

Mailing Date: August 7, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, :  
BUREAU OF LIQUOR CONTROL : Citation No. 12-1494  
ENFORCEMENT :

v. :

LANSFORD AMVETS, : License No. CC-4855  
HOME ASSN., INC. :  
201-203 West Ridge Street : LID 3763  
Lansford, PA 18232-1113 :

Representative for : Michael R. Frey  
Licensee (on appeal): : Lansford Amvets Home Assn., Inc.  
201 West Ridge Street  
Lansford, PA 18232

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

**OPINION**

Lansford Amvets Home Assn., Inc. (“Licensee”), seeks *nunc pro tunc* relief from the Adjudication and Order of Administrative Law Judge (“ALJ”) Felix Thau, mailed April 26, 2013, wherein the ALJ sustained Citation No. 12-1494

(“the Citation”) and imposed a fine of one thousand two hundred fifty dollars (\$1,250.00).

The underlying facts are not in dispute. On September 5, 2012, Licensee’s premises at 201-203 West Ridge Street, Lansford, Pennsylvania (“the licensed premises”) was open, in operation, and selling alcoholic beverages after its license expired and had yet to be renewed. (Adjudication and Order, Finding of Fact No. 4). Licensee had filed for renewal but did not respond after the Bureau of Licensing returned the renewal application as incomplete. (Adjudication and Order, Finding of Fact No. 4).

A Notice of Violation was mailed to Licensee at the licensed premises via first-class and certified mail. (N.T. 6; Ex. C-1). The certified mailing was returned unclaimed on October 3, 2012. (N.T. 6; Ex. C-1). On October 17, 2012, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation to Licensee, charging it with violating sections 491(1), 492(2), and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2), 4-493(16)] in that on September 5, 2012, Licensee, by its servants, agents, or employees, sold alcoholic beverages after its catering club liquor license expired on August 31, 2012, and had not been renewed and/or validated. The Citation was mailed to Licensee at the licensed premises via first-class and

certified mail. (N.T. 6; Ex. C-2). The certified mailing was signed as received on October 20, 2012. (N.T. 6; Ex. C-2). The Office of Administrative Law Judge (“OALJ”) sent a Notice of Hearing to the licensed premises by certified mail, and the notice was signed as received on January 26, 2013. (Adjudication and Order, Finding of Fact No. 1). The hearing was held *ex parte* on March 19, 2013, as no one appeared on behalf of Licensee. Craig A. Strong, Esquire, appeared at the hearing as counsel for the Bureau.

By Adjudication and Order mailed April 26, 2013, the ALJ sustained the Citation and imposed a fine of one thousand two hundred fifty dollars (\$1,250.00). 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. 4-5).

On May 15, 2013, the OALJ received a Request for Reconsideration from Michael R. Frey, on behalf of Licensee; however, the request was returned to Mr. Frey at his home address because it had not been filed within the required fifteen (15)-day deadline. Mr. Frey filed the instant appeal on behalf of

Licensee on June 28, 2013, and Licensee paid the outstanding fine on July 15, 2013.

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)).

Pennsylvania courts have consistently 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, 543 Pa. 381, 671 A.2d 1130 (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. Cook, 543 Pa. at 384-385, 671 A.2d 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).

On appeal, Mr. Frey contends that Licensee is now under new management and that a prior manager destroyed Licensee's files. Because

records were lost, Mr. Frey asserts Licensee “had no way of knowing the [hearing] date” in this case. The thrust of Licensee’s basis for seeking *nunc pro tunc* relief therefore appears to be that its prior manager is to blame for the untimeliness of its appeal.<sup>1</sup> No information is provided as to when the change in management occurred or when Licensee learned that the appeal deadline had passed.

Based on this information, the Board is unable to find that Licensee has met the first Cook factor. As a “creature of legal fiction,” a corporation may only act through its officers or other agents. Lokay v. Lehigh Valley Co-op. Farmers, Inc., 492 A.2d 405, 408-409 (Pa. Super. 1985). If Licensee’s prior manager is truly to blame for Licensee’s failure to send a representative to the hearing and to file its appeal within the statutory timeframe, Licensee must be held responsible for these failures. An untimely appeal may only be heard under “extraordinary circumstances” such as a breakdown in the court’s operation or non-negligent conduct of the appellant. Here there is no non-negligent cause for the untimeliness. Rather, the allegedly intentional actions of Licensee’s prior manager resulted in the delay. While the Board sympathizes

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<sup>1</sup> The appeal does not contest the underlying violation, i.e. that Licensee sold alcoholic beverages on September 5, 2012, after its license had expired and had not been renewed and/or validated.

with Mr. Frey, particularly in light of his allegations of theft by the prior manager, the statutory deadline for appeals cannot be ignored because of the actions of a licensee's agent.

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. Mr. Frey does not indicate when, if ever, Licensee's management learned that the appeal deadline of May 27, 2013, had passed. Licensee filed its appeal on June 28, 2013, a delay of thirty-two (32) days from the deadline. Although there is no defined period of time which satisfies the Cook standard, Licensee's delay of over four (4) 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.

Even if the Board had authority to consider Licensee's untimely appeal, the end result for Licensee would not change. Licensee asks for "leniency" from the Board with respect to the amount of the fine imposed by the ALJ. However, it is within the sole discretion of the ALJ, once satisfied that a licensee committed the violation or violations charged, to determine an appropriate penalty within the statutory parameters. Section 471 prescribes the penalty for violating section 493(16) of the Liquor Code [47 P.S. § 4-493(16)], permitting the ALJ to impose a license suspension or revocation and/or a fine of not less than one thousand dollars (\$1,000.00) nor more than five thousand dollars (\$5,000.00). (47 P.S. § 4-471(b)). In addition to the present facts, an ALJ may consider a licensee's prior citation history when imposing a penalty. [47 P.S. § 4-471(c)].

In this case, the ALJ imposed a fine of one thousand two hundred fifty dollars (\$1,250.00). The fine is within the range set forth in the statute and, in fact, is on the low end of the permitted scale. Since the fine is within the

statutory guidelines set forth in the Liquor Code and the Board will not alter the penalties imposed by the ALJ.

For the foregoing reasons, Licensee's appeal requesting *nunc pro tunc* relief is dismissed.

**ORDER**

The appeal of Licensee is dismissed as untimely.

The Adjudication and Order of the ALJ mailed April 26, 2013, remains in effect.

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

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Board Secretary