LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Belmont Lounge, Inc.	)	
Mark Domitrovich, President	)	
Licensee/Suspension	)	
for the premises located at	)	
1638 West Belmont	)	Case No. 14 LA 37
	)	
v.	)	
	)	
Department of Business Affairs and Consumer Protection	)	
Local Liquor Control Commission	)	
Gregory Steadman, Commissioner	)	

ORDER

DECISION OF COMMISSIONER O'CONNELL AND COMMISSIONER SCHNORF

Pursuant to 235 ILCS 5/7-5 and Title 4, Chapter 4, Section 280 of the Municipal Code of Chicago, the City of Chicago initiated disciplinary proceedings against the respondent and charged the respondent with the following:

> That on or about December 31, 2013, the licensee, by and through its agent, advertised or promoted a prohibited practice, to wit: offering to sell or serve a person an unlimited number of alcoholic liquor during a set period of time for a fixed price, in violation of 235 ILCS 5/6-28(b)(6).

A hearing was held before Deputy Hearing Commissioner Robert Emmett Nolan on August 12, 2014. He then entered Findings of Fact that the City did prove that the respondent violated 235 ILCS 5/6-28(b)(6) and further found that a seven day suspension of the licenses was an appropriate punishment. Respondent filed a timely appeal with this Commission.

RELEVANT STATUTES:

235 ILCS 5/6-28(b)(2)-(6) – No retail licensee or employee or agent of such licensee shall:
(2) sell, offer to sell or serve to any person an unlimited number of drinks of alcoholic liquor during any set period of time for a fixed price, except at private functions not open to the general public;

(6) Advertise or promote in any way, whether on or off the licensed premises, any of the practices prohibited under paragraphs (1) through (5).

235 ILCS 5/6-28(c) – Nothing in section (b) shall be construed to prohibit a licensee from:
(2) Including drink of alcoholic liquor as part of a meal package.

Section 1-3.36 – Private Function
"Private function" means a prearranged private party, function, or event for a specific social or business occasion, either by invitation or reservation and not open to the general public, where the guests in attendance are served in a room or rooms designated and used exclusively for the private party, function, or event.

The City presented Evan Schanerberger as its witness. As a law clerk with the City's Department of Business Affairs and Consumer Protection, he has personally conducted investigations involving liquor licenses. Since the department did not have enough manpower to go to each individual place, he looked for advertisements by any liquor establishment doing open bars or giving away free liquor or giving discriminatory practices, or even so much as just the selective times for happy hour. That was done in the regular course of its duties and responsibilities and then they did large enforcements for various holidays like New Year's and St. Patrick's Day.

He conducted the investigation of Belmont Lounge, Inc. d/b/a The Pony. The investigation started on December 20, but he recorded all the evidence around noon on the 31st. He identified City's Exhibit 3, in evidence, as the advertisement at issue. There was no dispute

this ad was used by The Pony, but there was a dispute as to how it got on a social media site. The witness said this ad caught his eye because it did not limit the number of drinks which was a happy hour violation. You are allowed to have a meal package but it has to focus on the meal. This ad lists the drinks first. Since it did not limit the number of drinks, he could assume *(emphasis added)* that one might be able to get an unlimited number of drinks. The Illinois Code holds you to have to limit the amount of drinks for advertisements. This advertisement does not limit the specific number of drinks offered.

The witness did not actually buy a ticket, but explained one could be purchased online through the website. One did not need a password to access this website; it was open to the general public. It was not a selective invitation.

On cross, the witness admitted the word "buffet" is on the ad but since it was listed third on the ad behind the premium drink package and live DJ, it was the third most important item.

The City rested its case after being allowed to introduce one prior order of a liquor disposition for a voluntary fine of $2,000.00 for sale of alcohol to a minor, minor on premises on 10-12-11. Two dispositions of fines from the Department of Administrative Hearings for food violations were also allowed.

Dan McCarthy is one of the owners of the respondent licensee and has been since January of 2004. He was familiar with City's Exhibit 3, and he had approved the posting of this advertisement. It does not contain a reference to unlimited drinks or similar all you can drink

language. Patrons could not drink an unlimited number of drinks at this event. Once you had a ticket, there was a premium drink package, a full buffet, entertainment in the form of a DJ, and a champagne toast. The Pony was not open for business on December 31, 2013, prior to this event. The buffet had signature items from its menu. There is not usually a buffet. It is their policy to never serve anyone an unlimited number of drinks. Mr. McCarthy read Subsection C-2 of the Happy Hour Law into the record and stated nothing in subsection specifies a specific number of drinks must be advertised with the meal package. He added all guests were required to have a reservation before admission to The Pony on New Year's Eve. There were no walk-ins off the street and no sales at the door. The entire venue was used for the event. The witness identified Licensee's Exhibit 3, in evidence, as the guest list for this party.

