

Mailing Date: January 26, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-2166
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	License No. R-13528
v.	:	
	:	
TIMBUKTU, INC.	:	LID 32628
770 South 7 th Street	:	
Philadelphia, PA 19147-2929	:	
	:	

Counsel for Licensee: John J. McCreesh, IV, Esquire (on appeal)
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Philadelphia, PA 19142

OPINION

Timbuktu, Inc. (“Licensee”) filed the instant appeal challenging the Second Supplemental Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ revoked Restaurant Liquor License No. R-13528 for

failure to pay the fine imposed with regard to Citation No. 09-2166 (“the Citation”).

On September 22, 2009, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation to Licensee. The Citation set forth two (2) counts. The first count of the Citation alleged that, on August 5, 2009, Licensee, by its servants, agents or employees, operated its licensed establishment without a valid health permit or license in violation of section 437 of the Liquor Code [47 P.S. § 4-437] and section 5.41 of the Pennsylvania Liquor Control Board (“Board”) Regulations [40 Pa. Code § 5.41]. The second count of the Citation alleged that, on October 31, 2008, Licensee, by its servants, agents or employees, supplied false information on the Application for Restaurant Liquor License for the term expiring October 31, 2010, in violation of sections 403(h) and 471 of the Liquor Code [47 P.S. §§ 4-403(h), 4-471]. Notice of the Citation was sent by certified mail, with return receipt requested. The notice was marked as unclaimed and returned to the sender on October 20, 2009.

A hearing was held regarding the Citation on January 14, 2010, at 11:14 a.m. Notice of the hearing was sent to Licensee by both first class and certified mail, with return receipt requested. Someone at Licensee’s address signed as

having received the notice for the hearing on December 3, 2009. Although being duly notified of the time and place for the hearing, Licensee failed to appear. James E. Dailey, Esquire, appeared at the hearing as counsel for the Bureau, and Officer Jason Suppin appeared and testified as a witness for the Bureau.

By Adjudication and Order mailed March 10, 2010, the ALJ sustained the charges set forth in the Citation and imposed a fine of eight hundred dollars (\$800.00). The ALJ also advised Licensee that failure to pay the fine within twenty (20) days of the mailing date of the Order would result in Licensee's license being suspended or revoked.

Licensee failed to pay the fine within the allotted twenty (20) days. As a result, by Supplemental Order mailed May 5, 2010, the ALJ suspended Licensee's license for at least one (1) day and continuing thereafter until the fine was paid. The ALJ advised Licensee that he would review the matter again in sixty (60) days and, if necessary, impose further sanctions, which could include revocation of the license. The Board takes administrative notice that the ALJ's Supplemental Order was mailed to Licensee via first class mail and certified mail.

The fine subsequently remained unpaid. Consequently, by Second Supplemental Order mailed July 27, 2010, the ALJ revoked Licensee's license effective September 20, 2010, at 7:00 a.m. The Board takes administrative notice that the ALJ's Second Supplemental Order was mailed to Licensee via first class mail and certified mail.

On December 17, 2010, Licensee filed the instant appeal *nunc pro tunc*. In its Petition for Leave to Appeal *Nunc Pro Tunc*, Licensee asserts that Frank J. DiSantis, in connection with a loan, is the holder of a Power of Attorney for Licensee, and Licensee attached the Irrevocable Power of Attorney document, which was executed on October 17, 2000, for the Board's consideration. Licensee further asserts that, at a special meeting, Frank J. DiSantis accepted the resignation of Licensee's President, John Torres, and that Frank J. DiSantis was appointed as President and Secretary of Licensee. Licensee also asserts that upon learning that the license had been revoked, Licensee immediately contacted counsel and filed an appeal. Additionally, Licensee indicates that it is agreeable to paying the eight hundred dollar (\$800.00) fine at this time so that its license can be reinstated.¹

¹ Licensee does not appear to be challenging the ALJ's decision to sustain the Citation and impose a fine of eight hundred dollars (\$800.00). Instead, Licensee only appears to be challenging the ALJ's decision to revoke its license for failing to pay the fine imposed with regard to the Citation.

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, 543 Pa. 381, 671 A.2d 1130 (1996), to provide that an appeal *nunc pro tunc* may be allowed 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.

Here, Licensee does not assert that it never received the ALJ's Orders; nor does it assert that it received those Orders in an untimely manner. Moreover, although Licensee indicates that Frank J. DiSantis, as the holder of a Power of Attorney executed in October 2000, accepted the resignation of Licensee's President, John Torres, and was himself appointed as Licensee's President and Secretary, Licensee fails to explain how this attributed to the late filing of its appeal. Similarly, Licensee fails to explain why almost (5) months elapsed between the issuance of the ALJ's Second Supplemental Order revoking its license and the filing of the instant appeal. Therefore, Licensee has failed to satisfy the requirements for allowing an appeal *nunc pro tunc*.

Even assuming that Licensee had satisfied the requirements for allowing an appeal *nunc pro tunc*, Licensee's appeal challenging the ALJ's revocation of its license is without merit. Section 471 of the Liquor Code [47 Pa. Code § 4-471] authorizes the ALJ to revoke or suspend a license if a licensee does not pay the previously imposed fine within twenty (20) days of its imposition.

In this case, the ALJ's Adjudication and Order imposing the eight hundred dollar (\$800.00) fine with regard to the Citation clearly stated that the fine had to be paid within twenty (20) days of the mailing date of the Order, March 10, 2010. When Licensee failed to pay the fine, the ALJ, by Supplemental

Order mailed May 5, 2010, suspended Licensee's license and warned Licensee that he would reevaluate the situation sixty (60) days from the mailing date of the Supplemental Order and "impose further sanctions, which may include revocation of the license, if the fine remains unpaid at that time." [Supplemental Order, May 5, 2010]. Despite the penalty of a suspension and the above-mentioned warning from the ALJ, Licensee still failed to pay the fine. As a result, by Second Supplemental Order mailed July 27, 2010, the ALJ revoked the license effective September 20, 2010. Significantly, in the Second Supplemental Order, the ALJ advised Licensee that he would reconsider his decision to revoke the license, if Licensee paid the fine in full prior to the effective date of the revocation. However, Licensee again failed to pay the fine. Thus, Licensee was given ample opportunity to pay the fine and avoid having its license revoked.

Given these circumstances, the Board concludes that the ALJ did not err or abuse his discretion in revoking Licensee's license. Licensee's willingness to pay the fine at this time is of no consequence in the present matter.

For the foregoing reasons, the instant appeal is denied as untimely, and the decision of the ALJ is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Restaurant Liquor License No. R-13528 remains
revoked.

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

Board Secretary