LICENSE APPEAL COMMISSION
CITY OF CHICAGO

8258 Halsted Food & Liquors	)	
Ramadan M. Itayem, President	)	
Licensee/Revocation	)	
for the premises located at	)	
8258 South Halsted	)	
	)	Case No. 08 LA 17
v.	)	
	)	
Department of Business Affairs & Licensing	)	
Local Liquor Control Commission	)	
Mary Lou Eisenhauer, Acting Director	)	
	)	
	)	

ORDER

CHAIRMAN FLEMING'S OPINION JOINED BY COMMISSIONER SCHNORF

The licensee received a Notice of Hearing in connection with license disciplinary proceedings regarding the City of Chicago liquor license and all other City of Chicago licenses issues to 8258 S. Halsted Food & Liquors. It was alleged that on August 27, 2007, the licensee, by and through its agents, sold alcoholic liquor on the premises and that he failed to display a current retail liquor license in a conspicuous place in violation of Title 4, Chapter 60, Section 020(a) and Title 4, Chapter 4, Section 210 of the Chicago Municipal Code. It was further alleged that the licensee engaged in the business of a retail food establishment and the sale of tobacco without valid licenses and that the licensee did not display licenses for such activity. These actions also violated the City of Chicago Municipal Code. Deputy Hearing Commissioner Raymond Prosser conducted a hearing on January 10 and 31, 2008. He entered Findings of Fact that the City proved charges 1 through 6 and that revocation on each of the charges was the

appropriate discipline based on the facts of the case and the prior disciplinary history of the licensee.

Mary Lou Eisenhauer, the Acting Director of the Local Liquor Control Commission adopted each of these findings as those of the Department of Business Affairs and Licensing. A timely Notice of Appeal was filed and oral argument was held on August 26, 2008.

Charges 3 through 6 deal with alleged violations of ordinances relating to the sale of tobacco and operation of a retail food establishment without a license and failure to display appropriate licenses. At the onset it should be referenced that it is the opinion of this Commissioner that the Liquor License Appeal Commission of the City of Chicago does not have jurisdiction to enter any decision affirming or reversing the revocations of the retail food and tobacco licenses. While an analysis of the evidence on those charges is necessary to make a decision on the propriety of the revocation of the liquor license, that is the sole purpose in reversing such evidence. This Commission is a creature of the legislature and its jurisdiction is limited to liquor.

Charge 1, alleged a violation of Title 4, Chapter 60, Section 20(a) of the Municipal Code of Chicago which states:

> No person shall sell at retail any alcoholic liquor without first having obtained a city retailer's license for each premises where the retailer is located to sell the same.

The actual language of Charge 1 alleges the licensee, through its agent, sold, offered for sale, exposed for sale or kept with intent to sell at retail alcoholic liquor on the premises without

having a valid City of Chicago retail liquor license. It is the position of the City that this Commission must look to the Illinois Liquor Control Act which defines *sell* as:

> To sell includes to keep or expose for sale and to keep with intent to sell.

The significance of whether the City's position is valid is clear when one reviews the findings of fact of the Deputy Commissioner where he states:

> I reject the licensee's argument that no sales took place because there were, according to Investigator Apostolos' testimony, patrons inside the premises when he entered the Licensee's products were held for sale to patrons.

While not stated specifically this finding suggests that Deputy Commissioner Prosser found there was no evidence of an actual sale of alcohol, food or tobacco in which a customer paid money for such a product. That would be the appropriate finding since there is no evidence of any such transaction between the license and any customer.

A close review of the transcript shows the investigator testified he saw people walk in and out (Tr. 1-10-08, p15). The investigator never used the word patron. Patron as defined in Webster's New College Dictionary as "a regular customer". There is no evidence that the people seen by the investigator were regular customers and no evidence they were customers on August 27, 2007. There was no evidence that the investigator saw any advertisement in the window for sale of alcohol. Such advertisement could be considered circumstantial evidence of an intent to sell on August 27, 2007. There is also evidence that the licenses were paid for prior to the renewal date of August 15, 2007, but that a hold had been placed on the license. That hold was apparently resolved since the licenses were printed on September 22, 2007, for the period of

August 15, 2007, through July 15, 2008. It is clear that the premises were open on August 27, 2007, but that is not the issue. There was no state statute or municipal ordinance preventing the licensee from having liquor, retail food or tobacco on its premises on August 27, 2007. The issue is whether there was substantial evidence in light of the whole record to support the finding that alcohol was sold in violation of the ordinance.

