

Mailed: June 4, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 12-0294
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
	:	
CLUB 700, INC.	:	License No. R-10106
499 East Uwchlan Avenue	:	
Chester Springs, PA 19425	:	LID 38569

Counsel for Petitioner: Matthew N. Goldstein, Esquire (on appeal)
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OPINION

On April 28, 2014, American Beauty Fish and Produce, Inc. (“Petitioner”), filed a Petition for Allowance of Appeal *Nunc Pro Tunc* (“Petition”) from the Second Supplemental Order of Administrative Law Judge Tania E. Wright

(“ALJ”), mailed January 17, 2014, which revoked Restaurant Liquor License No. R-10106, held by Club 700, Inc. (“Licensee”), effective at 7:00 a.m. on Monday, February 24, 2014. The revocation of the license stemmed from Citation No. 12-0294 (“the Citation”) and Licensee’s ultimate failure to pay the two hundred dollar (\$200.00) fine.

On February 28, 2012, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation to Licensee. The Citation charged Licensee with violating section 493(26) of the Liquor Code [47 P.S. § 4-493(26)], in that Licensee, by its servants, agents or employees, issued checks or drafts dated October 7, November 22 and 23, and December 2, 2011, in payment for purchases of malt or brewed beverages when Licensee had insufficient funds in, or credit with, the institution upon which the checks were drawn. The Citation was sent by first class and certified mail to Licensee at the licensed premises (499 East Uwchlan Avenue, Chester Springs, PA 19425). There is no documentation in the record to indicate that the Citation was not received by Licensee at the licensed premises.

On May 17, 2012, a citation hearing notice was mailed via first class and certified mail to Licensee at the licensed premises. Both notices were returned

as unclaimed on May 23, 2012. Another hearing notice was sent to Lee Krasley, Licensee's corporate stockholder, which was received by him on May 31, 2012.

The hearing regarding the Citation was continued twice and was ultimately held on November 15, 2012. Erik S. Shmukler, Esquire, appeared at the hearing as counsel for the Bureau, and presented the testimony of Bureau Officer Christopher Keisling, as well as Bill Conwell and Michael McAnulty, who testified regarding the checks submitted by Licensee that were backed by insufficient funds. Licensee did not attend or present any evidence.

By Adjudication and Order mailed July 25, 2013, the ALJ sustained the Citation and imposed a fine of two hundred dollars (\$200.00). 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 by first class and certified mail to Lee Krasley, Licensee's corporate stockholder.

On September 17, 2013, the ALJ issued a Supplemental Order, noting that Licensee had not paid the fine imposed by the July 25, 2013, Adjudication and Order. Therefore, the ALJ ordered that the license should be suspended indefinitely, for a period of at least one (1) day, pending the renewal of Licensee's license. He also noted that if the fine remained unpaid after sixty

(60) days from the mailing date of the Supplemental Order, the license would be reviewed for possible revocation. The Supplemental Order was sent by first class and certified mail to Lee Krasley, the corporate stockholder.

On January 17, 2014, the ALJ issued a Second Supplemental Order, noting that Licensee had not paid the fine as ordered in the Supplemental Order mailed on July 25, 2013. The ALJ therefore revoked the license effective at 7:00 a.m. on Monday, February 24, 2014. The Second Supplemental Order was also sent by first class and certified mail to Lee Krasley, Licensee's corporate stockholder.

On April 28, 2014, Petitioner filed the instant Petition, asserting that it had purchased the liquor license at a Sheriff's Sale on July 17, 2013, and had notified the Board of this fact. Petitioner argues that there are "compelling factual circumstances which establish non-negligent failure" to file a timely appeal. [Petition at 4].

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for taking an appeal 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)]. In the instant

matter, the ALJ's Order was mailed on January 17, 2014, and Licensee's Petition was filed on April 28, 2014.

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 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). 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).

Petitioner asserts that it notified the Board about the purchase of the license at Sheriff's Sale on July 17, 2013. The letter submitted by Petitioner's counsel requested that the license be placed in safekeeping. By letter dated August 14, 2013, the Bureau of Licensing advised that, in order for the license to be placed in safekeeping, validation and renewal paperwork had to be submitted along with tax clearance certificates and the necessary fees. [Admin. Notice]. On December 3, 2013, the Bureau of Licensing sent a reminder letter to Petitioner's counsel. [Admin. Notice]. Over two (2) months later, on March 25, 2014, Petitioner requested forms for renewal of the license and subsequently submitted the forms along with payment and filed the necessary

fees and paperwork on March 26, 2014.¹ On April 9, 2014, the Board's Bureau of Licensing ("Licensing") advised Petitioner that the license had been revoked.

Petitioner argues that "notice was promptly sent to the PLCB of [Petitioner's] ownership interest in the License. Despite this notice being sent, the Adjudications and Supplemental Orders continued to be sent to the premises to a party no longer having an interest in the License." [Petition at 4]. At the time Petitioner advised the Board of the sale of the license, the first Adjudication and Order had not yet been issued; there was simply an open citation on the license.

Petitioner's argument would have merit if it was the Board that issued the Adjudication and Supplemental Orders, but those documents were issued by the OALJ. Petitioner assumes, incorrectly, that the Board and the OALJ are the same entity. Failure to understand the distinction between these two entities fatally undermines Petitioner's argument that its untimely appeal is due to non-negligent circumstances.

