

Mailing Date: August 20, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-0626
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 Adjudication of Administrative Law Judge Felix Thau ("ALJ"), wherein the ALJ revoked the license effective February 25, 2008.

The citation charged that, on November 1, 2006, Licensee, by its servants, agents or employees, violated sections 471 of the Liquor Code [40 P.S. § 4-471] and 2709 of the Crimes Code [18 Pa. C.S. § 2709] by committing harassment.

On December 5, 2007, the Office of the Administrative Law Judge (“OALJ”) accepted an Admission, Waiver and Authorization (“waiver”) to in which Licensee admitted to the violations charged in the citation. (Admin. Notice).¹ The waiver form reflects that it was filed relative to Citation No. 07-0626, 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

¹ The waiver was initially submitted to the OALJ by Licensee on April 23, 2007. (Admin. Notice). The ALJ retained the waiver and scheduled the matter for hearing on December 13, 2007. The OALJ thereafter cancelled the hearing and accepted the waiver on December 5, 2007. (Admin. Notice).

revocation of the license and/or permits incidental to the license; and, (6) waived any right to appeal the adjudication. (Admin. Notice).

On December 26, 2007, the ALJ issued an Adjudication sustaining the citation and, since the subject license was revoked effective October 26, 2007 pursuant to Citation No. 06-3023, revoking the license effective February 25, 2008. (Admin. Notice).

The facts underlying this case reveal that the Adjudication was sent via certified and regular first class mail to the licensed premises and, while the certified mailing was returned marked “unclaimed” with a note stating that the OALJ should be notified of the new address, the first class mailing was not returned. (Admin. Notice). The Adjudication was re-mailed by the OALJ on January 1, 2008 to 512 Market Street, Johnsonburg, Pennsylvania 15845, but the mailing was returned marked “Moved left no address – Unable to forward.” (Admin. Notice). The Adjudication was again re-mailed by the OALJ by first class and certified mail on February 5, 2008 to John Hagemann at 322 Mill Street, Johnsonburg, Pennsylvania 15845 and, while the certified mailing was returned marked “unclaimed,” the first class mailing was not returned. (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).

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, Ridgeway, 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 or about June 5, 2008, 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 Citation No. 06-3023, which led to the current revocation.

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 Adjudication, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was January 25, 2008. Accordingly, Licensee's appeal relative to this citation was over four (4) 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 for Citation No. 06-3023, which initially revoked the subject license, it cannot be overlooked that it is the negligence of Licensee or its counsel that 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, since they were not returned, it is presumed that Licensee received the first class mailing of the Adjudication issued December 26, 2007, and the one re-mailed on February 5, 2008.² Licensee had counsel who, at least in early May of 2007 was involved in its legal matters. Therefore, while it appears that the OALJ may have erred in not sending the Adjudication to the address supplied by Licensee's counsel in August of 2007, Licensee failed to act on its own behalf in following up.

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 was 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

² 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).

citation. Under the circumstances, the Board finds, therefore, that Licensee has failed to adequately satisfy the first factor of the Cook criteria.

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 December 26, 2007 was not filed until June of 2008, four (4) 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 February 25, 2008.

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

Board Secretary