Mailing Date: August 28, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-1647
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
CARAVAN II ALBERGO, LLC	:	License No. H-6153
1465 Sampson Street	:	
New Castle, PA 16101	:	LID 60815

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OPINION

Caravan II Albergo, LLC ("Licensee") filed an untimely appeal from the Second Supplemental Order of Administrative Law Judge Robert F. Skwaryk ("ALJ") mailed on July 1, 2011, wherein the ALJ revoked Hotel Liquor License

No. H-6153 effective July 25, 2011, due to Licensee's failure to pay the fine for Citation No. 10-1647 ("the Citation").

Citation No. 10-1647 contained one count, that Licensee violated section 471 of the Liquor Code [47 P.S. § 4-471] and section 637.6(a)(2) of the Clean Indoor Air Act [35 P.S. § 637.6(a)(2)] when, on March 21 and May 6, 2010, Licensee, by its servants, agents, or employees, permitted smoking in a public place where smoking is prohibited.

In response to the Citation, Licensee submitted an Admission, Waiver and Authorization ("Waiver") on January 7, 2011, admitting to the violation and waiving its rights to a hearing and to appeal the adjudication. Subsequently, the matter was assigned to the ALJ for disposition.

Thereafter, the ALJ sustained the Citation. [Adjudication and Order, mailed January 28, 2011]. The ALJ imposed a penalty of a fine of two hundred fifty dollars ($250.00). The Adjudication and Order was sent by first class and certified mail to Licensee's address at 1465 Sampson Street, New Castle, PA 16101. Although the certified mailing was unclaimed, the first class mailing was not returned.

Subsequent to the issuance of the Adjudication and Order mailed on January 28, 2011, Licensee neither paid the fine nor filed an appeal, leading the

ALJ to issue a Supplemental Order. [Supplemental Order, mailed March 30, 2011]. The Supplemental Order noted that the fine of two hundred fifty dollars ($250.00) had not been paid, whereupon the ALJ imposed a one (1) day suspension of Licensee's liquor license and continuing thereafter until the fine was paid. The suspension period was deferred pending reactivation of Licensee's license, at which time the suspension period would be fixed by further Order. The ALJ noted that if the fine should remain unpaid by sixty (60) days of the mailing date of the Supplemental Order, revocation of the license would be considered. The Supplemental Order was sent by first class and certified mail to Licensee's address at 1465 Sampson Street, New Castle, PA 16101. Although the certified mailing was unclaimed, the first class mailing was not returned.

Subsequently, the ALJ issued a Second Supplemental Order [Supplemental Order, mailed July 1, 2011]. The ALJ noted that the fine had still not been paid, and revoked the license as of July 25, 2011, at 7:00 a.m. The Second Supplemental Order was sent by first class and certified mail to Licensee's address at 1465 Sampson Street, New Castle, PA 16101. Although the certified mailing was unclaimed, the first class mailing was not returned.

Over two (2) years later, on July 19, 2013, Licensee filed a "Petition Nunc Pro Tunc" ("Petition"), requesting that the Pennsylvania Liquor Control Board ("Board") grant the Petition and the reissuance of the license upon payment of fines and costs. The Petition acknowledges that Licensee's principal place of business is 1465 Sampson Street, New Castle, PA 16101. The Petition alleges that Licensee did not receive the Adjudication, the Supplemental Order, or the Second Supplemental Order, since they were mailed by registered mail to 1465 Sampson Street, New Castle, PA 16101, because the hotel "was not in operation on said dates" and in fact had ceased business operations on January 26, 2011. [Petition, ¶12].

Pursuant to section 471 of the Liquor Code, an aggrieved party has thirty (30)-days to file an appeal from an ALJ's Order. [47 P.S. § 4-471(b)]. The appeal in the instant matter was filed on July 19, 2013, over two (2) years after the ALJ's Second Supplemental Order, which had been mailed on July 1, 2011.

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, 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. In order for Licensee's late appeal to be permitted, Licensee must satisfy all four (4) prongs of the Cook test.

In applying the Cook standard, the Board finds that Licensee has failed to satisfy the first prong of the four (4)-prong test. Licensee asserts that it did not file a timely appeal because it did not receive the ALJ's decisions, since the business closed on January 26, 2011. However, the record shows that the ALJ's decisions were sent by first class and certified mail to the address of the

licensed premises, as required by the Liquor Code. [47 P.S. § 4-471]. In fact, Licensee's business is still located at that same address. [See Licensee's Cover Letter to Petition].

