

Mailing Date: May 18, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-1062
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
KOLESAR, INCORPORATED	:	License No. R-10596
247 Carey Avenue	:	
Wilkes-Barre, PA 18702-2121	:	LID 56480

Counsel for Licensee: Kevin M. Walsh, Esquire  
297-299 Pierce Street  
Kingston, PA 18704

Counsel for Bureau: Craig A. Strong, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
7448 Industrial Park Way  
Macungie, PA 18062

**OPINION**

Kolesar, Incorporated (“Licensee”), filed the instant appeal challenging the decision of Administrative Law Judge Felix Thau (“ALJ”) in his Second Supplemental Order, wherein the ALJ revoked Restaurant Liquor License No. R-10596 for failure to pay a fine of one hundred fifty dollars (\$150.00).

On May 21, 2010, Licensee was issued Citation No. 10-1062 by the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) for violating section 437 of the Liquor Code [47 P.S. § 4-437] and Board Regulation 5.41 [40 Pa. Code § 5.41] in that on May 1, 2010, Licensee, by its servants, agents or employees, operated the licensed establishment without a valid health permit or license, which had expired on April 30, 2010.

Licensee submitted a Statement of Waiver, Admission and Authorization in June 2010, in which it admitted to all of the violations, 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 August 11, 2010, the ALJ’s office mailed the Adjudication and Order in which the ALJ sustained the citation and imposed a fine of one hundred fifty dollars (\$150.00).

When Licensee had not paid the fine within the allotted twenty (20) days, the ALJ issued an Opinion and Order upon Licensee’s Failure to Pay a Fine, mailed on October 6, 2010, suspending its license for at least one (1) day and continuing thereafter until the fine was paid. The fine remained unpaid and the ALJ issued a Supplemental Opinion and Order, mailed on October 25, 2010, which deferred Licensee’s suspension period pending operation of the

licensed premises, at which time the suspension period was to be fixed by further Order because the licensed premises had been destroyed by fire. The Order also indicated that if the fine was not paid by December 6, 2010, the ALJ would re-evaluate the suspension penalty and consider revocation of the license. The fine remained unpaid and the ALJ issued a Second Supplemental Order, mailed on February 1, 2011, in which he revoked the license effective March 14, 2011. The instant appeal challenging the revocation of the license was filed *nunc pro tunc* on March 14, 2011. The Bureau did not file a response to Licensee's appeal.

Licensee's appeal avers that Licensee recently received the Second Supplemental Opinion and Order and was not aware of Citation No. 10-1172<sup>1</sup> or that there had been an adjudication on or about August 13, 2010. Licensee also avers that Licensee became aware of manager problems and had police remove its manager on October 21, 2011, and the licensed premises was destroyed on October 22, 2011 by a fire. Lastly, Licensee avers that it believes that prior notices from the ALJ were subverted by its manager.

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

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<sup>1</sup> Licensee's appeal incorrectly specified Citation No. 10-1172; the citation involved in the instant matter is Citation No. 10-1062.

(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, 671 A.2d 1130 (Pa. 1996); specifically, the court may allow an appeal *nunc pro tunc* 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.

The question in this case, therefore, is whether the circumstances described by Licensee would allow for a *nunc pro tunc* appeal, specifically, whether the circumstances would be considered "non-negligent," when

Licensee knew or should have known of the untimeliness, the duration of time which has elapsed, and whether the Bureau is prejudiced by the delay.

The record shows that the ALJ's office received a Statement of Waiver, Admission and Authorization on June 23, 2010 from Licensee, which provides that a fine or other penalty would be forthcoming. [Admission, Waiver and Authorization Article IV Licensees]. The ALJ's Adjudication and Order mailed August 11, 2010, clearly stated that Licensee's fine had to be paid within twenty (20) days from the date of the Order. [Adjudication and Order, pg. 3]. The ALJ's Opinion and Order upon Licensee's Failure to Pay a Fine mailed October 6, 2010, advised Licensee that the fine must be paid within sixty (60) days of the date of the Order or the ALJ shall "reevaluate the penalty. . . and consider revocation of the license." [Opinion and Order Upon Licensee's Failure to Pay a Fine, pg. 2]. The Board's records show that Licensee's address is 247 Carey Ave., Wilkes-Barre, Pennsylvania, 18702-2121. [Admin. Notice].