If one takes the definition of a sale as argued by this defense the record is clear no actual transaction in which liquor, retail goods or tobacco was transferred from the licensee to a customer in exchange for money. It is the position of this Commissioner that if one adopts the broader definition of to sell as set out in the Illinois Liquor Control Act there is not substantial evidence in light of the record as a while to support the finding of Commissioner Prosser. This Commissioner is fully aware of the limit on the scope of review and is not reweighing evidence to justify a different result than the finding of Commissioner Prosser. Under the facts in this record the substantial evidence requirement has not been met.

Since the finding as to Charge 2 was based on a finding of a sale of alcohol in Charge 1, there is not substantial evidence in light of the record as a whole to affirm the finding as to Charge 2.

Counts three through six allege violations of the requirements of the retail food establishment and tobacco ordinances. Pursuant to Section 4-4-280 of the Municipal Code a

liquor license can be revoked or suspended for any violation of the Municipal Code or state statute. Based on this section Charges 2 through 6 need to be reviewed since they could form the bases for the revocation of the liquor license. This requires a two-step analysis. The first step is whether those violations, if proved, could be used to justify the revocation of the liquor license. The second step is whether there was substantial evidence in light of the whole record to sustain the charges.

Case law has narrowed the application of 4-4-280 so that its use is limited to matters in which the violations of statutes, ordinances or regulations are fairly related to the control of liquor. Askew vs. Daley, 62 IllApp3d 370374. The premises in this case were described as "A packaged goods liquor store, food store and retail tobacco sales." (Tr. 1-10-08, p10). The fact that a licensee has a liquor license in itself is insufficient to proof that any violation of the retail food or tobacco license is sufficiently related to the control of liquor to justify a suspension or revocation of the liquor license. These are separate licenses and appropriate discipline can be imposed for a violation of the retail food or tobacco license. The first step of the analyses has not been met. If a reviewing court feels that this first step has been met, for judicial economy we will analyze whether the second step has been met. Commissioner Prosser made a finding of fact that the City proved all six charges based on the fact that respondent held his products for sale to patrons. The problem is that the definition of "to sell" from the Liquor Control Act is not applicable to violations of the retail food and tobacco licenses. A similar definition of the term "to sell" under the City of Chicago Municipal Code has been referenced at the initial hearing at the Local Liquor Control Commission or at oral argument. To prove a violation of Counts two

through six there must be proof that an actual transaction took place. There is no such proof in the record. Even if the broad definition of "to sell" is applicable to Counts 2 through 6 the only evidence on the record is that there was retail food and tobacco inventory present in the store and people walked in and out of the store.

This Commissioner again notes he is aware of the relatively law burden required to establish substantial evidence. In this case the City did not meet that burden in light of the whole record.

For all of these enumerated reasons it is the opinion of this Commissioner that there was not substantial evidence in light of the whole record to support the findings of the Local Liquor Control Commission. The revocation of the retail liquor license for 8258 Halsted Food & Liquors is reversed. No decision is made as to the propriety of the revocations of the retail food and tobacco licenses since such a decision is outside the scope of this Commission's jurisdiction.

OPINION OF COMMISSIONER KOPPEL

I concur with Chairman's Fleming's opinion.

IT IS THEREFORE ORDERED AND ADJUDGED That the order revoking the liquor license of the appellant is hereby REVERSED.

Pursuant to Section 154 of the Illinois Liquor Control Act, a Petition for Rehearing may be filed with this Commission within TWENTY (20) days after service of this order. The date of the mailing of this order is deemed to be the date of service. If any party wishes to pursue an administrative review action in the Circuit Court the Petition for Rehearing must be filed with this Commission within TWENTY (20) days after service of this order as such petition is a jurisdictional prerequisite to the administrative review.

Dated: December 17, 2008

Dennis M. Fleming
Chairman

Irving J. Koppel
Member

Stephen B. Schnorf
Member