

Mailing Date: August 8, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-2252
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

63 CVA, INC. : License No. E-113
2501 North 31st Street :
Philadelphia, PA 19132-2925 :

Counsel for Licensee: John J. McCreesh, III, Esquire
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Upper Darby, PA 19082

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Philadelphia, PA 19142

OPINION

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) appealed from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ dismissed the citation against 63 CVA, Inc. (“Licensee”).

The citation charged that, on August 23, 2006, Licensee, by its servants, agents or employees, violated section 442(a) of the Liquor Code [47 P.S. § 4-442(a)] by selling malt or brewed beverages for consumption off-premises.

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 that 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 this record reveals that the ALJ’s Adjudication and Order was mailed to the parties on May 15, 2007. The Bureau’s appeal was filed with the Board on June 22, 2007, beyond thirty (30) days from the mailing date of the ALJ’s Adjudication and Order. 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 June 14, 2007. The Bureau has requested for this appeal to be allowed *nunc pro tunc*.

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 Department of Public Welfare, 720 A.2d 193 (Pa. Cmwlth. 1998).

Relative to the Cook criteria, the Bureau has not alleged that the appeal was late because of non-negligent conduct. In fact, despite the Bureau's request for two (2) weeks to file a written argument in support of its appeal *nunc pro tunc*, the Bureau's written argument provided no reason for its failure to file the appeal timely.

Relative to the second and third Cook factors, the appeal was filed within three (3) weeks of the time it was due; however, because no facts were provided relative to why the Bureau's appeal was untimely, the Board is unable to determine whether the appeal is filed within a short time after appellant or his counsel learned of and had the opportunity to address the untimeliness, or whether the time period was of very short duration.

Finally, should the Board grant this appeal *nunc pro tunc*, there is potential for Licensee to be prejudiced by the Bureau's untimely filing of its appeal. The Board historically reverses Office of Administrative Law Judge ("OALJ") decisions that dismiss citations for sales of malt or brewed beverages for off-premises consumption based upon the fact that Licensee did not hold a valid off-premises sales permit. Should the Board grant this appeal *nunc pro tunc*, and the facts underlying the citation warrant same, the citation would be reversed, thereby resulting in fines and penalties against Licensee that it would otherwise not have to pay. Therefore, Licensee would be prejudiced by the Board granting this appeal *nunc pro tunc*.

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

ORDER

The decision of the ALJ is affirmed.

The appeal of the Bureau is dismissed.

The Bureau must adhere to all other conditions set forth in the ALJ's
Order dated May 4, 2007.

Board Secretary