The ALJ's Supplemental Opinion and Order mailed October 25, 2010, clearly provides that since Licensee's premises had been destroyed by fire, Licensee's suspension would be addressed by a future Order and that if Licensee's fine was not paid by December 6, 2010, the ALJ shall "reevaluate the penalty. . . and consider revocation of the license." [Supplemental Opinion and

Order]. The Supplemental Opinion and Order was subsequently mailed to Licensee's address via 1<sup>st</sup> Class and Certified Mail and was returned to the Office of Administrative Law Judge on December 2, 2010 and November 8, 2010, respectively. The Certified Mail mailing was marked "Bld Burned Down." [Certified Mail Envelope, Supplemental Opinion and Order] and the 1<sup>st</sup> Class mailing was marked:

RETURN TO SENDER  
NOT DELIVERABLE AS ADDRESSED  
UNABLE TO FORWARD

[1<sup>st</sup> Class Mailing Envelope, Supplemental Opinion and Order].

The ALJ's Second Supplemental Opinion and Order mailed February 1, 2011, was mailed to Licensee's address and Licensee's owner's, Joseph Kolesar, address via Certified Mail and were returned to the Office of Administrative Law Judge on February 3, 2011 and March 9, 2011, respectively. The Certified Mail mailings sent to Licensee's address were marked:

RETURN TO SENDER  
MOVED LEFT NO ADDRESS  
UNABLE TO FORWARD  
RETURN TO SENDER

[Certified Mail Envelope, Second Supplemental Opinion and Order].

The Certified Mail mailing sent to Mr. Kolesar's address was marked:

RETURN TO SENDER  
UNCLAIMED  
UNABLE TO FORWARD

[Certified Mail Envelope, Second Supplemental Opinion and Order].

The record shows that Licensee had ample notice that revocation of its license was possible if the fine was not paid in a timely manner. Although Licensee claims it was not aware of Citation No. 10-1062 and subsequent Orders until “recently” because it believed its manager subverted the notices, the Board finds that Licensee had an obligation to monitor and make sure that its manager was fulfilling his duties at the licensed premises, which appears to not be the situation in the instant case. Also, the Board finds that Licensee had an obligation to provide an alternative address where mail could be received after its premises was destroyed; the record shows that it did not provide such an address either.

Licensee’s actions or more aptly its inactions, provide ample evidence to show that the circumstances surrounding Licensee’s late appeal were the result of Licensee’s negligence. The Board is not able to address the remaining Cook factors, because Licensee failed to aver in its Appeal when it found out about Citation No. 10-1062, it only specified “recently.” However, Licensee’s failure to provide the specific details becomes moot, since the circumstances

surrounding Licensee's late appeal were the result of Licensee's negligence. Therefore, Licensee's request for *nunc pro tunc* relief is denied.

Section 471 of the Liquor Code authorizes the ALJ to revoke or suspend a license if a licensee does not pay a previously imposed fine within twenty (20) days of its imposition. There is no question that the fine was not paid within twenty (20) days of the imposition.

Based on the foregoing, the Board concludes that Licensee was advised of the potential revocation and took no action to pay the fine. Therefore, the ALJ acted properly when he revoked the license.

**ORDER**

The decision of the ALJ is affirmed as to Citation No. 10-1062.

The appeal of Licensee is dismissed as untimely.

It is hereby ordered that Restaurant Liquor License No. R-10596 remains  
revoked.

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

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Board Secretary