

Mailing Date: July 23, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1581  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

1520 ARROTT STREET, INC. : License No. R-92  
1520-22 Arrott Street :  
Philadelphia, PA 19124-5810 :

Counsel for Licensee: Weymouth Lewis, Pro Se – Before the ALJ

William T. Lawson III, Esquire – On Appeal  
1420 Walnut Street, Suite 1000  
Philadelphia, PA 19102-4015

Counsel for Bureau: Erik S. Shmukler, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
6901 Woodland Avenue, Third Floor  
Philadelphia, PA 19142

OPINION

1520 Arrott Street, Inc. (“Licensee”) appealed from the Second Supplemental Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ revoked the license.

The first count of the citation charged that, on May 30, 2006, Licensee violated section 102 of the Liquor Code [47 P.S. § 1-102)] on the basis that the licensed premises was not a bona fide restaurant because there were insufficient food items and eating utensils.

The second count of the citation charged that, on May 30, 2006, Licensee violated section 491(10) of the Liquor Code [47 P.S. § 4-491(10)] by fortifying, adulterating and/or contaminating liquor.

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 hearing was held before the ALJ on April 19, 2007, which hearing was attended by Licensee's president, Weymouth Lewis. (Admin. Notice).

Mr. Lewis stipulated to the facts contained in the Pennsylvania State Police, Bureau of Liquor Control Enforcement's ("Bureau") Pre-Hearing Memorandum. (N.T. 4-5; Ex. B-3). At the conclusion of the hearing, the ALJ stated on the record that he will "issue [his] decision in this matter after the record is transcribed. There's nothing for you to do until you receive that in the mail from us. It will be sent to the licensed premises." (N.T. 8).

On July 19, 2007, the ALJ issued an Adjudication and Order sustaining both counts of the citation and imposing a three hundred dollar (\$300.00) fine, to be paid within twenty (20) days. (Admin. Notice).

On August 30, 2007, the fine having not been paid, the ALJ issued a Supplemental Order, suspending the license indefinitely for at least one (1) day, noting however that the suspension period would be deferred pending renewal of Licensee's license. (Admin. Notice). The Supplemental Order further stated, in bold print:

**this order does not excuse the Licensee from the duty to pay the fine immediately. I will review this matter again after sixty (60) days from the mailing date of this order, and I will impose further sanctions, which may include revocation of the license, if the fine remains unpaid at that time. Jurisdiction is retained.**

(Admin. Notice).

On December 18, 2007, the fine having not been paid, the ALJ issued a Second Supplemental Order acknowledging that the license expired on October 31, 2006. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective January 28, 2008. (Admin. Notice). The Order further stated, "I will reconsider this order if full payment of the fine of \$300.00 is received . . . prior to the effective date of revocation." (Admin. Notice).

On May 15, 2008, Licensee faxed a letter to the Board acknowledging that, while attempting to obtain information on renewing the subject license, it became aware that its liquor license had been revoked. (Admin. Notice). On May 23, 2008, Licensee paid the fine of three hundred dollars (\$300.00) to the Office of Administrative Law Judge ("OALJ"). (Admin. Notice). On or about June 4, 2008, Licensee, through its counsel, sought consideration of allowance of an appeal nunc pro tunc, seeking only to appeal the revocation of the license. (Admin. Notice). Licensee's counsel avers that, on or about May 9, 2008, Licensee learned of the revocation.

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 Second Supplemental Order, pursuant to section 471, was January 17, 2008. Accordingly, Licensee's appeal was one hundred twenty-one (121) 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); J.C. v. Pennsylvania Dept. of Public Welfare, 720 A.2d 193 (Pa. Cmwlth. 1998).

The Board finds that Licensee has failed to adequately satisfy the first factor of the Cook criteria. Licensee 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.

Licensee contends that the licensed premises was not in active operation during the period in which the ALJ's orders were issued, as there had been a serious shooting incident outside of the licensed premises. As a result of the shooting, and the fact that the premises was not in active operation, Licensee believes that mail service to the licensed premises was sporadic at best. Licensee further suggests that, although it has no information as to how the notices were sent out by the OALJ, it had no notice of the fine until it sought to renew the license, at which time it was informed that it had been revoked.

