

Mailing Date: May 20, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 07-0092
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
COLLISS DOLAN, INC.	:	License No. R-19565
t/a Fireside Restaurant and Lounge	:	
2108 Clark Rd.	:	
Erie, PA 16510-4406	:	

Counsel for Licensee: Kerry J. Dolan, *Pro Se* (Hearing Only)  
President, Colliss Dolan, Inc.  
4512 Shannon Rd.  
Erie, PA 16510

Counsel for Petitioner: Kurt L. Sundberg (Petition Only)  
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Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
313 Mount Nebo Road  
Pittsburgh, PA 15237

## OPINION

National City Bank (“Petitioner”), presently seeks permission to appeal *nunc pro tunc* from the August 30, 2007, Adjudication and Order of Administrative Law Judge Roderick Frisk (“ALJ”), wherein the ALJ determined that the Licensee violated Section 15.62(b) of the Liquor Control Board Regulations, when it failed to post a Pennsylvania Liquor Control Board (“Board”) placard stating the license was suspended and, instead, posted a sign stating the business was closed for renovations. [40 Pa. Code § 15.62(b)]. In the August 30, 2007 Adjudication and Order the ALJ had imposed a penalty of a four hundred dollar (\$400.00) fine and a two (2)-day license suspension. Petitioner also seeks to appeal the ALJ’s Second<sup>1</sup> Supplemental Order, dated Jan. 24, 2008, wherein the ALJ revoked the license effective March 24, 2008 for failure to pay the four hundred (\$400.00) fine<sup>2</sup>.

License No. R-19656, LID No. 51369 (“License”), was issued to Colliss Dolan, Inc. t/a Fireside Restaurant & Lounge (“Licensee”). Licensee had been previously found to have committed numerous violations of the Liquor Code and Board Regulations while it held the License. [Adjudication & Order, Aug.

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<sup>1</sup> The ALJ’s initial Supplemental Order, dated October 12, 2007, had deferred the two (2) days of suspension pending the reactivation of the license.

<sup>2</sup> Petitioner has filed a concurrent petition to appeal the adjudication and subsequent license revocation under Citation No. 07-1971X.

30, 2007]. The License expired on July 31, 2007, and Licensee never took steps to renew the license. [Supplemental Order, Oct. 12, 2007].

In its petition to appeal *nunc pro tunc*, Petitioner alleges that it acquired a security interest in all corporate assets, including the License, as collateral for a loan made by Petitioner. Said security interest was recorded with the Pennsylvania Department of State in UCC Financing Statement No. 20030954205 on Sept. 16, 2003. [Petition, Paragraph 11]. In 2007, Licensee defaulted on the loan and a judgment was entered against the Licensee on December 10, 2007, in the amount of \$21,016.59. [Petition, Paragraph 18]. In April of 2008, Licensee voluntarily surrendered all corporate assets, including the License, to Petitioner. Licensee executed a Power of Attorney on May 28, 2008, granting Petitioner the power to take action regarding the maintenance and/or disposition of the License<sup>3</sup>. [Petition, Ex. A]. The following day the Petitioner forwarded the Power of Attorney and License to the Board for safekeeping. [Petition, Paragraph 25]. The May 29<sup>th</sup> cover letter requested that all notices pertaining to the License be sent to the Petitioner. [Petition, Paragraph 26].

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<sup>3</sup> The Power of Attorney only gave Petitioner the authority to transfer the License to a new buyer. Licensee never transferred the actual License to Petitioner in accordance with Board statutes and regulations.

Nearly nine (9) months later, on Feb. 13, 2009, Petitioner contacted the Board to obtain the paperwork necessary to remove the License from safekeeping and transfer the License to a new owner. At that time, Petitioner states that it was informed that the License had been revoked effective March 24, 2008. [Petition, Paragraph 29]. Petitioner immediately filed a Right to Know request asking for all documentation and adjudications pertinent to the License. The Board provided the requested information on February 23, 2009. The instant appeal followed over a month later on March 30, 2009.

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]. 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, 781 A.2d 1156 (2001); Morrisons Cove Home v. Blair County Bd. of Assessment Appeals, 764 A.2d 90 (Pa.Cmwlt. 2000).

Petitioner filed the present appeal on March 30, 2009, more than fourteen (14) months after the license revocation was imposed and more than eighteen (18) months after the original Adjudication and Order was mailed. There is no doubt that the Petitioner's appeal is untimely. Petitioner

acknowledges that the appeal is untimely and requests permission to appeal *nunc pro tunc*.

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, a breakdown in the administrative process, or non-negligent circumstances related to the party or its counsel. Cook v. Unemployment Compensation Board of Review, 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). 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).

Presently, Licensee argues that it should be permitted to file an appeal *nunc pro tunc* because it did not become aware of the license revocation until February of 2009. Petitioner’s argument fails to set forth any circumstances

suggesting fraud, a breakdown in the administrative process, or non-negligent circumstances. Petitioner contends that the Board failed to provide notice of the condition of the license. However, the Board had no obligation to advise Petitioner of ALJ actions that occurred prior to Petitioner's letter requesting such notice. The order from the ALJ imposing the instant revocation was mailed on January 24, 2008, nearly five (5) months before Petitioner submitted its Power of Attorney letter and four (4) months before Licensee surrendered the License to Petitioner and Petitioner submitted its Power of Attorney letter to the Board. The Board had no obligation to act, thus there was no breakdown in the administrative process.

Indeed, a review of the record indicates that the sole reason the present appeal was not filed in a timely manner was the inattentiveness of Petitioner. Petitioner could have filed a Right to Know request or simply called the appropriate office at any time – before it accepted the license as collateral, before it filed for a judgment, before it accepted the surrender of corporate assets to satisfy a debt<sup>4</sup>, before it obtained the power of attorney – yet it chose not to carefully investigate the status of the license in question. There is no evidence that Petitioner even contacted the office the ALJ, which is the

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<sup>4</sup> By which time the license had already been revoked.

autonomous office that issued the orders that the Petitioner now seeks to appeal. The Board is not responsible for protecting assets claimed by the Petitioner.

As no extraordinary circumstances existed to cause Petitioner's untimely filing of this appeal, the Board cannot accept an appeal *nunc pro tunc*. Based on the forgoing, Petitioner's appeal is dismissed.<sup>5</sup>

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<sup>5</sup> The Board takes administrative notice that in addition to the two ALJ decisions revoking the license, that Petitioner has appealed *nunc pro tunc*, there are three (3) additional revocation orders – in Citation Nos. 07-0235, 07-0807, and 07-0987 – that Petitioner has not challenged.

**ORDER**

The decision of the ALJ is affirmed.

The appeal of Petitioner is dismissed.

It is hereby ordered that the Licensee's Restaurant Liquor License No. R-19565 remains revoked as of March 24, 2008.

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

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Board Secretary