

Mailed August 28, 2013

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 12-1610
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
FINACARO-MAGLIO, INC.	:	License No. R-13575
t/a Noah's Ark	:	
1548-50 McKean Street	:	
Philadelphia, PA 19145	:	LID 16212

Counsel for Licensee: Edward B. McHugh, Esquire (on appeal)
Goldstein & McHugh
Constitution Place
325 Chestnut Street, Suite 713A
Philadelphia, PA 19106

Counsel for Bureau: Andrew R. Britt, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue, Third Floor
Philadelphia, PA 19142

OPINION

On July 3, 2013, Finacaro-Maglio, Inc., trading as Noah's Ark ("Licensee"), filed a Petition for Allowance of Appeal *Nunc Pro Tunc* ("Petition") from the Adjudication and Order of Administrative Law Judge David Shenkle ("ALJ"),

mailed May 14, 2013, which sustained Citation No. 12-1610 (“the Citation”) and imposed an eight hundred dollar (\$800.00) fine.

On November 20, 2012, the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”) issued the Citation to Licensee. Count 1 of the Citation charged Licensee with violating section 493(34) of the Liquor Code [47 P.S. § 4-493(34)], in that Licensee, by its servants, agents or employees, used, or permitted to be used on the inside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard beyond the licensee’s property line. Count 2 of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 10-602(5)(a.1) of the Clean Indoor Air Worker Protection Law [Phila. Code § 10-602(5)(a.1)(iv)], in that Licensee, by its servants, agents or employees, failed to post signage as required by the Clean Indoor Air Worker Protection Law. Count 3 of the Citation charged that Licensee, by its servants, agents, or employees, smoked and/or permitted smoking in a public place where smoking is prohibited, in violation of section 471 of the Liquor Code [47 P.S. § 4-471] and section 10-602(3)(a.1) of the Clean Indoor Air Worker Protection Law [Phila. Code § 10-602(3)(a.1)(iv)]. The Citation was sent by first class and certified mail to Licensee at the licensed

premises (1548-50 McKean Street, Philadelphia, PA 19145). There is no documentation in the record to indicate that the Citation was not received by Licensee at the licensed premises.

On February 1, 2013, a citation hearing notice was mailed via first class and certified mail to Rosemarie Maglio, Licensee's corporate officer, at her residence (1925 South Mole Street, Philadelphia, PA 19143). The certificate of mailing for the certified copy of the hearing notice was returned as unclaimed on February 19, 2013; the first class mailing was not returned.

A hearing regarding the Citation was held on April 3, 2013. Andrew R. Britt, Esquire, appeared at the hearing as counsel for the Bureau, and presented the testimony of Bureau Officers John Bernesky and Officer Chante McKoy. Licensee did not attend or present any evidence.

By Adjudication and Order mailed May 14, 2013, the ALJ sustained the Citation and imposed a fine of eight hundred dollars (\$800.00). 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 Rosemarie Maglio at her residence (1925 South Mole Street, Philadelphia, PA 19143).

On June 26, 2013, the ALJ issued a Supplemental Order, noting that Licensee had not paid the fine imposed by the May 14, 2013, Adjudication and Order. Therefore, the ALJ ordered that the license should be suspended indefinitely, for a period of at least one (1) day, effective at 7:00 a.m. on Monday, August 19, 2013. The Supplemental Order was sent by first class and certified mail to Rosemarie Maglio, at her residence (1925 South Mole Street, Philadelphia, PA 19143).

On July 3, 2013, Licensee filed its Petition with the Pennsylvania Liquor Control Board (“Board”). In the Petition, Licensee’s Counsel asserted that he filed an Entry of Appearance with the Office of Administrative Law Judge on or about December 10, 2012, requesting that any documentation regarding the Citation should be sent to Licensee’s Counsel. Licensee’s Counsel asserts that the Notice of Hearing was neither sent nor received at the licensed premises or by Licensee’s Counsel. In addition, Licensee asserts that it did not receive the Adjudication, and was not aware of the Adjudication until the issuance of the Supplemental Order.

On July 23, 2013, the ALJ issued a Second Supplemental Order, noting that Licensee had paid the fine on July 17, 2013. The ALJ revised the length of suspension to one (1) day only, that day being Tuesday, August 20, 2013,

commencing at 7:00 a.m. The Second Supplemental Order was also sent by first class and certified mail to Rosemarie Maglio at her residence (1925 South Mole Street, Philadelphia, PA 19143).

Section 471 of the Liquor Code provides only thirty (30) days for an aggrieved party to file an appeal from an ALJ's decision. [47 P.S. § 4-471(b)]. In the instant matter, the ALJ's Order was mailed on May 14, 2013, the Supplemental Order was mailed on June 26, 2013, and Licensee's Petition was filed on July 3, 2013.

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). However, the Pennsylvania Supreme Court has ruled that an extension of the time for the filing of an appeal is appropriate in 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 Board notes that, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed

an error of law or abused his discretion, or if his decision was not based upon substantial evidence. [47 P.S. § 4-471(b)].

In the Petition, Licensee's Counsel has asserted facts that are not in the record, but indicate that there may have been a breakdown in the administrative process. Therefore, the Board shall remand the matter to the ALJ for the purpose of holding a hearing to receive evidence regarding the mailings sent by the OALJ to Ms. Maglio's residence rather than the licensed premises or to Licensee's attorney, the efforts by Licensee's Counsel to enter his appearance in this matter, and any other evidence relating to Licensee's failure to attend the original hearing and failure to file a timely appeal from the ALJ's Adjudication and Order.

At the remand hearing, for purposes of administrative economy, the ALJ shall also receive evidence from Licensee relating to the issues raised by the Citation. Since the evidence presented at the original hearing remains part of the record, the Bureau need not recreate its case, but may cross-examine Licensee or object to Licensee's evidence as if the Licensee had been present at the original hearing. Similarly, Licensee should be given the opportunity to cross-examine the witnesses who appeared on behalf of Licensee at the first hearing.

Subsequent to the remand hearing, the record shall be transmitted back to the Board for a determination as to whether to allow Licensee's Petition. If the Board concludes that the Petition should not be granted, the Board shall proceed to issue a decision based upon the record established at the original hearing. However, if the Board grants the Petition, the matter shall be remanded to the ALJ for a new decision based upon the record established at the original hearing and the remand hearing.

ORDER

The case is hereby remanded to the ALJ for the purpose of holding a hearing to receive evidence regarding the mailings sent by the OALJ to Ms. Maglio's residence rather than the licensed premises or to Licensee's attorney, the efforts by Licensee's Counsel to enter his appearance in this matter, and any other evidence relating to Licensee's failure to attend the original hearing and failure to file a timely appeal from the ALJ's Adjudication and Order.

At the remand hearing, for purposes of administrative economy, the ALJ shall also accept into the record evidence from Licensee relating to the issues raised by the Citation. Since the evidence presented at the original hearing remains part of the record, the Bureau need not recreate its case, but may cross-examine Licensee or object to Licensee's evidence as if the Licensee had been present at the original hearing. Similarly, Licensee should be given the opportunity to cross-examine the witnesses who appeared on behalf of Licensee at the first hearing.

Subsequent to the remand hearing, the record shall be transmitted back to the Board for a determination as to whether to allow Licensee's Petition.

Board Secretary