LICENSE APPEAL COMMISSION
CITY OF CHICAGO

157 Ontario, Inc. d/b/a Ontourage Licensee/Fine for the premises located at 157 West Ontario Street v. Department of Business Affairs and Consumer Protection Local Liquor Control Commission	))))))))))	Case No. 09 LA 76

ORDER

OPINION OF COMMISSIONERS SCHNORF AND O'CONNELL

We have reviewed the opinion of Chairman Fleming and we agree with his analysis on the issues of whether the Local Liquor Control Commissioner proceeded in the manner provided by law and what findings are supported by substantial evidence in light of the whole record. We do not agree with his decision on the issue of whether the order of a $3,000.00 fine is supported by the findings.

The Deputy Hearing Commissioner found that the City met its burden of proof on Charges 3, 4, 5, 6, 7 and 8. Her decision specifically stated that she felt that a $3,000.00 fine was, in part, an appropriate penalty in light of the present violations. (emphasis added) This statement suggests that it was the combined findings on six charges that supported the $3,000.00. Since all of the Commissioners have reversed findings on four of these counts there are only findings in favor of the City on Counts 3 and 4. Without those other four findings there is no rationale for a $3,000.00 fine to be considered an appropriate penalty. The Deputy Hearing Commissioner could have indicated that the

fine was concurrent on all counts or could have broken the fine down to a set amount on each finding of a violation but that was not done. The language of the finding supporting a $3,000.00 fine specifically refers to present violations. With four of those findings being reversed, the order of a $3,000.00 fine is not supported by the findings sustained by all three Commissioners.

While we have reversed on this issue and need not address the question of whether a $3,000.00 fine in this case would be so arbitrary and capricious as to justify reversal in and itself, it is appropriate to point out certain problems in this record. The previous disciplinary history was allowed in evidence. It shows a warning on January 20, 2006, for failure to notify the police and a $2,500.00 voluntary fine for a 100.100 violation. There is nothing in the record that defined what a "100.100" violation was and/or is. It would be extremely difficult to determine the appropriateness of a fine without knowing what conduct found the reason for the earlier fine. Even with that information it appears to us a $3,000.00 fine for failure to post an occupancy sign and post a tavern license is very close to arbitrary and capricious since there is no question that the licensee had valid licenses.

In order to avoid similar decisions in the future we respectfully request that Deputy Hearing Commissioners specifically indicate if fines and/or suspensions and/or revocations are entered concurrent on all findings or indicate the portion of the fine that applies to each finding.

The order of a $3,000.00 fine is not supported by the findings. The decision of the Local Liquor Control Commission is reversed.

OPINION OF CHAIRMAN FLEMING IN DISSENT

The Licensee received notice that a hearing was to be held on October 12, 2007, in connection with proceedings to revoke City of Chicago Retail Liquor License and all other City of Chicago licenses issued to the licensee for the premises at 157 W. Ontario, Chicago, Illinois. The first two charges in the notice of hearing alleged incidents that occurred on July 8, 2007. Since no evidence was presented on those charges and they were not sustained by the Deputy Hearing Commissioner this decision did not address them.

The charges relevant to this decision are that on July 23, 2007, the licensee, by and through its agent:

3. Failed to conspicuously post illuminated, substantially secured, signs indicating the number of persons who may legally occupy the licensed premises at the main entrance to each room used as a place of assembly in violation of Title 13, Chapter 84, Section 410, Municipal Code of Chicago.

4. Conducted, engaged in, maintained, operated, carried on, or managed a business or occupation for which a tavern license is required without posting said license in a conspicuous place at the premises where the business or occupation is being conducted, in violation of Title 4, Chapter 4, Section 210 of the Municipal Code of Chicago.

5. Conducted, engaged in, maintained, operated, carried on, or managed a business or occupation for which a late hour license is required without posting said license in a conspicuous place at the premises where the business or occupation is being conducted, in

violation of Title 4, Chapter 4, Section 210 of the Municipal Code of Chicago.

