

Mailing Date: September 23, 2015

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 14-0848
ENFORCEMENT	:	
	:	
v.	:	
	:	
MONTGOMERY LODGE NO. 1271	:	License No. C-5210
I.B.P.O.E. OF W.	:	
605 Walnut Street	:	LID 2409
Pottstown, PA 19464-5713	:	

Counsel for
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OPINION

Montgomery Lodge No. 1271 I.B.P.O.E. of W. ("Licensee") petitions for leave to appeal *nunc pro tunc* from the Adjudication and Order of Administrative Law Judge ("ALJ") Tania E. Wright mailed July 9, 2015, wherein the ALJ sustained eleven (11) counts of Citation No. 14-0848. Because the Pennsylvania Liquor Control Board ("Board")

has no authority to accept the untimely appeal, and because the petition fails to show *nunc pro tunc* relief is warranted, the Board must dismiss Licensee's petition.

The Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation to Licensee on April 28, 2014, initially charging thirteen (13) violations of the Liquor Code and/or the Board's Regulations. The first count charged Licensee with selling alcohol to nonmembers on July 14, August 30 and 31, September 27, and October 27, 2013, in violation of section 406(a)(1) of the Liquor Code [47 P.S. § 4-406(a)(1)]. The second count charged Licensee with noisy and/or disorderly operations on June 9 and 18, July 10 and 25, August 10, and September 29, 2013, and February 2, 2014, in violation of section 471 of the Liquor Code [47 P.S. § 4-471]. The third count charged Licensee with a loudspeaker violation on September 29, 2013, in violation of section 493(34) of the Liquor Code [47 P.S. § 4-493(34)]. The fourth count charged Licensee with failing to conspicuously display the liquor license on November 6 and 17, 2013, and January 5, 2014, in violation of section 467 of the Liquor Code [47 P.S. § 4-467]. The fifth count charged Licensee with failing to post Clean Indoor Air Act signage on November 6 and 17, 2013, and January 5, 2014, in violation of section 471 of the Liquor Code [47 P.S.

§ 4-471] and section 637.6(a)(1) of the Clean Indoor Air Act [35 P.S. § 637.6(a)(1)]. The sixth count charged Licensee with failing to maintain records during the period May 1 through November 17, 2013, in violation of section 493(12) of the Liquor Code [47 P.S. § 4-493(12)] and sections 5.71 through 5.74 of the Board's Regulations [40 Pa. Code §§ 5.71-5.74]. The seventh count charged Licensee with failing to keep records on the licensed premises on November 17, 2013, and February 9, 2014, in violation of section 493(12) of the Liquor Code [47 P.S. § 4-493(12)]. The eighth count charged Licensee with selling alcohol after its license expired on April 30, 2013, during the period May 1 through 12, 2013, in violation of sections 491(1), 492(2), and 493(16) of the Liquor Code [47 P.S. §§ 4-491(1), 492(2), 493(16)]. The ninth count charged Licensee with gambling violations during the period February 12 through November 17, 2013, in violation of section 471 of the Liquor Code [47 P.S. § 4-471] and sections 5512 and/or 5513 of the Crimes Code [18 Pa. C.S. §§ 5512, 5513]. The tenth count charged Licensee with failing to maintain complete and truthful records covering the prior two (2) years on March 7, 2014, in violation of section 493(12) of the Liquor Code [47 P.S. § 4-493(12)]. The eleventh count charged Licensee with selling alcohol to a minor on July 14 and October 27, 2013, and divers other

occasions within the prior year, in violation of section 493(1) of the Liquor Code [47 P.S. § 4-493(1)]. The twelfth count charged Licensee with permitting a minor to frequent the licensed premises on July 14 and October 27, 2013, and divers other occasions within the prior year, in violation of section 493(14) of the Liquor Code [47 P.S. § 4-493(14)]. The thirteenth count charged Licensee with failing to adhere to its bylaws during the period April 21, 2013, through January 18, 2014, in violation of section 5.81 of the Board's Regulations [40 Pa. Code § 5.81].

Counts eleven and twelve were later withdrawn by the Bureau. The Bureau also amended count two of the Citation to remove July 10 and 25, 2013, from the dates of alleged disorderly operations, and it amended count one to remove July 14 and October 27, 2013, from the dates of alleged sales to nonmembers.

A hearing was held on February 26, 2015, at which both parties were represented by counsel. By Adjudication and Order mailed July 9, 2015, the ALJ sustained all of the remaining charges, i.e. counts one through ten and thirteen, and ordered Licensee to pay an aggregate fine of three thousand seven hundred dollars (\$3,700.00) and to serve a license suspension of sixty-five (65) days. The Order notified Licensee that if it wished to appeal the decision of the ALJ, the

appeal must be filed within thirty (30) days of the mailing date of the Order. It further provided contact information for the Board's Office of Chief Counsel.

Licensee filed the instant petition for leave to appeal *nunc pro tunc* with the Board on August 21, 2015, along with an Application for Supersedeas.

