

Mailing Date: September 23, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 08-0571
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

MJF COMPANY, LLC : License No. R-21395
T/A VEGAS :
220 PARK RD NORTH BUILDING 4 :
WYOMISSING, PA 19610 :

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Bureau of Liquor Control Enforcement
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OPINION

MJF Company, LLC t/a Vegas (“Licensee”), presently seeks permission to appeal *nunc pro tunc*¹ from the February 9, 2009 Second Supplemental Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ revoked

¹ Licensee filed a Motion for Reconsideration *Nunc Pro Tunc* with the Pennsylvania Liquor Control Board (“Board”) rather than the ALJ. In the interests of judicial efficiency, the Board will treat the filing as a Petition to Appeal *Nunc Pro Tunc*.

the license effective March 2, 2009, for failure to pay a four hundred dollar (\$400.00) fine.

On March 24, 2001, Licensee was issued a citation by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”). The citation charged Licensee with (1) violating section 13.102(a)(3) of the Pennsylvania Liquor Control Board’s (“Board”) Regulations by offering unlimited drinks for a set price on August 3, 2007; (2) violating section 493(26) of the Liquor Code by issuing checks or drafts dated July 18 and October 5, 2007, when it had insufficient funds for repayment of such checks; and (3) for violating section 474.1(6) of the Liquor Code and section 7.31(a) of the Board’s Regulations by failing to return its Restaurant Liquor License and Wholesale Liquor Purchase Permit Cards when, subsequent to November 1, 2007, because it had failed to be in operation for a period of fifteen (15) consecutive days. [40 Pa. Code §§ 13.102(a)(3), 7.31(a); 47 P.S. §§ 4-493(26), 4-474.1(6)]. Licensee submitted a Statement of Waiver, Admission and Authorization dated August 10, 2008, in which it admitted to all of the violations, acknowledged that the Bureau complied with the applicable notice requirements, authorized the ALJ to enter an adjudication without a hearing, and waived its appeal rights. Subsequently, on September 19, 2008, the ALJ issued the Adjudication and Order sustaining

all counts of the citation and imposed a four hundred dollar (\$400.00) fine. When Licensee had not paid the fine within the allotted twenty (20) days, the ALJ issued a Supplemental Order, dated November 4, 2008, suspending the license for at least one day. The fine remained unpaid and the ALJ issued a Second Supplemental Order dated February 9, 2009, in which he revoked the license effective March 2, 2009. The instant appeal followed².

Before addressing the issue raised by Licensee in its appeal, the Board will dispose of the Motions for Leave to Intervene in Support of the Motion for Reconsideration *Nunc Pro Tunc* of MJF Company, LLC filed by North Park Associates, LP (“North Park”) and Rumorz, Inc. (“Rumorz”) on August 18, 2009. Section 471 of the Liquor Code establishes appellate rights for the Bureau and the person who was fined or whose license was suspended or revoked. [47 P.S. § 4-471]. Neither the Liquor Code nor the Board’s Regulations create a right of intervention in citation cases. Nonetheless, a party may acquire standing in a matter if it can establish that it would be directly aggrieved by an adverse decision. See Malt Bevs. Distributions Ass’n. v. Pa. Liquor Control Bd., 881 A.2d 37 (Pa. Cmwlth. 2005), appeal denied, Malt Bevs. Distributions Ass’n. v. Pa. Liquor Control Bd., 895 A.2d 1264 (Pa. 2006).

² As noted earlier, Licensee had filed a waiver in this matter, expressly waiving the rights to appeal this adjudication. While the Board believes that such waiver precludes the filing of an appeal to the extent that what has been appealed is not the adjudication itself but the Second Supplemental Order, the Board, out of an abundance of caution, has addressed the appeal itself.

In the instant case, North Park asserts that it should be able to intervene because it acquired certain real estate with the understanding that the license in question would eventually be transferred to its tenant, Rumorz. For the Board to hold that such a relationship would confer standing to North Park would mean that dozens of entities with relationships with either current licensees or future licensees would have standing in citation matters. The Board does not believe, nor has any case law been brought to its attention, that would support such a legal position. Thus, North Park's Petition to Intervene is denied.

Similarly, Rumorz asserts that it should be granted standing because it acquired the rights to apply for this license from a third party creditor in June 2009. The Board notes that no license existed as of that date both because the license had been revoked several months prior and because the license had not been renewed. The Board does not believe, nor has any case law been brought to its attention, that would support a holding that acquiring the rights to apply for a non-existent license grants the receiving party standing.

Turning to the instant appeal filed by the Licensee, Section 471 of the Liquor Code clearly establishes a thirty (30)-day filing deadline for appeals from an ALJ decision. [47 P.S. § 4-471]. Additionally, the filing of a timely appeal is a

jurisdictional requirement that must be met before any appeal may be considered and appellate bodies do not have the authority to simply enlarge the time for filing an appeal. Criss v. Wise, 781 A.2d 1156 (Pa. 2001); Morrisons Cove Home v. Blair County Bd. of Assessment Appeals, 764 A.2d 90 (Pa. Cmwlth. 2000).

