Mailing Date: August 28, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

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| PENNSYLVANIA STATE POLICE, | : | Citation No. 12-0308C |
| BUREAU OF LIQUOR CONTROL | : | |
| ENFORCEMENT | : | |
| | : | |
| v. | : | |
| | : | |
| BROOKE DEREK, INC. | | |
| t/a Riley's | : | License No. H-1074 |
| 4505 Main Street | : | |
| Whitehall, PA 18052 | : | LID 46791 |

Counsel for Licensee: Albert Charlie, President, *pro se*
Brooke Derek, Inc.
t/a Riley's
4505 Main Street
Whitehall, PA 18052

Counsel for Bureau: Roy Harkavy, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Park Way
Macungie, PA 18062

**OPINION**

Brooke Derek, Inc., trading as Riley's ("Licensee"), filed an untimely appeal from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ") mailed on June 21, 2013, wherein the ALJ sustained Citation No. 12-0308C ("the Citation") and imposed a fine of one thousand two hundred

fifty dollars ($1,250.00). The Order also required that Licensee shall comply with the requirements of Liquor Code section 471.1 pertaining to Responsible Alcohol Management ("RAMP"), attaining certification within ninety (90) days of the mailing date of the Order and maintaining compliance for a period of one (1) year following certification.

Citation No. 12-0308C contained one count averring that Licensee violated section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] when Licensee, by its servants, agents, or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, nineteen (19) years of age, on January 12, 2012.

On February 24, 2012, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee, charging Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] as set forth above. The Citation was sent by first class and certified mail to Licensee at its licensed premises (4505 Main Street, Whitehall, Pennsylvania 18052). The certificate of mailing was signed as received on February 25, 2012.

Subsequently, the matter was assigned to the ALJ for disposition and a hearing on the matter was held on May 2, 2013.[1]

[1] The hearing was originally scheduled to occur on November 30, 2012, was first continued to March 15, 2013, and was ultimately held on May 2, 2013.

Thereafter, the ALJ sustained the Citation. [Adjudication and Order, mailed June 21, 2013]. The ALJ imposed a fine of one thousand two hundred fifty dollars ($1,250.00) and mandated RAMP training. The Adjudication and Order was sent by first class and certified mail to Licensee's address at 4505 Main Street, Whitehall, Pennsylvania 18052.

Subsequent to the issuance of the Adjudication and Order mailed on June 21, 2013, Licensee filed a timely Request for Reconsideration on July 2, 2013, in which it admitted serving a minor. By Supplemental Order mailed on July 15, 2013, following review of the evidence submitted at the May 2, 2013 hearing, the ALJ refused reconsideration. [Supplemental Order, mailed July 15, 2013]. The Supplemental Order was sent by first class and certified mail to Licensee's address at 4505 Main Street, Whitehall, Pennsylvania 18052.

On July 29, 2013, Licensee filed an "Appeal of Administrative Law Judge Adjudication" ("Appeal") and the requisite fee; however, no averments were made to support an 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, thirty-seven (37) days after the

ALJ's Adjudication and Order, which had been mailed on June 21, 2013.[2] The ALJ's Adjudication and Order of June 21, 2013 specifically stated that a Request for Reconsideration does not stay the thirty (30) day appeal period.

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 Board must dismiss this appeal as untimely.

Even if Licensee could 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

[2] On July 17, 2013, Licensee sent a letter to the Bureau of Licensing at the Board, stating that it wished to appeal the ALJ Order; however, Licensee did not file the appropriate forms and fees with the Office of Chief Counsel until July 29, 2013, which date was seven (7) days late. The fine imposed by the ALJ, which had been due by July 11, 2013,

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).

Initially, the Board notes that in its appeal, Licensee does not allege that the ALJ's findings of fact are not supported by substantial evidence, or that the ALJ committed an error of law or abused his discretion. It must be noted that section 17.21(b) of the Board's Regulations [40 Pa. Code § 17.21(b)] provides that an appeal to the Board "shall be in the form prescribed by the Board." It also requires, inter alia, that an appeal to the Board of a decision of the ALJ "shall include a concise enumeration and explanation, in the numbered paragraphs, as to each finding of fact which the appellant believes is not supported by substantial evidence." [40 Pa. Code § 17.21(b)(4)]. Licensee's appeal, while concise, does not enumerate or explain a specific finding of fact of the ALJ not supported by substantial evidence; nor does it specify how the ALJ committed an error of law.

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remained unpaid until August 5, 2013. As noted above, the late-filed appeal form did not contain any averments to support an appeal. Furthermore, no Petition to Appeal *Nunc Pro Tunc* was filed.

Such failure to follow the proper appeal procedure, as prescribed by section 17.21 of the Board's Regulations [40 Pa. Code § 17.21], is grounds for dismissal at the discretion of the Board. Nonetheless, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the ALJ's Adjudication & Order mailed June 21, 2013, the ALJ's Supplemental Order mailed July 15, 2013, and Licensee's Appeal, and has concluded that the ALJ's Order is without error and is supported by substantial evidence.