While Licensee has attempted to bolster the circumstances surrounding the lateness of its appeal so as to suggest fraud or breakdown in the operation of the OALJ, the Board cannot accept such an argument. A review of the OALJ records reveal that the July 19, 2007 Adjudication and Order, and the August 30, 2007 Supplemental Opinion were sent by first class and certified mail to the licensed premises. (Admin. Notice). The OALJ has no certified mail return receipt card or return envelop to establish receipt of either document. (Admin. Notice). The record further reveals that the Second Supplemental Order issued December 18, 2007 was sent to the licensed premises by first class mail and certified mail, return receipt requested. (Admin. Notice). The first class mailing was never returned to

the OALJ. (Admin. Notice). The certified mailing was returned to the OALJ marked, "vacant." (Admin. Notice). Thereafter, on or about January 2, 2008, the OALJ resent the Second Supplemental Order by first class mail and certified mail, return receipt to 1984 Sterling Street, Philadelphia, Pennsylvania 19138, the address listed for Mr. Lewis. (Admin. Notice). The OALJ records indicate that the first class mailing was not returned, while the certified mailing was returned and marked, "unclaimed." (Admin. Notice).

Although there is insufficient evidence to establish that Licensee received notice of the original Adjudication and Order, and the Supplemental Order, there is sufficient evidence to establish that Licensee's corporate president was sent notice of the Second Supplemental Order at his home address, that he failed to claim the certified mailing of the same, and that had he claimed the document in a timely manner, he would have had ample time to pay the outstanding fine prior to January 28, 2008, the effective date of revocation.

Licensee's counsel offered a short narrative of events taking place during the period relevant to the citation history, emphasizing that, during that period, Licensee's mail was sporadic at the closed premises. Licensee has

failed in its attempt to establish that it was non-negligent in not receiving notice of the Supplemental Orders. Licensee's ability to act in a timely manner clearly arose as a result of Licensee's negligence in not responding to the first class mailings or to the notice of a certified document which was sent to the corporate president's home address, after he was aware that a penalty would be imposed, and that the ALJ's Order would be sent to Licensee's establishment.

In Criss v. Wise, 781 A.2d 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 he attempted to file an appeal, but unforeseeable and unavoidable events precluded him from actually doing so. See Cook, 671 A.2d at 1132. Unfortunately, the circumstances raised by Licensee as to the late filing of its appeal do not rise to the level of non-negligent circumstances as described in the Cook case, nor do the circumstances described fall within the excusable circumstances involving non-negligent conduct of Licensee's attorney or his/her staff.

Relative to the second and third Cook factors, the appeal was filed more than nine (9) months after the ALJ issued its original Adjudication and

Order, despite having attended the hearing before the ALJ and being made aware that an opinion would be mailed to the licensed premises thereafter. The first class mailings of the Adjudication and Order and Supplemental Orders were not returned to the OALJ. The Second Supplemental Order was presumably in Licensee's hands by early January of 2008. Licensee claims, however, not to have been aware of the ALJ's decisions until May 9, 2008, and that it appealed on the next business day, May 12, 2008. The Board received Licensee's initial letter, however, on May 15, 2008. As insufficient facts were provided relative to why Licensee's appeal was delayed, the Board is unable to determine whether the appeal is filed within a short time after Licensee learned of and had the opportunity to address the untimeliness, or whether the time period was of very short duration. Based upon the record, however, the Board is inclined to find that Licensee has failed to meet the second and third Cook factors.

Relative to the final factor of the Cook criteria, while the Bureau has asked that this appeal be dismissed, it has not claimed prejudice by the delay in filing of this appeal. The Board sees no harm to the Bureau, whether or not this appeal is granted nunc pro tunc.

Based upon the foregoing, the appeal of Licensee is dismissed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed as untimely filed.

Licensee has paid the fine in the amount of three hundred dollars (\$300.00).

It is hereby ordered that Licensee's Restaurant Liquor License No. R-92 remains revoked as of January 28, 2008.

Licensee must adhere to all conditions set forth in the ALJ's Orders in this matter.

---

Board Secretary