

Mailing Date: August 28, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 12-0257
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
3904 INFINITE CORP.	:	License No. R-3858
3904 Frankford Avenue	:	
Philadelphia, PA 19124-4430	:	LID 55422

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OPINION

3904 Infinite Corporation (“Licensee”) filed an untimely appeal from the Second Supplemental Order of Administrative Law Judge David Shenkle (“ALJ”) mailed on February 1, 2013, wherein the ALJ revoked Restaurant Liquor

License No. R-3858 effective April 8, 2013, due to Licensee's failure to pay the fine for Citation No. 12-0257 ("the Citation").

The Citation contained one count, that Licensee violated sections 491(1), 492(2) and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2), 4-493(16)] when Licensee, by its servants, agents, or employees, sold alcoholic beverages on January 1, 2012, after its liquor license had expired on October 31, 2011, and had not been renewed and/or validated.

In response to the Citation, Licensee's counsel submitted to the ALJ, on or about August 29, 2012, a stipulation of facts agreed on by Licensee's counsel and the Bureau's counsel. The stipulation indicated that both counsel agreed to a fine of one thousand dollars (\$1,000.00). Subsequently, the matter was assigned to the ALJ for disposition without a hearing.

Thereafter, the ALJ sustained the Citation. [Adjudication and Order, mailed September 27, 2012]. The ALJ imposed a fine of one thousand dollars (\$1,000.00) and directed Licensee to pay the fine within twenty (20) days. The Adjudication and Order was sent to Licensee's counsel and was received by same.

Subsequent to the issuance of the Adjudication and Order mailed on September 27, 2012, Licensee neither paid the fine nor filed an appeal, leading

the ALJ to issue a Supplemental Order. [Supplemental Order, mailed November 14, 2012]. The Supplemental Order noted that the fine of one thousand dollars (\$1,000.00) 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. Since the license was inactive at that time, 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 the Supplemental Order did not excuse Licensee from the duty to pay the fine immediately. The ALJ advised that further sanctions would be considered, including revocation of the license, if the fine should remain unpaid sixty (60) days after the mailing date of the Supplemental Order. The Supplemental Order was sent to Licensee's counsel.

Subsequently, the ALJ issued a Second Supplemental Order [Supplemental Order, mailed February 1, 2013]. The ALJ noted that the fine had still not been paid, and revoked the license as of April 8, 2013, at 7:00 a.m. The ALJ further noted that he would reconsider the Second Supplemental Order if the fine was paid prior to April 8, 2013. The Second Supplemental Order was sent to Licensee's counsel.

Nearly six (6) months later, on July 29, 2013, Licensee's counsel filed an "Appeal Nunc Pro Tunc" ("Appeal"), requesting that the Pennsylvania Liquor Control Board ("Board") grant the Appeal and the reissuance of the license upon payment of fines and costs. The Appeal set forth a tale of woe experienced by Licensee's principal, Sarath Rinn, in an effort to justify the late appeal on the basis of "non-negligent" circumstances. Those events are described as follows, based on facts alleged in the Appeal.

On October 31, 2011, the liquor license expired. On January 1, 2012, Licensee served alcohol without a valid liquor license, which was the basis for the Citation issued on February 28, 2012.

In February or March of 2012, Mr. Rinn's wife became pregnant. Because she had previously experienced a miscarriage, and because she was suffering from a difficult pregnancy, she was unable to work and Mr. Rinn needed to care for her during the pregnancy. At about the same time, Mr. Rinn's father-in-law suffered critical injuries as the result of a very serious car accident in Cambodia. Mr. Rinn traveled to Cambodia to care for his father-in-law.

Sometime during Mrs. Rinn's pregnancy, Mr. and Mrs. Rinn moved their personal residence from a duplex on Tackawanna Street to an apartment on Pennway Street. Both residences are located in Philadelphia. The apartment

on Pennway Street was closer to Mrs. Rinn's mother, who was able to help Mrs. Rinn during the pregnancy.

