

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

GM and Sons, LLC)
Gloria Mena, Member)
Licensee/Revocation)
for the premises located at)
2532 South California) Case No. 10 LA 57
)
v.)
)
Department of Business Affairs and Consumer Protection)
Local Liquor Control Commission)
Gregory Steadman, Commissioner)

ORDER

OPINION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER O'CONNELL

Pursuant to 235 ILCS 5/7-5 Gregory Steadman in his position as the Local Liquor Control Commissioner of the City of Chicago issued an order that the liquor establishment at 2532 S. California be immediately closed. That closure was based on his determination that on at least four different occasions over the preceding month agents of the licensee had engaged in the sale and delivery of cocaine in the licensed premises while it was open to the public.

Attached to this order of closing was a Notice of Hearing to be held in connection with proceedings to revoke the City of Chicago retail liquor license and all other City of Chicago licenses used for the premises at 2352 S. California. This notice alleged 25 separate charges. In general these charges alleged violations of state statutes and municipal ordinances related to sale of controlled substances that occurred on August 13, 2010, August 26, 2010, September 2, 2010, and September 7, 2010.

Each of these charges alleged that the licensee, by and through its agent, committed these offenses.

This case proceeded to hearing on September 17, October 1, and October 15, 2010, before Deputy Hearing Commissioner Stratton. Assistant Corporation Counsels Shannon Trotter and Noel Quanbeck represented the City and attorney Philip E. Mullane represented the licensee. The Deputy Hearing Commissioner entered Findings of Fact that the City had met its burden of proof on Charges 3 through 25, and that based on the present violations and the licensee's past history that revocation was the appropriate penalty. That order did not specify if revocation was proper concurrent on all counts in which the City met its burden of proof or that revocation was proper based on the accumulated findings with respect to Counts 3 through 25. Gregory Steadman, Local Liquor Control Commissioner, adopted each of these findings as those of the Department of Business Affairs and Consumer Protection/Local Liquor Control Commission. The licensee filed a timely Notice of Appeal with this Commission.

Since this case deals with review of a revocation of a liquor license review by this Commission is limited to these questions:

- a. Whether the local liquor control commissioner has proceeded in the manner proved 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.

In order to better understand this decision a summary of the evidence and a setting out of the statutes and ordinances involved is appropriate.

Prior to the start of evidence, licensee's attorney objected to the case proceeding to hearing on short notice and also on the basis that he had only received certain responses to discovery on the date of the hearing. Counsel also objected to proceeding without his having access to possible video/audio tapes referenced on inventory slips. The Deputy Hearing Commissioner overruled any objections and ordered that the matter proceed to hearing. Attorney for licensee raised these arguments at various other times during the proceedings and did file a written Motion to Produce these tapes, as well as, another Motion to Produce text messages referenced in the testimony of City's witness Officer Gonzalez. These motions and the written request to produce were all denied by the Deputy Hearing Commissioner. It appears these rulings were based on her determination that this evidence was not relevant and that it was not in the possession of the law department.

John Gonzalez has been a Chicago Police Officer for twelve years and assigned to the narcotics section for the last four years. He has been involved in undercover narcotic work on dozens of occasions and had done between 25 to 50 undercover narcotic buys. On August 13, 2010, he and a member of his team met with a confidential informant who had information of narcotic sales at 2532 S. California. (The court reporter referred to the bar as Gene's but it is known as Jean's) The confidential informant was searched for contraband and to ensure he has no money on him other than 1505 funds the police gave

