

Mailing Date: May 22, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 12-1103
ENFORCEMENT	:	
	:	
v.	:	
	:	
PATTI M. HAWK	:	License No. R-11691
t/a Hawk's Nest	:	
246 West Sunbury Street	:	LID 41692
Shamokin, PA 17872	:	

Representative for Licensee: Patti M. Hawk, *Pro Se*

Counsel for Bureau: John H. Pietrzak, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
3655 Vartan Way
Harrisburg, PA 17110

OPINION

Patti M. Hawk t/a Hawk's Nest ("Licensee") seeks *nunc pro tunc* relief from the Third Supplemental Order¹ ("Supplemental Order") of Administrative Law Judge ("ALJ") Daniel T. Flaherty, Jr., mailed February 22, 2013, which

¹ Although the Order is titled "Third Supplemental Order," it appears to be a clerical error, as it was the first supplemental order issued with respect to this Citation.

revoked Restaurant Liquor License No. R-11691 for prolonged nonpayment of a fine.

On July 26, 2012, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued Citation No. 12-0824 (“the Citation”) to Licensee, charging it with violating sections 491(1), 492(2), 492(3), and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2), 4-492(3), 4-493(16)] in that on June 6 and 15, 2012, Licensee, by its servants, agents, or employees, sold alcoholic beverages after its restaurant liquor license expired on March 31, 2012, and had not been renewed and/or validated.

On December 12, 2012, Licensee submitted an Admission, Waiver and Authorization (“Waiver”) to the Office of the Administrative Law Judge (“OALJ”), in which Licensee admitted to the violation charged in the Citation and, *inter alia*, waived its right to appeal the adjudication. The Waiver was signed by Ms. Hawk on December 9, 2012. By Adjudication and Order mailed December 21, 2012, the ALJ sustained the charge and imposed a fine of two thousand dollars (\$2,000.00) and a one (1)-day suspension of the license. The Order advised Licensee that a motion for reconsideration must be received by the OALJ within fifteen (15) days of the mailing date of the Order. The Order further stated that Licensee was required to pay the fine within twenty (20)

days of the mailing date of the Order and that failure to do so would result in the license being suspended or revoked. (Adjudication and Order, p. 3). The OALJ sent the Adjudication and Order to Licensee by first-class and certified mail. The mailing was returned as unclaimed on January 15, 2013.

By Supplemental Order mailed February 22, 2013, the ALJ took notice that the license had been revoked for nonpayment of the fine ordered pursuant to the adjudication of Citation No. 12-0824, and thus, the ALJ revoked the license effective March 25, 2013 for this Citation also.

On March 6, 2013, the OALJ received a letter from Ms. Hawk addressed to the ALJ. In the letter, Ms. Hawk explains that due to financial and health problems she has been unable to work, and she asks that the revocation order be vacated. Ms. Hawk admits that she “knew [she] had this fine to pay . . .” and that she “lost track of time for paying [her] fine.” (Letter from Patti M. Hawk to the ALJ received March 6, 2013, p. 1). Enclosed with the letter was a personal check from Ms. Hawk in the amount of five hundred dollars (\$500.00).

The OALJ returned the check via certified mail sent March 8, 2013, and notified Licensee that fines may only be paid in the manner prescribed in section 15.61 of the Board’s Regulations [40 Pa. Code § 15.61]. On March 15, 2013, the OALJ received a partial fine payment of five hundred dollars (\$500.00)

from Licensee.

On April 11, 2013, Ms. Hawk submitted the instant untimely appeal to the Board. In the appeal form, Ms. Hawk states that due to various personal problems, she has been unable to come up with the money to pay the fine. Licensee provides no other basis for the appeal or for its untimeliness.

