

Mailing Date: September 1, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 08-1291  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :  
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 :  
 v. :  
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 :  
 TRAILSIDE INN, LLC : License No. R-13406  
RR 3, Box 3249 AA :  
Factoryville, PA 18419-9301 : LID 58487

(Appeal of Lazy Raven, Inc.)

Counsel for Licensee: Joseph Watkins, Pro Se (before ALJ)

Counsel for Lazy Raven, Inc.: Ann Lavelle Powell, Esquire (on appeal)  
Nogi, Appleton, Weinberger & Wren, P.C.  
415 Wyoming Avenue  
Scranton, PA 18503

Counsel for Bureau: Craig A. Strong, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
7448 Industrial Park Way  
Macungie, PA 18062-9687

**OPINION**

Lazy Raven, Inc. (“Appellant”), prior owner of Restaurant Liquor License No. R-13406, which was transferred to Trailside Inn, LLC (“Licensee”), in

September, 2007, has appealed *nunc pro tunc* from the Second Supplemental Order of Administrative Law Judge Daniel T. Flaherty, Jr. (“ALJ”), wherein the ALJ revoked the license since Licensee had failed to pay a previously imposed fine for Citation No. 08-1291.

The citation charged that on May 4, 2008, Joseph P. Watkins, member, consumed alcoholic beverages while tending bar or otherwise serving alcoholic beverages, in violation of section 493(28) of the Liquor Code. [47 P.S. § 4-493(28)].

In response to the citation, Licensee attended a hearing held before the ALJ on March 19, 2009, during which time a properly executed Waiver, Admission and Authorization Form was submitted by Mr. Watkins, Licensee’s sole partner/member. (N.T. 4-5).

On May 29, 2009, the ALJ mailed an Adjudication and Order sustaining the citation and imposing a two hundred fifty dollar (\$250.00) fine, to be paid within twenty (20) days of the above date.

On July 17, 2009, the fine having not been paid, the ALJ mailed a Supplemental Order imposing a one (1) day suspension to continue thereafter until the fine was paid. The Order further stated that if the fine remained

unpaid after sixty (60) days from July 17, 2009, the suspension would be reevaluated, and revocation of the license would be considered.

On October 6, 2009, the ALJ mailed a Second Supplemental Order acknowledging that the sixty (60) day period had elapsed and that Licensee failed to pay the fine. Accordingly, the ALJ ordered revocation of the license effective October 6, 2009.

On April 10, 2010, Ann Lavelle Powell, Esquire, counsel for Appellant, filed an appeal *nunc pro tunc* to the Board in the name of Lazy Raven, Inc., the prior owner of Licensee and proposed successful bidder at sheriff's sale of the interest in Licensee.

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/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, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

The thirty (30) day filing deadline for an appeal from the ALJ's Second Supplemental Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was November 5, 2009. Accordingly, Appellant's appeal was more than five (5) months late. Thus, Attorney Powell, acting on behalf of the successful bidder for License No. R-13406, is seeking to intervene and have Appellant's appeal allowed *nunc pro tunc*.

The time for taking an appeal cannot be extended as a matter of grace or mere indulgence. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); In re: Dixon's Estate, 443 Pa. 303, 279 A.2d 39 (1971). Furthermore, the extension of the time of filing an appeal should be limited to cases where "there is fraud [or] some breakdown in the court's operation" caused by extraordinary circumstances. West Penn Power Co., 333 A.2d at 912. The negligence of an appellant, or an appellant's counsel, or an agent of appellant's counsel, has not been considered a sufficient excuse for the failure to file a timely appeal. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979). The rule set forth in Bass was further clarified in Cook v. Unemployment Compensation Board of Review, 671 A.2d 1130 (Pa. 1996); specifically, the court may allow an appeal *nunc pro tunc* where (1) an appeal is not timely because of non-negligent circumstances, either as they relate to appellant or his counsel;

(2) the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness; (3) the time period which elapses is of very short duration; and (4) the appellee is not prejudiced by the delay. Cook v. Unemployment Compensation Board of Review, 671 A.2d at 1131.

The Board has reviewed Appellant's appeal in light of the above criteria to determine if Appellant is a legitimate intervenor in this matter, and if so, if it has established the non-negligent circumstances necessary to justify a *nunc pro tunc* appeal.

On appeal, Appellant contends that, at the time of the transfer of Liquor License No. R-13406 to Licensee, Appellant maintained a security interest in the license. (Appellant Ex. A). Appellant perfected its security interest in the liquor license by filing a UCC-1 with the Pennsylvania Department of State on July 31, 2007. (Appellant Ex. B). When Licensee failed to pay Appellant for the liquor license, Appellant instituted an action in Wyoming County to collect from Licensee or to regain possession of the license. (Appellant Ex. C).

Appellant further contends that its efforts to pursue its rights against Licensee were delayed by the fact that Licensee's sole member, Joseph Watkins, moved from Wyoming County, making it impossible for Appellant to

perfect service against Licensee, and required Appellant to obtain court approval to serve Licensee by publication. Appellant further contends that it notified Licensee of the judgment entered against it and the proposed sheriff's sale by publication. (Appellant Exs. D and E).

Appellant scheduled a sheriff's sale of the interest in Licensee for April 6, 2010, and, at said sale, Appellant acquired all the rights and interest of Licensee's liquor license. (Appellant Ex. B).

After reviewing the record in this matter, the Board recognizes Lazy Raven, Inc. as a legitimate intervenor.

In applying the standards set forth in the Cook case to the instant case, the Board finds that Appellant has failed to adequately satisfy the first factor of the Cook criteria. Specifically, Appellant 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 established that its failure to file a timely appeal was caused by non-negligent conduct on the part of Appellant. Appellant, in its *nunc pro tunc* appeal, asserts that its efforts to pursue its rights against Licensee were delayed by the fact that Joseph Watkins, Licensee's sole member, moved from Wyoming County, making it "impossible" for Appellant to perfect service and requiring Appellant to obtain court approval to serve

Licensee by publication. Said publication was instituted on or about November 11, 2009. Appellant offers no specific facts as to exactly how and when and under what circumstances it became aware of the Supplemental Orders that were issued on July 17, 2009 and October 06, 2009. Further, Appellant further fails to establish why it did not simply pay the outstanding fine in a timely manner while it pursued the various steps necessary to effectuate its security interest in Liquor License No. R-13406.

Relative to the second and third Cook factors, the appeal was filed within five (5) months of the time it was due; however, because insufficient facts were provided relative to when Appellant actually learned of the supplemental Orders in relation to when the appeal was filed, the Board is unable to determine whether the appeal was filed within a short time after Appellant learned of and had the opportunity to address the untimeliness.

Regardless, the circumstances set forth by Appellant as to the late filing of its appeal and its failure to pay the two hundred fifty dollar (\$250.00) fine do not meet the criteria in the Cook case and, therefore, do not warrant acceptance of the appeal *nunc pro tunc*, or support a decision to reverse the ALJ's Second Supplemental Order dated October 6, 2009.

ORDER

Licensee's appeal is denied.

The Second Supplemental Order issued by the ALJ on October 6, 2009 is affirmed.

The fine of two hundred fifty dollars (\$250.00) remains unpaid.

It is hereby ordered that Appellant's Restaurant Liquor License No. R-13406 remains revoked as of October 6, 2009.

Licensee must adhere to all conditions set forth in the ALJ's Second Supplemental Order issued October 6, 2009.

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Board Secretary