

Mailing Date: September 2, 2015

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 14-1372C
ENFORCEMENT	:	
	:	
	:	
v.	:	
	:	
BUDDY CLARKE'S TAVERN, INC.	:	License No. R-13323
1604 Clay Avenue	:	
Dunmore, PA 18509-2106	:	LID 49881

Counsel for Licensee: Mark J. Conway, Esquire (on appeal)
502 South Blakely Street
Dunmore, PA 18512-2237

Counsel for Bureau: Craig A. Strong, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
2936 Airport Road
Bethlehem, PA 18017

OPINION

Buddy Clarke's Tavern, Inc. ("Licensee") appeals from the Adjudication and Order of Administrative Law Judge ("ALJ") Felix Thau mailed June 12, 2015, wherein the ALJ sustained Citation No. 14-1372C ("Citation") and ordered Licensee to pay a fine of three thousand dollars (\$3,000.00) and to become compliant with the Pennsylvania Liquor Control Board's ("Board") Responsible Alcohol

Management Program ("RAMP"), outlined in section 471.1 of the Liquor Code [47 P.S. § 4-471.1]. Having reviewed the Notes of Testimony from the hearing held on May 6, 2015, the Adjudication and Order, as well as Licensee's appeal, and the Pennsylvania State Police, Bureau of Liquor Control Enforcement's ("Bureau") reply, the Board affirms the decision of the ALJ.

The Bureau issued the Citation to Licensee on July 16, 2014, setting forth the following charge:

1. On June 21, 2014, you, by your servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, nineteen (19) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1).

[Ex. C-2]. A hearing was held on May 6, 2015, in which Craig A. Strong, Esquire, appeared as counsel for the Bureau. Licensee did not appear or present any evidence, despite having been notified of the hearing by way of first class and certified mail sent on March 18, 2015. By Adjudication and Order mailed June 12, 2015, the ALJ sustained the charge and imposed a fine of three thousand hundred dollars (\$3,000.00). The ALJ also ordered Licensee to become RAMP-compliant for one (1) year from the date of the Bureau of Alcohol Education certification. Licensee filed an untimely *pro se* appeal to the Board on July 15, 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 (Pa. Cmwlth. 2008). 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 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 rule set forth in Bass was further clarified 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 the instant matter, Licensee has based its appeal on (1) its inability to obtain counsel in time, (2) Mr. Clarke's inability to attend the hearing along with his lack of knowledge as to what to do, (3) a family member's hospitalization at the time of the issuance of the citation, (4) the failure of the employee who served the minor "to do the math," along with his denial of the remark "18 is good enough," and (5) the financial hardship of the imposed fine upon Mr. Clarke's family. None of these satisfy the factors under the Cook test.

The first and most important factor is whether the failure to meet the deadline of the appeal was because of extraordinary circumstances or non-negligent conduct. Mr. Clarke's assertions of his inability to find counsel and/or to attend the hearing with sufficient knowledge constitute negligent conduct on his part. While the Board is sympathetic to a family member's hospitalization in June 2014, when the Citation was issued, it is not relevant to Licensee's failure to appear at the hearing in May 2015 or to its untimely appeal of the decision of the ALJ issued pursuant to that hearing. Licensee's assertion that the employee who furnished alcohol to the underage buyer miscalculated his age is neither a defense to the violation nor a basis for an appeal. Lastly, any financial hardship due to a lawful fine is not a valid basis for appeal herein. Licensee's untimely filing can be attributed only to negligence. Additionally, there is an absence of any extraordinary circumstances to meet the first prong of Cook.

With the failure to meet the first factor, the remaining factors as to time and prejudice need not be fully addressed. But, in brief, Licensee was notified of the issuance of the Citation and of the date set for the hearing; it chose not to respond. Once the Adjudication was mailed, Licensee failed to comply with the requisite time periods set for appeal and has neither enumerated nor substantiated any valid

reasons upon which to base its appeal. Finally, as to the factor of prejudice in Cook, arbitrarily extending the time periods of an appeal would ignore the will of the Legislature, and result in the inconsistent enforcement of procedures within the Liquor Code. The statutory deadline for appeals cannot be ignored or suspended. In light of the aforementioned, the Board does not have authority to entertain Licensee's untimely appeal.

Assuming arguendo that Licensee had timely filed its appeal, there is no substantive merit to the appeal. Pursuant to section 471 of the Liquor Code, the appeal in this case 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). Furthermore, the Pennsylvania Supreme Court has defined an abuse of discretion as "not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the

judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.” Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 297, 602 A.2d 1300, 1305 (1992) (citations omitted).

The record is clear from the testimony of the Bureau officers that on June 21, 2014, Licensee’s bartender served an alcoholic beverage to a nineteen (19)-year-old minor who was there as part of an Age Compliance Check Program detail, in violation of subsection 493(1) of the Liquor Code [47 P.S. § 4-493(1)]. (N.T. 8, 10). The underage buyer ordered a Yuengling Lager draft from the bartender, who requested his identification. (N.T. 10, 18). The minor produced his valid Pennsylvania junior driver’s license, after which the bartender served him the beer and charged him for it. (N.T. 10). Additionally, the underage buyer testified as to the transaction, stating that the bartender commented that “over 18 is good enough.” (N.T. 14). Following the minor’s departure, Licensee’s bartender was informed about the unlawful sale by a Bureau officer. (N.T. 11, 18).

In reliance upon the testimony presented, the ALJ rendered his decision and imposed a fine of three thousand dollars (\$3,000.00), which is well within the limits set forth in section 471(b) of the Liquor

Code [47 P.S. § 4-471(b)]. Pursuant to section 471(e) [47 P.S. § 4-471(e)], the ALJ also mandated compliance with RAMP for a period of one (1) year. Neither the finding of the ALJ nor the sentence imposed is an abuse of discretion or a misapplication/error of law.

In its appeal, Licensee has failed to set forth any evidence in support of an abuse of discretion and/or an error of law on the part of the ALJ in sustaining the citation of providing liquor to a minor. Further, Licensee does not dispute that the sale to a minor occurred, but uses it as a basis for appeal, qualifying that the employee/friend of Licensee failed “to do the math” in serving the minor.

Accordingly, for the foregoing reasons, the Adjudication and Order is affirmed, and the appeal of the Licensee is dismissed.¹

¹ The application for supersedeas is dismissed as moot.

ORDER

The appeal of Licensee is dismissed.

The application for supersedeas is dismissed.

The decision of the ALJ is affirmed.

Licensee has paid the fine of three thousand dollars (\$3,000.00).

The requirement that Licensee comply with the provisions of section 471.1 of the Liquor Code, pertaining to the Responsible Alcohol Management Program, remains in effect. Licensee shall receive RAMP certification within ninety (90) days of the mailing date of this Order.

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

Board Secretary