

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Wytrwal Enterprises, Inc.)
d/b/a Orion Restaurant)
Miroslaw Wytrwal, President)
Licensee/Suspension)
for the premises located at) Case No. 08 LA 51
5772 South Archer Avenue)
)
)
v.)
)
Department of Business Affairs and Consumer Protection)
Local Liquor Control Commission)
Norma I. Reyes, Commissioner)

ORDER

OPINION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER SCHNORF

Licensee was given a Notice of Hearing in connection with disciplinary proceedings to revoke the City of Chicago Retail Liquor License and all other licenses issued for the premises at 5772 S. Archer Avenue. The charges were that the Licensee, by and through its agent, sold, gave or delivered alcoholic beverages to Vincent Traversa, a person under the age of 21 years, in violation of Title 4, Chapter 60, Section 140 of the Municipal Code of the City of Chicago and in violation of 235 ILCS 5/6-16(a). This case proceeded to hearing before Deputy Hearing Commissioner Gary K. Chan. He issued Findings of Fact that the City sustained its burden of proof on these charges and that a thirty (30) day suspension concurrent on both charges was an appropriate penalty. Mary Lou Eisenhauer, then the Director of the Department of Business Affairs and Licensing/Local Liquor Control Commission adopted these findings. Respondent filed a timely notice of appeal to this Commission and oral argument was held by this Commission on March 10, 2009.

Prior to the taking of evidence at the Local Liquor Control Commission the attorney for the Licensee requested a subpoena issue for the criminal records of Vincent James Traversa, the alleged minor who bought the alcohol. Deputy Hearing Commissioner Chan granted the request for a subpoena on February 21, 2007, but on February 28, 2007, Chan reversed himself sua sponte and denied the motion for the subpoena. The Licensee filed an appeal of this denial in Chancery and it appears that case was resolved prior to the actual hearing.

At the hearing the City stated it has tendered to Mr. Komie a LEADS response dated as of February of 2008, with respect to the criminal history of Mr. Traversa. This LEADS inquiry was rerun at the request of Mr. Komie the day before the hearing, June 10, 2008, and it reflected no prior history of arrests or convictions for Mr. Traversa. Mr. Komie noted that this response did not come from the Illinois Bureau of Investigation. At oral argument Mr. Komie asserted that the issue of the propriety of the denial of the subpoena had not been resolved and Mr. Komie was allowed to make his constitutional arguments on the record.

Vincent Traversa testified he had previously been employed by the Chicago Police Department as part of the Stop Alcohol to Minor Program (SAM). He worked there about one and half years and was paid \$9.00 an hour. He was born on December 3, 1986, and was a minor on October 31, 2006. On that date, accompanied by Officer Dusan Puhar, he entered 5772 S. Archer Avenue, a bar, and ordered and paid for a bottle of Heineken. He never showed any identification to the bartender and she never asked to see identification or asked his birth date or age. Officer Puhar's testimony confirmed these relevant facts about the transaction.

Prior to resting City Exhibit 7 was allowed into evidence without objection as the past disciplinary history of the Licensee. It reflects a 21 day suspension in 1997 for a restaurant operating as a tavern.

The Licensee presented no evidence disputing the facts of the sale to a minor. The mitigation evidence was that this business is the sole support of Miroslaw Wyrwal and his family. Closing the premises for thirty days would cause a hardship for him and his family.

Since this matter deals with an appeal of a suspension the review by this Commission is limited to these 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 Local Liquor Control Commission did proceed in a manner provided by law. Rule 8 of the procedural rules of the Local Liquor Control Commission deals with the scope of discovery. It limits discovery as follows:

Discovery is limited to the following items:
Any and all police reports including inventories, laboratory reports, witness statements and/or summaries within the Law Department's custody and control which pertain directly to the charges in the Notice of Hearing and any written orders of disposition by the Commission relating to the Licensee and within the custody and control of the Law Department.

It appears that the discovery required by Rule 8 was produced and, in addition, the City provided

information from LEADS that the minor witness had no criminal history. The supplying of that information satisfied the discovery requirements of Rule 8 and, as such, shows the Local Liquor Control Commissioner did proceed in the manner provided by law. Counsel for the Licensee was given the opportunity to make constitutional arguments at the hearing before the Deputy Hearing Commissioner and at oral argument before this Commission. Those arguments are in the record and preserved for appeal. This Commission does not have jurisdiction to rule on constitutional issues.

The findings that the Licensee sold alcohol to a minor in violation of the City of Chicago Municipal Code and the State Statute were supported by substantial evidence in light of the whole record. No evidence was presented by the Licensee to contradict the testimony of the City's witnesses. The argument that the City failed to prove that alcohol was sold since there was no evidence of what was in the Heineken bottle is not persuasive. The cases of *Keeler Mart Liquor v. Daley* 57 Ill.App.3d 32 and *Village of Mundelein v. Taylor*, 130 Ill.App. 3d 819 addressed this issue and both held chemical analysis of the substance is not required. While the cases suggest a tribunal should not take judicial notice that the substance is alcohol, evidence that minor ordered an alcoholic drink and or beer bottles or beer cans was sold to that minor is sufficient to establish a prima facie case that the substance in the can or bottle was alcohol. That prima facie case is sufficient on cases like this which there was no evidence disputing that the substance on the Heineken bottle was not alcohol.

The final issue is whether the order of the thirty (30) day suspension is supported by the

findings. The Local Liquor Control Commissioner has broad discretion in imposing discipline to a liquor licensee based on violations of the municipal code or state statute. This Commission cannot modify or reverse a decision on the basis that it feels the suspension or revocation was too harsh. Reversal is allowed only in cases when the penalty is arbitrary and capricious. While this Commissioner feels the 30 day suspension is too harsh based on the past history of the Licensee and the fact this is a first time sale to a minor, it is not so arbitrary and capricious as to require reversal.

The thirty day suspension of the liquor license is upheld. No finding is made as to the propriety of the suspension of the other licenses since the jurisdiction of this Commission is limited to appeals from discipline imposed on liquor licensees.

IT IS THEREFORE ORDERED AND ADJUDGED That the order suspending the liquor

license of the appellant for THIRTY (30) 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 19, 2009

Dennis M. Fleming
Chairman

Stephen B. Schnorf
Member