LICENSE APPEAL COMMISSION
CITY OF CHICAGO

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| 2362, Inc. | ) | |
| Domingo Macedo, President | ) | |
| Licensee/Suspension | ) | |
| for the premises located at | ) | |
| 2360-62 North Clybourn | ) | Case No. 08 LA 40 |
| | ) | |
| 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

On December 11, 2007, the licensee was mailed a notice that a hearing would be held on January 28, 2008, in connection with disciplinary proceedings regarding the City of Chicago retail liquor licenses and all other City of Chicago licenses issued for this premises. The charges were that on August 11, 2007, the licensee:

1. Failed to conspicuously post a retail food license in a part of the licensed establishment to which the public has access in violation of Section 4-8-045, of the Municipal Code of Chicago.

2. Failed to display a liquor license in a conspicuous place on the licensed premises in violation of Section 4-4-210, of the Municipal Code of Chicago.

3. Operated without a public place of amusement license in violation of Section 4-156-300, of the Municipal Code of Chicago.

4. Failed to display a valid public place of amusement license in a conspicuous place on the licensed premises in violation of Section 4-4-210, of the Municipal Code of Chicago.

The notice was mailed to 2362, Inc., the licensee, for the premises located at 2360-62 N. Clybourn, care of Domingo Macedo, the President of the corporation. It specifically advised the licensee that "IN CASE OF YOUR FAILURE TO APPEAR, A DETERMINATION WILL BE MADE BY DEFAULT."

This matter proceeded to hearing on May 5, 2008. Prior to the start of evidence it was noted for the record that the matter had been previously scheduled for hearing on January 28th, March 10th and April 7, 2008. City's Exhibit #2, in evidence, is a letter to the licensee dated April 20, 2008, advising the matter was set for May 5, 2008, for a default hearing. The licensee was further advised that a default hearing would occur if the licensee failed to appear. The licensee did not appear personally or through counsel on May 5, 2008, and the matter proceeded to default hearing. The City's motion to withdraw Charges 3 and 4 was granted.

Sergeant Ralph Egan of the 18th district went to the Club Pearl at 2362 N. Clybourn at 12:45 a.m. on August 11, 2007, to do a license check due to several citizen complaints about noise. The establishment was open and operating and as he entered he noticed 15 to 30 patrons consuming alcoholic drinks and there was a bartender serving drinks. Nowhere on the premise was a retail liquor license or a retail food license displayed. Sergeant Egan spoke with Domingo Macedo who identified himself as the owner. Mr. Macedo stated he kept the licenses upstairs in the apartment he lived in immediately above the location.

City's Exhibit #5 was allowed into evidence as the past history of discipline issued to the licensee. It reflects a $1,000.00 fine for cases L-06-0555 and L-06-0605. The licensee was charged in both of these cases with operating without liquor and food licenses and failure to display a consumption on premises and retail food license on October 13, 2006, and October 27, 2006.

The Deputy Hearing Commissioner found that the City met its burden of proof on Counts 1 and 2 and recommended a 30-day suspension based on the testimony and the prior history of non-compliance. Acting Director Mary Lou Eisenhauer adopted those findings as those of the Department of Business Affairs and Licensing. The licensee filed a timely notice of appeal with the License Appeal Commission. Oral argument was heard on January 8, 2009.

In cases before this Commission dealing with suspension cases review 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.

Count 1 alleged a violation of Section 4-8-045 of the Municipal Code of Chicago. That section of the code reads "every license shall be posted in a conspicuous place in that part of a licensed establishment to which the public has access." While Section 4-8-020 is not set out in