him. They arrived at 2532 S. California at about 6:30 p.m. Gonzalez describes the premises as one selling food and liquor and noted there were a handful of patrons and a bartender inside the premises. The person behind the bar was serving drinks, taking money from the patrons and putting the money in the register. Gonzalez and the informant ordered a drink from the bartender who gave her name as Esmeralda. Esmeralda took money for the drink, put it in the register and gave him back change. The drinks were bought by 1505 contingency funds provided by the Chicago Police Department. The informant went to have a conversation with Esmeralda. The informant told Gonzalez what was said in that conversation and shortly after Jose entered the bar. Jose and the informant spoke at the front of the bar while Gonzalez was sitting at a table. Jose then left the bar and Gonzalez and the informant left and drove to a gas station at 32nd and Cicero. They waited for Jose at the gas station for fifteen to twenty minutes. Jose arrived and the informant paid Jose \$260.00 from 1505 Chicago Police Department funds to purchase cocaine. He observed this transaction from a distance of 20 yards and never lost sight of Jose and the confidential informant. The informant came back to the car and gave Gonzalez two small clear bags. After they returned to the police office at Homan Square, Gonzalez conducted a field test on the suspect cocaine which did test positive for cocaine. The cocaine was then inventoried, according to department policy, under inventory number 12097238 and under RD# HS461244. Since this was an ongoing investigation no arrests were made at that time. The sale of the actual drug transaction was in Cicero, Illinois and on August 13, 2010, no drugs were purchased at the bar and the transaction did not occur in the bar.

Gonzalez returned to the bar on August 26, 2010, in an attempt to buy narcotics. He was in plain clothes working in an undercover capacity. When he entered he noticed patrons and a bartender named Maribel. Gonzalez ordered a drink and sat at a table. A person known as Mikala entered the bar, put her purse behind the bar and walked over to him. Gonzalez offered to and did buy her a drink. Mikala took the 1505 funds money from Gonzalez and she gave the money to and received change from the bartender. Gonzalez, the informant, and Mikala had a conversation at a table toward the front of the bar. Gonzalez asked if Mikala could help him buy two \$20.00 bags of cocaine. Mikala said she could help but needed to make a call. Mikala left the bar and Gonzalez could see her making a phone call. Mikala re-entered the bar and an unknown person walked in the bar and spoke with Mikala. The second offender left the bar. Gonzalez sat at the bar and ordered drinks. Mikala would take his money, go to the bar and return with drinks and change. Mikala did this for other patrons as well. Mikala then asked for and Gonzalez gave her \$40.00 for the two bags. Mikala met the unknown person at the front door and Gonzalez observed her giving the unknown man \$40.00 in 1505 funds in return for two small items, Mikala gave Gonzalez two bags of suspect cocaine. Gonzalez returned to his unit's office at Homan Square where a field test of the suspect cocaine was positive for cocaine. The substance was then inventoried according to department procedure under inventory number 12108779 and RD# HS483477. Mikala never worked the register that night. She would give money to the bartender who would in turn break change and give her the money to give back to Gonzalez. No arrests were made at that time.

Gonzalez was accompanied on August 26, 2010, by other members of his team including surveillance officers who were videotaping outside the bar. Gonzalez saw the videotape on the day of purchase but did not view it before his testifying at the Local Liquor Control Commission. Gonzalez did see Mikala outside the bar on the phone but did not see her the whole time. He might have texted the members of his team that Mikala was leaving the bar. Gonzalez did not know if other people put their purses or belongings behind the bar.

Gonzalez and his informant returned to the bar on September 2, 2010, to try to purchase narcotics from Jose inside the tavern. They arrived at approximately 7:00 p.m. The bar was open and operating with other patrons and a bartender present. After waiting a half hour, Jose came through the kitchen area. He then placed beer inside the refrigerator behind the bar. Jose came over to the patron side of the bar and had a conversation with the informant about buying an eight ball of cocaine. Jose left the bar and Gonzalez and the informant remained. Jose returned later and in return for \$160 in 1505 funds he gave Gonzalez a clear plastic bag. Jose was on the bartender's side and Gonzalez on the patron side. Gonzalez spoke with Jose about a future purchase of half an ounce of cocaine. Jose agreed and told Gonzalez to call him on a cell phone number previously given to Gonzalez by the informant. At Homan Square a field test of this substance was positive for cocaine. The cocaine was inventoried under inventory number 12115064 and RD# HS496168.

