

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Rest 'N' Pieces, Inc.)
Sherry A. Michalski, President)
Licensee/Suspension)
for the premises located at)
5652 North Western) Case No. 13 LA 37
)
v.)
)
Department of Business Affairs and Consumer Protection)
Local Liquor Control Commission)
Gregory Steadman, Commissioner)

ORDER

DECISION OF CHAIRMAN FLEMING

The licensee received a Notice of hearing that a hearing would be held pursuant to the Municipal Code of Chicago 4-4-280 and 235 ILCS 5/7-5 with respect to license disciplinary proceedings regarding the City of Chicago Retail Liquor License and all other City of Chicago licenses issued to it for the premises located at 5652 N. Western, Chicago, Illinois. This hearing was based on the following charges:

1. That on January 21, 2012, the licensee, by and through its agent, while on the licensed premises, knowingly owned or possessed a book, instrument or apparatus by means of which bets or wagers had been recorded or registered, in violation of 720 ILCS 5/28-1(a)(5).
2. That on or about January 21, 2012, the licensee, by and through its agent, while on the licensed premises, possessed gambling materials, in violation of the Municipal Code of Chicago 8-12-020.
3. That on or about January 21, 2012, the licensee, by and through its agent, owned, maintained or managed premises used for the purpose of permitting persons to gamble for any valuable thing, in a book, instrument or apparatus by means of which bets or wagers had been recorded or registered, in violation of Municipal Code of Chicago 8-12-030.

4. That on or about January 21, 2012, the licensee by and through its agent, maintained a public nuisance on the licensed premises in violation of 720 ILCS 5/37-1, in that the premises were used for the commission of violation of 720 ILCS 5/28-3, to wit: keeping a gambling place.

This matter proceeded to hearing before Deputy Hearing Commissioner Raymond Prosser. He entered Findings of Fact that the City sustained its burden of proof on all four counts and further found in light of the facts of this case, the sustained charges on this case and licensee's prior disciplinary history, that a 7-day Suspension concurrent on all charges to be appropriate. The licensee filed a timely appeal with this Commission.

RELEVANT STATUTES AND ORDINANCES:

720 ILCS 5/28-1(a)(5) -

- (a) A person commits gambling when he or she:
- (b) Knowingly owns or possesses a book, instrument or other apparatus by means of which bets or wagers have been, or are, recorded or registered, or knowingly possesses any money which he has received in the course of a bet or wager.

8-12-020 of the Chicago Municipal Code –

No person shall either publicly or privately, as owner or agent, establish, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of any lottery, policy, or scheme of chance described in the previous paragraph; nor shall any person be in any way concerned in any such lottery, policy, or scheme of chance.

The previous paragraph referred to in the above ordinance states:

No person shall sell, offer for sale, barter, exchange, give away, or in any way dispose of or redeem any ticket, order, slip, or device of any kind for or representing any number of shares or any interest in any lottery, policy, or scheme of chance of any kind or description by whatever name, style, or title the same may be denominated or known, and whether located or drawn, or to be drawn, paid, or carried on within or without the limits of the city, or whether such purported drawings be real or imaginary.

Section 8-12-030 of the Chicago Municipal Code –

Every house, room, yard, boat, vessel, or other structure or premises kept or used for the purposes of permitting persons to gamble for any valuable thing within the city is declared to be a common nuisance.

720 ILCS 5/28-3 –

Sec. 28-3. Keeping a Gambling Place – A “gambling place” is any real estate, vehicle, boat or any other property whatsoever used for the purposes of gambling other than gambling conducted in the manner authorized by the Riverboat Gambling Act or the Video Gambling Act. Any person who knowingly permits any premises or property owned or occupied by him or under his control to be used as a gambling place commits a Class A misdemeanor. Each subsequent offense is a Class 4 felony. Whenever any premises is determined by the circuit court to be a gambling place:

(a) Such premises is a public nuisance and may be proceeded against as such

SYNOPSIS OF THE RECORD

Steven Lugo has been a Chicago Police Officer for 14 years and has been assigned to the License Investigation Unit for three years. On January 21, 2012, at about 10:40 p.m. he was on duty and went to Sherry’s Tavern, also known as Rest ‘N’ Pieces, Inc., at 5652 North Western to conduct a license investigation. It has a tavern and a retail food license. When he entered, he noticed several patrons and a female bartender. The interior is a standard tavern with a long bar area on the north wall and pub tables on the south wall.

