

MAILING DATE: November 15, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-2496X  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :  
 :  
 :  
 vs. :  
 :  
 : License No. R-21217  
YANKEE DOODLE, INC. :  
t/a Yankee Doodle Diner and :  
Restaurant :  
5000 Milford Road :  
East Stroudsburg, PA 18301-9246 :

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**AMENDED OPINION**

Yankee Doodle, Inc. (“Licensee”) by Penn Stroud Hotel, Inc., its attorney-in-fact and holder of Restaurant Liquor License No. R-21217, filed a nunc pro tunc appeal, from the Supplemental Order of Administrative Law

Judge Felix Thau (“ALJ”), wherein the ALJ revoked the license for failure to pay a fine.

The citation charged Licensee with violating section 493(26) of the Liquor Code [47 P.S. § 4-493(26)] on April 27, May 26, June 1, and July 28, 2006, in that Licensee, by its servants, agents or employees, made payment for purchases of malt or brewed beverages, when it had insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks.

On January 8, 2007, Licensee executed a Statement of Waiver, Admission and Authorization in which Licensee admitted the violation charged in the citation, and that the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) complied with the applicable investigatory and notice requirements of the Liquor Code. (Admin. Notice). On February 28, 2007, the ALJ mailed an Adjudication and Order to Licensee’s business address sustaining the citation and imposing a three hundred dollar (\$300.00) fine. (Admin. Notice). The ALJ’s Order provided that, “[i]n the event . . . the fine is not paid within 20 days from the mailing date of this Order, Licensee’s license shall be suspended or revoked.” (Admin. Notice).

On April 10, 2007, the fine having not been paid, the ALJ mailed a Supplemental Order to Licensee's business address noting that that the license had previously been revoked effective January 29, 2007 relative to Citation No. 06-0793X. (Admin. Notice). Therefore, because the fine was not paid and the license was already revoked, the license remained revoked effective as of the mailing date the Supplemental Order. (Admin. Notice).

On September 28, 2007, Licensee, by its attorney-in-fact, Penn Stroud Hotel, Inc., filed an application for Leave to Appeal Nunc Pro Tunc from the ALJ's Supplemental Order of April 10, 2007.

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).

Licensee's appeal nunc pro tunc provides that, on April 19, 2004, Penn Stroud Hotel, Inc. conveyed possession of the premises known as "Yankee Doodle Diner" to John A. Dimitrion, Athanasios Giakoumidis and Valilis Ketikidis pursuant to an installment agreement of sale. (Appeal Nunc Pro Tunc). As a part of the same deal, in December of 2004, Penn Stroud Hotel, Inc. conveyed the Restaurant Liquor License No. R-21217 to Licensee. (Appeal Nunc Pro Tunc). Licensee defaulted under the installment agreement of sale by failing to make regular payments. (Appeal Nunc Pro Tunc). Licensee closed for business in September of 2006. (Appeal Nunc Pro Tunc). Penn Stroud Hotel, Inc. filed a Confession of Judgment for money judgment and possession against John A. Dimitrion, Athanasios Giakoumidis and Vasilis Ketikidis, received a judgment and evicted Licensee from the premises on October 10, 2006. (Appeal Nunc Pro Tunc). Licensee failed to validate the subject license in August of 2006, resulting in the license being suspended as of September 30, 2006. (Admin. Notice). At the time of the eviction, Licensee had failed to file various necessary reports and tax forms with the Department of Labor and the Department of Revenue in order to maintain its liquor license. (Appeal Nunc Pro Tunc).

On May 23, 2007 Licensee's president made Penn Stroud Hotel, Inc. its attorney-in-fact relative to Restaurant Liquor License No. R-21217. (Appeal Nunc Pro Tunc). After extensive remodeling, Penn Stroud Hotel, Inc. opened the premises as a diner without a liquor license in June of 2007. (Appeal Nunc Pro Tunc). Penn Stroud Hotel, Inc. paid Licensee's accountant to file the necessary reports so it would be in a position to pay the Department of Labor and Department of Revenue and have the license remain active. (Appeal Nunc Pro Tunc). Penn Stroud Hotel, Inc. claims it then became aware that there were outstanding citations, and that Licensee failed to pay the fine which resulted in the revocation of the subject. (Appeal 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).

