

Mailing Date: February 4, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-0107
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
THE BLUE COMET, INC.	:	License No. R-234
106 S. Easton Road	:	
Glenside, PA 19038-4001	:	
	:	

Counsel for Licensee: John J. McCreesh, IV, Esquire
McCreesh, McCreesh, McCreesh & Cannon
7053 Terminal Square
Upper Darby, PA 19082

Counsel for Bureau: Roy Harkavy, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
8320 Schantz Road, Second Floor
Breinigsville, PA 18031

OPINION

The Blue Comet, Inc. (“Licensee”) appealed *nunc pro tunc* from the Order of Administrative Law Judge Tania E. Wright (“ALJ”), wherein the ALJ revoked the license.

The citation charged that Licensee violated section 471 of the Liquor Code [47 P.S. § 4-471] and section 7101 of the Tax Reform Code of 1971, [72 P.S. § 7101], in that Licensee failed and/or refused to remit, in a timely manner, to the Commonwealth of Pennsylvania, Department of Revenue, sales tax due and owing for the period of May 1 through May 31, 2007 in the amount of four hundred seventeen dollars and seventy-nine cents (\$417.79).

On July 16, 2008, Licensee submitted an Admission, Waiver and Authorization (“waiver”) to the Office of the Administrative Law Judge (“OALJ”), in which Licensee admitted to the violation charged in the citation and waived the right to appeal the adjudication. (Adjudication, p.1). The waiver form was signed by Scott Acker, Licensee’s sole corporate officer, on July 8, 2008.

On August 13, 2008, the ALJ issued an Opinion and Adjudication, sustaining the citation and revoking the license, since she had previously revoked the license, affective November 19, 2007, as a result of Citation Nos. 06-2621x and 06-3024x.

On or about October 21, 2008, Licensee, through its new counsel, John J. McCreesh, IV, filed a Petition for Appeal Nunc Pro Tunc (“Petition”) 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 her discretion, or if her 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. Acker, Licensee’s sole corporate officer, 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*, 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).

The Board finds that Licensee has failed to adequately satisfy the first factor of the Cook criteria. Licensee has not set forth circumstances surrounding the lateness of this appeal which suggest fraud or breakdown in the operation of the OALJ, nor has it alleged that the appeal was late because of non-negligent conduct by Licensee or its attorney. Although it is alleged that Licensee was initially unaware at the revocation of the license, Licensee's counsel failed to specify exactly when Licensee learned of the revocation and when it contacted counsel. Further, beyond mentioning that during some unspecified period of time Mr. Acker's mother became ill and Mr. Acker became distracted, there is no detailed explanation as to how the mother's illness impacted Mr. Acker's responsibility to the licensed premises on a day-to-day basis. In addition, Licensee has not provided an explanation for why Licensee did not appoint a responsible party to act on his behalf regarding the licensed business after his mother became ill; nor did Licensee 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. Licensee has thus failed to provide any explanation sufficient to rise to the level of non-negligent circumstances as described in the Cook case.

Relative to the second and third Cook factors, the appeal was filed on October 21, 2008, but should have been filed a month earlier, by September 12, 2008. Since Licensee's counsel has failed to specify exactly when he was contacted by Licensee, the Board is unable to determine whether the appeal was filed within a short time after Licensee learned of and had the opportunity to address the untimeliness. The passage of over a month from the date the appeal should have been filed, the third Cook factor, is not of very short duration and, thus, the Licensee does not meet the factor.

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.

Accordingly, even if the waiver were not in effect, the Board would not have accepted this appeal *nunc pro tunc*.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee’s Restaurant Liquor License No. R-234 remains revoked as of November 19, 2007.

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

Board Secretary