

Mailed: October 8, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 13-0839
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
CHECKERS BISTRO, LLC	:	License No. R-9338
T/A CHECKERS BISTRO	:	
300-308 West James Street	:	
Lancaster, PA 17603-2912	:	LID 58075

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OPINION

On August 29, 2014, Peter Keares (“Petitioner” or “Keares”), filed a Petition for Appeal *Nunc Pro Tunc* of Administrative Law Judge Adjudication Revoking License at Citation No. 13-0839 on Behalf of Peter Keares (“Petition”)

from the Opinion and Order Upon Licensee's Failure to Pay Fine Within Sixty Days of Administrative Law Judge Felix Thau ("ALJ"), mailed June 6, 2014, which revoked Restaurant Liquor License No. R-9338, held by Checkers Bistro, LLC ("Licensee"), effective Monday, July 21, 2014. The revocation of the license stemmed from Citation No. 13-0290 ("the Citation") and Licensee's ultimate failure to pay the resulting one thousand dollar (\$1,000.00) fine.

On April 18, 2013, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee. The Citation charged Licensee with violating section 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 March 1, 2, 3, 5, 6, 7, 8, 9, 10, and 12, 2013, Licensee, by its servants, agents or employees, sold alcoholic beverages after its restaurant liquor license expired on February 28, 2013. The Citation was sent by first class and certified mail to Licensee at the licensed premises; the certified mail was returned but the first class mail was not.

The hearing regarding the Citation was held on December 10, 2013. John Pietrzak, Esquire, appeared at the hearing as counsel for the Bureau, and presented the testimony of Bureau Officer John Deuter, Revenue Enforcement and Collection Agent Lisa Heilig, and Bureau Officer Harry Royer. Licensee did

not attend or present any evidence, despite having been notified of the hearing by certified (unclaimed) and first class mail.

By Adjudication and Order mailed January 31, 2014, the ALJ sustained the Citation and imposed a fine of one thousand dollars (\$1,000.00) and a suspension of ten (10) days. 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 Licensee at the licensed premises; the certified mail was returned but the first class mail was not.

On March 21, 2014, the ALJ issued an Opinion and Order Upon Licensee's Failure to Pay Fine ("March 21st Opinion and Order"), noting that Licensee had not paid the fine imposed by the January 31, 2014, Adjudication and Order. Therefore, the ALJ ordered that the license should be suspended indefinitely, for a period of at least eleven (11) days. The ALJ noted that, since the license had not been renewed, the suspension was deferred pending the renewal of Licensee's license. He also noted that if the fine remained unpaid after sixty (60) days from the mailing date of the March 21st Opinion and Order, the license would be reviewed for possible revocation. The March 21st Opinion and

Order was sent by first class and certified mail to Licensee at the licensed premises; the certified mail was returned but the first class mail was not.

On June 6, 2014, the ALJ issued an Opinion and Order Upon Licensee's Failure to Pay Fine Within Sixty Days ("June 6th Opinion and Order"), noting that Licensee had not paid the fine as ordered in the March 21st Opinion and Order. The ALJ therefore revoked the license effective Monday, July 21, 2014. The June 6th Opinion and Order was sent by first class and certified mail to the licensed premises.

On August 29, 2014, Keares, a creditor of Licensee, filed the instant Petition, asking the Board to accept the *nunc pro tunc* appeal and set aside the revocation. Petitioner asserts that he sold the liquor license to Licensee; the terms of the sales agreement purportedly state that if Licensee defaults on the sales agreement, the license would be "re-conveyed" to Petitioner. (Petition, ¶13). Petitioner asserts that it obtained a UCC Financing Statement from Licensee, giving Petitioner first priority interest in the license. (Petition, ¶21).

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for taking an appeal from an adjudication of an administrative law judge. [47 P.S. § 4-471(b)]. Further, section 17.21 of the Board's Regulations provides that failure to file or have the appeal postmarked within thirty (30) calendar days

will result in dismissal of the appeal. [40 Pa. Code § 17.21(b)(2)]. In the instant matter, the ALJ's Order was mailed on June 6, 2014, and the Petition was filed on August 29, 2014, well past the deadline.

The filing of a timely appeal is a jurisdictional prerequisite; if an appeal is filed outside the statutory period from the time the determination is made, it becomes final, and the appeal may not be considered. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194, 197-198 (Pa. Cmwlth. 2008) (citing Darroch v. Unemployment Comp. Bd. of Review, 627 A.2d 1235 (Pa. Cmwlth.1993)). Additionally, the heavy burden of establishing the right to have an untimely appeal considered rests with the moving party. Id. at 198.

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 the time for filing an appeal should be limited to cases where "there is fraud [or] some breakdown in the court's operation" caused by extraordinary circumstances. Arena Beverage Corp. v. Pennsylvania Liquor Control Bd., __ A.3d __, 2014 WL 3734307 (Pa. Cmwlth. Ct. 2014); 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 rule set forth in Bass was further clarified in Cook v. Unemployment Compensation Bd. 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, appellant's attorney or his/her staff; (2) the appeal is filed within a short time after appellant or his counsel learns of and has the opportunity to address the untimeliness; (3) the time period which elapses is of very short duration; and (4) appellee is not prejudiced by the delay. Id. at 1131.

