

Mailing Date: August 17, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 10-0445X  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

v. :

JUST SPORTS BAR & GRILL, INC. : LID 54676  
600 New Rodgers Road :  
Bristol, PA 19007-2503 :

Counsel for Americal : Edward B. McHugh, Esquire (on appeal)  
Financial Corporation: Goldstein & McHugh  
325 Chestnut Street, Suite 713A  
Philadelphia, PA 19106

Counsel for Bureau: Roy Harkavy, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
7448 Industrial Parkway  
Macungie, PA 18602

OPINION

American Financial Corporation (“Appellant”), holder of the right to apply for the transfer of Restaurant Liquor License No. R-19178 issued to Just Sports Bar & Grill, Inc. (“Licensee”), filed the instant appeal challenging the Second Supplemental Order of Administrative Law Judge David L.

Shenkle (“ALJ”), wherein the ALJ revoked the license for Licensee’s failure to pay the fine imposed with regard to Citation No. 10-0445X (“the Citation”).

On March 17, 2010, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation to Licensee. The Citation alleged that, Licensee, by its servants, agents or employees, issued checks or drafts dated November 12 and 25, 2009, in payment for purchases of malt or brewed beverages, when it had 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)].

Licensee submitted a Statement of Waiver, Admission and Authorization in April 2010, in which it admitted to the violation, acknowledged that the Bureau complied with the applicable notice requirements, authorized the ALJ to enter adjudication without a hearing, and waived its appeal rights. Subsequently, on May 18, 2010, the ALJ’s office mailed the Adjudication and Order in which the ALJ sustained the Citation and imposed a fine of one hundred and fifty dollars (\$150.00). 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 September 3, 2010, the ALJ suspended Licensee's license for at least one (1) day. 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 fine subsequently remained unpaid. Consequently, by Second Supplemental Order mailed December 21, 2010, the ALJ revoked Licensee's license effective February 14, 2011, at 7:00 a.m. The Order, Supplemental Order, and Second Supplemental Order were all mailed to Licensee at Just Sports Bar & Grill, Inc., 600 New Rodgers Road, Bristol, Pennsylvania 19007-2503.

On May 5, 2011, Appellant filed an Application for Leave to Appeal *Nunc Pro Tunc* from the ALJ's Second Supplemental Order with the Pennsylvania Liquor Control Board ("Board").

Appellant obtained the right to apply for transfer of Licensee's liquor license at a sheriff's sale on January 18, 2011. On January 18, 2011,

Appellant's counsel called the Board's Bureau of Licensing ("Licensing") and inquired about the status of the license. Licensing informed Appellant's counsel that, among other things, there were no outstanding citations. [Appeal, p. 3].

On February 3, 2011, Appellant's counsel sent a letter by facsimile and first class mail to Licensing. The letter stated that Appellant purchased the license at sheriff's sale and requested the license be placed in safekeeping. The letter also requested that the validation and renewal forms be sent to Appellant's counsel for completion. In a letter dated February 3, 2011, Licensing provided the Validation and Renewal Applications to Appellant's counsel by facsimile. On March 31, 2011, Appellant's counsel sent the completed renewal and validation applications and certificates of tax clearance, along with the appropriate fees, to Licensing. [Appeal, p. 3].

On April 4, 2011, Appellant entered into an Agreement of Sale with Rushton, LLC for the sale of the license to Rushton's premises in Bensalem Township, Pennsylvania. On or about April 8, 2011, Appellant received a letter from the Board's Director of the Office of Regulatory Affairs, indicating that the License was revoked effective February 14, 2011. [Appeal, p. 4]. Appellant asserts that neither it, nor its counsel, ever received a copy of the

Citation, the Citation Hearing Notice, the Adjudication and Order, the Supplemental Order, or the Second Supplemental Order.

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for appeals from an ALJ decision. [47 P.S. § 4-471]. 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 (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. Cook v. Unemployment Compensation Board of Review, 671 A.2d at 1131.

The Board finds that Appellant adequately satisfies the first factor of the Cook criteria and that Appellant's failure to file a timely appeal was caused by non-negligent circumstances related to Appellant and its counsel.

The thirty (30)-day appeal period from the ALJ's Second Supplemental Order expired on January 20, 2011. As of January 18, 2011, the Board was aware that the right to apply for the transfer of the license had been purchased by Appellant. On that date, Appellant's counsel called Licensing and inquired as to the status of the license but was not informed about the instant citation or the impending revocation, thus leading Appellant to believe the license was "clean." The license's revocation was effective as of February 14, 2011. As of February 3, 2011, Licensing had a copy of Appellant's Bill of Sale and its requests to place the license into safekeeping and to send Appellant the outstanding renewal and validation forms, which had been sent by facsimile by Appellant's counsel. Licensing complied with those requests.