In the event a licensee or the Bureau feels aggrieved by a decision of an ALJ, there is a right of appeal to the Board. (47 P.S. § 4-471(b); 40 Pa. Code § 17.21(a)). Section 17.21 of the Board's Regulations provides that failure to file or have the appeal postmarked within thirty (30) calendar days of the mailing date of the order will result in dismissal of the appeal. (40 Pa. Code § 17.21(b)(2)).

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 a statutory period for filing an appeal should be limited to cases where "there is fraud [or] some breakdown in the court's operation." 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 Pennsylvania Supreme Court established a four (4)-part test that, if met, may allow an appellant *nunc pro tunc* relief. 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, the appellant's attorney, or his/her staff; (2) the appeal is filed within a short time after the appellant or the appellant's counsel learns of and has the 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. *Id.* at 1131.

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). Additionally, 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).

In the instant case, Licensee submitted a Waiver and thus waived its right to appeal the adjudication of the Citation. Therefore, although not expressly stated in its appeal form, it is assumed Licensee seeks to appeal the ALJ's Supplemental Order, mailed February 22, 2013, revoking the license. The thirty (30)-day deadline for filing an appeal of that Order was March 25, 2013. Licensee did not file its appeal until April 11, 2013, and hence, was clearly untimely.

Despite the unfortunate personal problems alleged by Ms. Hawk, the Board cannot find that Licensee met its burden in justifying consideration of its late appeal. With respect to the first Cook factor, Licensee's appeal form fails to set forth any allegations of fraud, a breakdown in the administrative process, or non-negligent circumstances that would explain its delay.² While the Board is sympathetic to Licensee's circumstances, it is bound to follow the Liquor Code, the Board's Regulations, as well as the case law pertaining to *nunc pro tunc* appeals, such as Cook and Bass. The Board cannot simply bend the rules to allow an untimely appeal without justification. Section 17.21 of the Board's Regulations [40 Pa. Code § 17.21(b)(2)] requires the Board to dismiss an

² The OALJ followed the required procedure for mailing each order to Licensee. [See 47 P.S. § 4-470(b) ("The administrative law judge shall notify the licensee by registered mail, addressed to the licensed premises, of such suspension, revocation or fine.")]. Ms. Hawk did not provide the Board or the OALJ with an alternative address and, in fact, the return address listed by Ms. Hawk on the envelope containing her appeal is the same address to which the OALJ mailed the orders in this case.

appeal filed after the thirty (30)-day deadline. Therefore, in the absence of any evidence indicating a non-negligent reason for its untimely appeal, the Board is unable to find that Licensee met its burden with respect to the first Cook factor.

Turning to the second and third Cook factors, as discussed, the appeal should have been filed within a short time after Licensee learned of and had the opportunity to address the untimeliness issue. Ms. Hawk does not indicate when, if ever, she learned that the appeal deadline had passed. Although there is no defined period of time which satisfies the Cook standard, Licensee's delay of over two (2) weeks is problematic considering the Supreme Court's statement in Bass that "[w]ithout doubt the passage of any but the briefest period of time during which an appeal is not timely filed would make it most difficult to arrive at a conclusion that the failure to file was non-negligent." Bass, 401 A.2d at 1135. Thus, even if the first Cook factor had been met, Licensee failed to meet its burden in showing it filed its appeal within a short time after learning of the untimeliness.

In light of Licensee's failure to meet its burden with respect to each of the first three (3) Cook factors, there is no need for the Board to consider whether the Bureau will be prejudiced by the delay. The Board is without

authority to consider Licensee's appeal because it was not filed within the statutorily-prescribed time limit of thirty (30) days and because Licensee failed to establish a non-negligent reason for the late filing. Therefore, Licensee's appeal requesting *nunc pro tunc* relief is dismissed.

ORDER

The appeal of Licensee is dismissed.

The Third Supplemental Order of Administrative Law Judge Daniel J. Flaherty, Jr., mailed February 22, 2013, remains in effect.

It is hereby ordered that Restaurant Liquor License No. R-11691 remains revoked as of March 25, 2013.

Board Secretary