Jose had asked Gonzalez and the informant if they wanted to go with him and Gonzalez told him they would not leave and would remain at the bar. Surveillance officers followed Jose to his home at 3220 S. 48th Court in Cicero and then back to the bar. Jose put the \$160 in his pocket and did not put it in a cash box behind the bar.

On September 7, 2010, Gonzalez and another undercover officer returned to the bar to buy a half-ounce of cocaine from Jose. Gonzalez had called Jose to arrange for the purchase and Jose said to come by the bar. Gonzalez and the other officer came to the bar and ordered drinks. One or two other patrons might have been on the premises. The bartender gave the name of Myra. Jose came into the bar and first went to count money at the cash register behind the bar. Gonzalez then met Jose by the bathroom by the back of the bar. Gonzalez gave Jose \$500.00 of 1505 funds for one clear bag containing cocaine. Myra told Gonzalez that Jose was not the owner of the bar and that Gloria was the owner. At Homan Square the substance was field tested and found positive for cocaine. This substance was assigned inventory number 12119199 and RD# HS503956.

Gonzalez had called Jose at Jose's home and set up the transaction to be at the bar. Gonzalez asked Jose if he could meet him at the bar. Gonzalez suggested the location of the transaction. Gonzalez does not know Gloria Mena. Other than the controlled substance described in these buys, Gonzalez never saw or found drugs on the premises.

Over objection the lab reports were allowed in evidence. The reports showed the following results:

- Inventory 12097238 – 6.3 grams of powder from two items positive for cocaine
- Inventory 12108779 – 0.6 grams of powder from two items positive for cocaine
- Inventory 12115064 – 3.0 grams of powder from one item positive for cocaine
- Inventory 12119199 – 14.0 grams of white chunky substance from one plastic bag positive for cocaine

The parties agreed prior to the end of evidence that Charge 8 would be amended on the face of the notice to reflect that the licensee, by and through its agent, knowingly delivered or possessed with intent to deliver a controlled substance, to wit: less than one gram of cocaine, in violation of 720 ILCS 570/401 (d) on the licensed premises.

720 ILCS 570-401 in general states that except as authorized by this Act it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver a controlled substance. Paragraph (c)(2) of this statute defines the violation for possession more than 1 but less than 15 grams of cocaine to be a Class 1 felony. Violation of paragraph (d) of this section is classified as a Class 2 felony.

720 ILCS 570/402 in general criminalizes the possession of a controlled substance such as cocaine. Section C bars possession of any amount of cocaine.

720 570/405.1 (a) defines criminal drug conspiracy as an agreement with another to commit an offense set out in 720 ILCS 570/401 delivery of a controlled substance.

720 ILCS 570/406.1 defines the charge of permitting unlawful use of a building to be knowingly by granting, permitting or making the building available for use of unlawfully manufacturing or delivery of a controlled substance other than methamphetamine. It's a Class 4 felony.

720 ILCS 5/37-1 states any building used in the commission of any offense prohibited by the Illinois Controlled Substances Act is a public nuisance and a person who convicted of knowingly maintaining such a public nuisance is guilty of maintaining such a public nuisance is guilty of a Class 4 felony.

Section 4-60-141 (a) of the Chicago Municipal Code states that no licensee shall allow or permit any illegal activity on the licensed premises.

8-40-090 (b) of the Municipal Code of Chicago states in relevant part any person who owns, manages or controls any premises and who encourages or permits an illegal activity described in (a) to occur or continue on such premises shall be subject to a fine according to the schedule in (c). Paragraph A defines illegal activity to include premises used for illegal possession or delivery or trafficking of controlled substances. The range of fines are set out according to the class of the crime which is determined by the amount of the controlled substance.

This decision will address the events of each date in which Chicago Police purchased cocaine in this case. Despite the fact that 25 separate charges were filed in the notice of hearing, this case deals with events that occurred on five dates in August and September of 2010.