The witness and his team conducted a premise check which found six sheets broken down into squares with names on the squares. The squares had names and dollar amounts were written on notebook pad sheets. These documents were inventoried and were in evidence without objection as City’s Group Exhibit 4.

The large sheets contain the squares and the notebook sheets contain names and dollar amounts. The names on those small sheets of paper correspond to the names on the larger sheets of paper. In his opinion, these are ledgers kept for money received for the square for the gambling pool. Typically, sheets are broken down by points, or quarters, or both and the participants put their names down inside the squares. If the points coincide with their name, they are paid out on their bet. The initials on some of the sheets of AFC and NFC are for American Football Conference and National Football Conference. These items were found near the registers behind the bar. The officer did not find any money and did not witness any payouts. The sheets reflect wager amounts but nothing shows anybody was paid. The officer did not know if the sheets were in a drawer or on the counter, and did not know if the yellow sheets and larger paper were together. None of the larger sheets have dates on them.

The City rested its case.

Sherry Michalski has owned Sherry's Bar, Rest 'N' Pieces, for six years. She was present when the police conducted an investigation on January 21, 2012. The small sheets identified by the police officer were found in a drawer. The witness looked at those sheets and testified she had no idea what they were. The big sheets were also recovered from a drawer in the bar. She has no idea what those sheets represent. She has never conducted football pools or betting at her establishment. She did not hold money, pay anybody out, or collect money for the wagers on those sheets. She asked her employees and they had no clue. She never went through those drawers in the six years she owned the bar. The first time she saw those documents were when the police were digging through the drawers.

The witness is the sole owner of the business and she works the bar from 11 a.m. until 2 a.m., five days a week. It is a small place that she works alone. She has two employees that work Sundays and Mondays. She does not know what drawer the documents were in when the police searched the establishment.

Since this is an appeal from a suspension of a liquor license, the review by this License Appeal Commission is limited to the questions:

- a. Whether the local liquor control commissioner has proceeded in the manner provided 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.

There was no argument presented in this case as to whether the Local Liquor Control Commissioner proceeded in the manner provided by law.

The substantial evidence standard applied to these cases has been interpreted broadly so that a case must be affirmed if there is any evidence that supports the finding of the Deputy Hearing Commissioner and Local Liquor Control Commissioner. In reviewing these cases and reviewing this case, one must be aware of the distinction between evidentiary findings and the effect of those findings with respect to conclusions of law. The fact there is substantial evidence about the facts of this case does not automatically mean those facts proved issues in controversy.

There is substantial evidence in the record as a whole to affirm the findings of the Deputy Hearing Officer as to Charge 1. The police officer testified in his opinion that the large sheets

reflected the numbers for the squares and the initials AFC and NFC stood for American Football Conference and National Football Conference. His opinion was that the small sheets reflected the names of the bettors and the amounts of the bet. It was a question of credibility as to whether the Deputy Hearing Officer believed the opinion of the police officer or the testimony of the licensee. This Commission will not reverse and cannot reverse even if it disagreed with the credibility finding. For what it is worth, this Commissioner would agree with the credibility finding. The decision as to Charge 1 is affirmed.

The finding as to Charge 2 must be reversed. Section 8-12-020 is entitled Lottery and Policy Games. Possession of gambling materials as alleged in Count 2 is not a violation of 8-12-020. The section of 8-12-020 referenced by the Deputy Hearing Commissioner does not include a violation for possessing gambling materials.

The City failed to prove by substantial evidence the allegation in Charge 3. While there is more than substantial evidence that the documents were found in a drawer in the tavern, that is not evidence that the tavern was being used as a place permitting persons to gamble. There is no evidence of anyone filling out a square or paying money for a square. That is the type of evidence needed to prove the licensee permitted persons to gamble in the tavern.

The City also failed to meet its burden of proof on Charge 4. As in Charge 3, there is no evidence in the record that gambling was being conducted in the tavern. That evidence is needed to prove the tavern was a “gambling place” under the state statute.

