

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Club Flamingo, Ltd.)
d/b/a Red Number Five)
Licensee/Suspension)
for the premises located at)
440 North Halsted) Case No. 09 LA 03
)
)
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

The Licensee received a Notice of Hearing that a hearing would be held in connection with disciplinary proceedings regarding its liquor license and all other licenses issued to it. This original notice alleged two grounds for discipline:

1. On July 1, 2007, the Licensee, by and through its agent, knowingly or intentionally committed a battery in that without legal justification, it caused bodily harm upon Pearson Kale, a patron on the licensed premises, in violation of 720 ILCS 5/12-13(a)(1).
2. That on July 1, 2007, the Licensee, by and through its agent, failed to report promptly to the police department illegal activity reported to or observed by the Licensee on or within sight of the licensed premises, to wit: a battery committed upon Pearson Kale, in violation of Title 4, Chapter 60, Section 141 (b) of the Municipal Code of Chicago.

At the hearing the City amended the notice by withdrawing Count 2. At the conclusion

of the hearing Deputy Hearing Commissioner Gary K. Chan issued Findings of Fact that the testimony of Pearson Kale was credible, that the City met its burden of proof on Count 1 and that a thirty (30) day suspension was an appropriate disposition. Mary Lou Eisenhauer, then the Acting Director of the Department of Business Affairs and Licensing adopted these findings and entered an order for a 30 day suspension on December 19, 2008. The Licensee filed a timely Notice of Appeal with this Commission and oral argument was heard on May 20, 2009.

Since this is an appeal of a suspension the jurisdiction of this Commission is to review the propriety of the order or action of the local liquor control commissioner and to consider 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.

A review of the record of the proceedings establishes that there is no dispute that Justin Brown, an employee of the Licensee struck Pearson Kale. There also is no dispute that on the date and time of incident Mr. Brown was an employee of the Licensee. The Deputy Hearing Commissioner did hear two versions of how that incident occurred. Pearson Kale testified that in the cause of a dispute of over whether Mr. Kale had ordered a \$180 bottle of champagne, two bouncers pushed him into a booth and pinned him while Justin Brown hit him with his right hand in fist which cut Kale's lip. Justin Brown testified that while he was escorting Mr. Kale outside, two of Mr. Kale's friends grabbed him. Eventually Brown had three gentlemen on either side of

him. Despite his calls to security, none had appeared. Brown felt threatened and when Kale made a fist and began to throw a punch at him, Brown struck Kale one time.

The issue facing this Commission is whether there is substantial evidence in light of the whole record to support the propriety of the findings of the Deputy Hearing Commissioner. While counsel for the Licensee argued the Findings of Fact were not supported by the record the material findings of fact consist of four paragraphs. They reflect the fact that the Hearing Officer noted the two versions of the counts and believed Mr. Kale's version of the facts. The findings do address the issue of the affirmative defense of self-defense and the Deputy Hearing Commissioner found there was no reason that Brown should strike Kale, and that "Brown had punched Kale in the face without legal justification."

Counsel for the Licensee referred this Commission to Board of Regents vs. Illinois Educational Labor Relations Board, 208 Ill.App3d.220. A review of that opinion described that factual situation as "a classic example of the kind of case in which each side presents a different version of the relevant events, and as which the trier of fact must necessarily determine the credibility of the witnesses based on part on his observations of their demeanor while testifying....the weight to be given the evidence and the determination of the witnesses' credibility are primarily within the province of the administrative agency. The administrative agency's finding of facts are deemed prima facie true and correct and the sole function of a reviewing court is to determine whether the administrative agency's decision is contrary to the manifest weight of the evidence."

This case can also be described as a classic example of the kind of case where the trier of facts is presented with two versions and must determine the credibility of the witnesses based in part on observing the witnesses testify. The standard to be used by this Commission is not manifest weight but whether there is substantial evidence in the whole record to affirm the findings of the Local Liquor Control Commission.

Applying those principles to this case the Findings of Fact made by the Deputy Hearing Commissioner are deemed to be prima facie true and correct. This Commission does not have the authority to reweigh evidence and cannot reverse on the basis it would have made a different decision. There is more than substantial evidence supporting the Findings of Fact made by Deputy Hearing Commissioner Chan.

Based on the past disciplinary history of the Licensee, especially the fact that the global settlement entered into by the parties included two previous incidents of battery by an agent, there is substantial evidence to support a thirty (30) day suspension on this case.

The decision of the Local Liquor Control Commissioner is upheld.

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: June 11, 2009

Dennis M. Fleming
Chairman

Stephen B. Schnorf
Member