In applying the standards set forth in the Cook case, the Board finds that Licensee or Penn Stroud Hotel, Inc. did not adequately satisfy the first factor of the Cook criteria; that its failure to file a timely appeal was caused by extraordinary circumstances involving a breakdown in the Board's operation, or a non-negligent failure on the part of licensee, or its representatives to file a timely appeal.

Licensee admitted the violation on January 8, 2007, and executed a waiver agreeing to have a penalty imposed, but failed to pay the fine. The Adjudication and Order and the Supplemental Order were mailed to Licensee's business address of record. (Admin. Notice). Penn Stroud Hotel, Inc. gained possession of the premises on October 10, 2006, which was before the ALJ's Orders were issued.

Penn Stroud Hotel, Inc. cannot be relieved of its obligation to diligently monitor the status of the license in its possession. Whether or not Penn Stroud Hotel, Inc. received Licensee's mail at its business address, it was not diligent and was, therefore, negligent in failing to appeal the ALJ's Supplemental Order within the thirty (30)-day appeal period. The May 23,

2007 document making Penn Stroud Hotel, Inc. Licensee's attorney-in-fact provided Penn Stroud Hotel, Inc. no more rights than Licensee had before the agreement.

Since Penn Stroud Hotel, Inc., as Licensee's attorney-in-fact, has failed to show that its failure to file a timely appeal was caused by extraordinary circumstances involving a breakdown in the Board's operation, or a non-negligent failure on its part or on the part of Licensee, the Board finds that it has failed to meet the first factor of the Cook criteria.

The Board also finds that Licensee did not adequately satisfy the second factor of the Cook criteria; that the appeal was filed within a short time after appellant or its counsel learned of and had the opportunity to address the untimeliness. Appellant filed its appeal to the ALJ's Supplemental Order on September 28, 2007, one hundred seventy-one (171) days after receiving notice on April 10, 2007 that the license was subject to Citation No. 06-2496X. Since the appeal in question was not filed within a short time after Penn Stroud Hotel, Inc. learned of the Supplemental Order of the ALJ, the Board does not accept the time period as sufficient to meet the second factor of the Cook criteria.

The Board also finds that Penn Stroud Hotel, Inc. has not adequately satisfied the third factor of the Cook criteria; that the time period which elapsed was of very short duration. Pursuant to section 471(b) of the Liquor Code, an appeal from a decision of an ALJ on a citation matter must be filed within thirty (30) days of the mailing date of the Adjudication and Order. [47 P.S. § 4-471(b)]. The thirty (30)-day filing deadline for an appeal from the ALJ's Supplemental Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was May 10, 2007. The appeal was filed on or about September 28, 2007. Accordingly, Licensee's appeal was one hundred forty-seven (147) days late. As the time period which elapsed between issuance of the April 10, 2007 Supplemental Order and the September 28, 2007 appeal submitted to the Board was not a relatively short period of time, the Board does not accept it as sufficient to meet the third factor of the Cook criteria.

Relative to the final factor of the Cook criteria, Bureau has not claimed prejudice by the delay in filing of this appeal. As the Bureau has not set forth that it would be prejudiced if the Board were to accept Penn Stroud Hotel, Inc's appeal nunc pro tunc, the Board finds that Penn Stroud Hotel, Inc. has met the final factor of the Cook criteria.

The circumstances set forth by the parties as to the late filing of Appellant's appeal fail to sufficiently meet all of the criteria in the Cook case. Therefore, the appeal nunc pro tunc is dismissed.

**AMENDED ORDER**

The decision of the ALJ is affirmed.

The appeal of Appellant is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-21217 remains revoked as of April 10, 2007.

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Board Secretary