

Mailing Date: March 19, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1600
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

ESTATE OF J. OTTO TORNVALL : License No. R-3683
KEVIN NEALON, EXECUTOR :
t/a Silhouette Lounge :
523 Linden Street :
Scranton, PA 18503-1605 :

Counsel for Licensee: Gregory J. Pascale, Jr., Esquire
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Pennsylvania State Police,
Bureau of Liquor Control Enforcement
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OPINION

523 Linden Tavern, Inc.¹ appealed from the Supplemental Opinion and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the

¹ 523 Linden Tavern, Inc. claims that by Bill of Sale dated September 13, 2006, Mr. Nealon, executor of the estate that holds the liquor license, sold all the rights to the liquor license to 523 Linden Tavern, Inc.

ALJ sustained the citation and revoked the license held by Estate of J. Otto Tornvall, Kevin Nealon, Executor t/a Silhouette Lounge (“Licensee”).

The citation charged that, on June 5, 2006, Licensee, by its servants, agents or employees, violated section 15.62(a) of the Pennsylvania Liquor Control 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.

In response to the citation, Licensee failed to attend a hearing held before the ALJ on December 14, 2006.

On January 30, 2007, the ALJ mailed his Adjudication and Order sustaining the citation and imposing a five hundred dollar (\$500.00) fine. (Admin. Notice).

On March 21, 2007, the fine having not been paid, the ALJ mailed an Opinion and Order Upon Failure to Pay Fine imposing a one (1)-day suspension to continue thereafter until the fine was paid. (Admin. Notice). The Order further stated that, if the fine remained unpaid sixty (60) days from the mailing date of March 21, 2007, the 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 the sixty (60)-day period had elapsed, and that Licensee failed to pay the five hundred dollar (\$500.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective July 30, 2007. (Admin. Notice).

On September 25, 2007, the fine was paid and a request was made to the ALJ to have the revocation rescinded, pending transfer of the license. (Admin. Notice). On January 17, 2008, an appeal to the Board was filed by 523 Linden Tavern, Inc. (Admin. Notice).

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. (Admin. Notice). Accordingly, the instant appeal was more than six (6) months late. (Admin. Notice).

In this appeal, counsel for 523 Linden Tavern, Inc. avers that, Mr. Nealon, Licensee's Executor, was incarcerated and did not get notice of the hearing before the ALJ. (523 Linden Tavern, Inc.'s Appeal). Counsel for 523 Linden Tavern further advises that the fine was not paid in a timely manner, as neither party received notice of the hearing adjudication. (523 Linden Tavern, Inc.'s Appeal).

By Bill of Sale dated September 13, 2006, on behalf of Licensee, Mr. Nealon sold all the rights to the liquor license to 523 Linden Tavern, Inc., which has been actively working to clear the Department of Revenue tax liens on the property for the past year. (523 Linden Tavern, Inc.'s Appeal). It was not until after 523 Linden Tavern, Inc. obtained the tax clearance that it discovered that the license was revoked by Order of June 4, 2007, effective July 30, 2007. (523 Linden Tavern, Inc.'s Appeal). 523 Linden Tavern, Inc. further asserts that it never received the prior notice of the citation or the

Adjudication and Order. (523 Linden Tavern, Inc.'s Appeal). As soon as 523 Linden Tavern, Inc. discovered this fact, the fine was paid. (523 Linden Tavern, Inc.'s Appeal). 523 Linden Tavern, Inc. is now asking that the revocation be set aside in order that the transfer can be completed, in order to avoid irreparable harm to 523 Linden Tavern, Inc. (523 Linden Tavern, Inc.'s Appeal).

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).

After reviewing the record in this matter, the Board recognizes 523 Linden Tavern, Inc. as a legitimate intervener. However, the Board finds that 523 Linden Tavern, Inc. failed to adequately satisfy the first factor of the Cook criteria.

523 Linden Tavern, Inc. 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. 523 Linden Tavern, Inc., in exercising its authority on Licensee's behalf, offers only that Licensee is incarcerated and therefore, did not get notice of the hearing or the adjudication. 523 Linden Tavern, Inc. provided no explanation for why Licensee did not appoint a responsible party to act on his behalf regarding his licensed business during Mr. Nealon's incarceration. Nor did 523 Linden Tavern, Inc. offer any explanation for why it did not contact the ALJ or the Board to determine the status of the license it was attempting to transfer. 523 Linden Tavern, Inc. offers no explanation for how its failure to act for more than six (6) months after the effective date of the ALJ's Supplemental Opinion and Order, constitutes non-negligence on its behalf. 523 Linden Tavern, Inc. offers no specific facts as to exactly how and when or under what circumstances it became aware of the Supplemental Orders that were issued on March 21, 2007 and June 8, 2007. Unfortunately, 523 Linden Tavern, Inc. has failed to provide any explanation sufficient to rise to the level of non-negligent circumstances as described in the Cook case.

Relative to the second and third Cook factors, the appeal was filed within six (6) months of the time it was due; however, because insufficient facts were provided relative to why 523 Linden Tavern, Inc.'s appeal was untimely, the Board is unable to determine whether the appeal is filed within a short time after Licensee, Mr. Nealon or 523 Linden Tavern, Inc. learned of and had the opportunity to address the untimeliness, or whether the time period was of very short duration.

Relative to the final factor of the Cook criteria, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") 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. Nonetheless, 523 Linden Tavern, Inc. failed to establish that the circumstances met the previously aforementioned Cook criteria.

Under the circumstances, the Board is without authority to entertain 523 Linden Tavern, Inc.'s appeal, as it was untimely filed. The appeal, therefore, is dismissed.

ORDER

The decision of the ALJ is affirmed.

The appeal of 523 Linden Tavern, Inc. is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-3683 remains revoked as of July 30, 2007.

Licensee must adhere to all conditions set forth in the ALJ's Supplemental Opinion and Order issued June 8, 2007.

Board Secretary