Mailing Date: August 3, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : : : : : :	Citation No. 09-2651
v.		
KENRICH ATHLETIC CLUB 121 South 19th Street Philadelphia, PA 19103-4905 (Mailing address: P.O. Box 30484, Philadelphia, PA 19103)	: : : : :	License No. C-1927 LID 1117

Representative for Licensee:	Francis W. Twardy, Pro Se Steward of Licensee
Counsel for Bureau:	James E. Dailey, Esquire Pennsylvania State Police, Bureau of Liquor Control Enforcement 6901 Woodland Avenue Philadelphia, PA 19142

O P I N I O N

Kenrich Athletic Club ("Licensee"), appeals from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), mailed March 22, 2011, wherein the ALJ sustained both counts of Citation No. 09-2651 ("the Citation") issued by the Pennsylvania State Police, Bureau of Liquor Control

Enforcement ("Bureau"), and imposed a fine of one thousand one hundred dollars ($1,100.00).

On November 17, 2009, the Bureau issued the Citation to Licensee, setting forth two (2) counts. The first count of the Citation charged Licensee with violating section 406(a)(1) of the Liquor Code [47 P.S. § 4-406(a)(1)] on October 16, 2009, in that Licensee, by its servants, agents or employees, sold alcoholic beverages to nonmembers. The second count of the Citation charged Licensee with violating section 13.102(a)(3) of the Pennsylvania Liquor Control Board's ("Board") Regulations [40 Pa. Code § 13.102(a)(3)] on October 16, 2009, in that Licensee, by its servants, agents or employees, sold and/or served an unlimited or indefinite amount of alcoholic beverages for a fixed price by selling unlimited domestic beer and bottom-shelf liquor well drinks for the set price of twenty-five dollars ($25.00).

A hearing was held regarding the Citation on September 29, 2010. James E. Dailey, Esquire, appeared at the hearing as counsel for the Bureau, and Francis Twardy, Licensee's steward, appeared *pro se* on behalf of Licensee.

By Adjudication and Order mailed via certified mail on March 22, 2011, the ALJ sustained the charges set forth in the Citation and imposed a fine of one thousand one hundred dollars ($1,100.00). 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. The Board takes administrative notice that certified receipt of the Order was signed by Chris Twardy (Francis' son) on April 25, 2011.

Licensee failed to pay the fine within the allotted twenty (20) days. As a result, by Supplemental Order mailed May 13, 2011, the ALJ suspended Licensee's license for at least one (1) day and continuing thereafter until payment of the fine.[1]

In an envelope postmarked May 19, 2011, Licensee filed the instant appeal *nunc pro tunc*, but it did not pay the requisite fee of thirty-five dollars ($35.00) until June 6, 2011.

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for appeals from an ALJ decision. [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

[1]The Board takes administrative notice that the ALJ's Supplemental Order was mistakenly mailed via first-class mail and certified mail to an address that does not match either that of the licensed premises or Licensee's steward. Notice of the Supplemental Order was marked as unclaimed and returned to the sender on May 23, 2011. Licensee, however, does not raise this as an issue, since it appears to be appealing from the original Order of March 22, 2011.

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).

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 failed to show that the failure to file a timely appeal was a result of an administrative breakdown on the part of the Bureau or the Office of Administrative Law Judge ("OALJ") and not as a result of negligence by Licensee or its counsel. Furthermore, relative to the second prong, Licensee failed to file the appeal within a short time after learning of the untimeliness.

In its appeal, Licensee asserts that it placed its license in safekeeping in September 2010 and that at some point it notified the Bureau of a post office box to which future mail should be sent. Licensee also avers that it verbally confirmed its change of address with the Bureau's counsel during an unrelated hearing on March 22, 2011.

The Board received a letter from Donald M. Moser, Esquire, in September 2010 requesting that the licensee be placed in safekeeping.

[Admin. Notice]. However, the record reveals no evidence of Licensee's alleged efforts to inform the Bureau, the Board, or the OALJ regarding where to send its mail after the licensed premises was closed. The OALJ took the appropriate steps, by law[2], to send the Order to Licensee's last known address. It appears the Order did not reach Licensee until a period of thirty-four (34) days had elapsed because Licensee, self-servingly, failed to inform the OALJ or the Board of its new mailing address.

Notwithstanding the thirty-four (34)-day delay in Licensee's receipt of the Order, its appeal must still be rejected as untimely. Licensee clearly received the Order on April 25, 2011, when the certified receipt was signed by Chris Twardy, yet it did not complete submission of its appeal until June 6, 2011, after a span of forty-two (42) days. Licensee failed to meet its burden in demonstrating any non-negligent, extraordinary circumstances to excuse this additional delay.

Under the circumstances, the Board is without authority to entertain Licensee's appeal as it was untimely filed. Therefore, the *nunc pro tunc* appeal is dismissed.

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[2] The administrative law judge shall notify the licensee by registered mail, addressed to the licensed premises, of such suspension, revocation or fine. In the event the fine is not paid within twenty days of the adjudication, the administrative law judge shall suspend or revoke the license, notifying the licensee by registered mail addressed to the licensed premises. [47 P.S. § 4-471(b)].

O R D E R

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of one thousand one hundred dollars ($1,100.00) remains unpaid.

The case is hereby remanded to the ALJ to ensure compliance with this Opinion. The Supplemental Order of the ALJ remains in effect.

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Board Secretary