Mailing Date: June 25, 2014

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 13-2266
v.	:	
BERKS LODGE NO. 47 IBPOE 235-237 Walnut Street Reading, PA 19601-4061	:	License No. C-490 LID 605

Representatives for Licensee:
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Robert L. Spradley
Berks Lodge No. 47 IBPOE
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O P I N I O N

Berks Lodge No. 47 IBPOE ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") David L. Shenkle, mailed April 30, 2014, wherein the ALJ sustained Citation No. 13-2266 ("the Citation").

On November 15, 2013, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee, charging it

with violating subsections 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 during the periods April 5 through 7, 12 through 14, 19 through 21, and 26 through 28, and May 3 through 5 and 9 through 12, 2013, Licensee, by its servants, agents, or employees, sold alcoholic beverages after its club liquor license had expired on March 31, 2013. Licensee submitted an Admission, Waiver, and Authorization ("Waiver") form to the Office of Administrative Law Judge ("OALJ") on or about March 20, 2014, admitting the charge and, *inter alia*, waiving the right to a hearing and to appeal the ALJ's decision.

By Adjudication and Order mailed April 30, 2014, the ALJ sustained the charge and ordered Licensee to pay a fine of one thousand dollars ($1,000.00). The ALJ's Order advised Licensee that it must pay the fine within twenty (20) days and that motions for reconsideration must be filed within fifteen (15) days of the mailing date of the Order.

Licensee submitted an untimely Motion for Reconsideration on May 21, 2014. The OALJ returned Licensee's filing fee and rejected the motion as untimely. The instant appeal with the Pennsylvania Liquor Control Board ("Board") followed on June 2, 2014, also untimely.

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

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. Board 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 a statutory period for filing an appeal is generally limited to cases where "there is fraud or some breakdown in the court's operation." West Penn Power Co., 460 Pa. at 556, 333 A.2d at 912. The Court later added another exception to the general

prohibition against late appeals for the non-negligent conduct of an appellant's attorney or the attorney's staff. Bass v. Commonwealth Bureau of Corrections, 485 Pa. 256, 401 A.2d 1133 (1979).

The Court further clarified the holding in Bass and applied it in the context of an untimely administrative appeal in Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996). Specifically, the Court ruled that an untimely 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 or the appellant's counsel; (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.

In this case, the mailing date of the Adjudication and Order is April 30, 2014. Therefore, pursuant to section 17.21 of the Board's Regulations, an appeal to the Board should have been filed or postmarked within thirty (30) days, i.e. on or before May 30, 2014, yet it was postmarked on June 2, 2014. It should be noted that the filing of a motion for reconsideration with the OALJ

will not toll the thirty (30)-day time period for the filing of an appeal with the Board. (40 Pa. Code § 17.21(c)).

Licensee's Appeal form provides no basis for the appeal or for its untimeliness; it merely requests reconsideration of the Citation. Given the heavy burden on an appellant to demonstrate entitlement to *nunc pro tunc* relief, Licensee clearly failed to meet its burden here. Thus, it must be dismissed, as the Board is without authority to consider the untimely appeal.

Moreover, even if Licensee had met its burden in justifying the untimeliness of its appeal, the fact remains that Licensee waived its right to appeal the adjudication by submitting the Waiver form. In so doing, Licensee admitted to violating subsections 491(1), 492(2), and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 4-492(2), 4-493(16)], and acknowledged that the applicable penalty for this violation was a fine ranging from one thousand dollars ($1,000.00) to five thousand dollars ($5,000.00). Ultimately, the ALJ imposed the statutory minimum[1] penalty of a one thousand dollar ($1,000.00) fine. Therefore, Licensee's appeal would have been dismissed even if it was timely filed.

[1] Violations of section 493(16) carry a heightened penalty, as the ALJ is permitted 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)].

For the foregoing reasons, the appeal of Licensee is dismissed.

ORDER

The appeal of Licensee is dismissed.

The Adjudication and Order mailed April 30, 2014, remains in effect.

This case is hereby remanded to the ALJ to ensure compliance with this Order.

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Board Secretary