

Mailing Date: August 7, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1216
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

PAXSON ENTERTAINMENT, : License No. R- 4968
INC. :
t/a Paxson Entertainment :
315 Lehigh Avenue :
Palmerton, PA 18071-1809 :

Counsel for Licensee: Ex-Parte (before the ALJ)

Steven J. Hartz, Esquire (on appeal)
P.O. Box 22
Palmerton, PA 18071-0022

Counsel for Bureau: Craig A. Strong, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
7448 Industrial Parkway
Macungie, PA 18062

OPINION

Paxson Entertainment, Inc. t/a Paxson Entertainment (“Licensee”)
appealed from the Supplemental Opinion and Order of Administrative Law
Judge Felix Thau (“ALJ”), wherein the ALJ revoked the license.

The first count of the citation charged that, on October 18, November 19, 26 and December 30, 2005, Licensee, by its servants, agents or employees, violated section 471 of the Liquor Code [47 P.S. § 4-471] by operating in a noisy and/or disorderly manner.

The second count of the citation charged that, on February 11, 12, 19 and March 26, 2006, Licensee, by its servants, agents or employees, violated section 499(a) of the Liquor Code [47 P.S. § 4-499(a)] by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half (1/2) hour after the required time for the cessation of the service of alcoholic beverages.

A review of the record in this matter reveals that Licensee failed to attend a hearing held before the ALJ on December 15, 2006.

On February 6, 2007, the ALJ mailed an Adjudication and Order, sustaining the second count of the citation and imposing a one thousand dollar (\$1,000.00) fine,¹ to be paid within twenty (20) days of the mailing date of the Order (Admin. Notice).

On March 21, 2007, the fine having not been paid, the ALJ mailed an Opinion and Order Upon Licensee's Failure To Pay a Fine imposing a one (1)

¹ The ALJ dismissed the first count of the citation. (Admin. Notice).

days suspension.² (Admin. Notice). The Order further states that, in the event the fine was not paid within sixty (60) days from the mailing date of March 21, 2007, the one (1)-day suspension would be reevaluated, and revocation of the license would be considered. (Admin. Notice).

On June 8, 2007, the ALJ mailed a Supplemental Opinion and Order acknowledging that Licensee has failed to pay the one thousand dollar (\$1,000.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective July 30, 2007. (Admin. Notice).

On June 19, 2008, Steven J. Hartz filed an appeal nunc pro tunc on behalf of David Pereira, a secured creditor (“Secured Party”), pursuant to a Limited Power of Attorney executed by Licensee. (Admin. Notice).

On appeal, Attorney Hartz contends that Licensee has moved from the Commonwealth, and the Secured Party has been unable to ascertain its present whereabouts. The Secured Party also contends that Licensee defaulted on its loan in an amount in excess of one hundred twenty-one thousand dollars (\$121,000.00). Secured Party’s counsel further asserts that he became aware of the citation and subsequent revocation of the license on June 16, 2008, when its counsel attempted to obtain tax clearance

² The suspension period was deferred pending renewal of Licensee’s license, at which time the suspension period would be fixed by further order.

information on the subject licensee from the Department of Revenue while preparing an application to transfer the subject license. The Secured Party finally avers that he stands able and willing to pay all outstanding fines, penalties and costs in connection with the subject citation.

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 Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was July 8, 2007. Accordingly, this appeal was nearly one (1) year 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 on 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 1130, 1131 (Pa. 1996).

The Board finds that the Secured Party failed to adequately satisfy the first factor of the Cook criteria. Specifically, he has not set forth circumstances surrounding the lateness of this appeal which suggest fraud or breakdown in the operation of the OALJ, nor has it alleged that the appeal was late because of non-negligent conduct by Licensee or its attorney. The appeal provides that Licensee has moved from the Commonwealth, that the Secured Party has been unable to ascertain its whereabouts, and that the Secured Party became aware of the citation and subsequent revocation on June 16, 2008, when its counsel attempted to obtain tax clearance information while preparing an application to transfer the subject license.

The license expired on August 31, 2006, and Secured Party failed to determine the status of the license until twenty-two (22) months later. The Secured Party offers no specific facts as to exactly how, when and under what circumstances he became aware of the circumstances concerning Licensee's absence from the licensed premises. The Secured Party does not state what, if any, formal steps were taken to effectuate his security interest in the subject license. The Secured Party provides no explanation for why he believes a failure to act for almost an entire year after the effective date of the ALJ's June 4, 2007 revocation Order constitutes non-negligence on his or anyone else's behalf.

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. Cook, 671 A.2d at 1132.

There is no evidence in the instant matter which suggests that Licensee attempted to file a timely appeal. In fact, the appeal itself clearly states that it was not until after the Secured Party took steps toward the transfer of the

license that he made any attempt to contact the Office of Administrative Law Judge.

The Secured Party 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, and whether the time period was of very short duration.

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, while the appeal was filed within a few days of the Secured Party learning of the revocation of the subject license, the nunc pro tunc appeal was filed almost one (1) year after issuance of the ALJ's Supplemental Opinion and Order.

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 all of the Cook criteria.

Under the circumstances, the Board is without authority to entertain the Secured Party's appeal, as it was untimely filed. The appeal, therefore, 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 R-4968 remains revoked as of July 30, 2007.

Licensee must adhere to all other terms and conditions of the ALJ's Order dated June 4, 2007.

Board Secretary