

Mailing Date: August 20, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 06-3023  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

vs. :

JOIPs, INC. t/a JOHNNY'S : License No. R-18967  
ORIGINAL ITALIAN PIZZA :  
163 Main Street :  
Ridgway, PA 15853-1034 :

Counsel for Licensee: James H. DeVittorio, Esquire  
13 South Broad Street  
P.O. Box 411  
Ridgway, PA 15853

Counsel for Bureau: Nadia L. Vargo, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
313 Mount Nebo Road  
Pittsburgh, PA 15237

OPINION

JOIPs, Inc. t/a Johnny's Original Italian Pizza ("Licensee") appealed from the Supplemental Opinion and Order of Administrative Law Judge Felix Thau ("ALJ"), wherein the ALJ revoked the license effective October 26, 2007.

The citation charged that, on June 23, 2006, Licensee, by its servants, agents or employees, violated section 499(a) of the Liquor Code [40 Pa. Code § 499(a)] by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages, and by permitting 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.

On April 2, 2007, Licensee submitted an Admission, Waiver and Authorization (“waiver”) to the Office of the Administrative Law Judge (“OALJ”) in which Licensee admitted to the violations charged in the citation. (Admin. Notice). The waiver form reflects that it was filed relative to Citation No. 06-3023, and it was signed by John D. Hagemann, Licensee’s president of record. (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, (6) waived any right to appeal the adjudication. (Admin. Notice).

On April 18, 2007, the ALJ issued an Adjudication and Order sustaining the citation, and imposing a fine in the amount of three hundred dollars (\$300.00). (Admin. Notice). The ALJ's Order merged the counts, and provided that, "[i]n the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked." (Admin. Notice). The Adjudication and Order was sent via certified and regular first class mail to Licensee's address or record, and there has been no question concerning its timely receipt by Licensee. (Admin. Notice).

By letter dated May 7, 2007, counsel for Licensee, James H. DeVittorio, notified the Board that Licensee had lost its lease for occupancy/operating privilege at the licensed premises situated at 163 Main Street in Ridgeway, Pennsylvania and, thus, he was submitting the subject license for safekeeping. (Admin. Notice). The letter noted that Licensee could thereafter be contacted at 512 Market Street, Johnsonburg, Pennsylvania 15845. (Admin. Notice). Attorney DeVittorio also submitted

with this correspondence an affidavit signed by Mr. Hagemann attesting to these same facts. (Admin. Notice).

On June 20, 2007, the fine having not been paid, the ALJ issued a Supplemental Order imposing a one (1)-day license suspension to continue thereafter until the fine was paid. (Admin. Notice). The suspension period was deferred pending reactivation of the license. (Admin. Notice). The Order further stated that, if the fine was not paid within sixty (60) days from the mailing date of June 20, 2007, the penalty of one (1)-day suspension with thereafter conditions would be reevaluated, and revocation of the license would be considered. (Admin. Notice). The Supplemental Order was sent via certified and regular first class mail to the Johnsonburg address, and there has been no question concerning its timely receipt by Licensee. (Admin. Notice).

Attorney DeVittorio notified the Board's Bureau of Licensing ("Licensing"), by a letter dated August 27, 2007, of a change in contact information, and a change in corporate business structure, such that Mr. Hagemann was no longer Licensee's president as of August 17, 2007, but Robert T. Bogacki was now the sole shareholder, president and secretary/treasurer. (Admin. Notice). Correspondence was to be directed

thereafter to Mr. Bogacki at 16730 Boot Jack Road, Ridgway, PA 15853. (Admin. Notice). Licensee did not, however, file any of the statutorily required forms to formally effectuate a change of officers for Licensee, including PLCB-866 (Notice of Change in Business Structure of Licensed Corporations), or the six hundred fifty dollar (\$650.00) application fee. (Admin. Notice).

On September 5, 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 three hundred dollar (\$300.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective October 26, 2007 at 7:00 a.m. (Admin. Notice). This Order was also sent to the Johnsonburg address via certified and regular first class mail; the certified mailing was returned marked "unclaimed," but the first class mailing was not returned. (Admin. Notice).

