

Mailing Date: October 22, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-2161X
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

BILLY JEANS BOYS, LLC : License No. R-17355
t/a Pogey's Restaurant & Tavern :
1021 Morehall Road :
Devault, PA 19432 :

Counsel for Licensee: Ex-Parte (Before ALJ)
Paul J. Rubino, Esquire
50 Darby Road
Paoli, PA 19301

Counsel for Bureau: James E. Dailey, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

OPINION

Billy Jeans Boys, LLC ("Licensee") appealed from the Supplemental Opinion and Order of Administrative Law Judge Felix Thau ("ALJ"), wherein the ALJ revoked the license.

The citation charged that Licensee, by its servants, agents or employees violated section 493(26) of the Liquor Code [47 P.S. § 4-493(26)] by issuing checks or drafts dated July 20 and 27, 2007, in payment for purchases of malt or brewed beverages, when Licensee had insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks.

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).

A review of the record in this matter reveals that in response to the citation in question, Licensee failed to attend a hearing held before the ALJ on December 10, 2007.

On January 31, 2008, the ALJ mailed his Adjudication and Order sustaining the citation and imposing a three hundred dollar (\$300.00) fine to be paid within twenty (20) days. (Admin. Notice). The Order provided that, in the event the fine was not paid within that timeframe, the license would be suspended or revoked.

On April 15, 2008, the fine having not been paid, the ALJ mailed a Supplemental Order imposing a deferred one (1)-day license suspension, to be set upon renewal of the license. (Admin. Notice). The Order further stated that, in the event the fine was not paid within sixty (60) days from the mailing date of April 15, 2008, the suspension would be reevaluated, and revocation of the license would be considered. (Admin. Notice).

On June 30, 2008, the ALJ mailed a Second Supplemental Order noting that the sixty (60)-day period had elapsed and that Licensee had failed to pay the three hundred dollar (\$300.00) fine. (Admin. Notice). Accordingly, the ALJ ordered revocation of the license effective August 25, 2008. (Admin. Notice).

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 June 30, 2008 date to file a timely appeal with the Board, i.e., until July 30, 2008.

On or about August 18, 2008, Petitioner, Robert M. Long filed a Petition For Allowance Of Appeal *Nunc Pro Tunc* with the Board on behalf of the Licensee.

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 the Licensee has established the non-negligent circumstances necessary to justify a *nunc pro tunc* appeal.

Petitioner states in its Petition For Allowance of Appeal *Nunc Pro Tunc* that the Petitioner, Robert M. Long, is a fifty percent (50%) member of

Licensee, Billy Jeans Boys, LLC, t/a Pogeys' Restaurant and Tavern ("Billy Jeans Boys"). Petitioner has been in litigation against Billy Jeans Boys and Kenneth T. Long, the remaining fifty percent (50%) member and managing member since May 2007. Petitioner avers that since the inception of the LLC, Kenneth Long has mismanaged the operation of the business and has been running the business on his own without regard to Petitioner since 2005.

Petitioner's litigation in Common Pleas Court of Chester County involves Petitioner's request for dissolution of the corporation and accounting by Kenneth Long; repayment of all diverted funds or assets; appointment of liquidating receiver. Petitioner further avers that prior to and during the litigation, he was not made aware of any problems pertaining to the liquor license and was not aware of any citations, adjudications or orders.

In support of its Petition For Allowance of Appeal *Nunc Pro Tunc*, Petitioner has attached a copy of its Court of Common Pleas Complaint and the August 8, 2008 Order of the Court which orders that the licensed business cease operation and that Petitioner be appointed liquidating receiver; and the liquidation of the LLC. (Petition For Appeal *Nunc Pro Tunc* – Exhibit "C"). When Petitioner was appointed liquidating receiver he

contacted the Liquor Control Board in that capacity on or about August 13, 2008 and was then for the first time informed that there was an outstanding order and opinion revoking the license effective August 25, 2008. Petitioner further avers that pursuant to the stipulated order, the business was to cease operation effective August 24, 2008 and Petitioner, as liquidating receiver is to proceed with liquidating the assets and winding up the affairs of the license.

The Board's further review of the record confirms that Petitioner's Petition For Allowance of Appeal *Nunc Pro Tunc* was filed shortly after Petitioner learned of the outstanding order and opinion as its Petition was filed within one (1) week of learning of the Order to revoke the license.

In the instant matter, the Bureau has responded to the Petition For Allowance of Appeal *Nunc Pro Tunc* by stating that it is opposed based upon the Bureau's belief that the situation and facts set forth in the Petition fail to demonstrate that non-negligent circumstances prevented either managing partner from filing a timely appeal.

In applying the standards set forth in the Cook case to the instant case, the Board is constrained to find that Petitioner has not adequately satisfied the first factor of the Cook criteria. Petitioner was a fifty percent member of Licensee even before he assumed control of the license. The orders at issue

are public information that would have been made available to him had he simply inquired as to the status of the License at any time prior to August 2008. There is no allegation that any notice due to the Licensee or Petitioner was not received. Thus, there simply is not the type of administrative breakdown necessary to satisfy the first prong of the Cook test.

The Board does find that Licensee has adequately satisfied the second factor of the Cook criteria; that the appeal is filed within a short time after Petitioner learned of and had the opportunity to address the untimeliness. Upon learning of the Adjudication, the Opinion and Order Upon Licensee's Failure to Pay A Fine, and the Supplemental Opinion and Order on August 13, 2008, Petitioner filed a *nunc pro tunc* appeal to the Board on August 18, 2008. Since the appeal in question was filed within one (1) week after Petitioner learned of the Supplemental Opinion and Order of the ALJ, the Board accepts the time period as sufficient to meet the second factor of the Cook criteria.

The Board also finds that Licensee has adequately satisfied the third factor of the Cook criteria; that the time period which elapsed was of very short duration. In light of the circumstances, during the time period in question, the Petitioner has established that he immediately sought legal

action in an effort to regain management of the business and to seek the intervention of the court.

Relative to the final factor of the Cook criteria, although the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) has objected to Petitioner’s *nunc pro tunc* appeal based upon its assertion that the appeal does not meet the first of the Cook criteria, the Bureau has not, however, claimed prejudice by the delay in filing of this appeal.

Nonetheless, the circumstances set forth by Licensee as to the late filing of its appeal and its failure to pay the three hundred fine (\$300.00) do not sufficiently meet all of the criteria in the Cook case and, therefore, do not warrant acceptance of the appeal.

Further, even if the appeal *nunc pro tunc* had been accepted, there is no question that the fine was not paid in a timely manner and thus the decision by the ALJ to revoke the License would have been affirmed anyway. Of course, the Board is aware that if appealed, the Court of Common Pleas will review the decision *de novo* and impose whatever penalty it deems appropriate.

ORDER

The Supplemental Opinion and Order issued by the ALJ on June 30, 2008 is affirmed.

Licensee's request for Appeal *Nunc Pro Tunc* is denied.

Licensee may not resume operation of the licensed premises until further Order of the ALJ.

Licensee must adhere to all other terms and conditions of the ALJ's Order dated April 15, 2008.

Board Secretary