Mailing Date: December 3, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 09-1326
	:	License No. R-17815
v.	:	
RISTORANTE PAPARAZZI, INC. 47 North Lehigh Avenue Frackville, PA 17931-1423	:	LID 52271

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OPINION

Ristorante Paparazzi, Inc. ("Licensee"), seeks permission to appeal *nunc pro tunc* from the July 28, 2010, Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), wherein the ALJ sustained Citation No. 09-1326 and imposed a fine in the amount of five hundred dollars ($500.00). The ALJ Ordered that this fine must be paid within twenty (20) of the mailing date of

the Order, July 28, 2010, or the subject liquor license would be suspended or revoked. By Supplemental Order dated September 30, 2010, and mailed October 12, 2010, the ALJ found that License had failed to pay its fine within twenty (20) days and ordered that the subject liquor license be suspended for an indefinite period, not less than two (2) days, beginning at 7:00 a.m. on Monday, December 6, 2010 and continuing thereafter until further order. Contemporaneous with its present appeal, Licensee filed an Application for Supersedeas.

The citation underlying the present matter contained one (1) count and charged Licensee with violations of section 5.32 of the Board's Regulations [40 Pa. Code § 5.32(a)] in that, on April 12, 2009, Licensee by its servants, agents or employees, permitted the use of a loudspeaker or similar device whereby the sound of music or other entertainment could be heard outside of the licensed premises.

As an initial matter, section 471 of the Liquor Code [47 P.S. § 4-471], requires that any appeal 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. [Id.] The Commonwealth Court has 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). Additionally, the filing of a timely appeal is a jurisdictional requirement that must be met before any appeal may be considered and appellate bodies do not have the authority to simply enlarge the time for filing an appeal. Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (Pa. 2001); Morrisons Cove Home v. Blair County Bd. of Assessment Appeals, 764 A.2d 90 (Pa. Cmwlth. 2000).

A *nunc pro tunc* appeal may be granted only where the moving party can demonstrate that the delay in filing its appeal was caused by *extraordinary circumstances* involving fraud, some breakdown in the administrative process or non-negligent circumstances related to the party or its counsel. Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996); J.C. v. Department of Public Welfare, 720 A.2d 193 (Pa.Cmwlth. 1998); Marconi v. Insurance Department, 641 A.2d 1240 (Pa.Cmwlth. 1994). Further, 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). In order to fully address the issue, it is necessary to review the procedural history of this matter.

An evidentiary hearing regarding the Licensee's citation was held before the ALJ on May 14, 2010. Subsequent to the hearing, the ALJ issued an Adjudication and Order with a mailing date of July 28, 2010 (hereinafter July 28th Order). This July 28th Order sustained the sole count listed in the Citation and imposed a fine of five hundred dollars ($500.00) to be paid within twenty (20) days of the mailing date of the Order. The Order specifically advised Licensee that in the event the fine was not paid within twenty (20) days, Licensee's restaurant liquor license would be suspended or revoked.

Licensee ultimately failed to pay the fine within twenty (20) days of the mailing date and on October 12, 2010, the ALJ mailed a Supplemental Order (hereinafter October 12th Order). The October 12th Order imposed an indefinite suspension of at least two (2)-days beginning on Monday, December 6, 2010, at 7:00 a.m. and continuing thereafter until the fine was paid.

On or about August 16, 2010, Licensee filed a petition for review, not with the Board, but, instead with the Court of Common Pleas of Schuylkill County.[1]

[1] It should be noted that section 471 of the Liquor Code [47 P.S. § 4-471(b) provides that an appeal must be taken within thirty (30) days from the date of the Adjudication. In this matter, the Adjudication was mailed on July 28, 2010. Accordingly, the original filing deadline would have been August 27, 2010. It is well settled that if a government unit serves an order via mail, the mailing date is used to determine the date of entry, and the date on

On or about November 3, 2010, the Honorable Judge Michael Stine of the Schuylkill County Court of Common Pleas dismissed the petition for review as improvidently filed. On or about December 1, 2010, Licensee filed the present *nunc pro tunc* appeal, as well as an Application for Supersedeas.

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for appeals from an ALJ decision. [47 P.S. § 4-471]. Licensee filed the present request for appeal on December 1, 2010, one hundred twenty-six (126) days after entry of the July 28th Order. There is no doubt that the Licensee's appeal is untimely.

