

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Rafael Zavala, Inc.)
Rafael Zavala, President)
Licensee/Revocation)
for the premises located at) Case No. 10 LA 43
4218 South Archer Avenue)
)
v.)
)
Department of Business Affairs and Consumer Protection)
Local Liquor Control Commission)
Gregory Steadman, Commissioner)

ORDER

OPINION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER SCHNORF

This matter proceeded on an amended notice that a hearing was to be held in connection with license disciplinary proceedings regarding the City of Chicago liquor license and all other City of Chicago licenses issued to Rafael Zavala, Inc., for the premises located at 4218 South Archer Avenue, Chicago, Illinois. This matter proceeded to hearing before Deputy Hearing Commissioner Juliana Stratton on the following charges in the Amended Notice of Hearing:

1. That on or about April 3, 2009, the Licensee, by and through its agent, sold, gave or delivered alcoholic liquor to a person under the age of 21 years, in violation of Title 4, Chapter 60, Section 140 of the Municipal Code of Chicago.
2. That on or about April 3, 2009, the Licensee, by and through its agent, sold or gave or delivered alcoholic liquor to a person under the age of 21 in violation of 235 ILCS 5/6-16 (a)(i).
4. That on or about February 10, 2006, the Licensee was not the beneficial owner of the business operated on the licensed premises, in violation of 235 ILCS 5/6-2 (a)(15).

5. That on February 10, 2006, the Licensee was not the beneficial owner of the business operated on the licensed premises, in violation of Title 4, Chapter 60, 030 (r).
6. That on or about February 10, 2006, a change occurred in the officers, directors, managers or shareholders of the Licensee, and the Licensee failed to notify such changes to the Department of Business Affairs and Consumer Protection, with (30) days of that change, in violation of Title 4, Chapter 60, 060 (c) of the Municipal Code of Chicago.
8. That on or about September 5, 2008, the Licensee engaged, employed, or permitted a person under the age of 21 years to work in or upon the licensed premises where the principal business is the sale of alcoholic liquor, while such premises was open for the sale at retail of alcoholic liquor, in violation of Title 4, Chapter 60, Section 140 of the Municipal Code of Chicago.

The matter was heard on April 16, 2010, May 14, 2010, June 25, 2010, and July 9, 2010. Dan Rubinow and David Frueh represented the City and the Licensee was represented by Jeffrey Deer of the law firm of Deer, Stone & Maya, P.C. Deputy Hearing Commissioner Stratton entered Findings of Fact that the City met its burden of proof on Charges 1, 2, 4, 5, 6 and 8 and further finding in light of the present violations and the Licensee's prior disciplinary history that revocation was the appropriate penalty (Counts 3 and 7 were withdrawn by the City before the end of the hearing). The Licensee filed a timely appeal before this Commission.

Since this case deals with an appeal of a revocation of a liquor license review by this Commission is limited to these questions:

- a. Whether the local liquor control commissioner has proceeded in the manner proved by law;
- b. Whether the order is supported by the findings;

- c. Whether the findings are supported by substantial evidence in light of the whole record.

A review of the applicable sections of the State Statute and the Municipal Code will aid in understanding this decision.

235 ILCS (a)(i) states in relevant part that “No licensee nor any officer, associate, member, representative, agent or employee of such licensee shall sell, give, or deliver alcoholic liquor to any person under the age of 21 years.”

235 ILCS 5/6-2 (a)(15) prohibits the issuance of a liquor license to “A person who is not a beneficial owner of the business to be operated by the licensee.”

Title 4, Chapter 60, Section 140 (a) of the Municipal Code states that “It shall be unlawful for any licensee or any officer, associate, member, representative, agent or employee of such licensee to sell, give or deliver alcoholic liquor to any person under the age of 21 years.”

Title 4, Chapter 60, Section 030 (r) bars the issuance of a license for the sale of alcoholic liquor to “A person who is not the beneficial owner of the business to be operated by the licensee.”

