

Mailing Date: May 6, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-0723
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
GCT, INC.	:	License No. R-804
t/a DALY'S PUB	:	
733 BROADWAY	:	
STOWE TOWNSHIP	:	
MCKEES ROCKS, PA 15136-2225	:	

Counsel for Licensee: Ex-Parte (before ALJ)  
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Bureau of Liquor Control Enforcement  
313 Mt. Nebo Road  
Pittsburgh, PA 15237-1305

**OPINION**

GCT, Inc., t/a Daly's Pub ("Licensee") appealed *nunc pro tunc* from the Second Supplemental Order of Administrative Law Judge Robert F. Skwaryk

(“ALJ”), wherein the ALJ revoked the license since Licensee had failed to pay a previously imposed fine.

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 October 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 payment of such checks.

The citation hearing notice was mailed to GCT, Inc., t/a Daly’s Pub on July 9, 2008 by certified mail, returned receipt requested. (Admin. Notice). Thereafter, the citation hearing notice was returned, marked “Return to Sender-Unclaimed”. (Admin. Notice).

On August 20, 2008, the Office of the Administrative Law Judge (“OALJ”) received an Admission, Waiver and Authorization (“waiver”) in which Licensee admitted to the violation charged in the citation and waived the right to appeal the adjudication. (Adjudication, p.2). The waiver form was signed by Scott McGanahan, Licensee’s corporate secretary.

On September 5, 2008, the ALJ issued an Opinion and Adjudication, sustaining the citation and imposing a fine in the amount of one hundred dollars (\$100.00). The ALJ’s Order provided that, “[i]n the event . . . the fine is

not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked."

On November 7, 2008, the fine having not been paid, the ALJ issued a Supplemental Opinion and Order imposing a one (1)-day license suspension to continue thereafter until the fine was paid. The Supplemental Order further stated that, if the fine was not paid within sixty (60) days from the mailing date of November 7, 2008, the suspension would be reevaluated, and revocation of the license would be considered.

On February 2, 2009, the ALJ issued a Second Supplemental Opinion and Order acknowledging that a sixty (60)-day period had elapsed, and that Licensee had failed to pay the one hundred dollar (\$100.00) fine. Accordingly, the ALJ ordered revocation of the license effective March 9, 2009.<sup>1</sup>

On or about March 3, 2009, Mr. George C. Thomas, Jr., sole officer and director of Licensee, received a letter from the Board's Bureau of Licensing indicating that the license had been revoked by Order February 2, 2009. (Licensee's Appeal Ex. D). On March 9, 2009, an appeal was filed by Attorney

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<sup>1</sup> The February 2, 2009 Second Supplemental Opinion and Order further acknowledged that at the time the Order was issued, the license was inactive. Accordingly, the Bureau of Licensing was directed to mark their records to show the license had been revoked and that Licensee's right to renew the license was thereby cancelled.

Caputo on behalf of George C. Thomas, Jr. (“Appellant”), as sole officer and director of Licensee. (Admin. Notice).

On appeal, Appellant contends that on February 19, 2008, a Form PLCB-866, Notice of Change in Business Structure, was filed with the Board’s Bureau of Licensing notifying the Board that Mr. Thomas was the sole officer and director of Licensee. (Licensee’s Appeal Ex. A). Appellant further asserts that from January 2008 through June 2008, the Board communicated with Anthony J. Pivrotto as agent for Mr. Thomas and Licensee regarding the renewal of Licensee’s Restaurant Liquor License No. R-804. Appellant contends that, as a direct result of those communications, the Board also approved a Conditional Licensing Agreement (“CLA”) as a condition of the license renewal at its meeting on June 11, 2008. (Licensee’s Appeal Ex. B). Notwithstanding the ongoing communication with the Board, Appellant further asserts that he never received Citation No. 08-0723, nor any other correspondence regarding the citation matter, until he received the March 3, 2009 letter from the Board. Appellant asserts that upon notice of the Order of Revocation, he then acted promptly to bring the appeal and that he is ready and willing to pay the fine imposed at Citation 08-0723.

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 defines "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).

The thirty (30)-day filing deadline for an appeal from the ALJ's Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was December 7, 2008. Accordingly, Licensee's appeal of this matter was more than three (3) months late. (Admin. Notice). 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).