On or about June 5, 2008, some nine (9) months after the issuance of the ALJ's revocation Order, Licensee, through Attorney DeVittorio, filed a Petition for Leave to File Appeal Nunc Pro Tunc ("Petition") with the Board, which was signed by Mr. Bogacki as "president and sole stockowner of the corporate licensee/JOIPs, Inc." (Admin. Notice). Licensee avers that the

ALJ committed an error of law, in that it failed to properly provide notice to Licensee of the revocation of its license.

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. Hagemann on Licensee's behalf, this appeal must be dismissed. Mr. Hagemann, at a time when he was authorized to do so, 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.

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. 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 October 5, 2007. Accordingly, Licensee's appeal was eight (8) months late. (Admin. Notice).

Licensee states in its appeal that the ALJ committed an error of law in failing to notify Licensee consistent with the statutorily-required notice provision, contained section 471(b) of the Liquor Code, since the ALJ should have known that the contact address for Licensee had again changed.

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. While Licensee has set forth circumstances surrounding the lateness of this appeal which suggest a breakdown in the operation of the OALJ relative to the service of the Supplemental Opinion and Order which ultimately revoked the subject license, it cannot be overlooked that it is the negligence of Licensee or its counsel that has led to Licensee's predicament.

When Licensee's principal executed the waiver, he acknowledged that Licensee was going to be subject to a penalty for violations it admitted therein. Then, there is no dispute that Licensee received the Adjudication and Order issued April 18, 2007 which set forth the fine, and the time in which it was to be paid. Licensee retained counsel who, at least in early May of 2007 was involved in its legal matters. Finally, Licensee received at the safekeeping address supplied by its counsel the Supplemental Order issued June 20, 2007, which set forth the revised penalty and the warning that if

the fine was not paid, revocation would be considered.<sup>1</sup> Therefore, while it appears that the OALJ may have erred in not sending the revocation Order to the newest address supplied by Licensee's counsel in August of 2007, Licensee was put on notice three (3) separate times, and knew as early as June that revocation would be forthcoming should it further ignore the ALJ's Orders, yet it failed to act to protect its license.

Licensee appears to have had a responsible party, Attorney DeVittorio, acting on its behalf regarding its licensed business after the business closed. However, it fails to offer any explanation for why it did not contact the ALJ or the Board to determine the status of the license after the waiver or the first two (2) Orders were issued by the ALJ. Even after Licensee's corporate structure changed on or about August 17, 2007, neither its new officer, nor Attorney DeVittorio, contacted either Mr. Hagemann or the OALJ to determine the status of the citation. Under the circumstances, the Board finds, therefore, that Licensee has failed to failed to adequately satisfy the first factor of the Cook criteria.

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<sup>1</sup> The Commonwealth Court has made it clear that the notice provisions of the Liquor Code are satisfied if notice is sent via certified mail to the licensed premises, regardless of whether this results in actual notice. Further, where an order was properly mailed to the proper address, a licensee is deemed to have received it. See Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Can, Inc., 651 A.2d 1160 (Pa. Cmwlth. 1994), appeal denied, 541 Pa. 655, 664 A.2d 544 (1995).

Relative to the second and third Cook factors, which consider whether the appeal was filed within a short time after appellant or his counsel learns of and has the opportunity to address the untimeliness, and whether the time period which elapses is of very short duration, the Board finds that the appeal from the revocation Order issued September 5, 2007 was not filed until June of 2008, nine (9) months thereafter. Neither Licensee nor its counsel, who has represented Licensee for over one (1) year, provide an explanation as to why the appeal was filed so long after the revocation was ordered. In addition, in its appeal, Licensee claims to have received notice of the revocation when its counsel inquired on May 9, 2008 as to why it had not received its license renewal package. There is, likewise, no explanation as to why Licensee or its counsel then waited until June 5, 2008 to file this appeal. Under the circumstances, the Board finds, therefore, that Licensee has failed to adequately satisfy the second and third factors of the Cook criteria.

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, and 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-18967 remains revoked as of October 26, 2007.

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

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Board Secretary