

Mailing Date: July 15, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-1965
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
706 ALLEGHENY RIVER BLVD INC.	:	License No. R-12998
T/A THE GRAY GOOSE	:	
706 ALLEGHENY RIVER BLVD	:	
VERONA, PA 15147-1302	:	
	:	

Counsel for Licensee: Ex-Parte (before the ALJ)

Charles L. Caputo, Esquire (on appeal)
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Pittsburgh, PA 15222

Counsel for Bureau: Nadia L. Vargo, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
313 Mt. Nebo Road
Pittsburgh, PA 15237-1305

OPINION

Chuck Brusco (“Brusco”) appealed *nunc pro tunc* from the Second Supplemental Order of Administrative Law Judge Roderick Frisk (“ALJ”), wherein the ALJ revoked the license.

The citation charged that from May 16 through July 22, 2008, Licensee failed to comply with the Order of the ALJ at Citation No. 07-1703 mandating Responsible Alcohol Management (“R.A.M.P.”) Training.

A review of the record in this matter reveals that Licensee failed to attend a hearing before the ALJ on January 13, 2009.

On February 18, 2009, the ALJ issued an Opinion and Adjudication, sustaining the citation and revoking the license, effective March 30, 2009, noting that the license was previously revoked effective August 18, 2008 as the result of Citation No. 07-1703.

On April 29, 2009, Charles L. Caputo, Esquire, filed a Petition for Appeal *Nunc Pro Tunc* on behalf of Brusco, a secured creditor and successful bidder at an Internal Revenue Service (“IRS”) sale of Licensee’s Restaurant Liquor License No. R-12998.

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 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).

On appeal, Attorney Caputo contends that on or about July 19, 2007, Brusco made a loan to Licensee, which loan was secured by a first position UCC-1 security interest encumbering Restaurant Liquor License No. R-12998. Some time prior to October 29, 2008, Brusco received a notice from the IRS indicating License No. R-12998 had been seized and would be sold at a public auction sale to satisfy Licensee's delinquent tax obligations to the federal government. Brusco's agent attended a public auction sale on October 29, 2008 and became the successful bidder for the license with a bid of thirteen thousand eight hundred dollars (\$13,800.00). Brusco subsequently identified a potential purchaser for the license in February 2009; however, upon contacting the Board to request the necessary renewal applications, Brusco was informed the license was no longer in existence. On March 4, 2009, counsel for the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), informed Attorney Caputo that the license had been revoked for failure to pay the fine from Citation No. 07-1703.

On March 4, 2009, Bureau counsel faxed copies of the relevant citation documents to Attorney Caputo.

In the appeal *nunc pro tunc*, Attorney Caputo avers that notwithstanding the fact that Brusco had a perfected security interest in Licensee's license at the time the ALJ's Order of revocation was issued, Brusco was never notified that the license was in jeopardy of revocation as a result of enforcement proceedings until after the appeal period expired and the license was revoked.

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 has reviewed Brusco's appeal in light of the Cook criteria to determine if Brusco has established the non-negligent circumstances necessary to justify a *nunc pro tunc* appeal.

In applying the Cook criteria to the instant case, the Board finds that Brusco failed to adequately satisfy the first factor of the Cook criteria, i.e. that the failure to file a timely appeal was a result of an administrative breakdown on the part of the Bureau or OALJ and not as a result of negligence by the Appellant or his counsel.

Section 471(b) of the Liquor Code expressly states that following a hearing before the ALJ, if satisfied that a violation has occurred . . . the ALJ shall notify the licensee by registered mail, addressed to the licensed premises, of such suspension, revocation or fine [47 P.S. § 4-471(b)]. The record reveals that the adjudication for Citation No. 08-1965 was sent to Licensee, via his counsel of record, Charles Caputo, by certified mail and regular mail on the mailing date of February 18, 2009. (Admin. Notice). Accordingly, proper and sufficient notice was given to Licensee as set forth in the statute. The same counsel now purports to represent the secured creditor regarding the same liquor license, and Brusco concedes that the Bureau gave his counsel actual notice on March 4, 2009, which is two (2) weeks prior to the date the appeal had to be filed to be timely.

In Criss v. Wise, 781 A.2d 1156, 1160 (Pa. 2001), the Supreme Court stated that the exception for allowance of an appeal *nunc pro tunc* in non-negligent

circumstances is meant to apply only in unique and compelling cases in which the appellant has clearly established that it attempted to file an appeal, but unforeseeable and unavoidable events precluded it from actually doing so. Cook, 671 A.2d at 1132.

Brusco also failed to meet the second and third criteria set forth in Cook, supra, which examine whether or not the remedial filing was attempted within a short time after the appellant has the opportunity to address it, and whether the time period was of very short duration.

In Cook, the appellant filed his appeal three (3) days after he was released from the hospital, and four (4) days after the expiration of the appeal period. Clearly, whatever extraordinary circumstance is alleged as the reason for the late filing of an appeal (i.e., fraud, breakdown of the court's operation through default of its officers, or non-negligent conduct on the part of appellant, appellant's attorney, or the attorney's staff), the petition to file the appeal *nunc pro tunc* must be filed within a reasonable time after the occurrence of the extraordinary circumstance. Cook, 671 A.2d at 1132. In Bass v. Commonwealth Bureau of Corrections, et al., 401 A.2d 1133, 1135 (1979), the Supreme Court stated that, "[w]ithout doubt the passage of any but the briefest period of time during which an appeal is not timely filed would make it

most difficult to arrive at a conclusion that the failure to file was non-negligent.”

In the matter before the Board, the *nunc pro tunc* appeal was filed almost nine (9) weeks after Brusco and his attorney allegedly became aware of the revocation action. There is no detailed explanation as to why Brusco did not file the appeal until April 29, 2009, when, in fact, Brusco’s counsel was informed of the Revocation Order and the other citation documents on or before March 4, 2009, and in fact, may have known of the Revocation Order within days after the February 18, 2009 mailing date.

Relative to the fourth Cook factor, the Board sees no harm to the Bureau whether or not this appeal is granted *nunc pro tunc*. Nonetheless, Brusco failed to establish that its circumstances met all of the Cook criteria.

Under the circumstances, the Board is without authority to entertain Brusco’s appeal, as it was untimely filed. The appeal, therefore, is dismissed.¹

¹ It should be noted that Bursco does not raise any issues relating to the merits of the adjudication itself.

ORDER

The decision of the ALJ is affirmed.

The appeal of Brusco is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-12998 remains revoked under this citation as of March 30, 2009.

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

Board Secretary