The final issue is whether the seven day suspension is supported by the affirmed finding on Charge 1. The Deputy Hearing Officer found that a seven day suspension concurrent on all charges was the appropriate disposition. The finding was based on the facts of this case, the other sustained charges, and the licensee's disciplinary history. While it might be argued that since there are no longer any other sustained charges, a seven day suspension is excessive, that is not the standard that would justify an outright reversal of the 7-day suspension. While it might be the personal beliefs of this Commissioner that a jump from a \$500.00 fine for a gambling charge in July of 2000, about six years before Sherry Michalski bought the corporation to a seven day suspension is excessive, it is not so arbitrary and capricious as to require reversal.

The seven day suspension of the retail liquor license issued to Rest 'N' Pieces, Inc., for the premises located at 5652 North Western is affirmed.

COMMISSIONER O'CONNELL'S CONCURRING OPINION JOINED BY
COMMISSIONER SCHNORF

This Commissioner agrees with the Chairman that the City met its burden of proof in Charge 1, and that the City did not meet its burden on Counts 2, 3, and 4.

The remaining issue is whether the seven day suspension should be affirmed. The Local Liquor Control Commissioner has broad authority in issuing discipline but that power cannot be upheld if the discipline imposed is arbitrary and capricious. That decision must be determined after a review of the rationale stated by the Deputy Hearing Commissioner on his or her Findings of Fact. In this particular case, the Deputy Hearing Commissioner found a seven day suspension

for Count 1 was appropriate based on the facts of this case, the other sustained charges, and the licensee's prior disciplinary history.

The Deputy Hearing Commissioner did not explain what it was about the facts of this case that led him to find a seven day suspension was appropriate. It seems to this Commissioner that the facts of a case are the basis for a finding that a violation of the ordinance or statute occurred, but these facts, in themselves, should not be a basis to determine the severity of the discipline. This might not be true in cases when the facts show conduct on the part of the licensee that is so shocking that it should be considered in assessing a penalty. The facts in this case are that documents suggesting the existence of a football pool were found on the premises. This is hardly a shocking event since, as the Deputy Hearing Commissioner noted, the date of seizure was during the football playoffs. It would be helpful in these cases and would have been helpful in this case for the Deputy Hearing Commissioner to explain how the facts of this case impacted his recommendations on discipline.

The second basis for recommending a seven day suspension is the prior disciplinary history of the licensee. The sole discipline imposed on this corporation was a \$500 voluntary fine for a Gambling case from July 17, 2000. Since Sherry Michalski owned this corporation for six years when she testified in July of 2013, that previous event took place seven years before she took control of the corporation. That means she has operated the bar without any disciplinary matters for six years.

This Commissioner is aware that Sherry bought this previous disciplinary history when she purchased the corporation, but feels that the Deputy Hearing Commissioner should have explained why the past disciplinary history supports a jump in discipline from a \$500 voluntary fine to a seven day suspension.

The final rationale for the seven day suspension on Count 1 were the facts of other sustained charges in this case. Since this Commission has reversed the findings on the other three counts, this rationale cannot stand to support the seven day suspension.

This case is one that should be remanded to the Local Liquor Control Commissioner for a more appropriate penalty. This Commission feels that even if all charges were proven, the fact that all the charges arise from one particular event combined with the lack of poor disciplinary history would not provide a basis for a seven day suspension. Since this Commission cannot remand, the issue is whether the seven day suspension is so arbitrary and capricious that it must be reversed.

This Commissioner feels proper punishment in this case would have been a fine or possibly a one day closing. The Deputy Hearing Commissioner failed to explain his reasons for the seven day suspension. This makes it more difficult to assess whether the suspension is arbitrary and capricious. While other cases have come close, this case is as close to being arbitrary and capricious as any case presented to this Commission since I have served as a Commissioner. With regret, I must find that the previous discipline for gambling 13 years ago

resulting in a \$500 voluntary fine is sufficient to avoid any finding that the seven day suspension is so arbitrary and capricious as to require reversal.

I would urge any reviewing court to reverse this decision and remand this case to the Local Liquor Control Commissioner to render a different discipline.

IT IS THEREFORE ORDERED AND ADJUDGED That the order suspending the liquor license of the Appellant for SEVEN (7) days 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: June 20, 2014

Dennis M. Fleming
Chairman

Stephen B. Schnorf
Member

Donald O'Connell
Member