Petitioner asserts that it meets the four (4) part test in Cook. With regard to the first part, which requires extraordinary circumstances involving fraud, a breakdown in the court's operation, or non-negligent conduct of the appellant, the appellant's attorney or his/her staff, Petitioner simply states:

The untimely filing of this appeal was not the result of any negligent conduct on the part of Keares. Instead, it is the direct result of the withholding of notice of these proceedings and subsequent revocation of the License by [Licensee].

(Petition, ¶¶49). The Petition includes numerous statements to the effect that Licensee “failed to inform” Keares about receiving a citation, notice or adjudication, and Keares “had no independent knowledge” of same. (Petition at ¶¶28, 30, 34, 36, 38-39, 43).

In the Petition, Keares describes himself as “a respected restaurant operator,” successfully operating several restaurants in Lancaster County, serving alcoholic beverages pursuant to various licenses issued by the Board. (Petition at ¶¶40, 53). The Petition also references eight (8) documents executed between Licensee and Keares.¹ A common purpose of all of these documents appears to be an effort to ensure that Petitioner could reacquire the liquor license back from Licensee if Licensee failed to meet its obligations. The Petition indicates that the relationship between Petitioner and Licensee has been a rocky one, since they have been involved in several civil actions between 2012 and 2014. (Petition at ¶23).

However, the Petition contains no assertions that Petitioner made any effort to learn for himself about the status of the liquor license even once during the sixteen (16) month period from the issuance of the citation to the

¹ The documents are: Installment Agreement for the Sale of Real Estate, Liquor License and Personal Property; Lease Agreement; Security Agreement; Lease Guaranty; Agreement Concerning Retail Liquor License; Power of Attorney; Security Agreement and Financing Statement – Form UCC-1; and a Lease Termination Agreement.

revocation of the license. Even with his experience with liquor licenses, and the Power of Attorney he had with regard to the license, Petitioner did not call or contact the Board's Bureau of Licensing or the Office of Administrative Law Judge ("OALJ") to determine if there were any citations pending against the Licensee, or even to inform the Board of its interest in the license. Instead, he passively relied upon Licensee to keep him informed, despite the fact that Petitioner and Licensee were embroiled in litigation from 2012 until May of 2014. It is not the responsibility of the OALJ, the Board, or the Bureau to seek out and provide notice to any holders of a security interest in a license; just the Licensee, who was provided with notice of all relevant proceedings and Orders in this case. Petitioner's reliance upon Licensee for information, instead of checking on the status of the license for himself, does not meet the first part of the Cook test, which requires fraud, a breakdown in the court's processes, or non-negligent conduct.

The second part of the Cook test requires the appeal to be filed within a short time after the appellant or his counsel learns of and has the opportunity to address the untimeliness. In Cook, the appellant had been hospitalized in intensive care after collapsing; even so, he was only four (4) days late with his appeal. Cook, 671 A.2d at 1131.

In the instant matter, Petitioner asserts that he learned of the license revocation on August 1, 2014. The Petition to allow the late appeal was not filed until August 29, 2014. Petitioner attributes the delay to the need to “investigate” the matter, retain counsel, and prepare an appeal of the revocation. (Petition at ¶50). The Board does not consider twenty-eight (28) days to be a short period of time as required by the second part of the Cook test.

The third part of the Cook test requires that the time period which has elapsed must be very short in duration. Cook, 671 A.2d at 1131. Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal from the ALJ’s final Opinion and Order, mailed on June 6, 2014, should have been filed on or before July 7, 2014. In fact, the Petition was not filed until August 29, 2014, nearly two (2) months later. The Board does not consider two (2) months to be equivalent to a “very short” period of time, nor does Petitioner argue that it is. The Petition simply states, “The License was revoked by Orders dated June 3, 2014 and mailed June 6, 2014.”

The fourth and final part of the Cook test is that the appellee, the Bureau, would not be prejudiced by granting the *nunc pro tunc* appeal. Cook,

671 A.2d at 1131. Petitioner asserts that “Neither the [Bureau] nor the Board will be prejudiced by allowing this appeal to go forward.” (Petition ¶52).

The Board disagrees. The result of *nunc pro tunc* relief under these negligent circumstances would be the *de facto* modification of section 471 without legislative mandate and the establishment of precedent whereby the appeal period may be arbitrarily extended by any licensee without satisfying the strict standards of Cook. Dilatory licensees – or passive creditors – would gain the inequitable benefit of appealing ALJ opinions without regard to the need for the timely appeal of opinions. Such precedent would lead to the inconsistent, if not the non-existent, enforcement of a significant provision of the Liquor Code, which Pennsylvania’s lawmakers did not intend, to the prejudice of the Board and all responsible licensees.

Since the Petition has failed to meet any of the four (4) parts established in Cook, the Board dismisses the Petition.²

² Even if Petitioner had met the Cook test, he has not contended, nor is there anything in the record to suggest that the ALJ abused his discretion, committed an error of law, or that the decisions rendered in any of the three (3) Orders were not supported by substantial evidence.

ORDER

The Petition for Appeal *Nunc Pro Tunc* of Administrative Law Judge Adjudication Revoking License at Citation No. 13-0839 on Behalf of Peter Keares is dismissed.

The Opinion and Order Upon Licensee's Failure to Pay Fine Within Sixty Days of Administrative Law Judge Felix Thau, mailed June 6, 2014, is affirmed.

It is hereby ordered that Restaurant Liquor License No. R-9338 (LID 58075) remains revoked as of July 21, 2014.

Board Secretary