

Mailing Date: July 24, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-1258
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

DOOPOLE II, INC. : License No. E-2909
6 East 21st Street :
Chester, PA 19013-5413 :

Counsel for Licensee: Stephen R. Murphy, Esquire
239 South Camac Street
Philadelphia, PA 19107

Counsel for Bureau: Erik S. Shmukler, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

OPINION

DooPole II, Inc. (“Licensee”) appealed from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ sustained the citation, and imposed a three hundred fifty dollar (\$350.00) fine and a one (1)-day suspension with thereafter conditions.

The citation charged that, on May 7, 2007, Licensee, by its servants, agents or employees, violated section 102 of the Liquor Code [47 P.S. § 1-102] by not being a bona fide eating place in that Licensee maintained insufficient seating.

The record reveals that, on November 5, 2007, the date of the evidentiary hearing, Licensee did not appear personally or have any representation. [Admin. Notice]. On December 17, 2007, the ALJ issued an Adjudication and Order, sustaining the citation and imposing a fine in the amount of three hundred fifty dollars (\$350.00) and a one (1)-day license suspension to continue thereafter until Licensee certifies that it has enough chairs at tables to accommodate at least thirty (30) persons at one time on the licensed premises, thereby qualifying it as a bona fide retail dispenser eating place.¹ [Admin. Notice].

In its appeal, Licensee's counsel avers that he attempted to file a Notice of Appeal on Licensee's behalf by mailing it to the Court of Common Pleas of Delaware County on or about January 11, 2008; however the court did not receive it. [Admin. Notice]. On January 24, 2008, Licensee's counsel filed a second Notice of Appeal Nunc Pro Tunc in the Court of Common Pleas of

¹ The suspension period was deferred pending renewal of Licensee's license, at which time the suspension period would be fixed by further order.

Delaware County; however, he was told that it was not complete. [Admin. Notice]. On February 4, 2008, Licensee's counsel filed another Petition of Appeal Nunc Pro Tunc with the Court of Common Pleas of Delaware County. [Admin. Notice].

On February 27, 2008, Licensee filed a Motion to Withdraw Petition of Appeal Nunc Pro Tunc in the Court of Common Pleas of Delaware County stating that Licensee failed to exhaust its administrative remedies set forth under the relevant section 471 of the Liquor Code [47 P.S. § 4-471] and, therefore, the appeal was not ripe for consideration by the court at that time. [Admin. Notice]. Licensee's Motion sought permission to withdraw its appeal without prejudice in order to properly comply with the administrative appeal process. [Admin. Notice].

On April 14, 2008, Licensee filed an appeal to the Pennsylvania Liquor Control Board ("Board") from the ALJ's Order, stating that the ALJ abused his discretion by imposing a penalty well above the normal penalty imposed against a licensee with a previously clean history. [Admin. Notice].

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).

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. Therefore, Licensee had up to thirty (30) days after the December 17, 2007 date to file a timely appeal with the Board.

The filing deadline for this appeal from the ALJ's Adjudication and Order, pursuant to 471 of the Liquor Code, was January 18, 2008. Accordingly, Licensee's appeal was three (3) months late. (Admin. Notice).

While Licensee's counsel avers that he attempted to file a timely notice of appeal on or about January 11, 2008, an appeal was filed with the Court of Common Pleas of Delaware County under Docket MD No. 207-08 on January 24, 2008. Accordingly, Licensee's January 24, 2008 filing of its

appeal to the Court of Common Pleas was six (6) days past the filing deadline for appeal from the ALJ's Adjudication and Order.

Licensee does not set forth any reason why it did not file its appeal to the Board until April 14, 2008, over eighty (80) days beyond the late-filed appeal to the Court of Common Pleas, and forty-six (46) days after Licensee filed its Motion To Withdraw Petition of Appeal Nunc Pro Tunc.

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 matter, the Board finds that Licensee has failed to adequately satisfy the first factor of the Cook criteria. Specifically, Licensee has failed to establish that its failure to file a timely appeal was caused by it or

its counsel's non-negligent action or circumstances which suggest fraud or breakdown in the administrative process.

In Criss v. Wise, 781 A.2d 1156, 1160 (Pa. 2001), the Supreme Court stated that the exception for allowance of an appeal nunc pro tunc in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant has clearly established that it attempted to file an appeal, but unforeseeable and unavoidable events precluded it from actually doing so. Cook, 671 A.2d at 1132.

While Licensee suggests there was an attempt to file a timely appeal to the Court of Common Pleas of Delaware County on or about January 11, 2008, Licensee offers no support for its assertion. Even following the filing of its Motion to Withdraw the Petition of Appeal Nunc Pro Tunc, wherein he acknowledged that he filed late in the wrong forum, Licensee's attorney provided no reason for his failure to then file a timely appeal to the Board.

License has also failed to meet the second and third criteria set forth in Cook, supra, which examines whether or not the remedial filing was attempted within a short time after the appellant has the opportunity to address it.

In Cook, the appellant filed his appeal three (3) days after he was released from the hospital, and four (4) days after the expiration of the appeal period. Clearly, whatever extraordinary circumstance is alleged as the reason for the late filing of an appeal (i.e., fraud, breakdown of the court's operation through default of its officers, or non-negligent conduct on the part of appellant, appellant's attorney, or the attorney's staff, etc.), the petition to file the appeal nunc pro tunc must be filed within a reasonable time after the occurrence of the extraordinary circumstance. Cook, 671 A.2d at 1132.

In Bass v. Commonwealth Bureau of Corrections, et al., 401 A.2d 1133, 1135 (Pa. 1979), the Supreme Court stated that, "[w]ithout doubt the passage of any but the briefest period of time during which an appeal is not timely filed would make it most difficult to arrive at a conclusion that the failure to file was non-negligent."

In the matter before the Board, the appeal to the Board was filed by Licensee more than six and one-half (6½) weeks after its Petition For Appeal Nunc Pro Tunc was withdrawn from the Court of Common Pleas of Delaware County. Licensee admits in its withdrawal petition that it was aware of the administrative remedies set forth in section 471 of the Liquor Code, and that it intended to comply with the administrative appeal process. Licensee did

not, however, file the appeal for a significant period of time thereafter. For this reason alone it simply cannot be overlooked that Licensee did not act immediately to file an appeal to the Board upon its withdrawal of the court of common pleas petition, and it has failed to provide any explanation for the delay.

Relative to the last Cook factor, the Board sees no harm to the Pennsylvania State Police, Bureau of Liquor Control Enforcement, whether or not this appeal is granted nunc pro tunc.

Under the circumstances, the Board is without authority to entertain Licensee's appeal, as it was untimely filed. Therefore, the appeal is dismissed.

AMENDED ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee must pay the fine in the amount of three hundred fifty (\$350.00) dollars within twenty (20) days of the mailing date of this Order.

It is hereby ordered that Licensee's Retail Dispenser Eating Place License No. E-2902 be suspended for a period of one (1) day and continuing thereafter until Licensee has forwarded a Certification stating that it has enough chairs at tables to accommodate at least thirty (30) persons at one time on the licensed premises to qualify as a bona fide retail dispenser eating place. However, the suspension period is deferred pending renewal of Licensee's license at which time the suspension period will be fixed by further Order.

Licensee must adhere to all other conditions set forth in the ALJ's Order issued December 17, 2007.

Board Secretary