Agency cases in the sphere of liquor license cases differ from traditional principal/agency law. Counsel for the licensee in his written argument referred to Second Restatement of Agency in arguing that scope of employment should determine whether a principle is responsible for the actions of his agent or an employer responsible for the actions of his employee. He is correct that when a traditional question arises in employer-employee cases if the actions of the employee are beyond the scope of his job duties the employer is not responsible. In general, in the traditional cases an employer would not be liable for the criminal conduct of an employee.

This traditional approach does not apply to liquor license cases since ILCS 235 5/10-3 states in relevant part that any act of whatsoever nature, constituting a violation, this act by any agent or employee of the licensee shall be deemed and held to be the act of such employer or licensee, and said employer or licensee shall be punishable in the same manner as if said act or omission had been done by him personally. The questions that are before this Commission is whether there is substantial evidence in the whole record to affirm the decision of the Deputy Hearing Commissioner that Jose, Esmeralda and Mikala were all agents of the licensee. In reviewing that issue this Commission is guided by the case law that stands for the proposition that:

The performance of work by one party is prima facie evidence of employment, and, in the absence of contrary evidence, supports a presumption that the person is a servant. Byrne v. Stern, (1981) 103 Ill.App.3d 601, 431 N.E. 2d 107, Maldonado v. License Appeal Commission, (1981) 100 Ill.App.3d 601, 427 N.E.2d 225; Anderson v. Illinois Liquor Control Commission, (1984) 105 Ill.App.3d 924, 435 N.E.2d 192.

It should be noted that in this case the licensee did not put on any testimony denying that any of these individuals were her agents. Stating that fact should not be construed as shifting the burden of proof to the licensee. It is noted only in relation to the language in the cited cases.

Charges 1 through 7 alleged violations of state statutes and municipal ordinances with respect to the alleged sale of cocaine by Jose to Officer Gonzalez which took place on August 13, 2010. The actual transaction took place in a gas station in Cicero. The testimony with respect to did not have Jose performing any work in the bar and Esmeralda who was identified as a bartender had a conversation with the confidential informant. The substance of that conversation was not put into evidence. The Deputy Hearing Commissioner ruled for the licensee on Counts 1 and 2, based on her specific finding no evidence was presented to support a finding that a controlled substance was possessed on the licensed premises or that a controlled substance was actually delivered on the premises. Despite these specific findings the Deputy Hearing Commissioner did then find the City met its burden of proof on Charges 3 through 7. Without repeating these 7 specific charges, all of them are based on the licensee through its agent possessing or delivering a controlled substance. These findings on Counts 3 through 7 are legally

inconsistent with the findings in Counts 1 and 2, and also contradict the specific findings of fact referenced earlier. Since there is no evidence in the record as a whole to support a finding that a controlled substance was possessed on the licensed premises or that a controlled substance was actually delivered on the licensed premises, the findings that the City met its burden of proof on Charges 3 through 7 are reversed.

Charges 8 through 15 all relate to the drug transaction that allegedly occurred on August 26, 2010. Officer Gonzalez testified he encountered a girl named Mikala at the licensed premises. Mikala put her purse behind the bar and was seen taking orders from customers. Mikala would give the drink money from the customers to a bartender who would give the change to Mikala. After a conversation, Mikala agreed to help Gonzalez buy two \$20.00 bags of cocaine. Mikala made a phone call and later met with an unnamed individual. That individual left the bar and when he returned he gave Mikala two bags of cocaine in exchange for \$40.00. That substance was inventoried and the lab report was positive for cocaine in the amount of .6 grams of powder from two plastic bags.

Since there was no evidence in the record challenging whether a transaction took place the factual issues on this transaction revolves around whether there is substantial evidence in the record as a whole to support the finding that Mikala was an agent of the licensee on this date. The evidence of work with respect to Mikala is not limited to her obtaining drinks only for Officer Gonzalez and the informant.

