

LICENSE APPEAL COMMISSION

CITY OF CHICAGO

1040 Club, Inc.)	
Victor Barrera, President)	
Licensee/Revocation)	
for the premises located at)	Case No. 12 LA 7
1040 West 18 th Street)	
)	
v.)	
)	
Department of Business Affairs and Consumer Protection)	
Local Liquor Control Commission)	
Gregory Steadman, Commissioner)	

ORDER

DECISION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER SCHNORF

Respondent received notice that the City of Chicago was holding a hearing pursuant to 235 ILCS 5/7-5, and Title 4, Chapter 4, Section 280 of the Municipal Code of Chicago in connection with proceedings to revoke the City of Chicago Retail Liquor License and all other City of Chicago licenses issued to it for the premises at 1040 West 18th Street, Chicago, Illinois. The reasons alleged as the bases for the revocation arise out of two alleged sales of cocaine on November 12 and 19, 2010. It was alleged these sales violated the following sections of the Chicago Municipal Code and Illinois State Statutes:

1. 720 ILCS 570/405.1(a) – Criminal Drug Conspiracy
2. 720 ILCS 570/406.1 – Permitting or making the building available for the unlawful use of delivering a controlled substance; cocaine
3. 720 ILCS 5/37.1 – Knowingly maintaining a public nuisance on the licensed premises in that the premises were used for commission of offenses prohibited by the Illinois Controlled Substances Act. 720 ILCS 570 et seq.

4. 8-4-090(b) – Encouraged or permitted the licensed premises to be used for the sale of a controlled substance, cocaine, in a manner which is punishable by more than one year imprisonment.
5. 720 ILCS 570/401(d) – Knowingly delivered or possessed with intent to deliver a controlled substance; less than 1 gram of cocaine.
6. 720 ILCS 570/402(c) – Knowingly possessed a controlled substance; cocaine.
7. 4-60-141(a) – Permitted or allowed an illegal activity on the licensed premises; the possession and sale of cocaine.

This matter proceeded to hearing on November 11, 2011, December 6, 2011, and January 10, 2012, with Deputy Hearing Commissioner Robert Nolan presiding. The Deputy Hearing Commissioner entered Findings of Fact that the City met its burden of proof on all charges, and that based on the totality of the circumstances, revocation of the licenses was appropriate. The respondent filed a timely Notice of Appeal.

Since this matter comes before this Commission on an appeal of a revocation of a license, the scope of inquiry before this Commission is limited to these issues:

- 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 will assist in the review of this case.

David Torres is a Chicago Police Officer who has been assigned to the narcotics unit for more than five years. He does undercover operations involving narcotics and has done hundreds of undercover narcotics investigations.

Torres and Officer Mata went to the 1040 Club at 1040 W. 18th Street at 10:15 p.m. on November 12, 2010, to perform an undercover narcotics operation. He was dressed in civilian clothes. When one enters the club, the bar is on the right and there are tables on the left. There were patrons inside the bar and a person named Rosie who was serving drinks, accepting money for the drinks, and cleaning tables. This led him to believe Rosie was an employee of the 1040 Club. Rosie approached the witness and Officer Mata. She took their drink order, directed them to a table, and cleaned the table. She went to the bar, spoke with a bartender, and returned with their drinks. Torres paid her for the drinks and asked Rosie if she had cocaine for sale. This conversation was in Spanish. Rosie stated there is a guy here that sells cocaine. Rosie then went to the rear of the bar and spoke shortly with a male Hispanic. The male Hispanic was later identified by the nickname Oso, his actual name is Javier Arroyo. Rosie directed Torres to go to the bathroom where Oso, also known as, Javier Arroyo sold him two bags of suspect cocaine for \$40 U.S. currency of 1505 funds. Torres kept the two bags in his front pocket until he returned to his unit. He conducted an NIK test which was positive for cocaine. The bags were inventoried under number 12176295, and sent to the Illinois State Forensic Center. The lab report on this evidence was allowed into evidence as City's Exhibit 5, without objection. It was positive for 0.2 grams of cocaine powder.