In the event a party is 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)]. 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) (internal citations omitted).

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).

Thus, the heavy burden of establishing the right to have an untimely appeal considered rests with the moving party. Blast Intermediate Unit No. 17 v. Unemployment Comp. Bd. of Review, 645 A.2d 447 (Pa. Cmwlth. 1994). 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 recognized 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 light of the foregoing, the Board does not have authority to entertain Licensee's untimely appeal. The mailing date of the Adjudication and Order is July 9, 2015, and thus a timely appeal was due to the Board by August 10, 2015. Licensee's petition was not filed with the Board until August 21, 2015.

Nonetheless, Licensee argues that it is entitled to *nunc pro tunc* relief under the Cook standard because on August 6, 2015, Licensee incorrectly filed appeal documents with the Montgomery County Court of Common Pleas, rather than with the Board. [Petition paras. 5, 6; Ex. A]. Licensee contends that, because its filing with the court was "timely" in that it was within the thirty (30)-day appeal window, its untimeliness of eleven (11) days in eventually filing its appeal with the Board should be excused. [Petition para. 7]. Licensee further notes that the appellate courts of Pennsylvania routinely transfer appeals to the proper venue and that the Bureau will suffer no prejudice. [Petition paras. 9, 10].

However, this mistake is insufficient to establish the necessity for *nunc pro tunc* relief. There is no dispute that Licensee's petition for review was filed with the Montgomery County Court of Common Pleas

within the thirty (30)-day appeal period, but the incorrect filing of the petition is not an extraordinary, non-negligent circumstance which warrants *nunc pro tunc* relief.

It must first be noted that Licensee is correct with regard to the treatment by Pennsylvania courts of appeals filed in the wrong venue. Specifically, the Judicial Code provides that an appeal filed in a court which does not have jurisdiction to hear the appeal is required to be transferred to “the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth.” [42 Pa.C.S.A. § 5103(a)]. The term “tribunal” is defined as:

[A] court or district justice or other judicial officer of this Commonwealth vested with the power to enter an order in a matter, the Board of Claims, the Board of Property, the Office of Administrator for Arbitration Panels for Health Care and any other similar agency.

[42 Pa.C.S.A. § 5103(d)].

In Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Harry’s Holiday Park Lounge, 799 A.2d 878 (Pa. Cmwlth. 2002), the Commonwealth Court examined the above provisions in a matter with virtually identical facts. In that case, a liquor licensee was found to have violated the Liquor Code following a

hearing before an ALJ. [Id. at 879-880]. The licensee subsequently appealed the ALJ's decision to the Allegheny County Court of Common Pleas, rather than the Board. [Id.]. The Bureau moved to quash the appeal for lack of jurisdiction, which was granted by the court, and the licensee appealed to the Commonwealth Court. [Id.]. Ultimately, the court held that the Board was not a "tribunal" as that term is used in section 5103, affirming the court's decision to quash the licensee's appeal. Harry's Holiday Park Lounge, 799 A.2d at 881.

Therefore, given that section 5103 of the Judicial Code, governing the transfer of erroneously filed matters, is inapplicable to this particular circumstance, there is no basis for the Board to consider Licensee's appeal as having any other filing date than August 21, 2015, the date on which it was mailed to the Board.

With respect to the cause of the untimeliness, the only explanation provided by Licensee is the mistaken filing in the court of common pleas. The Supreme Court has made it clear that the failure to file an appeal must not stem from counsel's negligence or from a failure to anticipate foreseeable circumstances. Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (2001); see also, Riddle v. Com., Dept. of Transp., 583 A.2d 865 (Pa. Cmwlth. 1990) (holding that negligence on the part an attorney does not entitle a party to *nunc pro tunc* relief).

While the Board is sympathetic to Licensee's argument, no extraordinary circumstances existed to cause Licensee's untimely filing of this appeal. The Board is thus without jurisdiction to entertain the appeal, as the timeliness of an appeal is a jurisdictional prerequisite, and it is not at liberty to extend the deadline "as a matter of grace or mere indulgence."

Even if Licensee had satisfied the first Cook factor, the petition also fails to satisfy the second factor pertaining to the urgency with which Licensee acted after learning its appeal was untimely. In applying Cook, the courts require that a petitioner seeking *nunc pro tunc* relief demonstrate that it acted with reasonable diligence upon learning of the necessity to take action.

Here, the petition provides the date on which Licensee filed documents with the court of common pleas but does not indicate the date on which Licensee learned that it had done so incorrectly. It is the petitioner's burden to establish that it took action within a short duration after learning of a missed deadline, yet Licensee failed to provide any evidence to determine whether it has done so here. From the time Licensee filed its "appeal" with the court until the time it filed its petition with the Board, approximately fifteen (15) days had elapsed. The petition provides no explanation for this delay. While

there is no established time period for what constitutes a “short duration” after learning of a missed appeal deadline, the lengthy and unexplained delay in this case does not show that Licensee acted with reasonable diligence, especially given that similar periods have been found to be insufficient by the courts.¹

Having failed to meet the first two (2) Cook factors, there is no need for the Board to assess the third or fourth factors, i.e., the overall time period which elapsed, and prejudice. Because Licensee failed to satisfy its burden of justifying this rare relief by establishing all of the Cook factors, the Board is unable to consider the untimely appeal *nunc pro tunc*.