The testimony with respect to work was that Mikala was getting drinks for other customers. She was bringing money to the bartender and delivering change to the patrons. While this may not be the strongest evidence of agency it is sufficient to establish a prima facie case that Mikala was an agent of the licensee on August 26, 2010. This prima facie case was not challenged at the hearing by testimony of the licensee.

Counsel for licensee made an argument concerning the use of the lab reports and affidavits in lieu of court appearance. While such affidavits are not allowed to be used in criminal courts due the 6th Amendment constitutional issues, the rules on hearsay evidence at the Local Liquor Control Commission is a lesser standard and hearsay can be allowed. While Mr. Mullane pointed out certain differences in the reports, those differences go to the weight the tier of fact gave to those reports. In this case Deputy Hearing Commissioner Stratton found the reports provided sufficient evidence to establish the presence of controlled substance. This finding is supported by substantial evidence in the record as a whole as to all transactions alleged.

Charges 8 through 13 which allege violations of various sections of state statutes and municipal ordinances are all supported by substantial evidence in light of the whole record. It should be noted that while there are findings on each of these counts it should be considered one incident since all the charges flowed from the same transaction. If this was a criminal case some of these findings would have merged based on the fact they would have been lesser included charges.

Counts 14 through 19 allege various violations of state statutes and municipal ordinances arising out of a sale of cocaine which allegedly occurred on September 2, 2010. Officer Gonzalez testified he went to the tavern that night to try to purchase narcotics from Jose inside the tavern. Gonzalez stated he saw Jose coming from the bar area and then was placing beer inside a refrigerator behind the bar. While they discussed the purchase of an eight ball of cocaine, Jose was behind the bar and Gonzalez and the informant were on the other side of the bar as patrons. Jose physically left the bar premises for awhile and when he returned he was on the bartender's side. Jose took \$160.00 in cash from and gave Gonzalez a bag containing cocaine. They then had a conversation about a future purchase of a half-ounce of cocaine. The evidence of Jose working behind the bar loading the refrigerator and being behind the bar area is sufficient evidence of work to decide there is substantial evidence in the record as a whole to support the finding that Jose was the licensee's agent on September 2, 2010. As mentioned previously there is nothing in the record to contradict Gonzalez's testimony as to this transaction and that evidence is sufficient to find there was substantial evidence in the record as a whole to uphold the findings on Charges 7 through 15. It should again be pointed out that there was only one transaction and that many charges would have merged if this was a criminal case.

Counts 20 through 25 involve an allegation of a drug sale that occurred on September 7, 2010. Officer Gonzalez spoke with Jose by phone and set up a meeting at the bar to buy a half-ounce of cocaine for \$500.00. When Jose showed up he went behind the bar and was counting money at the cash register. When Jose was done

counting the money he nodded to Gonzalez and they met at the back of the bar where the transaction occurred. Gonzalez gave Jose \$500.00 and received cocaine.

The evidence of Jose being behind the bar and counting money from the register is sufficient to establish substantial evidence of agency in light of the whole record. The testimony of Officer Gonzalez and the lab reports are sufficient evidence to find there is substantial evidence in the record as a whole to affirm the finding on these counts. Again it should be noted there is one transaction that has violated at this level several different statutes and ordinances.

Counsel for the licensee has argued in this case that the actions of Officer Gonzalez were such as to allow the licensee to rely on the defense of entrapment. This affirmative defense may be raised by defendants in criminal cases, but in general it requires the defendant to show that it was the actions of the police that set in motion the criminal acts alleged. In other words, but for the police action, the defendant would not have performed the illegal acts. While there is evidence from Officer Gonzalez that he was trying to buy cocaine from Jose on the licensed premises this is insufficient evidence for the licensee to succeed with an entrapment defense. It is not even certain if an entrapment defense is available on these types of administrative hearings. The evidence in the record supports the conclusion that Jose was willing to sell cocaine without being urged to do so by the police. The fact the police suggested the bar as a location for the drug transaction does not use to entrapment.