Licensee filed the present appeal on August 3, 2009, more than five (5) months after the license revocation was imposed on February 3, 2009. There is no doubt that Licensee's appeal is untimely. Licensee acknowledges that the appeal is untimely and requests permission to 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). It is well established that failure to file a timely appeal is a jurisdictional defect; as a result, "the time for taking an appeal cannot be extended as a matter of

grace or mere indulgence.” H.D. v. Pennsylvania Dept. of Public Welfare, 751 A.2d 1216 (Pa. Cmwlth. 2000); Sofronski v. Civil Service Commission, City of Philadelphia, 695 A.2d 921 (Pa. Cmwlth. 1997). The heavy burden of establishing the right to have an untimely appeal rests with the moving party. Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194 (Pa. Cmwlth. 2008).

As to the first part of the four-part test, Licensee argues that it should be permitted to file an appeal *nunc pro tunc* because it did not become aware of the license revocation until July 13, 2009, during the process of transferring the license to a new owner. Licensee claims that it did not receive notice of the entry of the Adjudication and Order, the Supplemental Order, or the Second Supplemental Order. [Licensee’s Motion for Reconsideration *Nunc Pro Tunc*, Paragraph Nos. 19-27]. Licensee also maintains that it did not arrange to pay the fine because it was operating under severe financial distress. [Licensee’s Motion for Reconsideration *Nunc Pro Tunc*, Paragraph Nos. 28, 29]. Licensee’s arguments fail to set forth any circumstances suggesting fraud, a breakdown in the administrative process, or non-negligent circumstances.

Indeed, a review of the record indicates that the sole reason the present appeal was not filed in a timely manner was the inattentiveness of Licensee.

Licensee was aware of the citation proceedings and that a fine and/or suspension could be imposed as evidenced by the Statement of Admission, Waiver and Authorization signed by Michael Faust, sole owner of MJF Company, LLC, on August 10, 2008. Yet Licensee fails to allege any steps it took to determine the outcome of the citation proceedings before July 2009.

As to the issue of notice of the Second Supplemental Order, a review of the ALJ records of service, as provided to the Board, indicates the Second Supplemental Order was sent February 9, 2009, certified mail, return receipt requested, to Michael Faust, 217 Catherine Street, Shillington, PA 19607. The letter was returned unclaimed. The address used for mailing the Second Supplemental Order was provided by Licensee when the license was placed in safekeeping. Licensee specifically advised the Board to direct communications regarding issues related to the license to the Shillington address. [Safekeeping Letter, Feb. 26, 2008]. If Licensee had another address where mail was to be sent, it was the Licensee's responsibility to inform the Board of the change.

The Board takes administrative notice that Michael Faust, sole owner of MJF Company, LLC t/a Vegas, also holds Restaurant Liquor License R-17441 (LID 54601) for premises located at 217 Catherine Street, Shillington, Pennsylvania,

as sole proprietor. Mr. Faust is clearly receiving mail from the Board at the Shillington address.

As no extraordinary circumstances existed to cause Licensee's untimely filing of this appeal, the Licensee has not met the first part of the Cook test. Licensee had an obligation to determine the outcome of the citation proceedings and it failed to take any steps to do so. Furthermore, the ALJ took all steps necessary to advise Licensee of the outcome of the citation proceedings. Thus, the Board cannot accept an appeal *nunc pro tunc*.

As to the second Cook factor, an appeal of the Second Supplemental Order should have been filed with the Board by March 11, 2009, but was not filed until July 31, 2009. Even if the Board accepts as true Licensee's representation that it did not become aware of the revocation of this license until July 13, 2009, a delay of eighteen (18) days from the time Licensee becomes aware of the missed deadline and the actual filing of the appeal fails the second part of the Cook test. See UPMC Health Sys. v. Unemployment Comp. Bd. of Review, 852 A.2d 467 (Pa. Cmwlth. 2004) (delay of eleven (11) days from date counsel became aware of missed deadline and the filing of the appeal too long to allow *nunc pro tunc* relief), Stanton v. Commonwealth, Department of Transportation, 623 A.2d 925 (Pa. Cmwlth. 1993).

As to the third Cook factor, the Board believes that a delay of over four (4) months from the date the appeal should have been filed and the date it was filed is not a period of very short duration, as occurred under Cook.

As to the fourth Cook factor, no claim of prejudice has been made by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”). Nonetheless, since Licensee has not complied with the other Cook factors, the Board cannot grant the *nunc pro tunc* relief.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that the Licensee's Restaurant Liquor License No. R-21395 remains revoked as of March 2, 2009.

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

Board Secretary