

Mailing Date: January 16, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 12-0275
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
HUNLOCK CREEK BAR & GRILL, INC.	:	License No. R-14730
t/a Hunlock Creek Tavern	:	
7 Old Tavern Road	:	
Hunlock Creek, PA 18621-3526	:	LID 51183

Counsel for Licensee: Carol Mieczkowski, *Pro Se*

Counsel for Bureau: Craig A. Strong, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Park Way
Macungie, PA 18062

OPINION

Hunlock Creek Bar & Grill, Inc., trading as Hunlock Creek Tavern (“Licensee”) timely appealed from the Third Supplemental Order of Administrative Law Judge Daniel Flaherty (“ALJ”) mailed on October 19, 2012, wherein the ALJ revoked Restaurant Liquor License No. R-14730 effective

October 19, 2012, due to Licensee's failure to pay the fine for Citation No. 12-0275 ("the Citation").

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 Pennsylvania Liquor Control Board ("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).

Citation No. 12-0275 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 Licensee, by its servants, agents, or employees, permitted smoking in a public place where smoking was prohibited on December 8, 2011, and January 6, 2012.

In response to the Citation, Licensee submitted an Admission, Waiver and Authorization (“Waiver”) on April 19, 2012. Subsequently, the matter was assigned to the ALJ for disposition.

Thereafter, the ALJ sustained the Citation. [Adjudication and Order, mailed May 31, 2012]. The ALJ imposed a penalty of a fine of one hundred dollars (\$100.00). The Adjudication and Order was sent to Licensee by certified mail, and the return receipt was signed by a “Jacque Triplett” on June 2, 2012.

Subsequent to the issuance of the Adjudication and Order mailed on May 31, 2012, Licensee neither paid the fine nor filed an appeal, leading the ALJ to issue a Supplemental Order. [Supplemental Order, mailed August 2, 2012]. The Supplemental Order noted that the fine of one hundred dollars (\$100.00) had not been paid, whereupon the ALJ imposed a one (1) day suspension of Licensee’s liquor license, beginning at 7:00 a.m. on September 10, 2012, and continuing thereafter until the fine was paid. 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 to Licensee by certified mail, and the return receipt was again signed by a “Jacque Triplett” on August 3, 2012.

Subsequently, the ALJ issued a Second Supplemental Order [Supplemental Order, mailed September 18, 2012], wherein the ALJ noted that the license had expired and had not been renewed. Since the license was inactive, the ALJ amended his first Supplemental Order by postponing the effective date of the one (1) day suspension, pending reactivation of the license, at which time the suspension period would be fixed by the ALJ. Furthermore, the ALJ noted that the one hundred dollar (\$100.00) fine had to be paid by October 1, 2012 or revocation of the license would be considered. The Second Supplemental Order was sent to Licensee by certified mail, and the return receipt was signed by someone with the last name of "Mieczkowski" on September 20, 2012.

Thereafter, the ALJ issued a Third Supplemental Order [Third Supplemental Order, mailed October 19, 2012]. The ALJ noted that the fine had still not been paid, and revoked the license as of the mailing date of the Third Supplemental Order. The Third Supplemental Order was returned to the ALJ's Office, with a notation that it was marked unclaimed and the Post Office was unable to forward it.

On November 13, 2012, Licensee filed an Application for Reconsideration, an Appeal of Administrative Law Judge Adjudication, and an Application for

Supersedeas. Included with the Application for Reconsideration was a check for one hundred dollars (\$100.00) as payment for the original fine. On November 19, 2012, the ALJ issued a Fourth Supplemental Order [Fourth Supplemental Order, mailed November 19, 2012], denying the Application for Reconsideration on the basis that it was not filed within fifteen (15) days of the Third Supplemental Order and, therefore, was untimely pursuant to 1 Pa. Code § 35.241. The ALJ reiterated that the Third Supplemental Order, which revoked the Licensee's license, remained in effect.

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge ("OALJ"), including the ALJ's Adjudication & Order mailed May 31, 2012, the ALJ's Supplemental Order mailed August 2, 2012, the ALJ's Second Supplemental Order mailed September 18, 2012, the ALJ's Third Supplemental Order mailed October 19, 2012, Licensee's Application for Reconsideration, Licensee's Appeal of Administrative Law Judge Adjudication, and Licensee's Application for Supersedeas, and has concluded that the ALJ's Third Supplemental Order is without error and is supported by substantial evidence.

Initially, the Board notes that Licensee's appeal can only be considered a timely appeal of the ALJ's Third Supplemental Order. Licensee failed to file a

timely appeal from the ALJ's May 31, 2012 Order; nor did it file a timely appeal from the ALJ's August 2, 2012 Supplemental Order, or the ALJ's September 18, 2012, Second Supplemental Order. In its appeal to the Board, Carol Mieczkowski, on behalf of Licensee, stated that she did not send in the fine or "papers" due to her daughter's illness and traveling back to Philadelphia often. Without more information, the Board cannot conclude that Licensee had good cause for not timely filing appeals of the first three orders such that this appeal might be considered on a *nunc pro tunc* basis. See Cook v. Unemployment Compensation Board of Review, 671 A.2d 1130 (Pa. 1996). As a result, the Orders of May 31, August 2, and September 18, 2012 are final and are not present before us for appellate review.¹

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) of the Liquor Code addresses the circumstances under which an ALJ may revoke a license and provides the following guidance:

¹ Further, even assuming that the appeal had been timely as it relates to the ALJ's initial Order, 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 May 31 Adjudication and Order, and Licensee cannot now undo that action.

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 The appeal [to the Board] shall be based solely on the record before the administrative law judge. The board shall only reverse the decision of the administrative law judge if the administrative law judge committed an error of law, abused its discretion or if its decision is not based on substantial evidence.

[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 May 31, 2012 Order and gave Licensee twenty (20) days to pay the fine. More than a two (2) months after that Order, on August 2, 2012, the ALJ imposed a one (1) day suspension and continuing thereafter until the fine was paid. Furthermore, the ALJ advised that if the fine was not paid within sixty (60) days from the date of the August 2 Order, he would consider revocation of the license. More than two (2) months later, on October 19, 2012, the ALJ issued his Third 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 Board affirms the decision of the ALJ.

ORDER

The appeal of Licensee is denied.

The Third Supplemental Order of the ALJ in regard to Citation 12-0275 is affirmed.

It is hereby ordered that Licensee's Restaurant Liquor License No. R-14730 remains revoked as of October 19, 2012.

Board Secretary