LICENSE APPEAL COMMISSION
CITY OF CHICAGO

JB at Clybourn, Inc. David Casey, President Licensee/Suspension for the premises located at 2142 North Clybourn Avenue v. Department of Business Affairs and Consumer Protection Local Liquor Control Commission Gregory Steadman, Commissioner	)))))))))))	Case No. 14 LA 13

ORDER

DECISION OF CHAIRMAN FLEMING

Licensee received a Second Amended Notice of Hearing advising a hearing was to be conducted pursuant to 235 ILCS 5/7-5 and Section 4-4-280 of the Chicago Municipal Code, in connection with disciplinary proceedings regarding the City of Chicago Liquor License and all other licenses issued to it for the premises located at 2142 North Clybourn Avenue.

The Second Amended Notice alleged that:

1. On or about October 28, 2012, the licensee, by and through its agent, allowed the number of persons in the licensed premises to exceed the occupancy limit certified by the buildings commissioner, in violation of the Municipal Code of Chicago 13-36-020.

2. That on or about January 31, 2013, the licensee, by and through its agent, sold alcoholic liquor as its primary activity, and not as an activity incidental or secondary to the primary activity at the premises, at a time when the licensee held a “consumption on premises- incidental activity” license and did not hold a “tavern” license, in violation of Municipal Code of Chicago 4-60-020(a) and 4-60-010.

3. That on April 4, 2013, the licensee, after notice of a public hearing regarding revocation of its license had been served, failed to make books and records available for the purpose of investigation and control by the Local Liquor Control Commission, in violation of Municipal Code of Chicago 4-4-280.

A hearing was held on these charges before Deputy Hearing Commissioner Raymond J. Prosser. He entered Findings of Fact that sustained all three charges and further found in light of each individual charge and the other sustained charges in this case, that a fourteen (14) day concurrent suspension was appropriate punishment. Those Findings of Fact were adopted by Gregory Steadman, Local Liquor Control Commissioner, and Maria Guerra Lapacek, Commissioner of the Department of Business Affairs and Consumer Protection. The licensee filed a timely appeal with the License Appeal Commission.

The Findings of Fact indicate there were hearings on September 13, 2013, October 28, 2013, and February 10, 2014. The record contains transcripts of proceedings for September 30, 2013, October 28, 2013, and February 10, 2014. The parties also agreed to the Admission of a Bystander's Report prepared by the Deputy Hearing Commissioner. That Bystander's Report reflects the September 13, 2013 date of hearing in the Findings of Fact was an error. For purposes of setting out the relevant testimony in this case, this decision will review the actual transcripts and then the Bystander's Report.

Tommy Richardson has worked for the Chicago Fire Department for 31 years and holds the rank of Lieutenant. He has been assigned to the Fire Prevention Bureau for eleven years with the responsibility of enforcing city codes or violations, fire inspections, and commercial

properties. He was assigned to conduct an investigation of the licensee at 2142 N. Clybourn on October 28, 2012. He responded to a call with a complaint of overcrowding. He arrived at approximately 12:15 am and met with Chicago Police and the manager of the lounge, Benjamin Dan. They met in front of the facility and the Sergeant gave a count of 351.

Lieutenant Richardson entered the open premises and found it difficult to move around due to overcrowding. He checked the occupancy placards which showed a total occupancy of 323. The licensee was told he was over the crowd occupancy and the licensee was given twenty minutes to reduce the crowd. When the crowd was not reduced, the Lieutenant was told by his supervisor to shut the premises down.

Chicago Fire Department personnel were assigned to the front and rear exits with counters. The witness himself was at the rear exit. As a patron would leave, they would click the counter. At the end when all patrons were out of the premises, the count for the front and rear door was 407. That was how many people exited the premises. The count for the rear exit was 200, and 207 for the front exit.

Lieutenant Richardson secured all the exits which consisted of the front and rear exit. He counted all the persons at the rear. He excluded from his total count workers, but did not segregate anyone who were pub crawlers and only passing through the premises.

Craig Golucki has been a Chicago Police Officer for 22 years and has been assigned to the Vice Licensing Unit for three years. This unit investigates licensed businesses in the City to determine whether they are operating within the scope of their business license. He conducted an investigation of the establishment located at 2142 N. Clybourn, doing business as, The Linkin House. The corporate name is JB at Clybourn Incorporated, and it has a retail food license and consumption on premises license. The investigation was on January 31, 2013, and was conducted in covert manner by the witness and his partner Officer Lugo. They arrived about 11:30 pm and the premise was open and operating. He asked the bartender for a menu to order food and the bartender stated the kitchen was closed. He saw no one serving food to patrons and saw no patrons eating food. The tables had no condiments or eating utensils.

