

Mailing Date: July 22, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 09-0750
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

PASION TROPICAL INCORPORATED : License No. R-11529
3528 I St. :
Harrowgate Plaza Store 7 & 8 :
Philadelphia, PA 19134-1449 :

Counsel for Licensee: Paul L. Herron, Esquire
Kelly & Herron, P.C.
Suite 3112
1700 Market Street
Philadelphia, PA 19103-3914

Counsel for Bureau: Erik Shmukler, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Ave.
Philadelphia, PA 19142

OPINION

Pasion Tropical, Incorporated (“Licensee”), filed the instant appeal challenging the decision of Administrative Law Judge David L. Shenkle (“ALJ”) in his Second Supplemental Order, wherein the ALJ revoked Restaurant Liquor

License No. R-11529 for failure to pay a fine of two hundred fifty dollars (\$250.00).

On April 7, 2009, Licensee was issued Citation No. 09-0750 by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) for two counts: first, for violating section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] in that, on February 27, 2009, Licensee failed to keep records on the licensed premises; and second, for violating section 473 of the Liquor Code [47 P.S. § 4-473] and section 5.41 of the Board Regulations [40 Pa. Code § 5.41] in that, on May 31, July 26, 2008 and February 27, 2009, Licensee operated the licensed premises without a valid health permit or license.

Licensee submitted a Statement of Waiver, Admission and Authorization on May 11, 2009, in which it admitted to all of the violations, acknowledged that the Bureau complied with the applicable notice requirements, authorized the ALJ to enter an adjudication without a hearing, and waived its appeal rights. Subsequently, on July 15, 2009, the ALJ issued an Adjudication and Order in which he sustained the two (2) counts in the citation and imposed a fine of two hundred fifty dollars (\$250.00).

When Licensee had not paid the fine within the allotted twenty (20) days, the ALJ issued a Supplemental Order on September 15, 2009, suspending

the license for at least one (1) day and continuing thereafter until the fine was paid. The fine remained unpaid and the ALJ issued a Second Supplemental Order on December 11, 2009, in which he revoked the license effective January 25, 2010. The instant appeal challenging the revocation of the license was filed *nunc pro tunc* on May 3, 2010. A response to Licensee's appeal was filed by the Bureau on May 13, 2010.

Licensee's appeal states that Licensee ceased operations at the licensed premises in June 2009 when Licensee was allegedly denied access to the licensed premises by its Lessor. Additionally, the appeal indicates that the principal of Licensee became ill at the time. Licensee argues that, because it was no longer in possession of the premises, it did not receive any of the Orders from the ALJ.

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 question in this case, therefore, is whether the circumstances described by Licensee would allow for a *nunc pro tunc* appeal, specifically, whether the circumstances would be considered “non-negligent,” when Licensee knew or should have known of the untimeliness, the duration of time which has elapsed, and whether the Bureau is prejudiced by the delay.

Licensee had ample notice that revocation of the license was possible if the fine was not paid in a timely manner. Although Licensee claims it did not receive a copy of the Orders because it was denied access to the licensed

premises, it was Licensee's obligation to provide an alternative address where mail could be received. The ALJ provided adequate notice to Licensee at the address provided by Licensee. Further, Licensee submitted a Statement of Waiver, Admission and Authorization on May 11, 2009 and was aware that a fine or other penalty would be forthcoming. The circumstances indicated in Licensee's appeal are therefore negligent, as Licensee was aware of the ongoing proceedings and took no steps to ensure notice would be received. Additionally, Licensee filed the instant appeal almost ten (10) months after the date of adjudication was issued. This is an unreasonable amount of time considering the circumstances, and would be prejudicial to the Bureau.

The Adjudication and Order clearly stated that the fine had to be paid within twenty (20) days from the date of the Order. [Adjudication and Order, July 15, 2009]. The Supplemental Order advised Licensee that the fine must be paid within sixty (60) days of the date of the Order or the ALJ shall "reevaluate the penalty. . . and consider revocation of the license." [Supplemental Order, September 15, 2009, pg. 1]. To date, Licensee has not paid the fine.

Section 471 of the Liquor Code authorizes the ALJ to revoke or suspend a license if a licensee does not pay a previously imposed fine within twenty (20)

days of its imposition. There is no question that the fine was not paid within twenty (20) days of the imposition.

Based on the foregoing, the Board concludes that Licensee was advised of the potential revocation and took no action to pay the fine. Therefore, the ALJ acted properly when he revoked the license.

ORDER

The decision of the ALJ is affirmed as to Citation No. 09-0750.

The appeal of Licensee is dismissed.

It is hereby ordered that Restaurant Liquor License No. R-11529 remains
revoked.

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

Board Secretary