

Mailing Date: July 15, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-1703
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

706 ALLEGHENY RIVER BLVD INC. : License No. R-12998
T/A THE GRAY GOOSE :
706 ALLEGHENY RIVER BLVD :
VERONA, PA 15147-1302 :

Counsel for Licensee: Charles L. Caputo, Esquire
Caputo & Caputo
The Pitt Building
Suite 303
Pittsburgh, PA 15222

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

OPINION

Chuck Brusco (“Brusco”) appealed *nunc pro tunc* from the Second Supplemental Order of Administrative Law Judge Roderick Frisk (“ALJ”), wherein the ALJ revoked the license.

The first count of the citation charged that on June 13, 2007, 706 Allegheny River Blvd., Inc. t/a The Gray Goose (“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), 4-493(16)], by permitting by the sale of alcoholic beverages after its restaurant liquor license expired on May 31, 2007, and had not been renewed and/or validated.

The second count of the citation charged that on June 30, 2007, Licensee, by its servants, agents or employees, violated section 493(1) of the Liquor Code [47 P.S. § 4-493(1)], by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) female minor, nineteen (19) years of age.

On January 14, 2008, 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 and waived the right to appeal the adjudication. (Adjudication p. 2). The Waiver form was signed by Robert McMahon, Licensee’s corporate president, on January 11, 2008.

On February 13, 2008, the ALJ mailed an Adjudication and Order, sustaining the citation and imposing a twenty-five hundred dollar (\$2,500.00) fine, to be paid within twenty (20) days of the mailing date of the Order (Adjudication p. 4). The ALJ also imposed mandatory participation in the

Responsible Alcohol Management Program (“R.A.M.P.”), as set forth in section 471.1 of the Liquor Code.

On April 14, 2008, the fine having not been paid, the ALJ mailed a Supplemental Order imposing a one (1)-day suspension which was to commence on June 16, 2008. The Order further states that, in the event the fine was not paid within sixty (60) days from the mailing date of April 14, 2008, the one (1)-day suspension would be reevaluated, and revocation of the license would be considered. (Supplemental Order p. 2).

On June 30, 2008, the ALJ mailed a Second Supplemental Opinion and Order noting that Licensee has failed to pay the twenty-five hundred dollar (\$2,500.00) fine.¹ Accordingly, the ALJ ordered revocation of the license effective August 18, 2008. (Admin. Notice).

On April 29, 2009, Charles L. Caputo, Esquire, filed an appeal *nunc pro tunc* on behalf of Brusco, a secured creditor and successful bidder at an Internal Revenue Service (“IRS”) sale on Licensee’s Restaurant Liquor License No. R-12998.

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

¹ The OALJ noted that Licensee’s restaurant liquor license expired on May 31, 2008. Therefore, the one (1)-day suspension and continuing suspension could not have been served.

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. McMahon, Licensee's corporate President at the time of Waiver submission, this appeal must be dismissed. Licensee's right to appeal the substance of the violation and the penalty imposed were expressly waived. Therefore, the appeal must be dismissed. 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).

Even if Licensee's right to file an appeal was not waived, and the Board considered the appeal *nunc pro tunc* filed by Brusco, the appeal would be dismissed.

The Pennsylvania Supreme Court has stated that "[w]here an appeal is not timely because of non-negligent circumstances, either as they relate to

appellant or his counsel, and the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, and the time period which elapses is of very short duration, and appellee is not prejudiced by the delay, the court may allow an appeal *nunc pro tunc*.” Cook v. Unemployment Compensation Bd. of Review, 671 A.2d 1130, 1141 (1996).

The Board has reviewed Licensee’s appeal in light of the Cook criteria to determine if Brusco has established the non-negligent circumstances necessary to justify a *nunc pro tunc* appeal.