The facts in this paragraph come from the Bystander's Report. The City, without objection, was allowed to introduce into evidence City's Exhibit 5, the Second Amended Notice of Hearing, as a charging document. Barbara Gressel testified she has been with Business Affairs and Consumer Protection for fifteen years and holds the position of Deputy Commissioner for Prosecution and Adjudication. She identified City's Exhibit 6, in evidence without objection, as a copy of the Notice to Produce Business Records which was sent to licensee. The notice was served on April 4, 2013, and production of sales receipts and invoices regarding food and liquor sales were required by April 15, 2013. She never received documents responsive to the notice. The notice was sent out by Assistant Corporation Counsel Noel Quanbeck, but she did not know if it was sent by certified mail. She is not the Deputy Liquor Commissioner, but she has the authority to request these books and records. She never received any documents from the licensee.

The City rested its case.

Patrick McGary was employed as the licensee's Assistant General Manager on January 31, 2013. On October 28, 2012, the total occupancy for the establishment at 2142 N. Clybourn was 323. It had three separate occupancy placards. The first level was for 180, the second level for 50, and 183 for the lower level. There is usually anywhere from 22 to 30 employees. October 28 was Halloween weekend. They used two separate checkers. Once was for patrons entering and one for patrons leaving the establishment. If one of the counters read 351, it would not be indicative of what was in the establishment because a number of people would have left. He was present on October 28 when members of the Fire Department and Police Department showed up. He did not have any conversations with any of these officers and was not asked to reduce the number of patrons.

Mr. McGary testified that food was ordinarily and regularly available for service at this location. If someone asked for a burger, they would receive one. It has an extensive restaurant menu.

In the month he has been General Manager and the year and a half he served as the Assistant General Manager, he and the establishment did not receive notice from the City to produce documents. He recently saw a copy of an order to produce.

On October 28 there was word the police suggested they close. The counters used by the licensee were available for inspection by the police and fire but no one asked to see them.

The witness was not working the door on October 28, 2012. The Police and Fire did not speak with him but he does not know if they asked someone else to reduce occupancy. He was working on January 31, 2013, and the kitchen was closed at 1:45 am. He does not know why Officer Golucki could not order food at 11:30 pm. Benjamin Dan picks up the mail at the establishment and the witness does not know whether Mr. Dan received an order to produce books and records.

Since this case deals with an appeal of a suspension, the review by the License Appeal Commission is limited to the following 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.

The first issue to be addressed is whether the local liquor control commissioner has proceeded in the manner provided by law. This issue arises in this case due to the licensee's argument that the local liquor control commissioner did not proceed in the manner provided by law since there was no subject matter jurisdiction to allow a prosecution for an occupancy violation. The licensee's position is that prosecution of overcrowding are to be brought under Section 2-36-310 of the Municipal Code of Chicago. It is their further argument that the penalty for violating 2-36-310 is a fine between $200 and $500 pursuant to 13-36-070.

As the Deputy Hearing Commissioner noted in his Findings of Fact, this matter was brought before the Local Liquor Control Commission pursuant to 4-4-280 of the Chicago Municipal Code. In relevant part, 4-4-280(a) empowers the Mayor to fine a licensee and/or to suspend or revoke any license for good or sufficient cause if the issuing department determines the licensee, or its employee or agent, has violated any provision of the code or any rule or regulation promulgated thereunder or any applicable state or federal law. Section 4-4-280(b) states specifically "In the event the Mayor designates a local liquor control commissioner, said local liquor control commissioner shall exercise the power of the mayor set forth in subsection (a) of this section with respect to liquor licenses."

The Local Liquor Control Commissioner had the authority to bring this matter at the Local Liquor Control Commission and had the jurisdiction to hear this case. He proceeded in the manner provided by law.

The next issue is whether the findings are supported by substantial evidence in light of the whole record. Substantial evidence is very low burden of proof and has been defined by case law to be satisfied if there is any evidence in the record supporting the findings of the Deputy Hearing Commissioner.

There was no dispute in the record that the occupancy allowed was 323. Testimony of a count done by the Chicago Police on the scene showed 351 occupants was allowed in evidence without objection from the licensee. There was cross-examination of Lieutenant Richardson on this testimony. Lieutenant Richardson then testified the Fire Department's count of 407 was

several minutes later and after the licensee was given a chance to empty the premises. The testimony from Mr. McGary on the use of two counters and what a count of 357 actually meant was confusing and did not support a position that the occupancy was in compliance with Municipal Code.

This evidence in the record clearly meets and exceeds the substantial evidence requirement as to Charge 1. The finding of the Deputy Hearing Commissioner as to Charge 1 is affirmed.