Title 4, Chapter 60, Section 060 (c) requires that “whenever any changes occur in the officers of the licensee, the licensee shall notify the Department of Business Affairs and Licensing...” This section goes on to explain the notification procedures.

Title 4, Chapter 60, Section 140 states that “It shall also be unlawful for any person licensed pursuant to this chapter to engage or employ or permit any person under the age of 21 to work...upon the licensed premises where the principal business is the sale of alcoholic liquor.”

Tyrone Jackson has been a Chicago Police Officer for 20 years and has been assigned to the SAM unit of the Organized Crime Division for ten years. SAM stands for “Stop Alcohol to Minors” and his duties in that unit include taking minors that are employed by the City of Chicago to liquor license establishments to see if alcohol is being sold to minors at those locations.

He was working in that capacity on April 3, 2009. His shift started at 5:00 p.m. when he met with his partners and Grace Gallegos, the cooperating minor. Prior to leaving the staging area at Homan Square he obtained a \$20.00 bill from the vice control contingency fund and wrote the serial numbers off that bill onto his field notes. He and his partners had Grace Gallegos empty her pockets and put her personal items into a plastic bag. Once it was determined Grace had no personal items on her person he gave Grace the prerecorded \$20.00.

He and his crew drove in a covert vehicle to Zavala's Liquors at 4218 S. Archer. He was dressed in civilian clothes. Grace Gallegos entered the storefront and he followed after 15 to 20 seconds. From a distance of 5 to 7 feet he observed Ms. Gallegos take a six-pack of 16 ounce cans of Budweiser from the beer cooler and go to the checkout line.

Ms. Gallegos placed the six 16 ounce cans on the counter and tendered to the cashier, identified as a Sylvia Pineda, the prerecorded \$20 bill. The \$20.00 bill was put into the cash register and Ms. Gallegos took possession of the beer and \$12.62 in change. He heard no conversation between Ms. Gallegos and Ms. Pineda. He then identified himself as a police officer and retrieved the \$20 bill from the cash register. He returned the \$12.62 in change to Ms. Pineda. The \$20 bill retrieved from the cash register was the same bill previously recorded. He described Budweiser as an alcoholic beer and stated the beer was inventoried pursuant to Chicago Police procedures.

Grace Gallegos was born on April 3, 1991, and was 18 years old on April 3, 2009. She has worked for the Chicago Police on the SAM unit since January, 2009. She was working with the SAM unit on April 3, 2009. She was dressed in civilian clothes and was working with Officer Jackson. Before she left the staging area at Homan Square, she emptied everything out of her pockets in front of Officer Jackson. She put everything into a clear plastic bag and Jackson gave her a marked \$20.00 bill. They went to Zavala's Liquor Store at 4218 S. Archer. She entered the liquor store and Officer Jackson followed. She went to the cooler and got a six-pack of Budweiser. She brought

the beer to the counter and handed the marked \$20 bill to the person located behind the counter. The person behind the counter rang up the sale, bagged the beer and gave her back the change. Officer Jackson then identified himself. The woman behind the counter did not ask what her birthday was, did not ask how old she was and did not ask for I.D. Gallegos did not offer any I.D. Gallegos was 18 years old on the date of this incident but admitted most people think she was older in her 20's.

Michael Panico has been a Chicago Police Officer for about 17 years and has been assigned to the vice control section of the Organized Crime Division for about 11 years. Part of his duties include investigations of licensed liquor establishments. In this position, in September 2008, he was assigned to be part of an investigation into a Zavala's Liquors at 4218 S. Archer. To prepare for this investigation he checked the IRIS computer system used by the City of Chicago for licenses and determined that entity on record as being the sole officer of the corporate entity that held this liquor license was Rafael Zavala. The legal name of the corporation was Rafael Zavala, Inc. It held a packaged goods license, a tobacco license and a limited business license.

He also checked a database called Accurant to determine the deed holder of the property at 4218 S. Archer. The deed holder was then Mr. Pineda and the previous deed holder was Rafael Zavala.

