

Mailing Date:

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-2621X
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

THE BLUE COMET, INC. : License No. R-AP-SS-234
106 S. Easton Road :
Glenside, PA 19038-4001 :

Counsel for John J. McCreesh, IV
Licensee: McCREESH, McCREESH, McCREESH &
CANNON
7053 Terminal Square
Upper Darby, PA 19082

Counsel for Bureau: Roy Harkavy, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
8320 Schantz Road, Second Floor
Breinigsville, PA 18031

OPINION

The Blue Comet, Inc. (“Licensee”) appealed from the Second Supplemental Order of Administrative Law Judge Tania E. Wright (“ALJ”), wherein the ALJ sustained the citation and revoked the license.

The citation charged that Licensee violated section 493(26) of the Liquor Code [47 P.S. § 4-493(26)], in that Licensee, by its servants, agents

or employees, issued checks or drafts dated July 14, 28, August 11, 25, September 1 and 8, 2006, in payment for purchases of malt or brewed beverages, when there was insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks.

On February 26, 2007, Licensee submitted an Admission, Waiver and Authorization (“waiver”) to the Office of the Administrative Law Judge (“OALJ”) in which Licensee admitted to the violation charged in the citation. (Admin. Notice). The waiver form was signed by Scott Acker, Licensee’s sole corporate officer. (Admin. Notice).

On May 3, 2007, the ALJ issued an Opinion and Adjudication, sustaining the citation, imposing a fine in the amount of seven hundred dollars (\$700.00). (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 June 21, 2007, the fine having not been paid, the ALJ issued a Supplemental Opinion and Order For Failure to Pay A Fine imposing a one (1)-day license suspension¹ to continue thereafter until the fine was paid. (Admin. Notice). The Order further stated that, if the fine was not paid

¹ The suspension was deferred pending renewal of the license which had expired on April 30, 2007 and had not yet been renewed.

within sixty (60) days from the mailing date of June 21, 2007, the suspension would be reevaluated, and revocation of the license would be considered. (Admin. Notice).

On October 26, 2007, the ALJ issued a Second Supplemental Opinion and Order acknowledging that a 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 November 19, 2007. (Admin. Notice).²

On or about October 21, 2008, Licensee, through its counsel, John J. McCreech, IV, filed a Petition for Appeal Nunc Pro Tunc ("Petition") with the Board.

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'

² The October 26, 2007 Second Supplemental Opinion and Order further acknowledged that at the time the Order was issued the license had been renewed and was due to expire on April 30, 2008.

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).

Based solely on the waiver executed by Mr. Acker, Licensee's sole corporate officer, this appeal must be dismissed. Mr. Acker waived Licensee's right to appeal the substance of the violation and the penalty imposed. Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Wilner, 687 A.2d 1216 (Pa. Cmwlth. 1997); Pennsylvania Liquor Control Bd. v. Dentici, 117 Pa. Cmwlth. 70, 542 A.2d 229 (1988). Therefore, the appeal must be dismissed.

Even if Licensee's right to file an appeal was not waived, and the Board considered the appeal nunc pro tunc, under the circumstances the appeal would be dismissed.

Although 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, because the October 26, 2007 Second Supplemental Order of the ALJ sets forth the final adjudication as automatic

revocation, Licensee had up to thirty (30) days after the October 26, 2007 date to file a timely appeal with the Board.

The thirty (30)-day filing deadline for an appeal from the ALJ's Second Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was November 25, 2007. Accordingly, Licensee's appeal was more than ten (10) months late. (Admin. Notice).

Licensee states in its Petition that Licensee's principle, Scott Acker, was unaware that the license had been revoked. During this period of time Mr. Acker's mother was in bad health which made it difficult for him to stay apprised of his business concerns. Once Mr. Acker learned of the revocation, he hired counsel to appeal the decision of the ALJ. Licensee's Petition further avers that in light of the fact that the license was revoked for issuing worthless checks and not for a more serious offense such as minors, visibly intoxicated patrons, drugs or lewd conduct, Petitioner requests to be able to pay the fine and have the revocation removed so that Petition can operate its restaurant/tavern business.

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).

The Board finds that Licensee has failed to adequately satisfy the first factor of the Cook criteria. Licensee 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. Licensee's counsel fails to specify exactly when Mr. Acker learned of the revocation and when he contacted counsel. Beyond mentioning that during some unspecified period of time Mr. Acker's mother became ill, there is no detailed explanation as to how the mother's illness impacted Mr. Acker's responsibility to the licensed premises on a day-to-day basis. In addition, Licensee has not provided an explanation for why Licensee did not appoint a responsible party to act on his behalf regarding his licensed business after his mother became ill. Nor did Licensee offer any explanation for why it did not contact the ALJ or the

Board to determine the status of the license after the waiver was executed. Unfortunately, Licensee 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 ten (10) months of the time it was due; however, because insufficient facts were provided relative to why Licensee's appeal was untimely, and Licensee's counsel fails to specify exactly when he was contacted by Mr. Acker, the Board is unable to determine whether the appeal is filed within a short time after Licensee 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.

Accordingly, the appeal of Licensee must be dismissed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-234 remains revoked as of November 19, 2007.

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

Board Secretary