The evidence in the record with respect to Charge 2 was conflicting. Officer Golucki testified that on January 31, 2013 at 11:30 pm, he was told the kitchen was closed. He also saw no other patrons have food, no dinnerware on the tables, and no condiments. In the hour he was present, he saw no food served. Mr. McGary rebutted this testimony by stating food was ordinarily and customarily available and if someone asked for a burger they would receive one. This conflict in testimony was resolved by the Deputy Hearing Commissioner's specific finding that Officer Golucki was credible and Mr. McGary's generalized testimony was unbelievable and insufficient to rebut Officer Golucki's testimony. It is not the province of this Commissioner to reweigh the findings of credibility made by the Deputy Hearing Commissioner. The evidence, while in conflict, is sufficient to meet the substantial evidence burden of the factual finding that Officer Golucki could not order food, that the kitchen was closed for the night, that no patrons had food, that there was no dinnerware on the tables and no condiments, and no food was served during the hour he was present.

The question now becomes whether these findings are sufficient to find a violation of Municipal Code 4-60-10 and 4-60-020(a). Section 4-60-10 defines Consumption on Premises – incidental activity as a city license for the retail sale of alcoholic liquor for consumption on the premises at a place of business where the sale of alcohol is incidental or secondary to the primary activity of such place of business. Section 4-60-020(a) states "No person can sell at retail any alcoholic liquor without first having obtained a city retailer's license for each premise where the retailer is located."

As a matter of law, this Commissioner finds that the licensee did not violate 4-60-020(a) of the Municipal Code. They had a city retailer's license and the record contains no evidence to the contrary. The issue then becomes was there a violation of the Consumption on Premises – Incidental Activity license?

There is no definition of the term "incidental" in the Municipal Code and no rules or regulations that can be relied on the interpretation of what makes the sale of liquor primary over the sale of food. If one sells more alcohol then food in a two hour period, has the ordinance been violated? Is the ordinance violated if no patrons are eating but food is available? Must the kitchen be open until closing? Counsel for the licensee stated in his closing argument that "the ordinance requires that they b--meals ordinarily and regularly served." This Commissioner did not find this definition in Section 4-60-010 of the Municipal Code. While this view of the ordinance may be a reasonable interpretation, it is not set out definitively in the Municipal Code. It is no more reasonable a view that the City's position that being open at 11:30 pm with the kitchen closed is a violation of the ordinance for that specific factual situation.

A reviewing court may find as a matter of law that the factual situation is not a violation of this section of the Municipal Code. In that scenario, the question of substantial evidence would not need to be addressed.

Without guidance from the City Council, State Legislature, or the Courts as to how to define "incidental" in this scenario, it becomes a factual issue. While this Commissioner may personally feel this fact situation does not present a violation of 4-60-010, there is substantial evidence in the record as a whole to require that this finding be upheld. Charge 2 is upheld with respect to its allegation of a violation of 4-60-010.

The evidence in the record as to Charge 3 which was taken from the Bystander's Report is uncontradicted. City's Exhibit 6 was allowed in evidence without objection. It contains a proof of service by mail signed and certified by Assistant Corporation Counsel Noel Quanbeck that it was mailed on April 4, 2013. The records were to be produced by April 15, 2013. No records were delivered. The licensee's witness did not know if Mr. Benjamin Dan, the person responsible for picking up the mail, received an order to produce books and records. There is more than substantial evidence in the record as a whole to affirm the findings of the Deputy Hearing Commissioner on Charge 3.

Since the findings are supported by substantial evidence, the next issue is whether the order of a 14-day concurrent suspension on the charges is supported by the findings. Unlike many other cases, the Deputy Hearing Commissioner did not have any evidence of past discipline in the record. There is also no mitigation evidence showing how long the licensee has

operated these premises without disciplinary history. The over occupancy charge is certainly serious but there is no evidence in the record that the licensee refused to cooperate with the Fire Department. The failure to have a kitchen open at 11:30 pm is not the type of ordinance violation that this Commissioner would find merited a 14-day suspension. The record also contains no evidence that the failure to produce the requested records in some way frustrated an investigation of the licensee.

While this Commissioner personally feels that a 14-day suspension concurrent on these charges is excessive, that is not the standard that is under review. Section 280 allows for the fine, suspension, or revocation of a liquor license for any violation of a city ordinance. Fourteen days might be excessive, but it is not so unconscionable as to justify an outright reversal. The 14-day suspension concurrent on all three charges is affirmed.

COMMISSIONER O'CONNELL'S CONCURRING OPINION

This Commissioner, while strongly agreeing with the Chairman that the 14-day suspension is excessive, also cannot make an argument that it is arbitrary and capricious. I therefore concur with the affirmation of the penalty concurrent on all charges.

IT IS THEREFORE ORDERED AND ADJUDGED That the order suspending the liquor license of the Appellant for FOURTEEN (14) 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: May 8, 2015

Dennis M. Fleming
Chairman

Donald O'Connell
Member