The witness went to the 4218 S. Archer location on September 5, 2008, with his two partners Brian Cavanaugh and Robert Murphy. They were dressed in plain clothes

with police identifiers. He arrived about noon and found the packaged goods liquor store open with the doors unlocked and the lights on. In the presence of his partners the witness spoke to a young lady working behind the counter. Her first name was Guadalupe. In that conversation she said that Mr. Pineda had owned the establishment for approximately two years. As this conversation was ongoing a person entered who identified himself as Mr. Pineda and showed identification. Guadalupe identified the nephew as the manager of the store who could possibly provide information. The nephew was a Edwin Pineda. The witness left a subterfuge letter requesting pertinent documents with Guadalupe who signed for the letter as the agent. The packaged goods license allowed the sale of liquor. There was also tobacco and items like chips. The witness identified City's Exhibit 10, in evidence, which included a picture of the identification card obtained from Edwin Pineda.

In the cause of this investigation the witness spoke with a person named Rafael Zavala on October 16. In this telephone conversation Rafael Zavala stated he had sold the business of Zavala Liquors two years before. Zavala agreed to and did fax the purchase agreement, in evidence as City's Exhibit 11, to the witness. This agreement in essence stated Mr. Pineda was to pay Mr. Zavala \$100,000 with the license remaining in Mr. Zavala's name. An additional \$50,000 was to be paid when the liquor license transferred to Mr. Pineda and Mr. Pineda has closed on the real estate. The license has not transferred from Rafael Zavala to anyone.

City's Exhibit 12, the birth certificate of Edwin Pineda showing a date of birth of August 12, 1990, was allowed in evidence without objection.

Sylvia Pineda was present on April 3, 2009, when a ticket was issued for selling liquor to a minor. She sold the liquor to a woman about 5' 3" that she thought was at least 23. If somebody looks under 21 she asks for the I.D. She did not think it was necessary to ask for an I.D. because she looked over 21.

There has been no argument made that the Local Liquor Control Commissioner did not proceed in the manner provided by law. Respondent had due and adequate notice of the date, time and location of the hearing and of the charges filed against it. Respondent had the opportunity to present evidence and to confront the witnesses testifying against him.

With respect to Charges 1 and 2 alleging a sale of alcoholic beverage to a minor as violations of the applicable sections of the State Statute and Municipal Code the respondent did not assert a defense denying that the alleged sale occurred. Counsel for respondent asserted that there is no state law or City of Chicago Municipal Ordinance that imposes a mandatory obligation to card everyone that does buy liquor. That is a correct statement of the law but that does negate the fact that a sale of alcohol was made to a minor. Counsel also hinted at an entrapment defense based on the fact that the minor looked over 21. Entrapment is a defense in criminal law but this Commissioner is not aware of any case law that would support the position that it is a defense in administrative

hearings. Even assuming it could be a defense the facts in this case would not support an entrapment defense. The City has met its burden of proof in that there is more than substantial evidence in the whole record to support the findings on Counts 1 and 2.

Count 8 alleged that the respondent engaged, employed or permitted a person under the age of 21 to work on the licensed premises where the principal business is the sale of alcoholic liquors. Counsel for the City argued that Edwin Pineda, who was a minor in September, 2008, identified himself to the police as the manager. The transcript shows there was a substantial objection to the question that seemed to be leading to such a statement. No such admission or statement that he was the manager is in the record. The only evidence on this issue comes from a statement from the counter-person, Guadalupe Salazar, that Edwin Pineda was the manager and could answer questions and give contact information. Substantial evidence has been defined very broadly and that standard is met if there is any evidence in the record supporting the finding. Even with very low threshold the City did not meet its burden of proof on this count. There was nothing on the record that defined what the witness meant by the term manager or what responsibilities Edwin had in the running of the store. Without some other evidence, the statement by Guadalupe that Edwin was the manager was not sufficient to meet the substantial evidence standard. The finding as to Count 8 in the Amended Notice of Hearing is reversed.

