

Mailing Date: October 12, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 11-0499
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
SLOVAK INDEPENDENT	:	License No. CC-3251
POLITICAL CLUB	:	
295 Franklin Street	:	
Clymer, PA 15728-1117	:	LID 3417

Counsel for Licensee: Pro Se

Counsel for Bureau: Nadia L. Vargo, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
313 Mt. Nebo Road  
Pittsburgh, PA 15237-1305

**OPINION**

Slovak Independent Political Club (“Licensee”) timely appealed from the June 6, 2011 Opinion and Order Upon Licensee’s Application for Reconsideration (“Reconsideration Order”) of Administrative Law Judge Felix Thau’s (“ALJ”), wherein the ALJ denied reconsideration of his May 13, 2011 Adjudication and Order. In his May 13, 2011 Adjudication and Order, the ALJ

sustained the charges set forth in Citation No. 11-0499 (“the Citation”), imposed an aggregate fine of two thousand dollars (\$2,000.00), and suspended Licensee’s license for a period of seven (7) days.

On April 1, 2011, the Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation, which set forth two (2) counts. The first count of the Citation charged Licensee with failing to maintain complete and truthful records covering the operation of the licensed business for a period of two (2) years immediately preceding February 28, 2011, in violation of sections 471 and 493(12) of the Liquor Code [47 P.S. §§ 4-471, 4-493(12)] and section 901 of the Pennsylvania Department of Revenue’s Regulations [61 Pa. Code § 901]. The second count of the Citation charged Licensee with using funds derived from the operation of small games of chance for unauthorized purposes in violation of section 471 of the Liquor Code [47 P.S. § 4-471], section 314 of the Local Option Small Games of Chance Act [10 P.S. § 314], and section 901 of the Pennsylvania Department of Revenue’s Regulations [61 Pa. Code § 901].

On April 14, 2011, Licensee executed a Statement of Admission, Waiver and Authorization in which the Licensee admitted to the violations charged in the Citation, admitted that the Bureau complied with the applicable investigatory and notice requirements of the Liquor Code, authorized the ALJ

to enter an adjudication without a hearing based on a summary of facts provided by the Bureau and Licensee's prior citation history, and waived its right to appeal the adjudication that was to be issued by the ALJ.

On May 13, 2011, the ALJ issued his Adjudication and Order, in which he sustained both counts set forth in the Citation. The ALJ imposed a fine of one thousand dollars (\$1,000.00) and suspended Licensee's license for a period of three (3) days for Count 1, and he imposed a fine of one thousand dollars (\$1,000.00) and suspended Licensee's license a period of four (4) days for Count 2.

On May 24, 2011, Licensee filed an Application for Reconsideration, in which it requested that the ALJ reduce or eliminate the suspensions imposed in his May 13, 2011 Adjudication and Order.<sup>1</sup> Licensee cited no legal or factual basis in support of its request; rather, Licensee simply asked for mercy and pledged to comply with all Pennsylvania Liquor Control Board ("Board") policies in the future. On June 6, 2011, the ALJ issued his Reconsideration Order, in which he denied reconsideration of his May 13, 2011 Adjudication and Order.

On June 27, 2011, Licensee filed an appeal to the Board. In its appeal, Licensee alleges that the ALJ's Reconsideration Order did not provide sufficient

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<sup>1</sup> Licensee did not request a reduction or elimination of the fines imposed, as Licensee paid such fines when it filed its Application for Reconsideration.

information regarding Licensee's right to appeal the May 13, 2011 Adjudication and Order and file an application for supersedeas. Thus, Licensee asserts that it has been denied the full appeal process. Licensee further alleges that because its violations occurred over an eight (8)-year period, rather than over the four (4)-year period outlined in the Statement of Admission, Waiver and Authorization, a suspension was not warranted in this case.

Initially, the Board notes that while Licensee's appeal refers to alleged deficiencies with regard to the ALJ's Reconsideration Order, it appears that Licensee is, at least in part, attempting to appeal the underlying May 13, 2011 Adjudication and Order. However, Licensee's attempt to appeal the May 13, 2011 Adjudication and Order is untimely.

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for appeals from an adjudication of an administrative law judge. [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 for 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, 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 considered 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).