On cross, the witness said the ad did not specify the number of drinks and explained his staff is trained to not over serve customers. It was an open bar subject to not allowing a customer to be over served. Anyone over the age of 21 could make a reservation. Once one from the general public purchased a ticket, they became reserved customers. Anyone could make a reservation. The ad was a way to get people to make a reservation to celebrate New Year's Eve at The Pony.

The scope of review of this Commission is limited by state statute to the following:

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 definition of "substantial evidence" is very broad and if there is any evidence in the record to support the findings of the Local Liquor Control Commission, the City has failed to present any evidence that supports the finding of the Local Liquor Control Commission that:

a. The respondent offered to sell an unlimited number of drinks of alcoholic liquor during any set period for a fixed price;

b. This was not a private function, that is a prearranged private party, either by invitation or reservation and not open to the general public.

We will address the evidence as to "a" first since the ad did not offer to sell or serve an unlimited number of drinks. We need not to address "b".

The evidence as to whether the ad violates the Happy Hour statute is limited to the actual ad. The advertisement/invitation does not offer unlimited drinks but offers a "Premium Drink Package." There is no definition of "Premium Drink Package" in the state statute or on the face of the advertisement. Mr. Evan Schanerberger admitted the advertisement does not offer unlimited drinks. He then interjected his opinion that an ad of this type must state a limit on drinks. That is not mentioned anywhere in the state statute. Mr. Schanerberger then assumes *(emphasis added)* he might be able to get an unlimited number of drinks. He referenced no statute or ordinance that defines "Premium Drink Package" as meaning unlimited drinks. He did not call the licensee to find out if it was unlimited drinks. One could also assume that "Premium Drink Package" referred to the quality of the liquor, not the quantity.

The City's position is that unless the ad contains the exact number of drinks spelled out, it is automatically unlimited (1-8-15 LAC Tr. p22). The Illinois Happy Hour law does not require within an advertisement a statement of the specific number of drinks that are part of a

meal package. The fact that Mr. McCarthy testified there was an open bar is not relevant to this ad.

The City also argues that the buffet offered in the advertisement is not a meal package under the Happy Hour Act. That term is not defined by the state statute. The actual evidence on the record from the City's witness is that the ad did not focus enough on the meal package. This is based on buffet appearing third in the advertisement. There is nothing in the Happy Hour law that says the meal package must be the focus of an advertisement and there is no mention at all of what is the "focus" of an advertisement. There is nothing in the state statute that says a meal package requires pairing of foods to drinks or highlighting of food where food is the predominant focus of an event and drinks are served to accompany the food (1-8-15 LAC Tr. p30). In fact, this was pure argument by the City's Corporation Counsel because the City's witness did not testify to those matters.

Since the City has failed to introduce any evidence that the advertisement publicized an unlimited number of drinks and that the meal package was insufficient under the law, this case is reversed on those points alone.

Both parties addressed at length the issue of the meaning of "private function" as described in Section 1-3.36. The record does not contain any evidence from the City's witness except for his statement that the invitation was not specific and was made on a public forum offered to the general public. The actual advertisement is silent on the issues relevant for a private function but does reference one could buy tickets online. The testimony from Mr. McCarthy was that the function was for a specific social event, a New Year's Eve party and was held in rooms used

exclusively for people at the party and, in fact, had not been open at all before the party. The question comes down to whether the fact that the advertisement and the right to make a reservation was open to the public is at issue or whether the fact that the function itself required a reservation and was not open to the general public is the determining factor. Based on the facts in this case, the function was a private party as defined by Section 1-3.36.

The final issue to be reviewed is whether the seven day suspension would have been appropriate. This issue is address for judicial economy.

This Commission does not have the power to remand to reduce a penalty imposed by the Local Liquor Control Commission. This Commission can reverse only if the penalty imposed is so onerous as to require reversal. We do not need to address this issue since we have determined the City did not present substantial evidence to support the finding of the Deputy Hearing Commissioner. For expediency in case that decision is reversed, it would be the decision of this Commission that a seven day suspension for this alleged violation of the Happy Hour statute was such that it must be reversed. The Deputy Hearing Commissioner sets out no basis for why a seven day suspension was appropriate in light of the lack of disciplinary history in general and no history of a Happy Hour violation. What are the totality of circumstances to justify a seven day suspension?

The decision of the Local Liquor Control Commission that the licensee violated 235 ILCS 5/6-28(b)(6) and that a seven day suspension is an appropriate penalty is reversed.

IT IS THEREFORE ORDERED AND ADJUDGED That the order suspending the liquor license of the appellant for SEVEN (7) days 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: February 25, 2015

Donald O'Connell
Member

Stephen B. Schnorf
Member