

Mailing Date: February 8, 2012

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

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| PENNSYLVANIA STATE POLICE, | : | Citation No. 09-2448 |
| BUREAU OF LIQUOR CONTROL | : | |
| ENFORCEMENT | : | |
| | : | |
| | : | |
| v. | : | |
| | : | |
| CADEN, INC., | : | License No. R-4865 |
| t/a Caden's Irish Pub | : | |
| 6033-55 Castor Avenue | : | LID 55581 |
| Philadelphia, PA 17149-3208 | : | |

Counsel for Licensee: No appearance

Counsel for Third-Party
Creditor: John J. McCreesh, IV, Esquire
McCreesh, McCreesh, McCreesh & Cannon
7053 Terminal Square
Upper Darby, PA 19082

Counsel for Bureau: James E. Dailey, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

OPINION

Plymouth Finance, Inc. ("Plymouth") appeals *nunc pro tunc* from the January 7, 2011 Second Supplemental Order of Administrative Law Judge Tania E. Wright ("ALJ Wright"), which revoked Restaurant Liquor License No. R-4865

(“the license”) held by Caden, Inc., t/a Caden’s Irish Pub (“Licensee”), for failure to pay the fine associated with Citation No. 09-2448 (“the Citation”).¹

On October 9, 2009, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“BLCE”) sent a letter via certified mail, return receipt requested, to Licensee at 6053-55 Castor Avenue, Philadelphia, Pennsylvania, 19149-3208 (“the licensed premises”). [Letter from BLCE, October 9, 2009, Ex. B-1]. This letter advised Licensee that the BLCE had received information regarding alleged violations which could result in the issuance of a citation to show cause why the license should not be suspended or revoked or a fine imposed, or both. [Id.]. Those violations were as follows:

1. Permitted a minor to frequent on August 14, 2009, August 15, 2009 and diver[se] other occasions within the past year.
2. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on your licensed premises on August 15, 2009.

[Id.] The return receipt was signed by James Ross,² acknowledging receipt of the letter. [Id.]

¹ While the first paragraph of the Petition for Leave to Appeal *Nunc Pro Tunc* filed in this matter identifies the petitioner as Licensee, it is clear from the remaining portions of such petition and the exhibits attached thereto that the petitioner is actually Plymouth, a third party creditor who filed a Confession of Judgment and Writ of Execution against Licensee in the Court of Common Pleas of Philadelphia County.

On October 27, 2009, the BLCE issued the Citation, which set forth two (2) counts. [Citation No. 09-2448, dated October 27, 2009, Ex. B-2]. The first count charged Licensee with violating section 493(14) of the Liquor Code [47 P.S. § 4-493(14)], in that on August 14 and August 15, 2009, and fifteen (15) to twenty (20) unknown dates within the preceding year, Licensee, by its servants, agents, or employees, permitted one (1) twenty (20)-year-old male minor to frequent the licensed premises. [Id.]. The second count charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471], in that on August 15, 2009, Licensee, by its servants, agents, or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises. [Id.]. The Citation was sent to Licensee via certified mail, return receipt requested, at the licensed premises. [Id.]. The return receipt was signed by James Ross, acknowledging receipt of the Citation. [Id.].

On December 18, 2009, the Office of Administrative Law Judge (“OALJ”) sent a Citation Hearing Notice via first class mail and certified mail, return receipt requested, to the licensed premises. [Citation Hearing Notice, December 18, 2009]. The Citation Hearing Notice advised Licensee that a

² The Board’s records indicate that James Eric Ross is Licensee’s president, secretary, treasurer, director, sole shareholder, and Board-approved manager. (Admin. Notice).

hearing on the Citation to show cause why the license issued by the Pennsylvania Liquor Control Board (“Board”) should not be suspended or revoked or a fine imposed, or both, would be held on February 2, 2010, at 11:00 a.m., at the Meetinghouse Business Center, 140 West Germantown Pike, Suite 100, Plymouth Meeting, Pennsylvania, 19462-1421. [Id.]. The return receipt was signed by Eric Ross, acknowledging that the Citation Hearing Notice had been received. [Id.].

