

Mailing Date: October 22, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

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| PENNSYLVANIA STATE POLICE, | : | Citation No. 06-2438 |
| BUREAU OF LIQUOR CONTROL | : | |
| ENFORCEMENT | : | |
| | : | |
| vs. | : | |
| | : | |
| NEVE ENTERPRISES, INC., t/a | : | License No. R-15898 |
| Sorrento Pizza | : | |
| 104 ½ N. Market Street | : | |
| Duncannon, PA 17020 | : | |

Counsel for Licensee: Francis X. O'Brien, Esquire
411 Walnut Street
Harrisburg, PA 17110

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OPINION

Neve Enterprises, Inc., t/a Sorrento Pizza ("Licensee"), presently seeks permission to appeal *nunc pro tunc* from the August 6, 2008, Supplemental Order of Administrative Law Judge Daniel T. Flaherty, Jr. ("ALJ"), wherein the ALJ determined that the Licensee had failed to pay the fine imposed at

Citation No. 06-2438 within twenty (20) days of the ALJ's May 29, 2008 Order. Based on the Licensee's failure to pay the \$3,500 fine, the ALJ ordered Licensee's restaurant liquor license be suspended for a period of seven (7) days and continuing thereafter until the fine had been satisfied.

The citation underlying the present matter contained four (4) separate counts. The first count charged Licensee with violating sections 406(a)(3) and 493(16) of the Liquor Code [47 P.S. §§ 4-406(a)(3) and 4-493(16)] in that, on September 10, 2006, Licensee by its servants, agents or employees, sold, furnished and/or gave alcoholic beverages on Sunday between the hours of 2:00 a.m. and 11:00 a.m.

The second count charged Licensee with violating Section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that, on September 10, 2006, Licensee by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated male patron.

The third count charged Licensee with violating Section 499(a) of the Liquor Code [47 P.S. § 4-499(a)] in that on September 10, 2006, Licensee, by its servants, agents or employees, failed to require patrons to vacate the 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.

The fourth count charged Licensee with violating Section 499(a) of the Liquor Code [47 P.S. § 4-499(a)] in that on September 10, 2006, Licensee, by its servants, agents or employees, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages, after 2:30 a.m.

As an initial matter, section 471 of the Liquor Code [47 P.S. § 4-471], requires that any appeal 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/her discretion, or if his/her decision was not based upon substantial evidence. The Commonwealth Court has 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). Additionally, the filing of a timely appeal is a jurisdictional requirement that must be met before any appeal may be considered and appellate bodies do not have the authority to simply

enlarge the time for filing an appeal. Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (2001); Morrisons Cove Home v. Blair County Bd. of Assessment Appeals, 764 A.2d 90 (Pa.Cmwlt. 2000).

A *nunc pro tunc* appeal may be granted only where the moving party can demonstrate that the delay in filing its appeal was caused by *extraordinary circumstances* involving fraud, some breakdown in the administrative process or non-negligent circumstances related to the party or its counsel. Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996); J.C. v. Department of Public Welfare, 720 A.2d 193 (Pa.Cmwlt. 1998); Marconi v. Insurance Department, 641 A.2d 1240 (Pa.Cmwlt. 1994). In order to fully address the issue, it is necessary to review the lengthy procedural history of this matter.

An evidentiary hearing regarding the Licensee's citation was held before the ALJ on March 22, 2007. Subsequent to the hearing, the ALJ issued an Adjudication and Order with a mailing date of May 29, 2008 (hereinafter May 29th Order). This May 29th Order sustained all four (4) counts listed in the Citation and imposed an aggregate fine of \$3,500 to be paid within

twenty (20) days of the mailing date of the Order.¹ The Order specifically advised Licensee that in the event the fine was not paid within twenty (20) days, Licensee's restaurant liquor license would be suspended or revoked.

Licensee ultimately failed to pay the fine within twenty (20) days of the mailing date and on or about August 6, 2008, the ALJ mailed a Supplemental Order (hereinafter August 6th Order). The August 6th Order imposed a seven (7)-day license suspension beginning on September 15, 2008, at 7:00 a.m. and continuing thereafter until the fine was paid. On or about August 22, 2008, Licensee's counsel attempted to file with the ALJ a Motion for Reconsideration of the August 6th Order.² In this attempted filing, counsel averred that the sole reason the fine was not paid was because counsel had neglected to forward the May 29th Order to Licensee.³

On or about September 3, 2008, the ALJ issued its Second Supplemental Order (hereinafter September 3rd Order), dismissing the Licensee's Motion for Reconsideration as untimely. In this Order, the ALJ noted that pursuant to 1 Pa. Code § 35.241, motions for Reconsideration of

¹ The specific penalty was as follows: Count 1- \$1,250 fine and mandatory RAMP training; Count 2- \$1,250 fine; Count 3- \$500 fine; Count 4- \$500 fine.

² It should be noted that not only did the Licensee fail to file a timely Request for Reconsideration, but it also failed to submit the necessary filing fee.