Even assuming, *arguendo*, that Licensee was entitled to *nunc pro tunc* relief, the Board finds no merit to its appeal. Licensee contends that the ALJ’s decision to sustain count two of the Citation was not supported by substantial evidence “and/or applies an improper legal standard.” [Petition Ex. A]. Specifically, Licensee argues that the record lacks evidence of a causal connection between the operation of the licensed premises and the incidents of June 9 and 18, 2013, and February 2, 2014. [Appeal para. 4].

¹ See, e.g., Stanton v. Department of Transp., Bureau of Driver Licensing, 623 A.2d 925 (Pa. Cmwlth. 1993) (licensee’s delay of eleven days, upon becoming aware of the necessity to petition for leave to appeal *nunc pro tunc*, failed to show reasonable diligence).

With respect to count two, charging noisy and/or disorderly operations, the ALJ found that on June 9, 2013, police officers were dispatched to control a crowd of approximately two hundred (200) people who were exiting the licensed premises and gathering in the parking lot. The officers observed a man bleeding and showing signs of intoxication. According to Licensee's security guards, the man had been injured in a fight. [Finding of Fact No. 1]. On June 18, 2013, an officer was dispatched to the licensed premises for a report of a stabbing and, upon arrival, found the victim covered in blood and yelling loudly. Medical personnel eventually arrived to treat the victim. Licensee's bartender told police that the man had been stabbed prior to entering the establishment and that he had struck her when she tried to get him out of the bar. [Finding of Fact Nos. 2, 3]. On September 29, 2013, while on patrol an officer observed approximately twenty (20) to thirty (30) people loitering in the parking lot of the licensed premises. Many of them returned inside the establishment upon request to vacate the area. The officer also heard loud music emanating from the establishment at a distance of eighty (80) to ninety (90) yards. [Finding of Fact Nos. 10, 11]. On February 2, 2014, officers responded to a shooting and, upon arrival outside the licensed premises, found a man with multiple gunshot wounds. While

tending to the victim, the officers were attacked by a crowd that had exited the licensed premises, requiring multiple units to provide assistance. [Finding of Fact Nos. 25-30]. These findings were amply supported by the testimony of officers of the Pottstown Police Department. Thus, there was substantial evidence² to sustain the charge that Licensee's operation led to noise and disorder of a relatively routine and continuous nature, causing a disturbance to the community.³

Accordingly, for the foregoing reasons, Licensee's petition for leave to appeal *nunc pro tunc* is dismissed.⁴

² The Board's review of an appeal must be based solely on the record before the ALJ; the Board may only reverse the decision if the ALJ committed an error of law or abuse of discretion, or if his decision was not based upon substantial evidence. [47 P.S. § 4-471(b)]. The Commonwealth Court has defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984).

³ The courts have held that noisy and disorderly operations by a licensee may constitute a violation of section 471 of the Liquor Code [47 P.S. § 4-471] where there is recurrent noise and disorder of a "relatively continuous nature causing disturbance and effrontery to the public welfare, peace and morals." Appeal of Ciro's Lounge, 358 A.2d 141, 143 (Pa. Cmwlth. 1976). However, a single instance of noisy and disorderly conduct is insufficient to violate section 471. See Banks Liquor License Case, 429 A.2d 1279, 1280 (Pa. Cmwlth. 1981); Banks Liquor License Case, 447 A.2d 723, 724 (Pa. Cmwlth. 1982) ("to be in violation of [section 471], the licensed premises must be operated in a noisy and disorderly fashion on a routine basis").

⁴ For the same reasons, and in the absence of good cause, the Board cannot consider Licensee's untimely Application for Supersedeas. [40 Pa. Code § 17.31(b)].

ORDER

The petition for leave to appeal *nunc pro tunc* of Licensee is dismissed.

The Adjudication and Order of Administrative Law Judge Tania E. Wright, mailed July 9, 2015, remains in effect.

Licensee has paid the fine of three thousand seven hundred dollars (\$3,700.00).

IT IS FURTHER ORDERED, that the Club Liquor License of Montgomery Lodge No. 1271 I.B.P.O.E of W., License Number C-5210 (including all permits and Licensee Discount Card), be suspended for a period of sixty-five days BEGINNING at 7:00 a.m. on Monday, October 19, 2015 and ENDING at 7:00 a.m. on Wednesday, December 23, 2015.

Licensee is directed on Monday, October 19, 2015 at 7:00 a.m. to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised if a replacement placard is needed for any reason they are available at all Pennsylvania Liquor Stores/Fine Wine and Good Spirits stores.

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

Board Secretary