On February 2, 2010, a hearing was held on the Citation before ALJ Wright at the time and place specified in the Citation Hearing Notice. James E. Dailey, Esquire appeared at the hearing on behalf of the BLCE, and no appearances were made on behalf of Licensee.

At the hearing, Officer Clarence Clark, of the Philadelphia Police Department, testified on behalf of the BLCE. [N.T. 5]. Officer Clark testified that, on August 15, 2009, at approximately 1:05 a.m., he and another officer went to the licensed premises to conduct an undercover nuisance bar investigation as part of Operation Pressure Point. [N.T. 5-6]. Officer Clark testified that, upon entering the licensed premises, he and the other officer observed approximately six (6) to eight (8) patrons sitting at a poker table playing Texas Hold’em poker. [N.T. 7-9]. The buy-in for the poker game was

fifty dollars (\$50.00). [N.T. 9]. After observing for approximately fifteen (15) or twenty (20) minutes, Officer Clark notified backup and then identified himself as a police officer. [N.T. 10]. The police arrested three (3) individuals for gambling: the dealer of the game, a woman who was assisting with the game, and Licensee's owner and manager, James Ross. [N.T. 10]. A fourth individual was arrested for a gun violation. [N.T. 10].

BLCE Officer Christopher McGrath also testified on behalf of the BLCE. [N.T. 11]. Officer McGrath indicated that he was part of Operation Pressure Point and that, on August 15, 2009, around 1:25 a.m., he completed a routine inspection of the licensed premises as a follow-up to the initial undercover investigation. [N.T. 11-12]. Officer McGrath indicated that, during this inspection, he encountered a male individual, who presented identification indicating that he was only twenty (20) years of age, inside the licensed premises. [N.T. 12-14]. This male minor acknowledged to Officer McGrath that he had been at the licensed premises approximately fifteen (15) to twenty (20) times in the past year to play pool, but he indicated that he had never been served alcohol at the licensed premises. [N.T. 14]. Officer McGrath spoke with Mr. Ross regarding the minor, and Mr. Ross acknowledged that he

was aware of the minor coming to the licensed premises to play pool, but also indicated that the minor was never served alcohol. [N.T. 14-15].

By Adjudication and Order mailed August 18, 2010, ALJ Wright sustained the charges set forth in the Citation and imposed an aggregate fine of one thousand four hundred dollars (\$1,400.00). [Adjudication and Order, mailed August 18, 2010]. The Adjudication and Order also indicated that Licensee was required to pay the fine within twenty (20) days of the mailing date of the Order and that failure to do so would result in the license being suspended or revoked. [Id.]. The Adjudication and Order was sent to Licensee at the licensed premises via first class and certified mail, return receipt requested. [Id.]. However, the postal authorities returned the Adjudication and Order, checking the box marked “attempted not known.” [Id.].

Licensee subsequently failed to pay the fine, and, on October 6, 2010, ALJ Wright issued a Supplemental Order, which suspended the license for a period of at least one (1) day and continuing thereafter until the fine was paid. [Supplemental Order, mailed October 6, 2011]. However, the Supplemental Order also noted that the license had expired on October 31, 2008, and thus,

the suspension period was deferred pending renewal of Licensee's license.³ [Id.]. Additionally, the Supplemental Order noted that ALJ Wright would review the matter again in sixty (60) days and impose further sanctions, which could include revocation of the license, if the fine remained unpaid. [Id.]. The Supplemental Order was sent to Licensee via certified mail, return receipt requested, at the licensed premises. [Id.]. The return receipt was signed acknowledging that the Supplemental Order was received. [Id.].

Licensee again failed to pay the required fine, and, on January 7, 2011, ALJ Wright issued a Second Supplemental Order, which revoked the license, effective at 7:00 a.m., on Monday, February 28, 2011. [Second Supplemental Order, mailed January 7, 2011]. The Second Supplemental Order was sent to Licensee via certified mail, return receipt requested, at the licensed premises. [Id.]. The return receipt was signed acknowledging that the Second Supplemental Order was received. [Id.].

