

Mailing Date: August 31, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-0957
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
7178 CFJ, LTD.	:	License No. R-13624
7178 North 19 th St.	:	
Philadelphia, PA 19126-1510	:	LID 57615

Counsel for Licensee: Calvin Fielding, Pro Se (on Appeal)
7153 N. 19th St.
Philadelphia, PA 19126

Counsel for Bureau: Erik S. Shmukler, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19142

OPINION

7178 CFJ, Ltd. (“Licensee”) appeals from the Supplemental Order of Administrative Law Judge Tania E. Wright (“ALJ”), mailed May 13, 2011, where in the ALJ revoked the license due to Licensee’s failure to pay the fine of two hundred dollars (\$200.00) relative to Citation No. 10-0957 (“the Citation”)

issued by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”).¹

On May 11, 2010, the Bureau issued the Citation to Licensee, charging Licensee with violating section 493(12) of the Liquor Code [47 P.S. § 4-493(12)], in that on April 17, 2010, Licensee, by its servants, agents or employees, failed to keep records on the licensed premises.²

A hearing was held regarding the Citation on September 1, 2010. Erik S. Smukler, Esquire, appeared at the hearing as counsel for the Bureau. Neither Licensee nor a representative were present at the hearing.

By the Adjudication and Order mailed December 9, 2010, the ALJ sustained the Citation issued by the Bureau, and imposed a fine of two hundred dollars (\$200.00). 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 February 3, 2011, the ALJ suspended Licensee’s license for at least one (1) day and continuing thereafter until the fine was paid. Additionally, the ALJ

¹ Licensee does not actually indicate which ALJ Order it is appealing, but it is presumed that Licensee intended to appeal from the most recent Order, which revoked its license.

² Section 493(12) of the Liquor Code requires that a licensee keep all records covering the operation of the licensed business on the licensed premises. [47 P.S. § 4-493(12)].

deferred the suspension pending the renewal of Licensee's license. The fine remained unpaid and by Supplemental Order dated May 13, 2011, the ALJ revoked the license effective June 27, 2011.³

On July 1, 2011, Calvin Fielding, *pro se*, filed the instant appeal. However, Licensee did not provide any explanation for the basis of its untimely appeal.

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 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

³ The ALJ took judicial notice that the license expired on October 31, 2010.

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).

In the instant case, the Board finds that Licensee failed to meet its burden in justifying an untimely appeal. In fact, Licensee failed to provide any justification for failing to file a timely appeal.

Furthermore, there is no evidence of an administrative breakdown on the part of the Office of the Administrative Law Judge (“OALJ”), nor did Licensee allege such a breakdown. Under the circumstances, the Board is without authority to entertain Licensee’s appeal as it was not filed within the statutorily prescribed time limit of thirty (30) days. Therefore, the *nunc pro tunc* appeal is dismissed.

Even if this appeal had been timely, the Board would have found no reason to reverse the ALJ’s Order(s). The record reveals that on April 17, 2009, at approximately 11:30 p.m., Bureau enforcement officer Brian King arrived at the premises with the warrant unit for the First Judicial District of the Philadelphia Police Department and inspectors from Licensing and Inspection. [N.T. 6]. Upon entering the premises, Officer King conducted a routine inspection. [N.T. 6]. Officer King asked the bartender to produce beer and liquor invoices for the past two (2) years. [N.T. 7, 10]. The bartender was unable to produce the requested records. [N.T. 7, 10]. No other employees were encountered by Officer King. [N.T. 10]. In addition to asking the

bartender for the records, Officer King also searched the premises. [N.T. 10]. Officer King searched behind the bar area and throughout the other open areas of the licensed premises and did not locate any records during his search. [N.T. 10].

Based on these facts, the Board finds sufficient evidence to support the ALJ's conclusion that Licensee violated section 493(12) of the Liquor Code [47 P.S. § 4-493(12)]. 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). The ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. *McCauley v. Pennsylvania Bd. of Probation and Parole*, 510 A.2d 877 (Pa. Cmwlth. 1986). It is well settled that the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. *Borough of Ridgway v. Pennsylvania Public Utility Comm'n*, 480 A.2d 1253 (Pa. Cmwlth. 1984).

The Bureau presented uncontroverted evidence in the form of testimony by Officer King demonstrating a violation of section 493(12) of the Liquor Code

[47 P.S. § 4-493(12)]. The ALJ deemed the testimony of Officer King to be credible, and the Board will not overturn the ALJ's credibility determination. Furthermore, the Board finds no error of law in the ALJ's application of section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] to the evidence at hand.

Additionally, the ALJ did not abuse her discretion in sustaining the Citation and imposing a fine of two hundred dollars (\$200.00). The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. The Pennsylvania Supreme Court defined an abuse of discretion as “not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.” *Hainsey v. Pennsylvania Liquor Control Bd.*, 529 Pa. 286, 602 A.2d 1300, 1305 (1992).

In this case, there is no evidence in the record to suggest that the ALJ's conclusion was the result of prejudice or bias, or that it was manifestly unreasonable. The imposition of penalties is the exclusive prerogative of the ALJ; the Board may not disturb penalties which are within the parameters set

forth in the Liquor Code. Section 471 of the Liquor Code prescribes the penalty for the type of violation sustained in the Citation, and permits the ALJ to impose a license suspension or revocation and/or a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000.00). [47 P.S. § 4-471]. The ALJ imposed a fine of two hundred dollars (\$200.00) based upon his conclusion that Licensee failed to keep records on the licensed premises. Since the penalty is clearly within the statutory ranges set forth in the Liquor Code, and the Board has no authority to alter the penalty imposed by the ALJ, the decision of the ALJ as to the penalty is affirmed. Furthermore, the one (1)-day and continuing suspension and later, the revocation, were also within the parameters of section 471.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed as untimely.

The license remains revoked since February 3, 2011.

Board Secretary