Mailing Date: August 12, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : : : : : :	Citation No. 08-2629X
vs.		
HARRISON'S TAVERN, INC. t/a HARRISON'S TAVERN RTS. 390 & 191 P.O. BOX 284 CRESCO, PA 18326-0284	: : : :	License No. R-3086

Counsel for Licensee: David L. Horvath, Esquire (on Appeal)
Newman, Williams, Mishkin, Corveleyn, Wolfe & Fareri
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Bureau of Liquor Control Enforcement
7448 Industrial Park Way
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O P I N I O N

William C. Pipolo ("Pipolo")[1] filed a request for leave to appeal "*nunc pro tunc*" the Supplemental Order of Administrative Law Judge Daniel T. Flaherty ("ALJ"), wherein the ALJ revoked the license.

[1] On the date of the violation, license was held by a Corporation, Harrison's Tavern, Inc. with principals Patricia and Craig Harrison as President.

The citation charged that Harrison's Tavern, Inc. ("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 August 1 and 19, 2008, in payment for purchases of malt or brewed beverages, when it had insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks.

On December 22, 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. 1). The Waiver form was signed by Patricia Harrison, Licensee's corporate president, on July 20, 2008.

On January 15, 2009, the ALJ mailed an Adjudication and Order, sustaining the citation and imposing a six hundred and fifty dollar ($650.00) fine, to be paid within twenty (20) days of the mailing date of the Order (Adjudication p. 3).

On March 6, 2009, the fine having not been paid, the ALJ mailed a Supplemental Order noting that since the license was already revoked at Citation No. 08-0164, effective February 3, 2009, the license was ordered

revoked effective with the mailing date of said Order. (Supplemental Order p. 1).

On June 11, 2009, David L. Horvath, Esquire, filed an appeal *nunc pro tunc* on behalf of William C. Pipolo, purchaser of Licensee's Liquor License No. R-3086.

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).

Based solely on the Waiver executed by Ms. Harrison, Licensee's corporate President at the time of Waiver submission, 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* filed by Pipolo, the appeal would be dismissed.

The Pennsylvania Supreme Court has stated that "[w]here an appeal is not timely because of non-negligent circumstances, either as they relate to appellant or his counsel, and the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, and the time period which elapses is of very short duration, and appellee is not prejudiced by the delay, the court may allow an appeal *nunc pro tunc*." Cook v. Unemployment Compensation Bd. of Review, 671 A.2d 1130, 1141 (1996).

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

Pipolo states in his Request For Leave To Appeal *Nunc Pro Tunc* that Mr. Pipolo signed an agreement to purchase Liquor License No. R-3086 on July 30, 2008. (Request for Leave to Appeal *Nunc Pro Tunc* – Exhibit A). By signing the

agreement and tendering the Promissory Note as required under the terms of the agreement, Pipolo obtained an equity interest in Liquor License No. R-3086.

When Licensee failed to consummate the agreement to transfer the liquor license, Pipolo filed an action in equity in the Court of Common Pleas of Monroe County, Pennsylvania docketed to Number 145-Civil-2009. Thereafter, a Judgment by Default was obtained by Order dated March 25, 2009. (Request for Leave to Appeal *Nunc Pro Tunc* – Exhibit B). Pipolo thereafter filed a Petition for Contempt and on June 9, 2009, Judge J. Mark of the Monroe County Court of Common Pleas found Licensee's principals, Patricia and Craig Harrison to be in contempt of the March 25, 2009 Order; the Court further held that William C. Pipolo is an equitable owner of Licensee's liquor license by merit of the Agreement of Sale. The Court granted Mr. Pipolo standing to file any necessary proceedings with the Pennsylvania Liquor Control Board with regard to the conveyance of said license, including but not limited to appeals from any violation notices and Adjudications as a result of any actions or omissions by Harrison's Tavern, Inc. and its principals that may have occurred prior to the date of this Order. (Request For Leave to Appeal *Nunc Pro Tunc* – Supplemental Mailing, June 11, 2009).

On appeal, Attorney Horvath contends that Pipolo did not receive notice of the ALJ's Adjudication and was therefore unable to preserve and protect his equity interest in the license by either appealing the decision, arranging for the payment of the fines assessed by the ALJ, or otherwise.

Attorney Horvath further contends that the Licensee failed to provide any notice whatsoever to Pipolo that a citation had been issued, that the ALJ had adjudicated the matter, and that fines had been assessed and were to be paid within a limited amount of time. Pipolo contends that he had no notice of the violations or revocation of the license until May 27, 2009, and further avers that the ALJ committed an error of law by failing to notify Pipolo of the Adjudication and of the fines and when they were due.

The Board has reviewed this *nunc pro tunc* appeal matter with Pipolo's objections in mind.

In applying the Cook criteria to the instant case, the Board is constrained to find that Pipolo has not adequately satisfied the first factor of the Cook criteria, that the failure to timely appeal was the result of an administrative breakdown and not because of the negligence of appellant or its counsel. While Pipolo has suggested that there was an administrative breakdown in the case because the OALJ failed to notify him, a purchaser with an equitable

interest in the license, of the Adjudication and of the fine that was due, the Board does not agree. It was Licensee's corporate president, Patricia Harrison, who filed the Waiver, and thus, the OALJ acted properly in sending the Adjudication and all other Supplemental Orders to the Licensee of record. Further, Pipolo cites no case law for its proposition that the ALJ was somehow required to apprise a licensee's intended purchaser of the status of a citation matter.

In addition, the Board notes that Pipolo obtained a Judgment by Default from the Court of Common Pleas of Monroe County on March 25, 2009 wherein Licensee was ordered to place the license into safekeeping and to specifically perform the Agreement of Sale and convey the license to Mr. Pipolo. Pipolo avers that he did not become aware of Licensee's violations and Revocation Order until May 27, 2009. Pipolo provides no explanation for how he came to learn of the ALJ Adjudication and Revocation Order or why he did not contact the Board or the OALJ to determine the status of the liquor license prior to entering into the Agreement of Sale. The Orders at issue are public information that would have been made available to him had he simply inquired as to the status of the license at any time prior to issuance of the Default Judgment.

Thus, there simply is not the type of non-negligent circumstances necessary to satisfy the first prong of the Cook test.

The Board further finds that Licensee has not adequately satisfied the second factor of the Cook criteria; that the appeal is filed within a short time after Pipolo learned of and had the opportunity to address the untimeliness. Upon learning of the Adjudication and the Supplemental Orders on May 27, 2009, Pipolo filed a *nunc pro tunc* appeal to the Board on June 11, 2009. The appeal in question was filed within fifteen (15) days after Pipolo learned of the Supplemental Orders of the ALJ. Our Commonwealth Court has held that a delay of eleven (11) days is too long to merit *nunc pro tunc* relief. Stanton v. Commonwealth, Department of Transportation, 623 A.2d 925 (Pa. Cmwlth. 1993); UPMC Health Sys. v. Unemployment Comp. Bd. of Review, 852 A.2d 467 (Pa. Cmwlth. 2004).

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

Under the circumstances, the Board is without authority to entertain Pipolo's appeal, as it was untimely filed. The appeal, therefore, is dismissed.[2]

[2] It should be noted that Pipolo does not raise any issues relating to the merits of the adjudication itself.

ORDER

The decision of the ALJ is affirmed.

The appeal of Pipolo is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-3086 remains revoked as of March 6, 2009.

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

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Board Secretary