It is well established that failure to file a timely appeal is a jurisdictional defect; as a result, "the time for taking an appeal cannot be extended as a matter of grace or mere indulgence." H.D. v. Pennsylvania Dept. of Public Welfare, 751 A.2d 1216 (Pa. Cmwlth. 2000); Sofronski v. Civil Service Commission, City of Philadelphia, 695 A.2d 921 (Pa. Cmwlth. 1997). 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). Here, Licensee argues that it "acted promptly to appeal the Administrative Law Judge's adjudications but filed in the wrong

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which the appeal period commences. Wagner v. Com., Pennsylvania Bd. of Probation and Parole, 522 A.2d 155 (Pa. Cmwlth. 1987).

venue." This assertion is insufficient to establish the necessity for *nunc pro tunc* relief.

There is no dispute that Licensee's petition for review was filed with the Schuylkill County Court of Common Pleas within the thirty (30) day appeal period; however, the mere filing of the petition is insufficient in this matter. Generally, under Pennsylvania law If an appeal is filed in a court which does not have jurisdiction over the appeal, the court is not to quash or dismiss the appeal, but rather transfer the matter to "the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth." 42 Pa.C.S.A. § 5103. However, the transfer statute and the provision regarding the filing date are inapplicable in this matter.

In Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Harry's Holiday Park Lounge, 799 A.2d 878 (Pa. Cmwlth. 2002), the Commonwealth Court addressed a matter with virtually identical facts. In that case, a liquor licensee was found to have violated the Liquor Code following a hearing before an ALJ. [Id. at 879-880]. The licensee subsequently appealed the ALJ's decision to the trial court rather than the Board. [Id.]. The State

Police moved to quash the appeal for lack of jurisdiction. The Allegheny County Court of Common Pleas granted the motion and the licensee appealed to the Pennsylvania Commonwealth Court. [Id.].

Section 5103(a) of the Judicial Code provides that "[i]f an appeal ... is taken to or brought in a court ... which does not have jurisdiction of the appeal ... the court ... shall not quash such appeal or dismiss such matter but shall transfer the record to the proper tribunal." [42 Pa.C.S.A. § 5103(a)]. The term "Tribunal" is defined as:

> [A] court or district justice or other judicial officer of this Commonwealth vested with the power to enter an order in a matter, the Board of Claims, the Board of Property, the Office of Administrator for Arbitration Panels for Health Care and any other similar agency.

[42 Pa.C.S.A. § 5103(d)].

Ultimately Commonwealth Court held that the Board was not a "tribunal" as required by statute for trial court to transfer appeal and sustained the actions of the common pleas court. Harry's Holiday Park Lounge, 799 A.2d at 881. Because section 5103 of the Judicial Code is inapplicable to this circumstance, the Board considers this appeal first filed on December 1, 2010.[2]

[2] Indeed, it should be noted that Judge Stine's Order was entered November 5, 2010; nevertheless, Licensee waited nearly a month to file the present *nunc pro tunc* application. A party seeking *nunc pro tunc* relief "must proceed with reasonable diligence once he knows of the necessity to take action." Stanton v. Department of Transportation,

The Pennsylvania Supreme Court has made it clear that the circumstances occasioning the failure to file an appeal must not stem from counsel's negligence or from a failure to anticipate foreseeable circumstances. Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (2001); see also, Riddle v. Com., Dept. of Transp., 583 A.2d 865 (Pa. Cmwlth. 1990) (holding that negligence on the part an attorney does not entitle a party to *nunc pro tunc* relief).

As no extraordinary circumstances existed to cause Licensee's untimely filing of this appeal, the Board cannot permit an appeal *nunc pro tunc.* While the Board is sympathetic to Licensee's argument, it fails to set forth any circumstances suggesting fraud, a breakdown in the administrative process or non-negligent circumstances. Indeed, a review of the record indicates that the sole reason that the present appeal was not filed in a timely manner was due to the improvident filing of the appeal in the wrong location. Accordingly, Licensee's appeal is dismissed.[3]

Bureau of Driver Licensing, 623 A.2d 925, 927 (Pa. Cmwlth. 1993) (holding that the party failed to act with reasonable diligence when it waited eleven days after discovering the error to file the appeal).

[3] Having decided to appeal on the merits, the Licensee's request for supersedeas is moot.

O R D E R

Licensee's Application for Leave to File Appeal of Administrative Law Judge Adjudication *nunc pro tunc* is denied.

The decision of the ALJ in regard to Citation 09-1326 is affirmed.

The fine of five hundred dollars ($500.00) has not been paid.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-17815 be suspended for a period of not less than two (2) days beginning at 7:00 a.m., Monday, December 6, 2010 and continuing thereafter until further order of the ALJ.

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Board Secretary