On appeal, Attorney Caputo contends that on or about July 19, 2007, Brusco made a loan to Licensee, which loan was secured by a first position UCC-1 security interest encumbering Restaurant Liquor License No. R-12998. Some time prior to October 29, 2008, Brusco received a notice from the IRS indicating License No. R-12998 had been seized and would be sold at a public auction sale to satisfy Licensee’s delinquent tax obligations to the federal government. Brusco’s agent attended a public auction sale on October 29, 2008 and became the successful bidder for the license with a bid of thirteen thousand eight hundred dollars (\$13,800.00). Brusco subsequently identified a potential purchaser for the license in February 2009; however, upon contacting

the Board to request the necessary renewal applications, Brusco was informed that the license was no longer in existence. On March 4, 2009, counsel for the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), informed Attorney Caputo that the license had been revoked for failure to pay the fine from Citation 07-1703.

On March 4, 2009, Bureau counsel faxed copies of the relevant citation documents to Attorney Caputo.

On appeal, Brusco further avers there was an administrative breakdown because neither the Board nor the OALJ notified him that the license, in which Brusco had a perfected security interest, was in jeopardy of being revoked for failure to pay a fine. Brusco further avers that the fundamental rights of due process and existing case law requires either the Board or the OALJ to notify Brusco, who had a perfected security interest in the license, that the license was in jeopardy of being revoked for failing to pay a fine at Citation No. 07-1703.

Brusco contends that had he known that the license was in jeopardy, he would have sought permission to intervene in the enforcement proceedings and paid the twenty-five hundred dollar (\$2,500.00) fine, as evidenced by the

fact that Brusco willingly paid thirteen thousand eight hundred dollars (\$13,800.00) to the IRS on October 29, 2008 to preserve the license.

The Board has reviewed this *nunc pro tunc* appeal matter with the secured creditor's objections in mind.

In applying the Cook criteria to the instant case, the Board finds that Brusco failed to adequately satisfy the first factor of the Cook criteria, that the failure to timely appeal was the result of an administrative breakdown and not because of the negligence of appellant or its counsel. While Brusco has suggested that there was an administrative breakdown in the case because neither the Board nor the OALJ notified him, a creditor, of the fact that the license was in jeopardy of being revoked for failing to pay a fine, the Board does not agree. However, as it was Licensee's corporate president, Robert McMahon, who filed the Waiver, thus waiving Licensee's right to file any appeal, the OALJ acted properly in sending the Adjudication and all other Supplemental Orders to the Licensee of record. Further, Brusco cites no case law for the proposition that section 471 of the Liquor Code requires the Board or the Bureau to apprise a creditor of the status of a citation matter.

In addition, the Board notes that Brusco was the successful bidder for the liquor license on October 29, 2008. After the public auction, Brusco began

actively looking for a buyer for the license so he could recoup the unpaid balance on his loan and the additional monies paid to the IRS for the license. Yet, it was not until February 2009, that he made contact with the Board to request the necessary renewal applications. Brusco provides no explanation for why he failed to contact the Board or the OALJ to determine the status of the liquor license prior to or at the time of the auction. Had he done so, he would have become aware of the license's revocation prior to the public auction.

In Criss v. Wise, 781 A.2d 1156, 1160 (Pa. 2001), the Pennsylvania 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.

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

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), 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 (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 *nunc pro tunc* appeal was filed almost nine (9) weeks after Brusco and his attorney, Charles C. Caputo, became aware of the revocation action. There is no detailed explanation as to why Brusco did not file the appeal until April 29, 2009, when in fact Brusco's counsel was informed of the Revocation Order and the other citation documents on March 4, 2009.

Relative to the fourth Cook factor, the Board sees no harm to the Bureau whether or not this appeal is granted *nunc pro tunc*. Nonetheless, Brusco failed to establish that his circumstances met all of the Cook criteria.

Under the circumstances, the Board is without authority to entertain Brusco's appeal, as it was untimely filed. The appeal, therefore, is dismissed.²

² It should be noted that Brusco does not raise any issues relating to the merits of the adjudication itself.

ORDER

The decision of the ALJ is affirmed.

The appeal of Brusco is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-12998 remains revoked as of August 18, 2008.

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

Board Secretary