

Mailing Date: May 12, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-0610
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
HUERTERO CO., INC.	:	
T/A EL ANTRO LATIN BAR	:	License No. R-2009
AND RESTAURANT	:	
91-93 Parrish Street	:	
Wilkes-Barre, PA 18702-4359	:	
	:	

Counsel for Licensee: Steven M. Greenwald, Esquire  
664 Citizens Bank Center  
8 West Market Street  
Wilkes-Barre, PA 18711

Counsel for Bureau: Craig Strong, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
7448 Industrial Parkway  
Macungie, PA 18062

**OPINION**

Antonio Huertero (“Licensee”) appeals from the Supplemental Opinion and Order of Administrative Law Judge Felix Thau (“ALJ”), issued February 17, 2009 wherein the ALJ revoked the license.

The procedural background is as follows:

On April 16, 2008, Licensee was issued a citation by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”). The citation charged Licensee with (1) violating section 493(1) of the Liquor Code in that Licensee by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) female minor, eighteen (18) years of age on February 16, 2008; and (2) violating section 493(14) of the Liquor Code in that Licensee by its servants, agents, or employees, permitted one (1) female minor and one (1) male minor, eighteen (18) and nineteen (19) years of age, to frequent its licensed premises on February 16, 2008, and divers other dates within the previous year. [47 P.S. §§ 4-493(1), (14)].

On August 27, 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, N.T. p. 4). The ALJ accepted the Waiver as presented, but nevertheless required the Licensee to attend a hearing based upon the ALJ’s assessment of the seriousness of the charges and the underlying circumstances. (N.T. 4-6).

On October 9, 2008, the ALJ mailed an Adjudication and Order, sustaining the citation and imposing a fine in the amount of one thousand two hundred fifty dollars (\$1,250.00). The ALJ also deferred mandatory compliance with Liquor Code section 471.1 [47 P.S. § 4-471.1] pertaining to Responsible Alcohol Management, pending renewal of the liquor license. The Order provided that if the “fine is not paid within twenty (20) days from the mailing date of this Order, Licensee’s license shall be suspended or revoked.” (Adjudication p.3).

On November 21, 2008, the fine having not been paid, the ALJ mailed an Opinion and Order Upon Licensee’s Failure to Pay a Fine, imposing a deferred two (2) day license suspension to continue thereafter until the fine was paid.<sup>1</sup> (Admin. Notice). The ALJ’s Order provided that “[i]n the event the fine has not been paid within sixty days from the mailing date of this Order, [ALJ] shall reevaluate the penalty of two days suspension with thereafter conditions and consider revocation of the license.” (Admin. Notice).

On December 3, 2008, Licensee submitted a letter requesting reconsideration of the ALJ’s October 9, 2008 decision.

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<sup>1</sup> The suspension period imposed by the November 21, 2008 Opinion and Order was deferred pending reactivation of Licensee’s license. (Admin. Notice).

On December 16, 2008, the ALJ issued an Opinion and Order Upon Licensee's Application For Reconsideration denying Licensee's request for reconsideration as untimely filed. The December 16, 2008 ALJ Opinion further ordered that the Opinion and Order Upon Licensee Failure to Pay a Fine mailed November 21, 2008, "SHALL REMAIN IN FULL FORCE AND EFFECT." (Admin. Notice).

On February 17, 2009, the fine having not been paid, the ALJ issued a Supplemental Opinion and Order noting that a sixty (60) day period had elapsed, and that Licensee had failed to pay the one thousand two hundred fifty dollar (\$1,250.00) fine. (Admin. Notice). The ALJ then vacated the pending suspension of the license and instead issued a revocation of the license effective April 6, 2009.

On or about December 10, 2009, an appeal was filed to the Pennsylvania Liquor Control Board ("Board"). The appeal document was found to be deficient in that the form lacked a signature and date and failed to specify any basis for the appeal or even an explanation as to which Order was being appealed. On December 14, 2009, a letter was sent to Licensee from the Board's Office of Chief Counsel acknowledging receipt of the Appeal and stating that in order to have the Office of the Chief Counsel proceed on the

appeal it would be necessary for Licensee to provide the missing information no later than January 4, 2010. Licensee has failed to provide a completed appeal form as requested by the Office of the Chief Counsel. Based solely on Licensee's failure to submit a fully completed appeal form including a signature, date and a specified basis for the appeal, this appeal must be dismissed.

Even assuming *arguendo* that Licensee's appeal was not otherwise deficient, pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/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, 484 A.2d 413 (Pa. Cmwlth. 1984).

Based solely on the waiver executed by Mr. Huertero, 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 any of the criteria set forth in the Cook case. As to the first Cook factor, Licensee has not set forth any circumstances surrounding the lateness of this appeal and has provided no relevant circumstances associated with fraud or breakdown in the

Court's operation, nor has Licensee even suggested any non-negligent conduct of appellant. As to the second Cook factor, Licensee has not indicated when it became aware of the untimeliness of its appeal nor of how quickly it acted after becoming aware of its untimeliness. Therefore, Licensee has failed the second part of the Cook test. As to the third Cook factor, the record evidences Licensee's appeal was filed approximately ten (10) months after issuance of the ALJ Supplemental Opinion and Order. The passage of ten (10) months 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 test.

Relative to the final factor of the Cook criteria, the Pennsylvania State Police, Bureau of Liquor Control Enforcement has not claimed prejudice by the delay in filing of this appeal.

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

### **ORDER**

The decision of the ALJ is affirmed.

The appeal of the Licensee is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-2009 remains revoked as of April 6, 2009.

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

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Board Secretary