6. Conducted, engaged in, maintained, operated, or carried on or managed a business or occupation for which a public place of amusement license is required without posting said license in a conspicuous place at the premises where the business or occupation is being conducted, in violation of Title 4, Chapter 4, Section 210 of the Municipal Code of Chicago.

7. Conducted, engaged in, maintained, operated, or carried on or managed a business or occupation for which a tavern license is required without posting said license in a conspicuous place at the premises where the business or occupation is being conducted, in violation of Title 4, Chapter 4, Section 210 of the Municipal Code of Chicago.

After the case was continued on several occasions testimony from a City witness was taken on April 3, 2009. The matter was continued to May 15, 2009, and then to June 19, 2009, and finally to July 31, 2009, for additional City witnesses. As no other officers appeared the City rested its case on July 31, 2009, and the case was continued for the defense to present its case on September 4, 2009. On that date the matter was continued until September 11, 2009. The transcript of that date reflects Mr. Weber was not present and further notes the Deputy Hearing Commissioner left a phone message continuing the case until September 25, 2009, and at that hearing the City was allowed to introduce City's Exhibit 4 which is an Order of Prior Disposition. The Deputy Hearing Commissioner took the matter under advisement. On October 2, 2009, Mr. Weber presented a motion to vacate the September 25, 2009, order. The motion was denied. On October 23, 2009, Mr. Weber presented a motion to reconsider the denial of the motion to vacate. The transcript reflects this motion was filed but does not reflect any ruling on the motion.

The Hearing Commissioner entered findings of fact that the City met its burden of proof on charges three through eight. In light of the present violations and the prior disciplinary history she found a $3,000.00 fine was an appropriate penalty. Commissioner Norma Reyes adopted these findings as those of the Department of Business Affairs and Consumer Protection/Local Liquor Control Commission. The licensee filed a timely appeal with this Commission.

Since this case involves an appeal of a fine review by this 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.

Counsel for the licensee has argued that the Local Liquor Control Commissioner has not proceeded in a manner provided by law in that the Hearing Commissioner's denial of his motion to vacate her order of September 25, 2009, taking the case under advisement was an abuse of discretion that requires reversal by this Commission. Mr. Weber's argument is that the Hearing Commissioner did not take into consideration the facts set out in his motion and the harm to his client. The transcript of the hearing of October 2, 2009, shows Mr. Weber was allowed to set out his reasons that the previous order should be vacated and that the Hearing Commissioner listened to those arguments and denied the motion. The fact that there was an adverse decision to Mr. Weber and his client does not prove an abuse of discretion. A second point is that it is questionable if

this Commission has the authority to grant the relief sought. This Commission does not have the power to remand and can only reverse if the hearing did not proceed in a manner provided by law. That would suggest that the hearing itself was not conducted in a manner prescribed by state statute or the Chicago Municipal Code.

The next issue is whether the findings are supported by substantial evidence in light of the whole record. While this is a very broad standard and findings must be affirmed if there is any evidence supporting the finding, findings must be reversed when they are not supported by any evidence.

With respect to Counts 7 and 8 alleging failure to post a retail food license and retail tobacco license respectively, there is no evidence in the record to support a finding that food or tobacco were being sold. The testimony from Sergeant Byrne was that he saw no one eating food that night and did not observe any cigarettes or tobacco being sold. He could not recall any tobacco or cigarettes being held out for sale. Since there is no evidence the licensee was conducting or engaged in the retail food or retail tobacco business, there would be no need for such licenses to be posted. The findings of the Deputy Hearing Commissioner on these counts are reversed.

Count 5 alleged a failure to post a late hour liquor license. Section 4-60-130 of the Chicago Municipal Code sets forth the allowable hours of operation a retail of alcoholic liquor may sell until 2:00 a.m. Mondays through Saturdays and until 3:00 a.m. on Sunday mornings.