In applying the standards set forth in the Cook case to the instant case, the Board finds that Appellant has adequately satisfied the first factor of the Cook criteria. Specifically, Appellant has established that its failure to file a timely appeal was caused by a breakdown at the Board which caused a non-negligent failure on the part of Licensee's sole corporate officer to file a timely appeal. Appellant, in its *nunc pro tunc* appeal, asserts that, by submission of Form PLCB-866 on February 19, 2008, the Board was put on notice that there was a new sole corporate officer, George C. Thomas, in place via election on November 2, 2007. The PLCB-866 specifically named Scott McGranahan along with two (2) other individuals as former officers, directors and/or stockholders for Licensee. (Licensee's Appeal Ex. A). The Resolution section of the PLCB-866 further provides that at a meeting on November 2, 2007, Licensee resolved that George C. Thomas is authorized to execute the 866 form and any other papers required by the Board. (Admin. Notice; Licensee's Appeal Ex. A).

The CLA approved by the Board on June 11, 2008, was executed by Mr. Thomas as sole corporate officer of the Licensee and, specifically, paragraph

5(d) of the CLA recites that Mr. Thomas is the sole officer and director of the Licensee. (Admin. Notice; Licensee Appeal Ex. B).

Licensee's sole corporate officer learned of the citation violations, and the penalties assessed therein, only when he received a letter from the Board dated March 3, 2009.

Notwithstanding the Form-866 and the CLA on file with the Board, the citation was waived through Licensee's former corporate officer, Scott McGranahan on or about August 20, 2008. (Admin. Notice).

Board records reveal that Scott McGranahan resigned from his position as corporate secretary, treasurer, director and manager by letter dated November 2, 2007. Mr. McGranahan's letter of resignation was received by the Bureau of Licensing on December 7, 2007. Accordingly, Mr. McGranahan was without corporate authority on August 20, 2008 to file the waiver pertaining to Citation No. 08-0723. (Admin. Notice).

Since the facts of this case support that Licensee's delay in filing this appeal was caused by extraordinary circumstances involving a breakdown of the Board's administrative system, the Board accepts that this matter meets the first factor of the Cook criteria.

The Board also finds that Licensee has adequately satisfied the second factor of the Cook criteria; that the appeal is filed within a short time after appellant or his counsel learned of and had the opportunity to address the untimeliness. Upon learning of the action of the OALJ's issuance of a Revocation Order dated February 2, 2009, Licensee filed a *nunc pro tunc* appeal to the Board on March 9, 2009. Since the appeal in question was filed within a few days after Appellant 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 Appellant 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, it is not unreasonable to presume that Mr. Thomas would rely upon the submission of the Form-866 to insure that all notices regarding the license would be sent to him as Licensee's sole corporate officer. There is sufficient evidence in the instant matter to suggest that, had Mr. Thomas been notified of the citation issued on July 9, 2008 he would have responded accordingly. Given the circumstances outlined above, it does appear that the period between November 7, 2008, the date of issuance of the first Supplemental Order and the March 9, 2009 appeal to the Board,

was a relatively short period of time. Therefore, the Board accepts this time period as sufficient to meet the third factor of the Cook criteria.

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. Further, given the circumstances involving the Board’s failure to inform Appellant of the pending citation action, it shall not claim to be prejudiced by the delay in filing of this appeal.

The circumstances set forth by Licensee as to the late filing of its appeal and its failure to pay the one hundred dollar (\$100.00) fine sufficiently meet all of the criteria in the Cook case and, therefore, warrant acceptance of the appeal *nunc pro tunc*, and support a decision to reverse the ALJ’s Second Supplemental Order dated February 2, 2009 and to reinstate the Supplemental Order dated November 7, 2008.

ORDER

The Second Supplemental Opinion and Order issued by the ALJ on February 2, 2009 is reversed.

Licensee's appeal is granted.

The November 7, 2008 Supplemental Opinion and Order shall be reinstated. Therefore, it is hereby ordered that Licensee pay the fine in the amount of one hundred dollars (\$100.00) within twenty (20) days of the mailing date of this Order.

It is further ordered that Licensee's Restaurant Liquor License No. R-804 be suspended for a period of one (1) day, and continuing thereafter until the fine has been paid, however, the suspension period is deferred pending reactivation of Licensee's license at which time the suspension period will be fixed by further Order of the ALJ.

Licensee must adhere to all other terms and conditions of the ALJ's Order dated November 7, 2008.

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Board Secretary