

Mailing Date: August 7, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-1283
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

SPORTS CAFÉ & GRILLE, L.L.C. : License No. R-19784
244 West College Avenue :
State College, PA 16801-4628 :

Counsel for Licensee: Samuel J. Malizia, Esquire
MALIZIA SPIDI & FISCH, PC
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State College, PA 16801

Counsel for Bureau: Thomas M. Ballaron, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17110

OPINION

Sports Café & Grille, L.L.C. (“Licensee”) appealed from the Supplemental Opinion and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ revoked the license effective July 14, 2008.

The citation charged that Licensee, by its servants, agents or employees, violated section 5.16 of the Pennsylvania Liquor Control Board’s (“Board”)

Regulations [40 Pa. Code §5.16] by failing to notify the Board within fifteen (15) days of a change of manager which occurred on February 27, 2007.

On January 8, 2008, the Office of the Administrative Law Judge (“OALJ”) accepted from Licensee an Admission, Waiver and Authorization (“waiver”) in which Licensee admitted to the violation charged in the citation. (Admin. Notice). The waiver form reflects that it was filed relative to Citation No. 07-1283, and it was signed by Kevin Anderson, Licensee’s principal. (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, (6) waived any right to appeal the adjudication. (Admin. Notice).

On January 22, 2008, the ALJ issued to Licensee, by regular and certified mail at its business address of record, 244 West College Avenue, State College, Pennsylvania 16801, an Opinion and Adjudication, sustaining

the citation, imposing a fine in the amount of one hundred fifty dollars (\$150.00). (Admin. Notice). The ALJ's Order provided that, "[i]n the event . . . the 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 certified mailing was returned marked "unclaimed," but the regular mailing was not returned. (Admin. Notice).

The subject license was placed into safekeeping by Mr. Anderson on January 31, 2008. (Admin. Notice). At that time, the Board's Bureau of Licensing ("Licensing") entered the address for Mr. Anderson as 882 Greenbriar Drive, State College, Pennsylvania. (Admin. Notice). Licensing sent correspondence to that address dated February 7, 2008, and there is no indication that it was returned. (Admin. Notice).

On March 11, 2008, the fine having not been paid, the ALJ issued to Licensee, by regular and certified mail at its business address of record, 244 West College Avenue, State College, Pennsylvania 16801, an Opinion and Order Upon Failure to Pay A Fine imposing a one (1)-day license suspension to continue thereafter until the fine was paid. (Admin. Notice). The Order further stated that, if the fine was not paid within sixty (60) days from the mailing date of March 11, 2008, the suspension would be reevaluated, and

revocation of the license would be considered. (Admin. Notice). The certified mailing was returned marked "unclaimed," but the regular mailing was not returned. (Admin. Notice).

On May 30, 2008, the ALJ issued to Licensee, by regular and certified mail at its business address of record, 244 West College Avenue, State College, Pennsylvania 16801, a Supplemental Opinion and Order acknowledging that a sixty (60)-day period had elapsed, and that Licensee had failed to pay the one hundred fifty dollar (\$150.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective July 14, 2008. (Admin. Notice). The certified mailing was returned marked "unclaimed," but the regular mailing was not returned. (Admin. Notice).

On July 30, 2008, Licensee, by its counsel Samuel J. Malizia, filed an Appeal with the Board.

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 upon the waiver submitted on Licensee's behalf, Mr. Anderson 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). While the Board would normally end the inquiry there and dismiss an appeal, under the specific circumstances of this case, the Board finds that this appeal is neither based upon the substance of the violation, nor the initial penalty imposed but, rather a series of unfortunate events that led to revocation of the license.

Section 17.21(c) of the Board's Regulations [40 Pa. Code § 17.21(c)] requires that appeals from decisions 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 June 30, 2008. Accordingly, Licensee's appeal was thirty (30) days late. (Admin. Notice).

Licensee states in its appeal that it ceased operations during the fourth quarter of 2007, due to financial and market difficulties, and that no person has been at the licensed premises since that time. It claims that, since January of 2008, it has been working to convey ownership of the licensed business to LaVar Arrington and FMM, LLC t/a Linebacker U Sports Café ("Linebacker U"). To that end, an Asset Purchase Agreement was signed by the parties on April 11, 2008, and all of the required Board applications were filed in May of 2008. By letter dated July 21, 2008 (received by Licensee's counsel July 23, 2008), Linebacker U's counsel was informed that the subject license had been revoked effective July 14, 2008. The transaction to transfer the licensed business, originally scheduled for July 25, 2008, was postponed, and the money to close the transaction is being held in escrow pending this appeal.

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 satisfied the first factor of the Cook criteria. Licensee has set forth circumstances surrounding the lateness of this appeal which suggest a breakdown in the operation of the Board or the OALJ, and/or non-negligent conduct by Licensee.

Licensee's operation closed down at the end of 2007. In January of 2008, Licensee's waiver, wherein Licensee's principal agreed that a penalty should be imposed by the ALJ, was accepted by the OALJ. Licensee does not 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 executed and Licensee was aware that a penalty would be forthcoming. However, overshadowing that is the fact that the Board was put on notice that the licensed premises was no longer in operation, and that Licensee's principal's address was 882 Greenbriar Drive, State College. Unfortunately, this information was either

not transmitted to the OALJ, or did the OALJ pick up on it. Therefore, in addition to Licensee's lack of effort on its own behalf, there appears to have been a breakdown in the administrative system that may have led to Licensee being unaware of the potential revocation of its license.

Because Licensee has set forth circumstances surrounding the lateness of this appeal which suggests a breakdown in the operation of the Board or the OALJ, and/or non-negligent conduct by Licensee, the Board finds that Licensee has satisfied the first factor of the Cook criteria.

Relative to the second and third Cook factors - whether the appeal was filed within a short time after Licensee learned of and had the opportunity to address the untimeliness, and whether the time period which elapsed was of very short duration - the Board notes that the appeal was filed within seven (7) days of the time Licensee's counsel became aware of the revocation, and within thirty (30) days of the issuance of the Order revoking the subject license. While it can be said that Licensee should have known in January to look for a penalty to be imposed against the subject license, giving Licensee the benefit of the doubt under the specific circumstances of this case, the Board is inclined to determine that the appeal was filed within a short time after Licensee learned of the untimeliness, and the period of time which

elapsed was of very short duration. Licensee, therefore, has met 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. The Board sees no harm to the Bureau, whether or not this appeal is granted nunc pro tunc.

Accordingly, the appeal of Licensee is granted, and the decision of the ALJ is reversed.

ORDER

The appeal of Licensee is granted.

The decision of the ALJ is reversed.

It is hereby ordered that this matter is remanded to the OALJ for imposition of a penalty in accordance with the Opinion and Order Upon Failure to Pay a Fine issued March 11, 2008.

Board Secretary