Prior to Act 14 of 1987, the Board was responsible for administration of liquor licenses and for enforcement of the provisions of the Liquor Code and

¹ Petitioner asserts that the Board has cashed the checks it submitted with the validation and renewal forms. If the Bureau of Licensing improperly cashed checks for the validation and renewal of the license after revocation, the Board will ensure that a refund is issued to Petitioner.

the Board's Regulations. Act 14 added section 211 to the Liquor Code, which states:

There is created within the Pennsylvania State Police a Bureau of Liquor Control Enforcement which shall be responsible for enforcing this act and any regulations promulgated pursuant thereto.

[47 P.S. § 2-211(a)]. The separation of these two (2) functions was a significant reason for this legislation, as Representative Chaka Fattah (D – Philadelphia) noted:

In our efforts to reform the liquor control system in the State, one of the centerpieces of that has been the suggestion to remove enforcement from the purview of those people who are mainly responsible for generating revenue, because there is an inherent conflict between the two.

[Commonwealth of Pennsylvania Legislative Journal, House of Representatives, April 28, 1987, at 462].

Act 14 also established, in section 471, the procedure for adjudicating citations issued by the Bureau of Liquor Control Enforcement (“Bureau”). The Bureau may, within one year from the date of a violation of the Liquor Code or

any laws of the Commonwealth or of the Federal Government relating to the payment of taxes on liquor, cite the licensee to appear before an administrative law judge. [47 P.S. § 4-471(a)]. A hearing is held before the administrative law judge, thus providing the licensee with due process. [47 P.S. § 4-471(b)]. The administrative law judge issues an adjudication, and the aggrieved party may file an appeal to the Board. [Id.]. Only on appeal does the Board become involved in the citation process, and even then, the standard of review is limited. The Board may only reverse the decision of the administrative law judge if there was an error of law, abuse of discretion, or if the decision was not based on substantial evidence. [Id.].

As it is now more than twenty-five (25) years since the establishment of the Bureau and the procedures for the issuance and adjudication of citations, Petitioner should be aware that the Board and the OALJ are two (2) separate and distinct entities. The Board does not have the authority to issue fines or suspensions for a violation of the Liquor Code or the Board's Regulations; only the OALJ may do so. [47 P.S. § 4-470]. The Board does not have the authority to revoke a license for the failure to pay a fine; only the OALJ may do so. [Id.]. Indeed, as required by section 471(b), the Petition to Appeal the ALJ's decision was filed **with the Board**.

Although Petitioner may have made the Board aware that it had acquired the rights to apply for a transfer of the license through a Sheriff's Sale, it apparently never made the Bureau and/or the OALJ aware of the same. The failure of Petitioner's counsel to notify the OALJ that Petitioner had purchased the license is more akin to the negligence of counsel that the Bass court held was not a sufficient excuse for an untimely appeal than fraud or the breakdown of the court's operation that would justify such an appeal, as found by the court in West Penn Power. Therefore, the Board finds that Licensee has not met the first Cook factor in that it failed to establish non-negligent circumstances for the untimely appeal.

Additionally, it is not the responsibility of the Board to notify the Bureau and the OALJ of Petitioner's interests in the license. Such involvement by the Board into the operation of the Bureau and the OALJ would violate the legislative intent of Act 14 to establish separate entities.

Similarly, it is not the responsibility of the Board to apprise Petitioner of any citations issued regarding the license and the disposition of such citations.² No cause of action could exist against the Board for not apprising Petitioner of

² Information concerning the existence of citations and their dispositions is available to any member of the public by accessing either the OALJ's public website or by contacting or calling the OALJ. [See 40 Pa. Code § 15.31].

the open citation incurred by Licensee. The Commonwealth Court noted that “[t]he Board is not a necessary party to the resolution of the contractual difficulties of the two private corporations.” Emerson-Harrell Bar Corp. v. Pennsylvania Liquor Control Bd., 382 A.2d 500, 502 (Pa. Cmwth. 1978). Rather, it was Petitioner’s responsibility to take the necessary actions to protect its interests. However, it failed to do so.

Finally, Petitioner acknowledged that it first obtained actual knowledge of the Citation, the Orders regarding the Citation, and the revocation of the license on April 9, 2014. However, Petitioner offers no explanation for why it waited nineteen (19) more days before filing its appeal in this matter. There is no excuse for this additional delay absent further information.

Therefore, the Board does not agree that the late filing of the appeal in this matter was the result of non-negligent conduct beyond the control of Petitioner, or its counsel; nor does the Board agree that Petitioner and/or its counsel acted diligently upon learning of the need to file an appeal in this matter. Accordingly, Petitioner’s appeal *nunc pro tunc* is dismissed.

ORDER

The appeal *nunc pro tunc* of American Beauty Fish and Produce is dismissed.

The Second Supplemental Order of Administrative Law Judge Tania E. Wright, mailed January 17, 2014, is affirmed.

It is hereby ordered that Restaurant Liquor License No. R-10106 (LID 38569) remains revoked as of February 24, 2014.

Board Secretary

