

Mailing Date: November 16, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-0988
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

LA TIERRA DE CARIBE, INC. : License No. R-7472
119 East Tioga Street :
Philadelphia, PA 19134-1040 :

Counsel for Licensee: John J. McCreesh, IV, Esquire
McCREESH McCREESH McCREESH &
CANNON
7053 Terminal Square
Upper Darby, PA 19082

Counsel for Bureau: Erik S. Shmukler, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

AMENDED OPINION

La Tierra De Caribe, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), wherein the ALJ revoked the license and assessed one (1) point against the record of Licensee.

The citation charged that, on March 13, 2006, Licensee, by its servants, agents or employees violated sections 15.62(a) of the Liquor Control Board's ("Board") Regulations, [40 Pa. Code § 15.62(a)], by failing to post in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from the outside of the premises, a Notice of Suspension.

A review of the record reveals that Licensee was represented by counsel at a hearing held before the ALJ on January 25, 2007, at which Licensee's counsel stipulated to the facts presented in the Pre-hearing Memorandum of the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"). (N.T. 4; Ex. B-3).¹ On May 15, 2007, the ALJ issued an Adjudication and Order, revoking the license, since it had been revoked relative to an Adjudication and Order relative to Citation No. 05-1425.

On August 22, 2007, John McCreesh, Esquire filed an appeal to the Board in the name of Licensee and on behalf of Herb Zayon, as proposed intervenor/appellant, stating that the ALJ's findings of fact were not supported by substantial evidence.

¹ The Bureau's Pre-Hearing Memorandum had as an attachment Licensee's prior citation record referencing Citation Nos. 05-0691 and 05-1425. The citation history relative to Citation No. 05-1425 included only the fine and points assessed, with no reference to the issuance of the Supplemental Order issued May 8, 2006, and the Second Supplemental Order issued July 20, 2006, which revoked the subject license effective August 21, 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 the ALJ committed an error of law or abused his/her discretion, or if his/her 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 May 15, 2007 Adjudication was June 14, 2007. (Admin. Notice). Accordingly, Licensee's appeal was more than sixty-nine (69) days late. (Admin. Notice).

Mr. Zayon, acting on behalf of Licensee, is seeking to have appeal allowed nunc pro tunc.

The appellate courts in Pennsylvania have held that a 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 on the part 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).

Licensee, in its combined Petition For Leave To Intervene and Petition For Leave To Appeal Nunc Pro Tunc, asserts that on August 14, 2002, Licensee, through its officer, accepted a loan from Mr. Zayon and executed a judgment note in Mr. Zayon's favor. (Appeal Petition; Ex. A). The judgment note was executed to secure the repayment of the principle sum of sixty-two thousand dollars (\$62,000.00) due Mr. Zayon. (Appeal Ex. A). At the time Mr. Zayon made the loan to Licensee, its restaurant liquor license was presented to Mr. Zayon as collateral for repayment of the loan. (Appeal Petition). Upon learning that the license was subject to Citation No. 05-1425, and that the ALJ had ordered revocation of the license, Mr. Zayon sought to file a request for leave to appeal nunc pro tunc. (Appeal Petition).

After reviewing the record in this matter, the Board recognizes Herb Zayon as a legitimate intervenor. However, the Board finds that Licensee has

failed to adequately satisfy the first factor of the Cook criteria. Specifically, Herb Zayon, in exercising his authority on Licensee's behalf, offers only that he, as judgment creditor should be permitted to intervene in this action pursuant to Pa. R.C.P. 2327(2) and (4). Licensee's attorney provided no reason for its failure to file a timely appeal. Rather, in its August 22, 2007 appeal Licensee avers that "Petitioner has just learned that Restaurant Liquor License R-7472...was revoked...". Licensee offers no explanation for why it believes its failure to act for more than three (3) months after the effective date of the ALJ's Opinion and Adjudication of May 5, 2007, constitutes non-negligence on its behalf.

The Board takes judicial notice of the fact that not only was Licensee represented by Attorney John McCreesh, IV at the hearing on January 25, 2007, but review of the Office of the Administrative Law Judge records further reveals that a copy of the Adjudication and Order, revoking the license, was sent to Attorney John McCreesh, IV on the mailing date of May 15, 2007. (Judicial Notice).

Licensee offers no specific facts as to why it failed to file an appeal within the time frame set forth in section 471 of the Liquor Code [47 P.S. § 4-471].

Licensee also failed to meet the second criteria set forth in Cook, supra, which examines whether or not the remedial filing was attempted within a short time after the appellant has the opportunity to address it. In Cook, the appellant filed his appeal three (3) days after he was released from the hospital, and four (4) days after the expiration of the appeal period. Clearly, whatever extraordinary circumstance is alleged as the reason for the late filing of an appeal (i.e., fraud, breakdown of the court's operation through default of its officers, or non-negligent conduct on the part of appellant, appellant's attorney, or the attorney's staff), the petition to file the appeal nunc pro tunc must be filed within a reasonable time after the occurrence of the extraordinary circumstance. Cook, 671 A.2d at 1132.

In Bass v. Commonwealth Bureau of Corrections, et al., 401 A.2d 1133, 1135 (1979), the Supreme Court stated that, "[w]ithout doubt the passage of any but the briefest period of time during which an appeal is not timely filed would make it most difficult to arrive at a conclusion that the failure to file was non-negligent."

In the matter before the Board, the nunc pro tunc appeal was filed by Licensee more than three (3) months after issuance of the ALJ's Adjudication and Order. Licensee's counsel is tasked with notice of the underlying

adjudication when said correspondence is mailed to his address of record and not returned undelivered by the United States Post Office. Moss v. Unemployment Compensation Bd. of Review, 557 A.2d 839 (Pa. Cmwlth. 1989).

Under the circumstances, the Board is without authority to entertain Licensee's appeal, as it was untimely filed. Therefore, the appeal is dismissed.

AMENDED ORDER

The Petition of Herb Zayon for Leave to Intervene is granted.

The decision of the ALJ is affirmed.

The appeal is dismissed.

It is hereby ordered that Restaurant Liquor License No. R-7472 remains revoked as of Monday, May 15, 2006.

Licensee must adhere to all other terms and conditions of the ALJ's Order dated May 15, 2007.

Board Secretary