

Mailing Date: August 20, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-1216
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

KAREN R. DEMMA : License No. R-12368
t/a Bistro Bello :
1600 Painters Run Road :
Pittsburgh, PA 15243-1640 :

Representative for George Retos
Licensee: 550 Munce Ridge Rd
Washington, PA 15301

Counsel for Bureau: Nadia L. Vargo, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
313 Mt. Nebo Road
Pittsburgh, PA 15237-1305

OPINION

Karen R. Demma t/a Bistro Bello (“Licensee”) appealed from the Second Supplemental Order of Administrative Law Judge Robert S. Skwaryk (“ALJ”), wherein the ALJ revoked the license effective June 30, 2008.

The first count of the citation charged that, from October 24 through November 27, 2006, Licensee, by its servants, agents or employees, violated

sections 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2) and 4-493(16)] by selling alcoholic beverages when it was not authorized to do so because the license had been seized by the Allegheny County Sheriff's Department.

The second count of the citation charged that, from October 24 through November 27, 2006, Licensee by its servants, agents or employees, violated section 467 of the Liquor Code [47 P.S. § 4-467] by failing to constantly and conspicuously expose its restaurant liquor license under a transparent substance on the licensed premises.

On December 3, 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. 07-1216, and it was signed by Karen R. Demma, Licensee's president. (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 \$1,000.00 to \$5,000.00 for the violation found in the first count, and ranging from \$50.00 to \$1,000.00 for the violation found in the second count) 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 December 20, 2007, the ALJ mailed an Adjudication and Order, sustaining the citation and imposing a fine in the amount of one thousand one hundred dollars (\$1,100.00). (Admin. Notice). The Order provided that if the “fine is not paid within twenty (20) days from the mailing date of this Order, Licensee’s license shall be suspended or revoked.” (Admin. Notice). The ALJ took administrative notice that the subject license expired May 31, 2007, and was inactive. (Admin. Notice).

On March 24, 2008, the fine having not been paid, the ALJ mailed a Supplemental Order imposing a one (1)-day license suspension to continue thereafter until the fine was paid. (Admin. Notice). The ALJ again took administrative notice that the subject license expired May 31, 2007, and was inactive. He, therefore, deferred the suspension 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 March 24, 2008, the suspension would be reevaluated and revocation of the license would be considered. (Admin. Notice).

On June 10, 2008, the ALJ mailed a Second Supplemental Order acknowledging that a sixty (60)-day period had elapsed, and that Licensee had failed to pay the eleven hundred dollar (\$1,100.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective June 30, 2008. (Admin. Notice). The ALJ further advised the Bureau of Licensing to mark their records that the license has been revoked, noting that the license was inactive. (Admin. Notice).

Licensee submitted a letter on June 27, 2008 from Mr. Retos requesting reconsideration of the ALJ's June 10, 2008 Order, and paid the fine in the amount of \$1,100.00. (Admin. Notice).¹

On July 1, 2008, an appeal was filed from the Second Supplemental Order by George Retos, Esquire, a retired lawyer and Licensee's brother.

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

¹ The OALJ did not issue a formal response to Licensee's reconsideration letter, however, the reconsideration request was untimely, as it was received beyond the fifteen (15)-day period prescribed by section 35.41 of the General Rules of Administrative Practice and Procedure [1 Pa. Code § 35.41]. (Admin. Notice).

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).

On appeal, Mr. Retos referred to the June 26, 2008 letter to the ALJ requesting reconsideration of the Second Supplemental Order. Mr. Retos asserts that, as a result of the restaurant business falling into financial hardship due to a sixteen (16)-month road closure, Licensee was forced to close the licensed business and file for Chapter 11 bankruptcy protection in 2003. Mr. Retos further asserts that the notices from the OALJ were sent to the Licensee's business address, and were not forwarded to Licensee by the current tenant until recently. Licensee's address of record with the Board was not changed after her business ceased operation. (Admin. Notice).

Based solely on the waiver executed by Licensee, this appeal would generally be dismissed, since Licensee waived her 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).

And, 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.

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).

In the instant case, the ALJ imposed a fine after Licensee waived its hearing and admitted to the violations charged. The penalty fell within the parameters of section 471 of the Liquor Code. [47 P.S. § 4-471]. Licensee

failed to pay the fine imposed despite a subsequent order from the ALJ. Licensee's appeal was filed relatively quickly after it claimed to have learned that its license had been revoked, and the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") has not claimed that it would be prejudiced if Licensee's appeal is accepted. Licensee claims that her failure to timely file appeals to any of the ALJ's orders issued over a six (6)-month period was due to the fact that she did not receive the OALJ's orders until the tenant forwarded them to her "recently." Licensee's appeal does not state when she received those orders. She failed to keep the subject license active, and it was not in safekeeping with the Board. There is no indication that Licensee supplied the Board with a corrected address after her business failed and closed. Finally, Licensee failed to follow up with the OALJ when she knew that a penalty would be forthcoming after she filed her waiver. Based upon the foregoing, if the Board were to consider Licensee's appeal nunc pro tunc, under the circumstances, the appeal would be dismissed.

In Licensee's appeal, it is claimed that she filed for Chapter 11 bankruptcy protection on May 29, 2008, which was after the ALJ issued the original Adjudication setting the fine, after it issued the Supplemental Opinion ordering a deferred suspension, and just shortly before issuance of the Second

Supplemental Order revoking the license. The fact that Licensee filed a Chapter 11 bankruptcy petition did not, however, automatically preclude the ALJ from proceeding with the citation case herein.

Ignoring the procedural morass concerning the expiration of the license, which could be remedied upon submission of the required documents and fees, the question remains concerning the effect, if any, of the bankruptcy case on the ALJ's revocation order, which is the only order that is on appeal before the Board. The purpose of a Chapter 11 bankruptcy is to allow individuals to obtain relief from their debts, while providing at least partial payment to creditors. The filing of a petition under Chapter 11 automatically stays most collection actions against the debtor(s) or the debtor(s) property.² [11 U.S.C. § 362(a)]. However, the Bankruptcy Code sets forth several exceptions to the automatic stay. [11 U.S.C. § 362(b)]. One (1) of these exceptions permits the commencement of an action or proceeding by a governmental unit to enforce its police and regulatory power, including the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce its police or regulatory power. [11 U.S.C. § 362(b)(4)]. Thus, while the Bureau could

² While a license constitutes a privilege between the Board and a licensee, it constitutes property as between a licensee and third parties. [47 P.S. § 4-468(d); see also 47 P.S. § 4-468(b.1)].

issue its citation and proceed against Licensee on the citation matter, and while the ALJ could issue an order fining Licensee for its illegal conduct, it appears that enforcement of the fine, similar to enforcement of a money judgment, is stayed by section 362(a) of the Bankruptcy Code. Therefore, the ALJ's Second Supplemental Order revoking the license for failure to pay the fine, while valid in other respects, was precluded by the filing of the bankruptcy case, which subsumed the license as property of the debtors.

Therefore, the Second Supplemental Order issued by the ALJ June 10, 2008, is reversed, and this matter is remanded to the OALJ, which will retain jurisdiction to ensure compliance with its Supplemental Order mailed March 24, 2008, should this license be reactivated and/or subsequently transferred.

ORDER

The decision of the ALJ is reversed.

The appeal of Licensee is sustained.

It is hereby ordered that this matter is remanded to the OALJ for proceedings not inconsistent with this Order, any orders of the Bankruptcy Court, and the ALJ's Supplemental Order mailed March 24, 2008.

Board Secretary