An essential element of proving the allegation in Count 5 would be establishing that the date and time of the sale of alcohol required a late hour license. Sergeant Byrne testified he entered the premises at 2:15 a.m. but when asked about the day of the week responded he could not remember specifically. He added "there were a lot of people there so that it was probably later in the week; Thursday, Friday, Saturday night." Counsel for the City did not attempt to refresh the Sergeant's recollection as to the day of the week. Without evidence establishing the specific day of the week the City has failed to prove that it was not on a Sunday morning. If it was Sunday morning the licensee was allowed to sell under 3:00 a.m. The finding of Count 5 is reversed.

Count 6 alleges a failure to post a public place of amusement license. In order to affirm a finding that the violation occurred the record must have evidence that the licensee engaged in a business or occupation that required a public place of amusement license. Section 4-156-300 requires a public place of amusement license if an owner, lessee or manager produces, presents, or conducts, for gain or profit, any amusement. There is no evidence in the record of any owner, manager or lessee presenting any amusement for gain or profit. While there was evidence that people were dancing and music playing the record does not contain even an estimate from Sergeant Byrne as to the capacity of the venue. Section 4-156-305 (c) excepts from the public place of amusement requirement "music, dancing, or other amusement, if: (1) it is offered in a venue with a capacity of less than 100 persons and (11) no admission fee, minimum purchase requirement, membership fee or other fee or charge is imposed for the privilege of entering the premises or the portion of the premises where the music, dancing or other

amusement is provided or permitted. The record is also devoid of any evidence that there was an admission or cover charge. The finding in favor of the City on Count 6 is reversed.

The City did meet its burden of proof on Counts 3 and 4 which alleged a failure to post the occupancy sign and failure to post the tavern license. The testimony of Sergeant Byrne is sufficient to affirm the findings of the Deputy Hearing Commissioner on those charges.

The final matter to be reviewed is whether the order of a $3,000.00 fine is supported by the findings. The specific question in this case is whether the $3,000.00 fine is supported by the two counts which have been affirmed? Does the fact that the findings in favor of the City on four of the counts have been reversed require that this Commission find the $3,000.00 fine is not supported by the findings.

This Commission is placed in a compromising position. Since it does not have the power to remand the case to the Local for a review of the fine in light of the reversal of the four counts it must either reverse outright or affirm the fine. This Commission's decision would have been easier if the Deputy Hearing Commissioner had indicated in her opinion that the $3,000.00 fine was concurrent on all findings. Without that indication this Commissioner must look at this fine in light of the fact that two charges have been sustained and the fact that the licensee has a past history of a voluntary fine of $2,500.00 and one voluntary warning.

Section 4-4-280 of the Chicago Municipal Code allows the Mayor to fine a licensee if it is determined that the licensee has violated any of the provisions of the Municipal Code or state statutes. Since a fine is allowed for one violation of ordinance and there were two sustained charges in this case the question is whether the $3,000.00 fine is so arbitrary and capricious that it should not be affirmed. Since there was a previous $2,500.00 fine for a single violation and another previous warning a $3,000.00 fine for findings on two counts is not so arbitrary and capricious that it must be reversed. The fact that this Commissioner may not have arrived at that amount of a fine is not relevant to this decision.

Counsel for licensee has provided citations to cases where reviewing courts have remanded cases for reconsideration of sanctions when some, but not all, findings of liability are reversed. These cases are Dugan's Bistro v. Daley 56 Ill App3d 463 and Sip and Save Liquors, Inc. v. Daley 275 Ill App3d1009. It is true that those cases deal with similar fact situations to this case. The difference is that this Commission does not have the power to remand. If that is the proper disposition for this case it must be ordered by the Circuit Court.

This Commissioner affirms the decision of the Local Liquor Control Commission based on the affirmance of Counts 3 and 4 in the Notice of Hearing.

Dennis M. Fleming
Chairman

IT IS THEREFORE ORDERED AND ADJUDGED that the order to Fine the Appellant the sum of $3,000.00 is 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: September 7, 2010

Stephen B. Schnorf
Member

Donald O'Connell
Member