Here, Licensee did not file its appeal until June 27, 2011, which was fifteen (15) days beyond the thirty (30)-day appeal period for filing an appeal of the May 13, 2011 Adjudication and Order.<sup>2</sup> Thus, Licensee's attempt to appeal the May 13, 2011 Adjudication and Order is clearly untimely. Moreover, Licensee has failed to establish adequate justification for the late filing of its appeal. Therefore, the Board is without jurisdiction to consider Licensee's untimely appeal of the May 13, 2011 Adjudication and Order.

Even assuming Licensee had filed a timely appeal of the May 13, 2011 Adjudication and Order, or had established adequate justification for the late filing of the appeal, the Board would find Licensee's appeal to be without merit. Significantly, when faced with the Citation, Licensee executed a Statement of Admission, Waiver, and Authorization. By doing so, Licensee authorized the ALJ to enter an adjudication based on a summary of facts and Licensee's prior adjudication history, and Licensee waived the right to appeal that adjudication. Thus, the right to appeal the May 13, 2011 Adjudication and

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<sup>2</sup> The filing of a request for reconsideration by Licensee did not toll the time period for filing an appeal with the Board. [See 40 Pa. Code § 17.21(c)].

Order was expressly waived by Licensee. 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). Licensee cannot now undo the waiver of its appeal rights.

To the extent that Licensee is attempting to appeal the ALJ's June 6, 2011 Reconsideration Order, such appeal is timely because Licensee filed its appeal on June 27, 2011, which was within thirty (30) days of June 6, 2011. Therefore, the Board has jurisdiction to consider Licensee's appeal of the Reconsideration Order.

Nevertheless, the Board believes that Licensee's appeal of the Reconsideration Order is without merit. Interestingly, Licensee asserts that it was denied the full appeal process because the ALJ failed to provide sufficient information in his Reconsideration Order regarding Licensee's right to appeal the May 13, 2011 Adjudication and Order and file an application for supersedeas. However, as explained above, Licensee executed a Statement of Admission, Waiver, and Authorization when faced with the Citation, and, in doing so, Licensee waived its right to appeal the May 13, 2011 Adjudication and Order. Because Licensee had already waived its right to appeal the May 13, 2011 Adjudication and Order, there was no need for the ALJ to advise Licensee of its

appeal rights in his Reconsideration Order. Similarly, there was no need for the ALJ to advise Licensee of the right to file an application for supersedeas. Thus, Licensee's allegations are misplaced.

Moreover, while Licensee challenges the ALJ's denial of reconsideration on the basis that the ALJ failed to consider that Licensee's citation history occurred over a period of eight (8) years, rather than four (4) years, when imposing the penalty of a suspension, such challenge is also misplaced. The decision to grant or deny a request for reconsideration is a matter of administrative discretion and will be reversed only for an abuse of that discretion. Modzelewski v. Department of Public Welfare, 109 Pa. Cmwlth. 519, 531 A.2d 585 (1987). In deciding if an abuse of administrative discretion has occurred, the decision shall not be overturned unless there is "evidence of bad faith, fraud, capricious action or abuse of power." Columbia Gas of Pennsylvania v. Pennsylvania Public Utility Comm'n, 112 Pa. Cmwlth. 611, 614, 535 A.2d 585 (1987).

In the instant matter, the May 13, 2011 Adjudication and Order reflects that, in imposing the penalty in this matter, the ALJ considered Licensee's entire citation history dating back to 2000, and did not limit his consideration to a four (4)-year period as asserted by Licensee. Therefore, the Board

concludes that the ALJ did not abuse his discretion in denying reconsideration of his May 13, 2011 Adjudication and Order.

Accordingly, for the reasons set forth above, to the extent that Licensee is attempting to appeal the ALJ's May 13, 2011 Adjudication and Order, Licensee's appeal is dismissed as untimely. Further, to the extent that Licensee is appealing the ALJ's June 6, 2011 Reconsideration Order, Licensee's appeal is denied, and the ALJ's Order is affirmed.

### **ORDER**

Licensee's appeal is dismissed as untimely to the extent that Licensee is attempting to appeal the ALJ's May 13, 2011 Adjudication and Order.

The ALJ's May 13, 2011 Adjudication and Order is affirmed.

Licensee's appeal is denied to the extent that Licensee is appealing the ALJ's June 6, 2011 Reconsideration Order.

The ALJ's June 6, 2011 Reconsideration Order is affirmed.

The fine of two thousand dollars (\$2,000.00) has been paid.

The case is hereby remanded for imposition of the seven (7) day suspension in accordance with this Opinion.

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Board Secretary