

Mailing Date: May 29, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-2642
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

BANK STREET LIMITED : License No. R-00384
PARTNERSHIP :
1-3-5-7 Bank Street and :
230 Market Street :
Philadelphia, PA 19106-2825 :

Counsel for Licensee: Paul L. Herron, Esquire
KELLY & HERRON, P.C.
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Philadelphia, PA 19103-3914

Counsel for Bureau: James Dailey, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue, Third Floor
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OPINION

Bank Street Limited Partnership (“Licensee”) appealed from the Supplemental Opinion and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ revoked the license effective January 14, 2008.

The citation charged that, on October 12, 2006, Licensee, by its servants, agents or employees, violated section 13.102(a)(3) of the Liquor Code [40 Pa. Code §13.102(a)(3)] by selling and/or serving an unlimited or indefinite amount of alcoholic beverages for a fixed price, in that domestic beers and well drinks were served for the set price of ten dollars (\$10.00).

On April 30, 2007, the date of the evidentiary hearing, 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; N.T. 4; Ex. J-1). The waiver form reflects that it was filed relative to Citation No. 06-2642, and it was signed by Paul L. Herron, Licensee’s counsel. (Admin. Notice).

The waiver provided that Licensee: (1) acknowledged receipt of the citation; (2) admitted to the violations charged in the citation; (3) waived its right to a hearing; (4) authorized the ALJ to enter an adjudication based upon a summary of facts and Licensee’s prior citation history; (5) acknowledged that the possible penalty included a fine ranging from fifty dollars (\$50.00) to one thousand dollars (\$1,000.00) and/or suspension or revocation of the license and/or permits incidental to the license and one (1)

to three (3) points; and, (6) waived any right to appeal the adjudication. (Admin. Notice).

On June 6, 2007, the ALJ issued an Opinion and Adjudication, sustaining the citation, imposing a fine in the amount of four hundred dollars (\$400.00), and assessing one (1) point against the record of Licensee. (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 August 28, 2007, the fine having not been paid, the ALJ issued an Opinion and Order Upon Failure to Pay A Fine imposing a one (1)-day license suspension to continue thereafter until the fine was paid. (Admin. Notice). The Order further stated that, if the fine was not paid within sixty (60) days from the mailing date of August 28, 2007, the suspension would be reevaluated, and revocation of the license would be considered. (Admin. Notice).

On November 14, 2007, the ALJ issued a 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 January 14, 2008. (Admin. Notice).

On or about March 24, 2008, Licensee, through Mr. Herron, file a Petition for Leave to File 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' 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. Herron on Licensee's behalf, this appeal must be dismissed. Mr. Herron 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 November 14, 2007 Supplemental Order of the ALJ sets forth the final adjudication as automatic revocation, Licensee had up to thirty (30) days after the November 14, 2007 date to file a timely appeal with the Board.

The thirty (30)-day filing deadline for an appeal from the ALJ's Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was December 14, 2007. Accordingly, Licensee's appeal was more than three (3) months late. (Admin. Notice).

Licensee states in its Petition that, in April of 2007, Licensee's premises was totally destroyed in a fire. (Petition). Since that time, the business has been closed. (Petition). Licensee further states that, shortly after April

2007, Phillip Cohen, Licensee's authorized representative, left the area and relocated to upstate New York. (Petition). Licensee's counsel, Mr. Herron, then had limited contact with Mr. Cohen, and his attempts to reach Mr. Cohen by mail resulted in letters being returned. (Petition). As a result, Mr. Herron was unable to communicate with Licensee or its representative. (Petition). Mr. Herron further avers in Licensee's Petition that he was "only recently" able to communicate with Licensee and its authorized representative and, at that time, advised Licensee of the Order revoking the license. (Petition). Mr. Herron was then told that Mr. Cohen had been involved in a motorcycle accident in which he suffered several broken bones, a dislocated shoulder and a crushed knee. (Petition). In addition, the real estate where the business was located was involved in litigation with insurance carriers relating to the fire loss, and other prior litigation. (Petition). Finally, Licensee's Petition avers that Mr. Cohen also suffered financial losses resulting in foreclosure actions of his home in Gloucester, New Jersey, as well as other properties he owned in New Jersey, Pennsylvania and New York. (Petition).

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 he was able to contact Mr. Cohen, and whether or not the motorcycle accident and foreclosure actions preceded or followed the Supplemental Order of the ALJ. Licensee's counsel only offers that he could not reach Licensee's authorized representative until "recently," presumably after the subject license was revoked. 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 business closed, or during his accident recuperation. 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 three (3) 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 able to contact Mr. Cohen, 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-00384 remains revoked as of January 14, 2008.

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

Board Secretary