

Mailing Date: December 5, 2012

PENNSYLVANIA LIQUOR CONTROL BOARD

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| PENNSYLVANIA STATE POLICE, | : | Citation No. 11-1695 |
| BUREAU OF LIQUOR CONTROL | : | |
| ENFORCEMENT | : | |
| | : | |
| | : | |
| v. | : | |
| | : | |
| MJH VENTURES, LLC | : | License No. R-6097 |
| 445 Bairdford Road | : | |
| P.O. Box 304 | : | |
| Bairdford, PA 15006 | : | LID 62886 |

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OPINION

MJH Ventures, LLC (“Licensee”) appeals *nunc pro tunc* from the Third Supplemental Order of Administrative Law Judge Roderick Frisk (“ALJ”), mailed August 23, 2012, wherein the ALJ revoked Restaurant Liquor

License No. R-6097 due to Licensee's failure to pay a previously-imposed fine for Citation No. 11-1695 ("the Citation"). Based upon a review of the certified record, including the ALJ's Adjudication and Order, [first] Supplemental Order, Second Supplemental Order, Third Supplemental Order, Appellant's Appeal, and Licensee's Statement of Waiver, Admission and Authorization in lieu of the hearing, the Pennsylvania Liquor Control Board ("Board") denies the appeal and affirms the ALJ's decision to revoke License No. R-6097.

On October 3, 2011, the Bureau issued the Citation to Licensee, setting forth two (2) counts. The first count of the Citation alleged that during the period May 1 through 31, 2011, Licensee, by its servants, agents, or employees, operated the licensed premises without a valid health permit or license, which had expired on April 30, 2011, in violation of section 437 of the Liquor Code [47 P.S. § 4-437)] and section 5.41 of the Board's Regulations [40 Pa. Code § 5.41]. The second count alleged that on June 15 and 20, 2011, Licensee, by its servants, agents, or employees, sold alcoholic beverages after the expiration of its restaurant liquor license, in violation of sections 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2), 4-493(16)].

Notice of the Citation was sent by first class and certified mail, return receipt requested to Licensee at the licensed premises, 445 Bairdford Road, P.O. Box 304, Bairdford, Pennsylvania. The notice was returned on March 9, 2012, marked as unclaimed and unable to forward.

Nonetheless, an Admission, Waiver and Authorization was filed by Licensee in the Office of the ALJ on March 26, 2012. By Adjudication and Order issued on April 5, 2012, the ALJ sustained the Citation on both counts and imposed a fine of one thousand, four hundred dollars (\$1,400.00) to be paid within twenty (20) days. If payment was not timely, the license was subject to suspension or revocation. The Opinion was mailed to Licensee by first class and certified mail on April 13, 2012, return receipt requested. The certified mailing of the Opinion was returned to the ALJ on May 24, 2012, marked unclaimed and unable to forward.

Licensee was required to pay the fine within twenty (20) days of the mailing date of the Adjudication, but failed to do so. Accordingly, on May 1, 2012, the ALJ entered a Supplemental Order, whereby Licensee's license was suspended for one (1) day and continuing thereafter until the ALJ issued a further order terminating the suspension. The ALJ imposed a sixty (60)

day period from the mailing of the Supplemental Order in which Licensee was to pay the fine; the failure to do so would result in further action by the ALJ. The Supplemental Order was mailed to Licensee by first class and certified mail, return receipt requested on May 22, 2012. The certified mailing of the Supplemental Order was returned to the Office of the ALJ on July 2, 2012, marked as unclaimed and unable to forward.

A Second Supplemental Order was issued by the ALJ on July 3, 2012, taking notice of non-compliance with the suspension and non-payment of the fine. However, since the license had not been renewed when it expired on May 31, 2012, the ALJ deferred the suspension until reactivation of the license. The Order was mailed on July 3 to Licensee by first class and certified mail, return receipt requested.

Pursuant to the lapse of the sixty (60) day time period without compliance, a Third Supplemental Order was issued by the ALJ on August 23, 2012, revoking the license and all applicable permits, effective September 24, 2012. This was mailed on August 23 to Licensee by first class and certified mail, return receipt requested. The certified mailing was again returned to the ALJ on September 13, 2012, marked unclaimed and unable to forward.

On October 18, 2012 Licensee's appeal *nunc pro tunc* followed. Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his or her discretion, or if his or her decision was not based upon substantial evidence. [47 P.S. § 4-471(b)]. 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).

The thirty (30)-day deadline for an appeal from the ALJ's Third Supplemental Order, pursuant to section 471(b) of the Liquor Code [47 P.S. § 4-471(b)], was September 22, 2012. Since that date was a Saturday, the deadline fell on Monday, September 24, 2012.¹ Licensee's appeal *nunc pro tunc*, filed on October 18, 2012, was nearly one (1) month

¹ Pursuant to the Rules of Statutory Construction, "Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation." [1 Pa. C.S. § 1908].

late and over five (5) months from the date of the original Adjudication and Order in this case.

