

Mailing Date: November 14, 2012

PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE POLICE, : Citation No. 11-1761
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

v. :

MARK L. WILSON t/a Matt's Bar & Grill : License No. R-12574
711 Mifflin Street :
Huntingdon, PA 16652-1715 : LID 60873

Counsel for Licensee: Harvey B. Reeder, Esquire
504 Penn Street
Huntingdon, PA 16652-1715

Counsel for Bureau: Nadia L. Vargo , Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
313 Mount Nebo Road
Pittsburgh, PA 15327

OPINION

Mark L. Wilson t/a Matt's Bar & Grill ("Licensee") appeals *nunc pro tunc* from the second Opinion and Order Upon Licensee's Failure to Pay Fine ("Second Supplemental Order") of Administrative Law Judge Felix Thau

("ALJ"), mailed August 7, 2012, wherein the ALJ revoked Restaurant Liquor License No. R-12574 due to Licensee's failure to pay a previously-imposed fine for Citation No. 11-1761 ("the Citation"). Based upon a review of the certified record, including the ALJ's Adjudication and Order, first Opinion and Order Upon Licensee's Failure to Pay Fine ("First Supplemental Order"), Second 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-12574.

On October 14, 2011, the Bureau issued the Citation to Licensee, setting forth eight (8) counts. The first count of the Citation alleged that on June 8-11, 14-15, and July 16, 18-19, 2011, Licensee, by his servants, agents, or employees, issued checks or drafts in payment for purchases of malt or brewed beverages with insufficient funds in or credit with the institution in which the payment was to be drawn, in violation of section 493(26) of the Liquor Code. [47 P.S. § 4-493(26)]. The second count alleged that during the period of July 8 through August 17, 2011, Licensee, by his servants, agents, or employees, failed to maintain malt or brewed beverages dispensing system cleaning records in violation of section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] and section

5.52 of the Board's Regulations [40 Pa. Code § 5.52]. Count three alleged that on August 17, 2011, Licensee violated section 493(12) of the Liquor Code [47 P.S. § 4-493(12)], in that Licensee, by his servants, agents, or employees, failed to keep records on the licensed premises. Count four alleged a violation of section 491(10) of the Liquor Code [47 P.S. § 4-491(10)], in that on August 17, 2011, Licensee, by his servants, agents, or employees, fortified, adulterated and/or contaminated liquor. Count five alleged a violation of section 102 of the Liquor Code [47 P.S. § 1-102], in that on August 17, 2011, Licensee failed to qualify as a bona fide restaurant on the basis of insufficient food items. Counts six and seven alleged violations of sections 5.23(c) and 5.23(a) of the Board's Regulations, respectively [40 Pa. Code §§ 5.23(c), 5.23(a)], in that Licensee, by his servants, agents, or employees, failed to notify the Board within fifteen (15) days of a change of manager during the time period of July 1 through August 17, 2011; and that during that same time period, the manager failed to devote full time and attention to the operation of the licensed business. The eighth count alleged a violation of section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)] in that, on July 8, 2011, Licensee, by his servants, agents, or employees, used or permitted to be used a loudspeaker or similar device inside the premises with amplified sound heard outside of the premises.

Notice of the Citation was sent by first class and certified mail to Licensee at the licensed premises, 711 Mifflin Street, Huntingdon, Pennsylvania. In response to the pre-trial hearing memo, Licensee filed an Admission, Waiver and Authorization on December 23, 2011, in which Licensee admitted to the violations charged in the Citation, and that the Bureau complied with the applicable investigatory and notice requirements of the Liquor Code, and authorized the ALJ to enter an Adjudication without a hearing based upon a summary of facts as provided by the Bureau, and waived the right to appeal the Adjudication.

By Adjudication and Order mailed March 22, 2012, the ALJ sustained the Citation on seven (7) of the eight (8) counts, dismissing count seven on the basis that the Bureau had failed to meet its burden of proof. A fine of one thousand six hundred seventy-five dollars (\$1,675.00) was imposed. The Order stated that if the fine was not paid within twenty (20) days of the mailing date, Licensee's license would be suspended or revoked. The Adjudication and Order was sent to Licensee's counsel, Harvey B. Reeder, by certified mail, return receipt requested, on March 22, 2012.

Licensee was required to pay the fine by April 11, 2012, but failed to do so. Accordingly, on May 1, 2012, the ALJ entered the First 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 First Supplemental Order in which Licensee was to pay the fine; the failure to do so would result in further action by the ALJ. Since the First Supplemental Order had a mailing date of May 3, 2012, Licensee was required to pay the fine by July 2, 2012.

Licensee's continuing failure to pay the fine prompted the ALJ's Second Supplemental Order, at issue here. The Second Supplemental Order, mailed on August 7, 2012, revoked the license effective August 20, 2012. The Second Supplemental Order was sent to Licensee's counsel via first class and certified mail. Licensee's untimely 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).

Also pursuant to section 471 of the Liquor Code, however, the thirty (30)-day filing deadline for an appeal from the ALJ's Second Supplemental Order was on or about September 6, 2012. [47 P.S. § 4-471(b)]. Licensee's appeal *nunc pro tunc*, filed on September 19, 2012, was nearly two (2) weeks late.

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 September 19, 2012, Licensee filed for leave to appeal *nunc pro tunc* the ALJ's Second Supplemental Order revoking the license. In support, Licensee avers that he misunderstood a communication from the secretary of the ALJ, believing that his license would be restored upon payment of the fine. Additionally, Licensee alleges that he had some physical and emotional issues that precluded his attention to the operational aspects of the licensed premises.

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 does not assert that the three (3) Orders were not received or that they were not received in a timely manner. In fact, Licensee was and is represented by counsel and counsel did, in fact, receive notice. Nor does Licensee account for the delay of two (2) weeks in filing this appeal. Rather, he relies solely upon an alleged oral misunderstanding with an Office of the ALJ secretary and his own physical and emotional issues. Neither

are non-negligent nor compelling in nature and, thus, do not satisfy the requirements for allowing an appeal *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 his license is without merit. 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 six hundred seventy-five dollars (\$1,675.00) fine with regard to the Citation clearly stated that the fine had to be paid within twenty (20) days of the mailing date of the Order, March 22, 2012. When Licensee failed to pay the fine, the ALJ, by First Supplemental Order mailed May 3, 2012, suspended Licensee's license and clearly warned Licensee that he would reevaluate the situation sixty (60) days from the mailing date of the First Supplemental Order and impose further sanctions, "which will likely include revoking the license." Despite the penalty of a suspension and the above-mentioned warning from the ALJ, Licensee still failed to pay the fine. As a result, by Second Supplemental Order mailed August 7, 2012, the ALJ revoked the license

effective August 20, 2012. 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.

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

ORDER

The appeal *nunc pro tunc* of Mark L. Wilson is dismissed.

The Second Supplemental Order of the ALJ is sustained.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-12574 remains revoked as of August 20, 2012.

Board Secretary