As set out earlier with the State Statute and the Municipal Code bars the issuance of a liquor license to a person who is not the beneficial owner of the business to be

operated by the licensee. A violation of these laws was alleged in Counts 4 and 5 of the Amended Notice of Hearing. The license of these premises at all times relevant to this case was in the name of Rafael Zavala, Inc. Officer Panico testified Mr. Zavala was the President and Secretary of that corporation and City's Exhibit 6, in evidence without objection, confirmed Mr. Zavala was the President. This information was obtained in his investigation that started in September of 2008.

Officer Panico's investigation of property records revealed a sale of the property at 4218 S. Archer from Mr. Zavala to Ruben Pineda on March 21, 2006. Panico also testified to an October 16 conversation with an individual who identified himself as Rafael Zavala. That individual stated he was not the owner of Zavala Liquors and that he had sold the business approximately two years before. Panico identified City's Exhibit 11, in evidence without objection, as the Purchase Agreement and a cover letter from Mr. Zavala's attorney. (In fact the document is entitled RIDER TO STOCK PURCHASE AGREEMENT, the stock purchase agreement was not placed in evidence) The letter dated August 14, 2008, from attorney Richard Wojnarowski to attorney Robert Weber recites that Mr. Pineda, Weber's client, is trying to secure a liquor license in his own name. That letter adds that Weber's client, Mr. Pineda, has been operating the liquor store using his client's name. The Rider to Stock Purchase Agreement is not dated but it states that Ruben Pineda, the buyer, upon payment of \$100,000 on February 10, 2006, will be allowed to run the liquor store and keep all of the profits until the liquor license is transferred.

While the burden of proof is on the City it should be noted that the Licensee presented no evidence challenging Officer Panico's testimony on the terms of the Rider to Stock Purchase Agreement. The evidence in the record is more than sufficient to prove the allegations in Charges 4 and 5 of the Amended Notice of Hearing.

The City also met its burden relative to the allegations in Count 6 of the Amended Notice of Hearing. While there was no evidence of any formal change in the officers, directors or shareholders of the license the Rider to Stock Purchase Agreement established that on February 10, 2006, the buyer will be allowed to run the liquor store and keep all of the profits. This is evidence that the buyer Ruben Pineda was the manager of the business as of that date and there is no evidence that the Department of Business Affairs and Licensing was advised of this managerial change.

The final issue is whether the order of revocation is supported by the findings. The Deputy Hearing Commissioner did not indicate that the order of revocation was appropriate on each count. This could be troublesome in light of the fact that one of the charges was reversed. The remaining findings on this case make that potential problem immaterial.

Revocation would be an appropriate penalty based only on the sale to a minor. The previous discipline for this Licensee shows four previous sales to minor with penalties from a \$500.00 voluntary fine to a 21-day suspension. Despite the fact that

there has not been a sale to a minor since 2004, revocation for a fifth sale to a minor cannot be seen as so arbitrary and capricious as to require reversal.

The findings on the other counts also justify revocation on themselves. Based on the documents in City's Exhibit 11, Mr. Pineda has been using Mr. Zavala's license since as far back as February 6, 2006. This activity cannot be condoned and revocation would be the only appropriate finding.

The revocation of the liquor license issued to Rafael Zavala, Inc., for the premises located at 4218 S. Archer is affirmed.

COMMISSIONER O'CONNELL'S CONCURRING OPINION

In light of the reversal of Count 8, I am disturbed that the Local continues to omit any reference to whether or not the penalty is appropriate for each count. If the sole remaining charge that upheld had been the SAM, I would be hard pressed in light of the age of the history to find that revocation was not arbitrary and capricious. Having said this, and taking into account all the other charges, I concur with Chairman Fleming's opinion and hope that the Local takes note, once again, of his comments on Page 11.

IT IS THEREFORE ORDERED AND ADJUDGED that the order revoking the liquor license of the APPELLANT is AFFIRMED.

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: February 4, 2011

Dennis M. Fleming
Chairman

Stephen B. Schnorf
Member

Donald O'Connell
Member