Pennsylvania courts have, for many years, followed the "mailbox rule," which provides that "depositing in the post office a properly addressed, prepaid letter raises a natural presumption, founded in common experience, that it reached its destination by due course of mail." Jensen v. McCorkell, 154 Pa. 323, 325, 26 A. 366, 367, (1893) (citation omitted). The Pennsylvania Supreme Court noted: "The overwhelming weight of statistics clearly indicates that letters properly mailed and deposited in the post office are received by the addressees." Meierdierck v. Miller, 394 Pa. 484, 487, 147 A.2d 406, 408 (1959). Therefore, "[e]vidence that a letter has been mailed will ordinarily be sufficient to permit a jury to find that the letter was in fact received by the party to whom it was addressed." Szymanski v. Dotey, 52 A.3d 289, 292 (2012) (citing Shafer v. A.I.T.S., Inc., 428 A.2d 152, 156 (Pa. Super. 1981)).

Licensee alleges that it did not receive the notices because the business closed on January 26, 2011, but offers nothing to rebut the presumption of the mailbox rule. If the mailings could not be received at the licensed premises because the business had closed, Licensee had an affirmative duty to advise

the ALJ of the address where notices and adjudications could be sent. [1 Pa. Code § 31.24(a)].[1] Licensee did not assert, in the Petition, that it provided the ALJ with an updated address after the business closed.

Licensee has neither alleged circumstances that could suggest a fraud or breakdown in the administrative process, nor has it established that the failure to file an appeal by July 21, 2011, was caused by non-negligent conduct. As noted by the Pennsylvania Supreme Court,

> [N]o amount of insistence on the importance of a … license, whether its possession is termed a right or a privilege, can cure the inability of any form of notice to reach a suspendee whose whereabouts are unknown. **Rights and privileges, however essential, must be given some measure of protection by those who hold them, or they are lost.**

Dept. of Transp. v. Warenczuk, 534 Pa. 623, 626 (1993) (emphasis added). The Board must dismiss the appeal as untimely.

Even if Licensee were able to establish grounds for allowing the appeal to proceed *nunc pro tunc*, the appeal would be denied on the merits of the case. Pursuant to section 471 of the Liquor Code, an appeal must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused

[1] "If an individual appears in his own behalf before an agency head or a presiding officer in a particular proceeding which involves a hearing or an opportunity for hearing, he shall file with the office of the agency or

his/her discretion, or if his/her decision was not based upon substantial evidence. The Commonwealth Court 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).

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the ALJ's Adjudication & Order mailed January 10, 2011, the ALJ's Supplemental Order mailed March 30, 2011, and the ALJ's Second Supplemental Order mailed July 1, 2011, and Licensee's Petition, and has concluded that the ALJ's Second Supplemental Order is without error and is supported by substantial evidence.

The imposition of penalties is the exclusive prerogative of the administrative law judge. The Board may not disturb penalties imposed by an administrative law judge if they are within the parameters set forth in section 471 of the Liquor Code [47 P.S. § 4-471]. Section 471(b) addresses the circumstances under which an ALJ may revoke a license:

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otherwise state on the record an address at which a notice or other written communication required to be served upon him or furnished to him may be sent." [1 Pa. Code § 31.24(a)].

> 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. Suspensions and revocations shall not go into effect until thirty days have elapsed from the date of the adjudication during which time the licensee may take an appeal as provided for in this act….

[47 P.S. § 4-471(b)].

A review of the record indicates that the ALJ adhered to the provisions of section 471 of the Liquor Code. The ALJ initially imposed the fine in his January 28, 2011, Order and gave Licensee twenty (20) days to pay the fine. More than two (2) months after that Order, on March 30, 2011, the ALJ imposed a one (1) day suspension and continuing thereafter until the fine was paid, although the suspension period was deferred pending reactivation of Licensee's license. Furthermore, the ALJ advised that if the fine was not paid within sixty (60) days from the date of the March 30th Order, he would consider revocation of the license. More than three (3) months later, on July 1, 2011, the ALJ issued his Second Supplemental Order revoking Licensee's license.

The Board does not consider the ALJ's determination to be an abuse of discretion. The Pennsylvania Supreme Court has 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). See also Commonwealth v. Levanduski, 907 A.2d 3, 13-14 (Pa. Super. 2006)(*en banc*).

Based upon a review of the record, the ALJ was more generous with deadlines than required by statute. Abuse of discretion is an extremely high standard of review, and the Board does not find that it has occurred in the instant matter.

For the reasons set forth above, the appeal is dismissed and the license remains revoked.

O R D E R

The appeal of Licensee is dismissed as untimely.

It is hereby ordered that Licensee's Hotel Liquor License No. H-6153 remains revoked as of July 25, 2011.

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Board Secretary