Mailing Date: December 1, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-1062
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
THE DIRTY BIRD, LLC	:	License No. R-8762
T/A THE DIRTY BIRD	:	
66 CO OP COURT	:	
DANVILLE, PA 17821-2112	:	LID 57121

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O P I N I O N

The Dirty Bird, LLC t/a The Dirty Bird ("Licensee") appeals *nunc pro tunc* from the Second Supplemental Order of Administrative Law Judge Daniel T. Flaherty, Jr. ("ALJ"), wherein the ALJ revoked Licensee's restaurant liquor license due to failure to pay the fine imposed at Citation No. 09-1062.

The first count of the citation, issued on May 7, 2009, charged that on April 7, 2009, Licensee, by its servants, agents or employees, sold, furnished and/or gave alcoholic beverages during a time when its restaurant liquor license was suspended as the result of an earlier citation, in violation of sections 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2) and 4-493(16)].

The second count of the citation charged that on April 7, 2009, Licensee, by its servants, agents or employees, failed to post in a conspicuous place on the outside of the licensed premises, or in a window plainly visible from the outside of the premises, a Notice of Suspension, in violation of section 15.62(a) of the Board's Regulations [40 Pa. Code § 15.62(a)].

On August 3, 2009, 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, *inter alia*, waived a right to appeal the adjudication. [Adjudication p. 2]. The Waiver was signed by David W. Bird, Licensee's owner, on July 27, 2009.

On August 31, 2009, the ALJ issued an Order and Adjudication, sustaining the citation and imposing a fine of one thousand two hundred dollars ($1,200.00). Upon failure to pay the fine within the specified twenty (20) days,

a Supplemental Order was issued on November 2, 2009, suspending the license for three (3) days and continuing indefinitely until said fine was paid. Because the license was in safekeeping, the suspension was deferred pending reactivation of the license. The ALJ reviewed the matter at least sixty (60) days from the mailing date of the Supplemental Order and upon Licensee's failure to pay the fine, the ALJ issued a Second Supplemental Order on February 18, 2010, revoking the license effective February 18, 2010.

Licensee paid the fine on February 23, 2010. On October 29, 2010, C. Brian Crane, Esquire, filed a Petition for Appeal *nunc pro tunc* on behalf of Licensee.

Licensee avers that, because the licensed premises was severely damaged by fire on August 16, 2009, approximately fifteen (15) days before the fine was imposed, Licensee had no revenue with which to pay the fine. ["Petition to Reinstate Liquor License" p. 2]. It was not until the insurance disbursement on February 18, 2010, that Licensee had sufficient funds to pay the fine, which it did on February 22, 2010. [Id. at 3]. As a result, Licensee asks the Board to reverse the decision of the ALJ revoking the license for non-payment of the fine.

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for appeals from an ALJ decision. [47 P.S. § 4-471]. The Supreme Court of Pennsylvania has held that 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). 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, a delay in filing an appeal is only 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. Id. at 1131.

The heavy burden of establishing the right to have an untimely appeal rests with the moving party. Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). Additionally, the filing of a timely appeal is a jurisdictional requirement that must be met before any appeal may be considered. Criss v. Wise, 781 A.2d 1156 (Pa. 2001); Morrisons Cove Home v. Blair County Bd. of Assessment Appeals, 764 A.2d 90 (Pa. Cmwlth. 2000).

Licensee filed the present appeal on October 29, 2010, more than eight (8) months after the license revocation was imposed on February 18, 2010, and approximately fourteen (14) months after the initial fine was imposed. There is no question that Licensee's appeal is untimely. Licensee makes no acknowledgment that the appeal is months late, however, and instead attempts to excuse the late payment of the underlying fine which led to the license revocation.

Applying the Cook criteria to the instant case, the Board finds that Licensee failed to meet its burden in justifying an untimely appeal. As to the first prong of the four (4)-part test, Licensee offered no facts indicating 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 Licensee or its counsel. Despite the unfortunate circumstances of the fire, this does not explain Licensee's approximately eight (8)-month delay in filing its appeal.

Section 471(b) of the Liquor Code expressly states that "if satisfied that a violation has occurred . . . the administrative law judge 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 Second Supplemental Order, revoking the license, was delivered by certified mail on February 19, 2010, and the return receipt, signed by David Bird, was received by OALJ on February 22, 2010. Accordingly, proper and sufficient notice was given to Licensee as set forth in the statute, and there was no administrative breakdown to consider in the Cook analysis.

Licensee also failed to meet the second and third criteria set forth in Cook, which examine whether 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. As discussed, supra, there is no non-negligent explanation for the eight (8)-month delay in filing the appeal. As the Supreme Court stated in Bass, "[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." 401 A.2d 1135.

As to the fourth Cook factor, no claim of prejudice has been made by the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"). Nonetheless, since Licensee has not satisfied with the other Cook factors, the Board cannot grant the *nunc pro tunc* relief.

Under the circumstances, the Board is without authority to entertain Licensee's appeal, as it was untimely filed. The appeal, therefore, is dismissed.[1]

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[1] Even if the Board were able to consider this untimely appeal, it would not find an abuse of discretion in the penalty set by the ALJ. First, Licensee's right to appeal the substance of the violation and the penalty imposed were expressly waived. 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). Furthermore, the record shows that Licensee expressly agreed to the original fine of one thousand two hundred dollars ($1,200.00) prior to its issuance. Second, the Board's review of penalties imposed by the ALJ is limited to determining whether the penalty imposed is within the parameters set forth in section 471 of the Liquor Code. [47 P.S. § 4-471]. Under section 471 of the Liquor Code, the Board has no authority to alter a penalty if it is within the statutory guidelines of the Liquor Code. In this case, the penalty issued by the ALJ in response to Licensee's failure to pay the fine within sixty (60) days from the mailing date of the Supplemental Order of the ALJ, falls within the parameters of section 471 of the Liquor Code. Specifically, the ALJ is authorized to suspend or revoke a license or impose a fine ranging from one thousand dollars ($1,000.00) to five thousand dollars ($5,000.00) for the violations in the first count of the citation and fifty dollars ($50.00) to one thousand dollars ($1,000.00) for the violations in the second count of the citation. Moreover, section 471 further provides that "[i]n the event the fine is not paid within twenty days of the adjudication, the administrative law judge shall suspend or revoke the license." [Id.]. Thus, the penalty imposed by the ALJ in his Supplemental Orders regarding Licensee's failure to pay its fine is certainly within the parameters set forth in section 471.

ORDER

The decision of the ALJ is affirmed.

The *nunc pro tunc* appeal of Licensee is dismissed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-8762 remains revoked under this citation as of February 18, 2010.

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

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Board Secretary