the notice of hearing or the charges one must assume that the prohibition listed in 4-8-020 (a) was also violated. Section (a) prohibits a person from engaging in the business of a retail food establishment without having a retail food establishment license. There must be evidence that a licensee was operating a "retail food establishment" as defined in 4-8-10 of the Municipal Code of Chicago before that licensee had an obligation to conspicuously post a retail food license. No such evidence was introduced in this case. Sergeant Egan did not testify as to what licenses were issued to 2362, Inc., other than liquor. His testimony is that he went "to do a licensed premises check on this location - the liquor license for the premises at that location." He did not testify that he saw any of the 15 to 30 patrons in the premises eating. His testimony was that those patrons were consuming alcoholic beverages and a bartender was serving drinks. Sergeant Egan's testimony about his conversation with Mr. Macedo concerning the location of the licenses did not specify if he asked Mr. Macedo for a retail food license. As to this count there is not substantial evidence as the record as a whole to affirm the finding of the Deputy Hearing Commissioner. This is not reweighing testimony or the credibility of Sergeant Egan but is based on a lack of evidence as to whether this licensee had a retail food license and, if so, a lack of evidence of sale of food at retail.

Count 2 alleged that the licensee failed to display a valid liquor license in a conspicuous place on the licensed premises in violation of Section 4-4-210, of the Municipal Code of Chicago. Sergeant Egan testified he did observe patrons drinking and a bartender serving drinks. The licensee said his licenses were upstairs in his apartment. The record as a whole shows the City proved this count by substantial evidence.

The final matter to be decided is whether this order of the 30 day suspension is supported by the findings. While the Deputy Hearing Commissioner did not indicate if that 30-day recommendation was concurrent on each of his findings this Commissioner will proceed on that assumption. This is based on the fact that it appears this Commission does not have the power to remand. This Commissioner also does not have the power to modify a suspension. The issue to be decided in these factual scenarios is not whether this Commissioner or this Commission as a whole would have imposed a 30-day suspension but whether the 30-day suspension in this case is so arbitrary and capricious as to require a reversal. This is the third time this licensee has been found to have failed to display the proper liquor license. Twice before it admitted operating without a city liquor license and retail food license and failing to display its consumption on premises license and retail food license. Based on this history this Commissioner does not feel that a 30-day suspension in this case is so arbitrary or capricious as to require reversal.

The decision of the Local Liquor Control Commission suspending the liquor license of 2362, Inc., is affirmed.

COMMISSIONER KOPPEL'S DISSENTING OPINION

According to the Liquor Control Act, the Local Liquor Control Commissioner (LLCC) has that discretionary authority to assess a fine, suspension or revocation if the LLCC proves that the licensee has committed a license violation. Part of this discretionary authority includes the LLCC's ability to look back at prior violations committed by the licensee for purposes of aggravation. In other words, the severity of the penalty for a given violation depends upon the

licensee's prior proven bad acts on record.

While this Commission defers to the discretionary authority of the LLCC to assess a punishment for a license violation, we also have the responsibility to review each case to determine whether or not the LLCC has issued a fundamentally fair penalty. Due process requires that the LLCC carefully assess aggravating factors prior to assessing a penalty for a license violation. In most cases, this means that the LLCC will review the severity of the current violation and prior recorded and recent bad acts of the licensee in determining the severity of a new penalty. Generally, the LLCC should follow a path of progressive discipline increasing fines and suspensions gradually over time prior to revocation of a license. Although each case is unique and stands on its own set of aggravating factors, the local commissioner should follow a set of consistent aggravation rules that apply to all licensees in similar circumstances.

In this case, the LLCC did not follow a consistent pattern of progressive discipline and over-reached in the assessment of a 30 day suspension. In addition, in aggravation, the LLCC reviewed evidence that, in 2006, this licensee committed almost the identical violations that they have committed in this case. In 2006, they were fined $1,000 for these same acts. Therefore, the LLCC's disciplinary actions of assessing a 30 day suspension in 2008 and a $1,000 fine two years earlier for the same offense are neither consistent nor progressive. Although I agree with the LLCC that it is important for liquor licensed businesses to operate with all necessary business licenses, the penalty in this case is far too severe after considering the licensee's prior violations. For this reason, I would reverse the decision of the Local Liquor Control

Commission to suspend this licensee for 30 days.

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: March 11, 2009

Dennis M. Fleming
Chairman

Stephen B. Schnorf
Member