³ The Board approved Licensee's applications for renewal for the renewal periods effective November 1, 2008 and November 1, 2010, subject to a conditional licensing agreement ("CLA"), on February 9, 2011. (Admin. Notice). Pursuant to the CLA, Licensee agreed that it would place the license into safekeeping within sixty (60) days of the Board's approval of the CLA and keep it there until such time that the license could be transferred to a bona fide purchaser meeting Board requirements for use at another location. (Admin. Notice).

On January 10, 2012, Plymouth filed a Petition for Leave to Appeal *Nunc Pro Tunc* of ALJ Wright's Second Supplemental Order ("Petition") along with the PLCB-1018 appeal form. Plymouth asserts that it filed a Confession of Judgment and Writ of Execution in the Court of Common Pleas of Philadelphia County against Licensee in connection with a loan without notice that the license had been revoked for failure to pay the fine. [Petition ¶ 7]. The Confession of Judgment, which was included with Plymouth's Petition as an exhibit, was filed on April 13, 2011. [Petition, Ex. D]. The Writ of Execution, which was also included as an exhibit with Plymouth's Petition, was filed on July 26, 2011. [Petition, Ex. E]. Plymouth further asserts that, "[u]pon learning that the license was revoked," it filed the present appeal *nunc pro tunc*. [Petition ¶ 8]. Plymouth also asserts that it would be agreeable to paying the fine initially imposed with regard to the Citation within twenty (20) days of the Board's decision, if the license is reinstated. [Petition ¶ 9]. Finally, Plymouth asserts that if the revocation is permitted to stand, it will suffer undue hardship. [Petition ¶ 10(d)].

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for taking an appeal from an adjudication of an administrative law judge. [47 P.S. § 4-471(b)]. Further, section 17.21 of the Board's Regulations provides that

failure to file or have the appeal postmarked within thirty (30) calendar days will result in dismissal of the appeal. [40 Pa. Code § 17.21(b)(2)]. 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 for 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 considered 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).

Here, Plymouth seeks to appeal ALJ Wright's January 7, 2011 Second Supplemental Order revoking the license.⁴ The thirty (30)-day deadline for filing an appeal of that Order was February 8, 2011. However, Plymouth did not file its appeal until January 10, 2012, which was more than eleven (11) months past the appeal deadline. Therefore, Plymouth's appeal was clearly untimely.

⁴ There is some question as to whether Plymouth has standing to file an appeal in this matter. The Board typically recognizes only the named licensee as having an interest in a license until the Board receives a court order or a Writ of Execution together with a Sheriff's Bill of Sale directing or stating otherwise or a sworn Affidavit executed by counsel, representing that the licensee is in default and that all necessary and required procedures have been followed pursuant to any underlying agreements as well as all applicable laws. Here, Plymouth has not presented any such documentation to the Board, nor does it purport to have obtained any such documentation. Nonetheless, it will be assumed, for purposes of this opinion, that Plymouth has standing to bring the instant appeal.

Acknowledging that its appeal was untimely, Plymouth asks the Board to consider its appeal *nunc pro nunc*. However, the Board cannot agree that Plymouth has satisfied its heavy burden of proving that it is entitled to such relief.

Relative to the first Cook factor, Plymouth does not assert that its late appeal was the result of fraud or that there was a breakdown in the administrative process, such as Licensee not receiving proper notice of the Citation, the hearing on the Citation, or any of ALJ Wright's orders that followed.⁵ Moreover, although Plymouth asserts that it was not aware of the revocation of the license at the time of filing its Confession of Judgment and Writ of Execution and that the revocation will cause it to suffer undue hardship, this does not establish that the late-filed appeal was the result of non-negligent conduct by Plymouth, Plymouth's attorney, or his/her staff.⁶ Notably, Plymouth's Confession of Judgment indicated that Licensee failed to make any of the required installment payments beginning on January 10, 2010. Yet, Plymouth waited until April 13, 2011, over one (1) year and four (4) months

⁵ Even if Plymouth had made such an assertion, it would be misplaced since the record evidence clearly supports that Licensee was given proper notice at all stages of the proceedings in this matter.