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). The extension of 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 counsel is not a sufficient excuse for the failure to timely file an appeal. See Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979). The rule articulated in Bass was further refined in Cook v. Unemployment Compensation Board of Review, 671 A.2d 1130 (Pa. 1996). Specifically, a tribunal may allow an appeal *nunc pro tunc* where (1) an appeal is not timely because of non-negligent circumstances, either as they relate to the appellant or appellant's counsel, (2) the appeal is filed within a short time after the appellant or counsel learns of and has an opportunity to address the untimeliness, (3) the time period that elapses is of very short duration, and (4) the appellee is not prejudiced by the delay. Id. at 1131.

On October 18, 2012, Licensee filed for leave to appeal *nunc pro tunc* and applied for supersedeas. In support thereof, Licensee avers that its owner had become less involved in the day-to-day operation of the premises due to her health. She was relying upon her son for updates and receipt of mail, which he apparently did not do. Licensee's owner alleges that she received the paperwork only after the license had been revoked.

It is Licensee's burden to demonstrate a breakdown in the administrative process, or to establish that the untimely appeal is due to non-negligent circumstances. Herein, Licensee asserts that she had relied upon her son to receive mail and to update her as to the daily operations. Licensee does not assert that the mailings were improperly executed. The certified mailing of the citation was returned as unclaimed, yet Licensee did file an Admission, Waiver and Authorization as to the Citation, so it was aware that the Citation had been issued and knew that a penalty would follow. The certified copies of the initial Order and the first and Third Supplemental Orders were returned as unclaimed, yet the Licensee recently acquired counsel by whom this appeal was filed. The second Supplemental Order was presumably received since it was not returned. Licensee does not account for these discrepancies, or for the fact that it failed to renew the license. Rather,

its owner pleads that her misplaced reliance upon her son, along with her health issues, precluded her from involvement in the business operations and justifies her current legal predicament. Neither of these reasons are non-negligent nor compelling in nature and, thus, do not satisfy the first requirement for allowing an appeal *nunc pro tunc*.²

Even assuming that Licensee had satisfied the requirements for allowing an appeal *nunc pro tunc*, Licensee's appeal challenging the ALJ's revocation of her license is without merit.³ Section 471 of the Liquor Code [47 Pa. Code § 4-471] authorizes the ALJ to revoke or suspend a license if a licensee does not pay the previously imposed fine within twenty (20) days of its imposition.

In this case, the ALJ's Adjudication and Order imposing the one thousand four hundred dollar (\$1,400.00) fine with regard to the Citation clearly stated that the fine had to be paid within twenty (20) days of the

² Given Licensee's failure to meet the first factor set forth in Cook, the Board finds it unnecessary to address the final three (3) factors. However, it is noted that the nearly month-long delay in filing its appeal *nunc pro tunc* is not a period of "short duration."

³ The Board notes that while Licensee's appeal does not make it is not clear from what Order it is appealing, the substance of its appeal appears to be challenging the ALJ's Third Supplemental Order, which revoked the license. However, to the extent that the appeal is from the ALJ's April 13, 2012 Adjudication and Order, the Board concludes that such appeal is untimely and that Licensee failed to establish adequate justification for the late appeal. Further, even assuming that the appeal had been timely or that Licensee had established adequate justification for the late appeal, the Board would conclude that such appeal is without merit because Licensee submitted an Admission, Waiver, and Authorization waiving the right to appeal the ALJ's April 13 Adjudication and Order, and Licensee cannot undo that action.

mailing date of the Order, April 13, 2012. When Licensee failed to pay the fine, the ALJ, by Supplemental Order mailed May 22, 2012, suspended the license and clearly warned Licensee that he would reevaluate the situation sixty (60) days from the mailing date and impose further sanctions, “which may include revocation of the license.” Despite the penalty of a suspension and the above-mentioned warning from the ALJ, Licensee still failed to respond. As a result, in the Second Supplemental Order mailed July 3, 2012, the ALJ noted not only Licensee’s failure to comply, but the failure to renew the license prior to its expiration date of May 31, 2012. The ALJ, by Third Supplemental Order, mailed August 23, 2012, revoked the license effective September 24, 2012. Clearly, Licensee was given ample opportunity to pay the fine and avoid having its license revoked.

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]. Absolutely nothing in the record suggests that the ALJ abused its discretion, committed an error of law, or rendered a decision unsupported by substantial evidence.

Given these circumstances, the Board concludes that the ALJ did not err or abuse his discretion in revoking Licensee's license.⁴

For the foregoing reasons, the instant appeal is denied as untimely, and the decision of the ALJ is affirmed.

⁴ Licensee also sets forth that it is entitled to an automatic supersedeas to permit it to continue operations despite being revoked. Pursuant to 47 P.S. § 4-471(b), such entitlement applies when the appeal is timely filed. This is not the case herein.

ORDER

The appeal *nunc pro tunc* of MJH Ventures, LLC is dismissed.

The request for supersedeas is denied.

The Third Supplemental Order of the ALJ is sustained.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-6097 remains revoked as of September 24, 2012.

Board Secretary