

Mailing Date: August 28, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 12-0823
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. 12-0823 (“the Citation”) and imposed a fine of one thousand two hundred fifty dollars (\$1,250.00).

The Citation 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) visibly intoxicated patron on February 18, 2012.

On May 23, 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). [Exhibit C-2].

Subsequently, the matter was assigned to the ALJ for disposition and a hearing on the matter was held on May 2, 2013.¹

Thereafter, the ALJ sustained the Citation. [Adjudication and Order, mailed June 21, 2013]. The ALJ imposed a penalty of a fine of one thousand two hundred fifty dollars (\$1,250.00). The Adjudication and Order was sent by first

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.

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 Licensee averred that there was no evidence to support the ALJ's decision. The requisite filing fee was paid on July 5, 2013. 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

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,

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. Therefore, the appeal is untimely and Licensee did not file a Petition to Appeal *Nunc Pro Tunc*.

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

remained unpaid until August 5, 2013. As noted above, the late-filed appeal form did not contain any averments to

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. Licensee merely filed the Appeal form with no allegations or averments of any kind. 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 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.

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 and 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.

Bureau Officer David R. Daza testified that, on February 18, 2012, he was one (1) of two (2) undercover liquor enforcement officers investigating the licensed premises for allegations of sales to minors, gambling, and disorderly operations. [N.T. 22-23, 27]. On February 18, 2012, around 1:15 a.m., Officer Daza and Bureau Officer Mike Higgins³ entered the licensed premises in an undercover capacity and sat at a table on the right hand side of the bar, straight across from the bar counter. [N.T. 23]. Officer Daza observed approximately twenty-five (25) patrons being served by one (1) white, non-

Hispanic female bartender. [N.T. 23]. Officer Daza observed a white, non-Hispanic male patron sitting approximately six (6) feet away from Officers Daza and Higgins, on the officers' right side. The patron was approximately forty-five (45) years of age, approximately 5' 8" tall and weighing approximately one hundred seventy (170) pounds. The patron was wearing a baseball cap with the Penn State logo, jeans and a dark blue sweatshirt. [N.T. 23].

Officer Daza observed this male patron trip over a stool as he was walking to the bar counter, and then trip again as he walked past the two (2) officers. The patron was stumbling and staggering, and the patron apologized to Officer Daza, stating that he (the patron) had had too much to drink that night. [N.T. 23]. Officer Daza observed this patron finishing one pint of beer, following which the patron approached Officers Daza and Higgins, speaking to Officer Higgins in a very slurred voice, exhibiting glassy eyes and droopy eyelashes. [N.T. 24].

Officer Daza testified that this patron conversed with another patron, a white, non-Hispanic female approximately the same age as the visibly intoxicated male patron. The intoxicated male patron kept his arm around this female patron, trying to keep his balance. The male then attempted to dance

³ Liquor Enforcement Officer Mike Higgins was no longer with the Bureau as of the date of the hearing on May 2, 2013. [N.T. 22].

with the female, but he was physically unable to do so due to his level of intoxication. [N.T. 24].

Next, Officer Daza testified that, around 1:50 a.m., the intoxicated male patron returned to the bar counter, whereupon the female bartender served him a pint of draft Miller Lite, taking an undetermined amount of cash from the bar counter in front of the male patron and ringing the sale up on the cash register, facing the patrons. The intoxicated male patron drank from the draft Miller Lite while only three (3) to four (4) feet away from Officer Daza and Officer Higgins. [N.T. 24].

Officer Daza and Officer Higgins departed the interior of the premises at approximately 2:10 a.m., leaving six (6) patrons, including the aforementioned intoxicated male patron. The officers conducted surveillance to confirm that the premises were vacated by 2:30 a.m., at which point the officers left. [N.T. 25].

Officer Daza identified Bureau Directive Special Order dated April 26, 2011, which document was entered into evidence as Exhibit C-3 without objection. This document sets forth Bureau protocol for giving notice to a Licensee of service to a visibly intoxicated patron. [Exhibit C-3]. The standard protocol, according to the Special Order, is to give notice to the Licensee via telephone within seventy-two (72) hours of the violation, “except in cases that

would be adversely affected by this pilot project, e.g., a long-term investigation into gambling or other criminal activity at a licensed establishment.” [Exhibit C-3].

Officer Daza testified that, as documented in Exhibit C-1, Notice of Violation dated May 9, 2012, admitted without objection [N.T. 20], this investigation began on December 9, 2011 and the instant violation occurred on February 18, 2012. [N.T. 25]. Officer Daza testified that, due to safety concerns and other violations being investigated by the Bureau, it was not feasible to notify Licensee of this violation of service to a visibly intoxicated person within seventy-two (72) hours. That is, the February 18, 2012 situation constituted an exception under the protocol as described in Exhibit C-3. [N.T. 25-26]. Notice was given to Licensee via a Notice of Violation letter dated May 9, 2012 [Exhibit C-1] and via the Citation dated May 23, 2012 [Exhibit C-2]. Both of these documents were admitted into evidence without objection and with a stipulation that Licensee had received both documents. [N.T. 20].

Licensee presented no evidence in this case.

The ALJ concluded that, on February 18, 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) visibly intoxicated person.

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 not alleged or averred anything other than an apparent disagreement with the ALJ's decision. 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*). The evidence of record in this matter clearly supports the ALJ's decision.

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

ORDER

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.

Board Secretary