⁶ It is necessary to stress that Plymouth is not the licensee in this matter, and notice in citation matters is not typically sent to non-licensees.

later, to file its Confession of Judgment and until July 26, 2011, over one (1) year and seven (7) months later, to file its Writ of Execution. Plymouth should have been more diligent in filing its Confession of Judgment and Writ of Execution against Licensee. Plymouth also should have been more diligent in taking appropriate steps to determine whether there were any outstanding citation matters that would jeopardize the existence of the license. Under these circumstances, the Board cannot conclude that the late filing of the appeal in this matter was the result of non-negligent circumstances beyond Plymouth's control.

Relative to the second Cook factor, the Petition indicates that the appeal in this matter was filed “[u]pon learning that the license was revoked.” [Petition ¶ 8]. However, the Petition does not actually indicate when Plymouth or its counsel became aware that the license had been revoked. Thus, the Board is unable to evaluate whether Plymouth's appeal was filed within a short time after Plymouth or its counsel learned of and had the opportunity to address the untimeliness issue.

Relative to the third Cook factor, the time period that elapsed between the appeal deadline and when Plymouth actually filed its appeal was almost a full year. This cannot be considered a very short duration.

Having failed to meet the first three (3) Cook factors, there is no need for the Board to consider the fourth factor (i.e., whether the appellee will be prejudiced by the delay). Because Plymouth failed to satisfy its heavy burden of establishing all of the Cook factors, Plymouth is not entitled to *nunc pro tunc* relief.

Even assuming that Plymouth had satisfied the requirements for allowing an appeal *nunc pro tunc*, the Board would conclude that Plymouth's appeal challenging the revocation of the license is without merit. Section 471 of the Liquor Code [47 P.S. § 4-471] authorizes administrative law judges to impose a fine, or suspend or revoke a license upon determining that a violation of the Liquor Code or the Board's Regulations has occurred. Moreover, section 471 of the Liquor Code [47 P.S. § 4-471] also authorizes administrative law judges to revoke or suspend a license if the licensee does not pay the previously imposed fine within twenty (20) days of its imposition.

The imposition of penalties is the exclusive prerogative of the administrative law judge. The Board may not disturb penalties imposed by an administrative law judge if they are within the parameters set forth in section 471 of the Liquor Code [47 P.S. § 4-471].

Here, ALJ Wright imposed a fine of one thousand four hundred dollars (\$1,400.00) as the initial penalty with regard to the Citation. ALJ Wright's Adjudication and Order imposing the fine clearly stated that the fine had to be paid within twenty (20) days of the mailing date of the Order, August 18, 2010. When Licensee failed to pay the fine, ALJ Wright suspended the license and warned Licensee that its continued failure to pay the fine could result in revocation of the license. Despite the imposition of a suspension and the above-mentioned warning, Licensee still failed to pay the fine. As a result, ALJ Wright issued a Second Supplemental Order revoking the license, effective at 7:00 a.m., on Monday, February 28, 2011. Because the penalty of revocation was within the parameters of section 471 of the Liquor Code, there was no abuse of discretion by ALJ Wright with regard to the Citation.

Any rights that Plymouth has with regard to the license would be subject to the penalties incurred by Licensee as a result of its improper conduct. The Board cannot overlook the conduct of Licensee which led to the revocations simply because Plymouth wishes to have the license reinstated so that it can recoup the money it is owed.

Nevertheless, under the circumstances of this case, the Board is without authority to entertain Plymouth's appeal because it was not filed within the

statutorily-prescribed time limit of thirty (30) days, and Plymouth failed to establish adequate justification for the late filing. Therefore, Plymouth's appeal *nunc pro tunc* is dismissed.

ORDER

The appeal *nunc pro tunc* of Plymouth Finance, Inc. is dismissed.

The Second Supplemental Order of Administrative Law Judge Tania E. Wright, mailed January 7, 2011, is affirmed.

It is hereby ordered that Restaurant Liquor License No. R-4865 remains revoked as of February 28, 2011.

Board Secretary