Prior to August 29, 2012, Mr. Rinn apparently met with or contacted counsel to discuss a response to the Citation. On August 29, 2012, Licensee's counsel filed the aforementioned stipulation. The ALJ issued his Adjudication and Order on September 27, 2012. Licensee's counsel forwarded a copy of the Adjudication and Order to Mr. Rinn, but erroneously sent the copy to 3409 Frankford Avenue, instead of 3904 Frankford Avenue. Licensee's counsel apparently could not reach Mr. Rinn by telephone because, in September of 2012, Mr. Rinn lost his cell phone and could not afford a replacement.¹

Licensee's counsel asserts that "Upon the expiration of the license term ending October 31, 2012, Mr. Rinn did not renew his liquor license and the premises was closed. The premises has remained closed since that time." [Appeal, ¶9]. However, the license actually expired on October 31, 2011; the Citation issued against Licensee was for serving alcohol without a license on January 1, 2012. It is unclear from the Appeal exactly when the licensed premises was closed, but it was closed as of November 5, 2012, when Licensee's counsel sent a properly addressed letter to the licensed premises.

¹ Mr. Rinn eventually did get another cell phone at the end of February 2013.

Mr. Rinn did not receive the letter, despite having asked the U.S. Postal Service to forward his mail. At around the same time, intruders broke into the licensed premises by cutting the fence beside the property, thereby releasing the dogs that were guarding the property, and subsequently ransacked the premises.

On November 14, 2012, the ALJ issued the Supplemental Order that ordered the suspension of the license, pending renewal. Sometime during the month of November 2012, Mr. Rinn's wife gave birth, by Cesarean section, to a baby boy. In early 2013, Mr. Rinn's father-in-law moved to the United States from Cambodia, so that the entire family could assist with his care.

On February 1, 2013, the ALJ issued the Second Supplemental Order, advising that the license would be revoked on April 8, 2013, but that the ALJ would reconsider such revocation if the one thousand dollar (\$1,000.00) fine was paid before April 8, 2013. The fine remained unpaid, and the license was revoked on April 8, 2013. Finally, on July 29, 2013, Licensee's counsel filed the Appeal.

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 29, 2013, almost six (6) months after the ALJ's Second Supplemental Order, which had been mailed on February 1, 2013.

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.

The Board finds that Licensee has failed to satisfy the Cook test. 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 February 21, 2013, was caused by non-negligent conduct. The Board acknowledges that, given the facts alleged in the Appeal, Mr. Rinn had an eventful year in 2012, but by early 2013, the chaos had subsided. The Second Supplement Order was issued on February 1, 2013, and gave Licensee until April 8, 2013, to pay the fine. Not until July of 2013 did Mr. Rinn make any effort to renew his liquor license. While the loss of his cell phone in September of 2012 may have made it more inconvenient for Mr. Rinn to communicate with his counsel, such communication was not rendered impossible. Mr. Rinn was certainly aware of the pending Citation, but he did not contact counsel until approximately a year after directing counsel to file the Stipulation with the ALJ.

Moreover, Mr. Rinn is not the only person involved with the license. In the Appeal, Licensee's counsel notes that "the two principals of the Licensee are Sarath Rinn and his sister-in-law, Sothoeon Chher. Sarath Rinn was the operating principal of the subject business." [Appeal, ¶13]. The Appeal contains no further reference to Sothoeon Chher, or any explanation as to why

she did not file an appeal or assist Mr. Rinn with the preservation of the license.

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 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 September 27, 2012, the ALJ's Supplemental Order mailed November 14, 2012, and the ALJ's Second Supplemental Order mailed February 1, 2013, and Licensee's Appeal, 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:

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 September 27, 2012, Order and gave Licensee twenty (20) days to pay the fine. Over a month and a half after that Order, on November 14, 2012, 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 November 14th Order, he would consider revocation of the license. After two and a half (2½) months, the ALJ issued his Second Supplemental Order on February 1, 2013, revoking Licensee's license if the fine was not paid by April 8, 2013. The fine remained unpaid, and as a result, the license was revoked as of April 8, 2013.

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.

ORDER

The appeal of Licensee is dismissed as untimely.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-3858 remains revoked as of April 8, 2013.

Board Secretary