

Mailing Date: September 22, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-1175X
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
AAA BEVERAGE, INC.	:	License No. D-173
669 East Main Street	:	
Hegins, PA 17938	:	LID - 57828
	:	
	:	

Counsel for Licensee: Keith Hoppes, Esquire (on appeal)  
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7448 Industrial Park Way  
Macungie, PA 18062

**OPINION**

AAA Beverage, Inc. (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle (“ALJ”), and subsequent supplemental orders wherein the ALJ sustained Citation No. 09-1175X and issued a fine of three hundred dollars (\$300.00). Upon failure to pay said fine

within twenty (20) days, a Supplemental Order was issued on November 16, 2009, suspending Licensee's distributor license indefinitely, beginning January 11, 2010, until the fine was paid. 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 said fine, the ALJ issued a Second Supplemental Order on March 8, 2010. The Second Supplemental Order revoked Licensee's distributor license effective April 12, 2010.

The citation in the present matter alleged that Licensee issued checks or drafts, dated March 10, 2009, in payment for purchases of malt or brewed beverages, when there were insufficient funds in, or credit with, the institution upon which drawn for the payment of such checks in violation of section 493(26) of the Liquor Code. [47 P.S. § 4-493(26)].<sup>1</sup>

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 has defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to

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<sup>1</sup> Licensee's prior record includes three (3) other citations for bad checks issued in 2008.

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 Pennsylvania Liquor Control Board ("Board") has reviewed the record, including the ALJ's Adjudication and Order, Supplemental Order, Second Supplemental Order, Licensee's Adjudication, Waiver and Authorization and Licensee's Petition for Appeal *Nunc Pro Tunc*, with Licensee's contentions in mind, and has concluded that the ALJ did not commit an error of law when he found that Licensee violated section 493(26) of the Liquor Code and fined Licensee three dollars (\$300.00). Furthermore, the ALJ's decision is supported by substantial evidence and Licensee's Waiver.

In the instant action, a citation was issued on May 22, 2009 and mailed to Licensee by certified mail. Licensee received that citation and on August 19, 2009, it completed an Admission, Waiver and Authorization regarding the charge. In this document, Licensee admitted to the violation and the notice provisions, waived the right to a hearing, authorized the ALJ to enter an Adjudication, and waived the right to appeal the Adjudication. Thus, to the extent that Licensee is now attempting to appeal the substance of the initial Adjudication and Order, such appeal, whether timely or not, is precluded.

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).

As to the *nunc pro tunc* appeal, under section 17.21(b)(2) of the Board's Regulations, appeals of ALJ adjudications must be made within thirty (30) calendar days of the mailing date of the ALJ's adjudication and order. [40 Pa. Code § 17.21(b)(2)]. The ALJ's Order and Adjudication was mailed to Licensee (to the same address where the citation was sent) on September 22, 2009, via certified and regular first class mail. The ALJ's Supplemental Order was mailed November 6, 2009, and his Second Supplement Order was mailed to Licensee on March 5, 2010, both via certified and regular first class mail. Licensee filed its Petition for Leave to Appeal *Nunc Pro Tunc* on July 27, 2010, ten (10) months after the Adjudication and nearly five (5) months after the ALJ's Second Supplemental Order.

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.

In its Petition for Leave to Appeal *Nunc Pro Tunc*, Licensee contends that at the time of the ALJ's Adjudication and Order, Licensee had temporarily closed its distributorship and the certified mailing containing the Order was returned to the Office of the Administrative Law Judge ("OALJ"), unclaimed, as well as the Supplemental and Second Supplemental Orders. Licensee contends that it did not discover the license revocation until doing preliminary

research to possibly transfer the license. Upon learning of the revocation, Licensee allegedly immediately contacted the Bureau to determine how to remedy the situation.

Section 15.44 of the Board's Regulations [40 Pa. Code § 15.44] states that service shall be as required by statute and as supplemented by 1 Pa. Code §§ 33.31-33.36.

According to section 33.31 of the Pennsylvania Code,

[N]otices ... shall be served by the office of the agency by mail ... by mailing a copy thereof to the person to be served, addressed to the person designated in the initial pleadings or submittal at his principal office or place of business. If service is not accomplished by mail; it may be effected by anyone authorized by the agency in the manner provided in 231 Pa. Code Rules 400-441....

[1 Pa. Code § 33.31].

If the mail is returned with notation by the postal authorities that it was unclaimed, the agency shall make service by another means, such as mailing a copy at the same address by ordinary mail with the return address of the sender appearing thereon. [231 Pa. Code § 403].

In the instant case, it is acknowledged that each of the three (3) Orders sent by certified mail was returned as "unclaimed," but the Bureau also sent each Order via regular first class mail. The OALJ correctly and timely mailed the

Adjudication and subsequent Orders to Licensee's proper address on record with the OALJ. Licensee may have temporarily closed, but by no fault of the OALJ did Licensee decide to not set up a forwarding mailing address or notify the OALJ of a new mailing address. "Remission of notice by certified mail is sufficient compliance [of section 471 of the Code]<sup>2</sup> although notice is returned unclaimed and a second notice is never received." Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Can, Inc., 651 A.2d 1160, 1164 (Pa. Cmwlth. 1995).

Licensee had received notice of the Citation to which it responded by way of a Waiver. No due process issues are present as Licensee acknowledged receipt of the Citation and, therefore, would have reasonably expected to receive a subsequent Adjudication and Order that correlated to the Citation and Waiver. Accordingly, the failure to timely pay the fine or to timely appeal was due to negligent circumstances related to Licensee and/or its counsel, as it did not take proper steps to receive its mail upon temporarily closing, despite having adequate notice to expect an Adjudication and Order. Accordingly, Licensee's Petition for Appeal *Nunc Pro Tunc* should be denied as untimely,

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<sup>2</sup> Section 471 of the Code provides that "[n]o penalty provided by this section shall be imposed for any violations provided for in this act unless the bureau notifies the licensee of its nature within thirty days of the completion of the investigation." [47 P.S. § 4-471(b)].

since its excuse of not receiving the certified Orders is inadequate to meet the Cook standard above.

Accordingly, the decision of the ALJ is, therefore, affirmed.

**ORDER**

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Licensee's Distributor License No. D-173 remain  
revoked.

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

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Board Secretary