

Mailing Date: September 5, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1096X
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

NORTHAMPTON ALEHOUSE : License No. R-8462
INVESTORS, INC. :
475 East Northampton Street :
Wilkes-Barre, PA 18702-6325 :

Counsel for Licensee: Michael McLaughlin, President

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

OPINION

Northampton Alehouse Investors, Inc. ("Licensee") appealed from the Second Supplemental Order of Administrative Law Judge Daniel T. Flaherty ("ALJ"), wherein the ALJ revoked the license.

The citation charged that Licensee, by its servants, agents or employees, violated section 493(26) of the Liquor Code [47 P.S. § 4-493(26)] by issuing checks or drafts dated January 13, 2006, 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.

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).

A review of the record in this matter reveals that Licensee failed to attend a hearing held before the ALJ on August 10, 2006. (Admin. Notice). Thereafter, on October 11, 2006, the ALJ mailed an Adjudication and Order, sustaining the citation and imposing a one hundred fifty dollar (\$150.00) fine, to be paid within twenty (20) days. (Admin. Notice).

On November 28, 2006, the fine having not been paid, the ALJ mailed a Supplemental Order imposing a one (1)-day suspension, beginning

on January 8, 2007, ending on January 9, 2007, and continuing thereafter until the fine was paid. (Admin. Notice). The Supplemental Order further stated that, in the event the fine was not paid within sixty (60) days from the mailing date of November 28, 2006, the suspension would be reevaluated, and revocation of the license would be considered. (Admin. Notice).

On February 20, 2007, the ALJ mailed a Second Supplemental Order acknowledging that Licensee failed to pay the one hundred fifty dollar (\$150.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the licensee effective February 20, 2007. (Admin. Notice).

On May 21, 2007, Licensee submitted a money order for payment of the fine imposed. (Admin. Notice).

On July 12, 2007, Licensee filed an appeal from the ALJ's Second Supplemental Order, which provided the reasons for the delay. According to the appeal, Licensee's sole corporate principal and shareholder, Michael McLaughlin, took a job in Houston, Texas in December of 2006. He closed the licensed premises in January of 2007. Mr. McLaughlin stated that, during the hectic process of relocating from Pennsylvania to Texas, he overlooked paying the one hundred and fifty dollar (\$150.00) fine. Licensee now wishes to sell its license.

Licensee did not place the license into safekeeping with the Board. (Admin. Notice).

Section 471 of the Liquor Code expressly provides that appeals to the Board from a decision of the ALJ must be filed within thirty (30) days of the mailing date of the ALJ's decision. [47 P.S. § 4-471]. The filing deadline for this appeal from the ALJ's Adjudication and Order, pursuant to section 471, was March 22, 2007. Accordingly, Licensee's appeal was one hundred twelve (112) days late.

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 Dept. 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 has failed to adequately satisfy the first factor of the Cook criteria. Specifically, Licensee has failed to establish that its failure to file a timely appeal was caused by non-negligent circumstances.

On appeal, Licensee did not set forth any circumstances surrounding the lateness of this appeal which suggest fraud or a breakdown in the operation of the administrative process, nor did Licensee allege that the appeal was late because of non-negligent conduct by it or its attorney. Licensee fails to adequately address why it failed to respond to the ALJ's Supplemental Order and Second Supplemental Order issued in response to his failure to pay the fine set forth in the Order mailed October 11, 2006.

Licensee asserts that its operation was closed in January of 2007. The Board's records are devoid of any evidence to show that Licensee took steps to place the subject license into safekeeping during the period in which the business was closed, nor is there any evidence to establish that Licensee sought to have its business mail forwarded to a secure address, or monitored by a responsible party.

Licensee was aware, despite Mr. McLaughlin's failure to attend the hearing on August 10, 2006, that a fine was imposed as a penalty. It cannot

be overlooked that Mr. McLaughlin did not move to Texas until January of 2007, the same period of time in which the suspension was to begin pursuant to the ALJ's Supplemental Order, and during which Licensee still had time (until January 27, 2007) in which to pay the fine.

Mr. McLaughlin's decision to relocate his family and sell the licensed business are not the key factors to be considered in applying the Cook criteria. Rather, a review of the totality of Mr. McLaughlin's actions and inaction during the period prior to relocation are determinative of the circumstances that caused the untimeliness of Licensee's appeal request.

In Criss v. Wise, 781 A.2d 1156, 1160 (Pa. 2001), the Supreme Court stated that the exception for allowance of an appeal nunc pro tunc in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant has clearly established that it attempted to file an appeal, but unforeseeable and unavoidable events precluded it from actually doing so.

There is no evidence in the instant matter which suggests that the Licensee attempted to file a timely appeal. In fact, the appeal itself clearly states that it was not until after Licensee reached an agreement to sell the licensed premises that it made any attempt to pay the fine.

License has also failed to meet the second and third 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, etc.), 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 (Pa. 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 and one-half (3½) months after issuance of the ALJ's Second Supplemental Order. Licensee is tasked with notice of the

underlying adjudication when said correspondence is mailed to the 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).

Relative to the fourth Cook factor, the Board sees no harm to the Pennsylvania State Police, Bureau of Liquor Control Enforcement, whether or not this appeal is granted nunc pro tunc. Nonetheless, Licensee failed to establish that its circumstances met the previously aforementioned Cook criteria.

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

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-8462 remains revoked as of February 20, 2007.

Licensee must adhere to all conditions set forth in the ALJ's Second Supplemental Order dated February 7, 2007.

Board Secretary