

Mailing Date: April 2, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-1649
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

JR ENTERTAINMENT, LLC : License No. R-1203
t/a Felton Supper Club :
4800 Rising Sun Avenue :
P.O. Box 24518 :
Philadelphia, PA 19140-6665 :

Counsel for Licensee: Barry Goldstein, Esquire
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Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

OPINION

JR Entertainment, LLC t/a Felton Supper Club (“Licensee”) appealed from the Second Supplemental Order of Administrative Law Judge Tania E. Wright (“ALJ”), wherein the ALJ revoked the license.

The citation charged that, on March 3, 4 and April 1, 2006, Licensee, by its servants, agents or employees, violated section 5.32(a) of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 5.32(a)], by using or permitting to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside.

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 her discretion, or if 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).

A review of the record in this matter reveals that the Hearing Notice was sent to Licensee via P.O. Box 46665. (Admin. Notice). It was returned marked "return to sender, unable to forward." (Admin. Notice). Licensee

failed to attend a hearing held before the ALJ on December 21, 2006. (Admin. Notice).

On July 26, 2007, the ALJ mailed her Adjudication and Order sustaining the citation and imposing a four hundred dollar (\$400.00) fine to be paid within twenty (20) days. (Admin. Notice). The Order provided that, in the event the fine was not paid within that timeframe, the license would be suspended or revoked. (Admin. Notice). The Adjudication and Order was sent to Licensee via P.O. Box 46665. (Admin. Notice). It was returned marked "return to sender, not deliverable as addressed, unable to forward." (Admin. Notice).

On September 21, 2007, the fine having not been paid, the ALJ mailed a Supplemental Order imposing a one (1)-day license suspension, to begin on October 15, 2007, and to continue thereafter until the fine was paid. (Admin. Notice). The Order further stated that, in the event the fine was not paid within sixty (60) days from the mailing date of September 21, 2007, the suspension would be reevaluated, and revocation of the license would be considered. (Admin. Notice). The Supplemental Order was sent to Licensee via P.O. Box 46665. (Admin. Notice). It was returned marked "unclaimed." (Admin. Notice).

On December 11, 2007, the ALJ mailed a Second Supplemental Order noting that the sixty (60)-day period had elapsed, and that Licensee had failed to pay the four hundred dollar (\$400.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective January 7, 2008. (Admin. Notice). The Second Supplemental Order was sent to Licensee via P.O. Box 46665. (Admin. Notice). It was returned marked "return to sender, unable to forward." (Admin. Notice). It was, however, remailed on December 26, 2007 to P.O. Box 24518, but was returned "unclaimed." (Admin. Notice).

The Board's Bureau of Licensing lists Licensee's address as P.O. Box 24518. (Admin. Notice)

Section 17.21(c) of the Board's Regulations [40 Pa. Code § 17.21(c)] sets forth that appeals from decision of the ALJ shall be filed or postmarked within thirty (30) calendar days of the mailing date of the adjudication of the ALJ. Licensee had up to thirty (30) days after issuance of the December 11, 2007 Second Supplemental Order to file a timely appeal with the Board. Licensee's appeal was filed February 4, 2008, which is

twenty-five (25) days late. Since Licensee's appeal consists of a Petition For Allowance Of Appeal Nunc Pro Tunc, it will be considered on that basis.¹

The Pennsylvania Supreme Court has stated that “[w]here an appeal is not timely because of non-negligent circumstances, either as they relate to appellant or his counsel, and the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, and the time period which elapses is of very short duration, and appellee is not prejudiced by the delay, the court may allow an appeal nunc pro tunc.” Cook v. Unemployment Compensation Bd. of Review, 671 A.2d 1130, 1141 (1996).

Licensee, citing Cook and Bass v. Commonwealth of Pennsylvania, 401 A.2d 1133 (Pa. 1970), contends that since the OALJ sent all notices prior to December 27, 2007 to an incorrect address, it has established the non-negligent circumstances which constitute the first Cook factor. Specifically, Licensee avers that it never received the Notice of Investigation, the Citation, the Pre-hearing Memorandum, Hearing Notice, the original Adjudication and Order imposing the four hundred dollar (\$400.00) fine, nor the

¹The docket of the Office of the Administrative Law Judge (“OALJ”) reveals that Check No. 5420 in the amount of four hundred (\$400.00) dollars was received by the Office of Administrative Law Judge (“OALJ”) on January 28, 2008.

Supplemental Order because they were mailed to P.O. Box 46665, which is incorrect. The correct post office box number is P.O. Box 24518, which is the one recognized and used by the Board's Bureau of Licensing. (Admin. Notice). Licensee's appeal further avers that P.O. Box 24518 has been Licensee's post office box number for over two (2) years. Based upon the foregoing, the Board concludes that Licensee has met the first Cook factor.

Relative to the second and third Cook factors, Licensee's appeal to the ALJ's Second Supplemental Order was filed twenty-five (25) days after it was due. The Second Supplemental Order was re-sent to the correct address on December 26, 2007. It was returned "unclaimed," and Licensee avers that it did not receive actual notice until January 22, 2008; the fine was paid six (6) days later, and the instant appeal was filed thirteen (13) days later. The Board concludes, therefore, that Licensee's Petition For Allowance of Appeal Nunc Pro Tunc was filed within a short time after it learned of and had an opportunity to address the untimeliness of the appeal, and the time period which elapsed was of very short duration, thereby satisfying the second and third Cook factors.

As to whether the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") has been prejudiced by the delay, the Bureau has

responded to Licensee's appeal by stating that it does not oppose it, based upon the circumstances outlined in the Petition, and requests that the matter be remanded to the OALJ. Therefore, the fourth factor of the Cook criteria is met.

The Board finds that the circumstances raised by Licensee as to the late filing of its appeal rise to the level of non-negligent circumstances as described in the Cook line of cases. Under such circumstances, Licensee's Appeal Nunc Pro Tunc is granted.

ORDER

The ALJ's Second Supplemental Order is reversed.

The appeal nunc pro tunc of Licensee is granted.

Licensee has paid the fine in the amount of four hundred dollars (\$400.00).

This matter is remanded back to the OALJ for further proceedings consistent with this Opinion.

Board Secretary