

Mailing Date: July 6, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

| | | |
|----------------------------------|---|----------------------|
| PENNSYLVANIA STATE POLICE, | : | Citation No. 10-1084 |
| BUREAU OF LIQUOR CONTROL | : | |
| ENFORCEMENT | : | |
| | : | License No. H-1728 |
| v. | : | |
| | : | |
| OBR, Inc. | : | LID 61993 |
| t/a The Old Bethlehem Road Hotel | : | |
| 243 Old Bethlehem Road | : | |
| Quakertown, PA 18951-5911 | : | |
| | : | |

Counsel for Licensee: Pascale Bazelais-McLoughlin, Pro Se

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

OPINION

OBR, Inc. t/a The Old Bethlehem Road Hotel (“Licensee”) filed the instant appeal challenging the Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ imposed a fine of five hundred dollars (\$500.00) with regard to Citation No. 10-1084 (“the Citation”).

On May 26, 2010, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation to Licensee. The Citation set forth two (2) counts. The first count of the Citation charged that on September 10, 11, 12, 13, 17, 20, 22, October 2, 3, 8, 9, 10, 14, 16, 17, 18, 20, 24, 25, 31, November 1, 2, 20, 21, 22, December 2, 4, 13, 22, 31, 2009, and January 1, 14, 23 and February 5, 2010, Licensee, by its servants, agents or employees, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard outside, in violation of section 5.32(a) of the Liquor Control Board Regulations. [40 Pa. Code § 5.32(a)].

The second count of the Citation charged that on August 19, September 2, 5, 6, 7, 10, 11, 12, 13, 17, 20, 22, October 2, 3, 8, 9, 10, 11, 14, 16, 17, 18, 20, 24, 25, 31, November 1, 2, 20, 21, 22, December 2, 4, 13, 22, 31, 2009, and January 1, 14, 23 and February 5, 2010, the licensed establishment was operated in a noisy and/or disorderly manner, in violation of section 471 of the Liquor Code. [47 P.S. § 4-471].

Notice of the impending Citation was sent to Licensee by certified mail, return receipt requested on March 12, 2010. [N.T. 4; Ex. B-1]. Licensee stipulated that the Notice was received. [N.T. 4]. The Citation was sent to

Licensee by certified mail, return receipt requested on May 26, 2010. [N.T. 4; Ex. B-2]. Licensee stipulated that the Citation was received. [N.T. 4]. The Bureau's motion to withdraw the violation dates of September 13, 2009 for the first count and September 2, 7, 13, and October 11, 2009, for the second count was granted on January 11, 2011.

A hearing was held regarding the Citation on January 13, 2011. Roy Harkavy, Esquire, appeared at the hearing as counsel for the Bureau. Pascale Bazelais-McLoughlin, Licensee's corporate officer, appeared at the hearing on behalf of Licensee. At the hearing, the parties stipulated to pre-hearing memorandums from the Bureau and the Licensee. [N.T. 4-5; Ex. B-3, L-1].

By Adjudication and Order mailed February 17, 2011, the ALJ sustained the charges set forth in the Citation and imposed a fine of five hundred dollars (\$500.00). The Adjudication contained this warning:

“NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.”

Licensee filed a Motion for Reconsideration, which was received by the Office of Administrative Law Judge on March 11, 2011, twenty-two (22) days after the

mailing date of the Order. By Order mailed March 25, 2011, the ALJ denied Licensee's Motion for Reconsideration as untimely.

On April 19, 2011, Licensee filed the instant 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]. The filing of a motion for reconsideration does not toll the thirty (30)-day time period for the filing of an appeal with the Board. [40 Pa. Code § 17.21(c)].

Although Licensee filed a Motion for Reconsideration on March 11, 2011, this motion did not stop the running of the thirty (30)-day appeal period under section 17.21(c) of the Board's Regulations. Therefore, Licensee's appeal filed on April 19, 2011 was filed sixty-one (61) days after the ALJ's Order and Adjudication of February 17, 2011, and is clearly outside the thirty (30)-day appeal period.

Here, Licensee does not make any argument concerning its late-filed appeal. Licensee does not assert that it never received the ALJ's Order; nor does it assert that it received the Order in an untimely manner. Licensee fails to offer any explanation why sixty-one (61) days elapsed between the issuance of the ALJ's Order imposing a fine and the filing of the instant appeal.

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.

Licensee has failed to show extraordinary circumstances involving fraud or breakdown in the court's operation or non-negligent conduct of the appellant for its untimely filing. Failing to review the Board's Regulations for filing deadlines is not "non-negligent" conduct. Therefore, a review of the other factors included in Cook is not necessary. Licensee's appeal does not meet the requirements to be considered *nunc pro tunc*.

Even assuming that Licensee had satisfied the requirements for allowing an appeal *nunc pro tunc*, Licensee's appeal challenging the ALJ's revocation of its license is without merit. In its appeal, Licensee contends that the ALJ's decision was not based on substantial evidence. 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 Board (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Board of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

Licensee asserts that the ALJ's decision was based on "the constant stream of calls to complain by Mark and Lori Ford, THE ONLY neighbors and community members to have an issue with the licensee and the establishment." Licensee presented this same argument in its pre-hearing

memorandum, which the ALJ considered prior to sustaining the charges set forth in the Citation. [N.T. 5; Ex. L-1]. The ALJ also considered the Bureau's pre-hearing memorandum, which outlined the Bureau's investigation of the noise complaints. [N.T. 4-5; Ex. B-3]. There is sufficient evidence in the record to support the conclusion the ALJ's decision to sustain the citation.

Accordingly, the instant appeal must be denied as untimely, and the decision of the ALJ is, therefore, affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

The fine of five hundred dollars (\$500.00) remains unpaid.

Licensee must pay the fine within twenty (20) days of the mailing date of this order. If Licensee fails to pay the fine within twenty (20) days of the mailing date of this order, Licensee's license shall be suspended and/or revoked.

Licensee must also adhere to any other conditions set forth in the ALJ's Order issued February 17, 2011.

Board Secretary