The record indicates that, at the May 2, 2103 hearing before the ALJ, testimony and documentary evidence in support of the Citation was submitted by the Bureau. Gerard Russi testified that he is a trained and tested underage compliance check buyer for the Bureau, and that his date of birth is February 28, 1992. [N.T. 9-10]. On January 12, 2012, he entered the licensed premises at 7:00 p.m. and sat at the bar. He ordered a Budweiser draft beer from the white male, approximately late 30's, bartender, and was charged two dollars and fifty cents ($2.50) for the beer. Mr. Russi gave the bartender a ten dollar ($10.00) bill, and then he received his change and the beer. Mr. Russi immediately left the premises, without having consumed any of the beer and leaving the beer on the bar. [N.T. 10]. Mr. Russi went directly to Bureau Officer Fetterolf, who was waiting in a vehicle in the parking lot of the premises, and Mr. Russi

informed Officer Fetterolf that he had purchased and been served a beer. Mr. Russi was nineteen (19) years old on the date of the age compliance check. He testified that he was not requested to produce any identification by the bartender and he was not asked to sign a declaration of age card. [N.T. 9-10].

Bureau Officer Joe Mitzak testified that he entered the licensed premises at approximately 7:00 p.m. for the express purpose of conducting an age compliance check. [N.T. 6]. Officer Mitzak's duty was to observe any transactions involving the underage buyer and the Licensee. Officer Mitzak identified Mr. Russi as the underage buyer involved in this age compliance check and Officer Mitzak corroborated Mr. Russi's above-described transaction. Officer Mitzak was five (5) to seven (7) feet away from Mr. Russi as the transaction took place. [N.T. 6-7].

Bureau Officer Fetterolf testified that he is an Enforcement Officer III Supervisor who, on January 12, 2012, was participating in the underage compliance check detail at the licensed premises. [N.T. 12]. Officer Fetterolf was the person in charge of this particular detail and he waited outside of the premises while Officer Mitzak and Mr. Russi were inside the licensed premises. Officer Fetterolf stated that, once Mr. Russi came outside to report having been sold and served beer, along with a description of the bartender who had sold and served the beer, Officer Fetterolf entered the licensed premises and

verbally informed the bartender that he had just sold to a minor. [N.T. 13]. Officer Fetterolf also submitted into evidence a Notification of Non-Compliance Letter dated January 19, 2012 (the "Letter"), sent by regular and by certified mail, and addressed to Licensee at the licensed premises. [N.T. 14; Exhibit C-3]. The letter was sent within seven (7) calendar days of the violation. The Exhibit contains a sticker containing a tracking number for the Letter. [Exhibit C-3]. Licensee did not object to the admittance of the Letter. [N.T. 14].

Albert Charlie, President of Licensee, cross-examined Officers Mitzak and Fetterolf. Most relevantly, Mr. Charlie questioned Officer Fetterolf and counsel for the Bureau concerning the absence of a signed receipt of certified mail. It is Licensee's position that the Bureau was required to produce a signed receipt of certified mail to document that the Letter was presented to Licensee within ten (10) days of the violation. [N.T. 16-18, 30]. Licensee presented no evidence to support this claim, and in fact, using the tracking number from the certified mail sticker on the Letter, the ALJ determined that the certified letter had been received by Licensee on January 21, 2012, nine (9) calendar days after the violation occurred.

Licensee has not contested the charge of selling to a minor and in fact, Licensee admitted the violation in its Request for Reconsideration. Licensee's appeal is based on a perceived technical lapse in protocol surrounding notice

of the violation; however, there is no requirement that notice be sent via certified mail. [37 Pa. Code § 23.23]. Furthermore, Licensee does not contest having actually received notice, via regular mail or via certified mail. Rather, he incorrectly argues that the Bureau has a duty to submit into evidence the signed certified mail receipt. This is simply wrong.

The ALJ concluded that, on January 12, 2012, Licensee did violate section 493(1) of the Liquor Code by selling, furnishing and/or giving or permitting such sale, furnishing or giving of alcoholic beverages to one (1) minor, nineteen (19) years of age. The ALJ further referenced the regulatory rules of the age compliance check program, which specify that the non-compliant licensees must be notified verbally immediately upon the occurrence of the non-compliance and then again in writing within ten (10) working days. There is no requirement that such notification be via certified mail, with proof of receipt admitted into evidence. [37 Pa. Code § 23.23].

The Board does not consider the ALJ's determination to be an error of law, an abuse of discretion, or lacking substantial supporting evidence. Rather, the appeal lacks merit on its face since Licensee has admitted to the violation that is the subject of the Citation. 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*).

For the reasons set forth above, the appeal is dismissed.

## O R D E R

The appeal of Licensee is dismissed as untimely and without merit.

The Order of Administrative Law Judge David L. Shenkle is sustained.

The fine of one thousand two hundred fifty dollars ($1,250.00) has been paid in full.

It is ordered that Licensee shall comply with the requirements set forth in Liquor Code section 471.1 pertaining to RAMP in the following manner: Licensee shall contact the Board's Bureau of Alcohol Education (@ toll free 866-275-8237) within thirty (30) days of the mailing date of this Order to receive assistance in the compliance process. Licensee must receive certification within ninety (90) days of the mailing date of this Order, and must remain in compliance for a full year from the date of such certification. Failure to comply with this requirement may result in further citation.

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Board Secretary