeal submitted to the Board 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 Penn Stroud Hotel, Inc's appeal nunc pro tunc, the Board finds that Penn Stroud Hotel, Inc. has met the final factor of the Cook criteria.

The circumstances set forth by the parties as to the late filing of this 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-21217 remains revoked as of January 29, 2007.

Board Secretary