The previous disciplinary history of this licensee was paying a \$6,000.00 fine in case 08 LR 0203. That fine was for the following violations:

- | | |
|---------|--|
| 1-10-08 | Operating without a license
Operating without a retail food license
Failure to display
Failure to display retail food license |
| 4-26-08 | Sale to Minor – not a SAM
Failure to notify the police |
| 2-23-08 | Operating after permitted hours
Failure to notify the police |

Contrary to the findings of the Deputy Hearing Commissioner the licensee did present a defense through Mr. Mullane's objections and cross-examination of the City's witness. It is true the licensee called no witnesses and presented no evidence in its defense.

The final issue before this Commission is whether the order of revocation is supported by the findings. This Commission cannot disagree with a penalty and order a case remanded to the Local Liquor Control Commission for reconsideration. This Commission cannot reverse a penalty imposed by the Local Liquor Control Commission because the Commissioners disagree with a penalty. This Commission must affirm an order of revocation supported by the evidence unless such a revocation would be so arbitrary and capricious as to be an abuse of discretion.

In general a violation of any statute, ordinance, or regulation fairly related to the control of liquor, upon liquor-licensed premises, contributes cause for revocation of a license. Leong v. Village of Schaumburg, (1990) 194 Ill.App.3d 60, 550 N.E.2d 1073.

There have been cases in which revocation has been an abuse of discretion based on the licensee's prior history of operating a liquor business with no previous charges of license violations. Byrne v. Stern, (1981) 103 Ill.App.3d 601 431 N.E.2d 107; Soldano v. Illinois Liquor Control Commission, (1985) 131 Ill.App.3d 10, 475 N.E.2d 560. In those cases, the licensees had been in business for 33 years in Byrne and 40 years in Soldano. In Hanson v. Illinois Liquor Control Commission, 201 Ill.App.3d 974; 559 N.E.2d 1092, the second district of the Appellate Court ruled revocation was an abuse of discretion. That case dealt with 3 purchases of cocaine by an Illinois State Police Officer from a man found to be an agent of the bar. The actual finding from the Illinois State Liquor Commission only referenced one sale of cocaine. The Court focused on the fact there was no evidence the licensee had any knowledge of the sale of controlled substance in the tavern or that they participated in or approved such sale. It also ruled on the fact that the business was in operation for 5 ½ years without a previous violation. The Appellate Court remanded the case to the local liquor control commissioner of the City of Belvidere for imposition of a reasonable sanction.

There is no evidence on the record that the owner Gloria Mena was present during any of the drug transactions and no evidence she had knowledge of the sales or participated or approved the sale of cocaine in her bar. Officer Gonzalez did not know

who she was when asked at the hearing. There is evidence of past history that is not drug-related, but the record is silent as to how long this entity has held the liquor license at 2532 S. California. The three sustained sales took place over a period of time from August 13, 2010 through September 7, 2010. The record is silent as what information led the Chicago Police to initiate an investigation of these premises.

If this case dealt with a one-time sale of narcotics by an agent of the licensee that was not condoned by the owner and for which the owner was not aware revocation might very well be an abuse of discretion. In this case the three separate sales of cocaine by agents of the licensee, especially without affirmative mitigating evidence that Gloria Mena was not aware of the sales and did not condone the sales, is sufficient evidence to support the finding of revocation. This Commissioner feels that the fact that the findings in favor of the City on Counts 3 through 7 have been reversed does not change the fact that the findings in favor of the City relating to three separate cocaine transactions by the agent of the licensee are sufficient themselves to support revocation.

The decision of the Local Liquor Control Commission is affirmed.

IT IS THEREFORE ORDERED AND ADJUDGED that the order revoking the liquor license of the APPELLANT 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: April 14, 2011

Dennis M. Fleming
Chairman

Donald O'Connell
Member