³ This information is contained in the Office of Administrative Law Judge Docket Entries provided with the Certified Record.

agency decisions must be filed within fifteen (15) days of an Adjudication and the ALJ had determined that the present request was filed sixteen (16) days after the Adjudication.

On September 12, 2008, Licensee submitted a check to the ALJ's office in the amount of three thousand five hundred dollars (\$3,500). As a result, the ALJ issued a Third Supplemental Order on September 16, 2008 (hereinafter September 16th Order), noting receipt of payment and limiting the total license suspension to seven (7) days beginning on Monday, September 15, 2008, and ending at 7:00 a.m. on September 22, 2008.

Licensee then filed a second Motion for Reconsideration on or about September 15, 2008, requesting that the ALJ vacate the seven (7)-day suspension.⁴ On or about September 18, 2008, the ALJ issued its Fourth Supplemental Order⁵ (hereinafter September 18th Order), denying Licensee's second Motion for Reconsideration.

⁴ This second Motion for Reconsideration is also not contained in the Certified Record and accordingly the substance of the Motion cannot be considered by the Board.

⁵ This Fourth Supplemental Order is erroneously labeled as the Third Supplemental Order.

On or about September 19, 2008, Licensee filed the present *nunc pro tunc* appeal as well as an Application for Supersedeas from the August 6, 2008 Order of the ALJ.⁶

Section 471 of the Liquor Code clearly establishes a thirty (30)-day filing deadline for appeals from an ALJ decision. [47 P.S. § 4-471]. Licensee filed the present appeal on September 19, 2008, forty-four (44) days after entry of the August 6th Order. There is no doubt that the Licensee's appeal is untimely.

It is well established that failure to file a timely appeal is a jurisdictional defect; as a result, "the time for taking an appeal cannot be extended as a matter of grace or mere indulgence." H.D. v. Pennsylvania Dept. of Public Welfare, 751 A.2d 1216 (Pa.Cmwlt. 2000); Sofronski v. Civil Service Commission, City of Philadelphia, 695 A.2d 921 (Pa.Cmwlt. 1997). The heavy burden of establishing the right to have an untimely appeal rests with the moving party. Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194 (Pa.Cmwlt. 2008). Here, Licensee argues that it filed an

⁶ By letter dated September 19, 2008, the Office of Chief Counsel for the Board notified counsel for Licensee that its Application for Supersedeas was denied. Section 17.31(b) of the Board's Regulations provide that an Application for Supersedeas in decisions involving enhanced violations may not be considered if filed more than thirty (30) days after the mailing date of the Opinion and Adjudication of the ALJ unless good cause is shown. [40 Pa. Code § 17.31(b)]. The Office of Chief Counsel determined that no good cause was shown to justify the late filing and thus the Board could not accept the application..

appeal *nunc pro tunc* because “it wasn’t until the ALJ allowed the suspension to stand in spite of the facts of record that were submitted thereafter, the appeal would not have been ripe.” *Appeal of Administrative Law Judge, September 19, 2008*. Licensee’s argument is nonsensical and utterly fails to set forth any circumstances suggesting fraud, a breakdown in the administrative process or non-negligent circumstances. Indeed, a review of the record indicates that the sole reason that the present appeal was not filed in a timely manner was due to the negligence of Licensee’s counsel. The extensive review of the record outlined above suggests that counsel for the Licensee has failed to exercise any degree of diligence throughout this process, up to and including the present filing.⁷

The Pennsylvania Supreme Court has made it clear that the circumstances occasioning the failure to file an appeal must not stem from counsel's negligence or from a failure to anticipate foreseeable circumstances. Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (2001); see also, Riddle v. Com., Dept. of Transp., 583 A.2d 865 (Pa.Cmwlt. 1990) (holding that

⁷ Counsel’s actions at earlier stages of the proceedings are not necessarily relevant to a determination regarding negligence in the present filing. However, negligence in this case is evidenced by counsel’s; (a) failure to file a timely Motions to Reconsider; (b) failure to submit proper filing fees with its Motions; and (c) failure to advise his clients of the ALJ’s decision that imposed a significant penalty.

negligence on the part an attorney does not entitle a party to *nunc pro tunc* relief).

As no extraordinary circumstances existed to cause Licensee's untimely filing of this appeal, the Board cannot permit an appeal *nunc pro tunc*. Based on the forgoing, Licensee's appeal is dismissed.⁸

⁸ It should be noted that even if this matter were addressed *nunc pro tunc*, Licensee's appeal must still fail. Licensee did not obtain a supersedeas from the suspension imposed by the ALJ and the period of time involved in the suspension has elapsed, accordingly this issue is moot and cannot be considered. Scranton School District v. Scranton Federation of Teachers, 445 Pa. 155, 282 A.2d 235 (1971); Wallace v. Insurance Department, 9 Pa.Cmwth. 567, 308 A.2d 162 (1973)

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of three thousand five hundred (\$3,500.00) dollars.

The period of time during which the Licensee was to have been suspended has passed and therefore there is no need to reset the dates of suspension.

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

Board Secretary