Thus, it appears that Appellant's counsel acted reasonably in that he sought clarification and direction from Licensing as soon as Appellant had a legal right to do so and, but for the alleged misinformation received from Licensing, it would have had the chance to pay the pending fine.

The Board also believes that Appellant filed its appeal within a short period of time after Appellant learned of and had the opportunity to address the untimeliness. Appellant filed its appeal to the ALJ's Second Supplemental Order on May 5, 2011, approximately thirty (30) days after receiving written notice, in a letter dated April 5, 2011, indicating that the license had been revoked. Given the fact that Appellant had not known that the license was even in danger of being revoked, nor the reasons therefore, Appellant acted within a reasonable time to be able to file a meaningful appeal to the Second Supplemental Order of the ALJ. Therefore, the Board finds the second factor of the Cook criteria has been met.

The Board also finds that, in the interest of justice, Appellant has adequately satisfied the third factor of the Cook criteria in that the time period which elapsed was of very short duration. Pursuant to section 471(b) of the Liquor Code, an appeal from a decision of an ALJ on a citation matter must be filed within thirty (30) days of the mailing date of the Adjudication

and Order. [47 P.S. § 4-471(b)]. The thirty (30)-day filing deadline for an appeal from the ALJ's Second Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], was January 20, 2011. The appeal was filed on May 5, 2011. Accordingly, Licensee's appeal was one hundred and four (104) days late. However, Appellant did not have notice until receiving a letter dated April 5, 2011, that anything was wrong with the license. Appellant quickly sought to investigate and collect evidence that would permit it to file a meaningful appeal. Therefore, the Board finds that Appellant has satisfied the third Cook factor.

Relative to the final factor of the Cook criteria, the Bureau has not claimed prejudice by the delay in filing of this appeal. As the Bureau has not argued that it would be prejudiced if the Board were to accept Appellant's appeal *nunc pro tunc*, the Board finds that Appellant has met the final factor of the Cook criteria.

The circumstances set forth by the Appellant as to the late filing of Appellant's appeal are sufficient to meet all of the criteria in the Cook case. Therefore, the appeal *nunc pro tunc* is hereby granted and the Board will now consider the appeal on its merits.

Initially, it should be noted that Licensee signed an Admission, Waiver, and Authorization regarding the charge contained in the Citation. Thus, Licensee's right to appeal the substance of the violation and the penalty imposed were expressly waived. See 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). Nonetheless, even if Licensee's right to file an appeal was not waived, the appeal would be dismissed.

Appellant, who now stands in the place of Licensee, has appealed from the Second Supplemental Order, in which the ALJ revoked the license. In its appeal, Appellant requests the Board to vacate the revocation and instead permit it to pay the fine imposed by the May 18, 2010, Adjudication and Order.

However, the imposition of penalties is the exclusive prerogative of the ALJ. The Board's review of penalties imposed by the ALJ is limited to determining whether the penalty is within the parameters set forth in section 471 of the Liquor Code [47 P.S. § 4-471]. The Board may not disturb penalties within the statutory parameters.

Section 471(b) of the Liquor Code provides that the ALJ shall “immediately suspend or revoke the license, or impose a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000.00), or both” for offenses of the type set forth in the Citation. It also provides that in the event the fine is not paid within twenty (20) days of the adjudication, the ALJ shall suspend or revoke the license, notifying the licensee by registered mail addressed to the licensed premises. [47 P.S. § 4-471(b)].

Here, the decision of the ALJ, by Second Supplemental Order, to revoke the license due to non-payment of the fine comports with section 471(b). Because the penalty set forth by the ALJ is clearly permissible and within the scope of section 471, the Board has no authority to alter it.<sup>1</sup>

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<sup>1</sup> In the event the Bureau or the person who was fined or whose license was suspended or revoked shall feel aggrieved by the decision of the Board, there shall be a right to appeal to the court of common pleas in the same manner as provided for appeals from refusals to grant licenses. [47 P.S. § 4-471(b)].

ORDER

Appellant's Application for Leave to Appeal *Nunc Pro Tunc* is hereby granted.

The decision of the ALJ's Second Supplemental Order, mailed December 21, 2010, is affirmed.

Restaurant Liquor License No. R-19178 remains revoked.

This matter is remanded to the ALJ to ensure compliance with this order and all other conditions set forth in the ALJ's Orders in this matter.

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Board Secretary