Torres and Mata returned to the 1040 Club on November 19, 2010, at approximately 10:45 p.m. As they entered Rosie met them, took a drink order, and directed them to a table. She returned with their drinks and gave the money to a bartender behind the bar. The witness then asked Rosie if she had any cocaine for sale. When Rosie said yes, Torres gave her \$40 in prerecorded funds. Rosie took the \$40 and met with Javier Arroyo. A short time later, Rosie handed Torres a white crumpled up napkin and stated the cocaine was inside the napkin. Inside the napkin were two bags of white powder, suspect cocaine. Torres kept possession of the bags until they returned to his unit. He conducted a NIK swab test which was positive for cocaine. The bags were inventoried under number 12182237, and sent to the lab. City's Exhibit 6, in evidence by agreement, shows the substance was positive for 0.1 grams of cocaine. Torres observed that Rosie was taking care of other patrons by taking drink orders, going to the bar, and serving drinks.

Torres had never been to the 1040 Club before November 12, 2010, and had never seen Rosie before that date. The bar was crowded on November 12, with several bartenders working, as well as, another female bartender named Rocio.

City's Exhibit 7, which is the prior Order of Disposition sheet was admitted into evidence over objection. The objection was based on the fact that the document is vague and does not explain the changes that arose out of incidents in 1998 and 1999. It includes a charge listed as narcotics on August 15, 1999.

Victor Barrera is the president and secretary-treasurer of the 1040 Club, Incorporated, which holds a liquor license with the City of Chicago and the State of Illinois. It has had this license since 1989. Since 1998 the licensee has not had any other problems or violations other than this case.

He has two employees at the location named Delfina Reveles and Juana Quiones. He also works at the location and is there at various times throughout the day. He did not employ anyone by the name of Rosie during the month of November of 2010. The bar is open from 7:00 a.m. and closes at 2:00 a.m. Delfina and Juana split the a.m. and p.m. shifts. They serve drinks and are cashiers. He does not employ any waitresses that wait on customers throughout the premises. The witness identified Respondent's Exhibit 1, in evidence, as the employment compensation forms for Juana Quiones and Delfina Reveles for the year 2010. Respondent's exhibit 3, in evidence, is the form for the Illinois Department of Employment Security showing payments due for two employees. They are Delfina Reveles and Juana Quiones. These forms were prepared by his accountant Don Putlak. He has been the accountant since 1989. The documents show payments to his employees in 2010. No one was employed on a cash basis.

The witness stated he was at the premises on November 12, 2010 at 10:00 p.m. He does not know a woman named Rosie or Rosita. He did not see a woman cleaning the tables at his establishment or anyone other than Juana or Delfina seating patrons. He does not know someone named Oso as a frequent customer. He was at the bar on November 19, 2010, but could not remember if he was there at 10:00 p.m. He does not know a woman named Rosie who was serving drinks and cleaning tables on that date at his establishment. Neither Juana nor Delfina

has the authority to ask others for help in their traditional bartender duties. No one is paid as cash at his establishment. His occupancy is 61 patrons and there is one bar.

The witness could not remember how many patrons were in the bar on November 12 at 10:00 p.m., but it could have been crowded. It would have been him and either Delfina or Juana working. Customers walk to the bar to get their drinks. There is no table service. He would clean the tables or they are left there. The bartenders will come from behind the bar or he would wipe them down. He essentially worked as a busboy. He did this as it was crowded on November 12, 2010, but does not recall if he did it on November 19, 2010. The bar is open every night until 2:00 a.m. and he is in and out various times every day.

Izamaldo is the owner of the building. He comes by to see if everything is in order but Izmaldo does not handle the hiring or firing of employees, and Izmaldo is not paid a salary for anything related to the licensed establishment.

Neither Juana nor Delfina go by any other name. Delfina would have been working on November 12 and 19 at 10:00 p.m. She was described as Hispanic, 5 feet seven or eight inches, with long blonde hair.

One issue in this case is whether there is substantial evidence in the record as a whole to affirm the revocation. Case law has defined “substantial evidence” very broadly so as to include any evidence in the record which supports the decision to revoke. In this case, the question becomes if there is any evidence in the record to support the findings that Rosie was an agent of

the respondent. Case law defines what is an agency relationship in liquor cases has also been broadly defined to include any work done on behalf of a respondent. If Rosie was directing customers to tables, taking drink orders, and cleaning tables that would be work sufficient to make her an agent of the respondent. The evidence in the record on this point was contradictory, as the police officer testified to these facts and the owner testified he did not have waitresses and did not have people cleaning tables. The Deputy Hearing Commissioner who had the opportunity to observe the witnesses testify and who then weighed their credibility made a finding that the testimony that the testimony of Police Officer Torres was credible and believable. It is not within the power of this Commission to overrule a finding of credibility made by a Deputy Hearing Commissioner.

The finding that there was an agency relationship between Rosie and the respondent is supported by substantial evidence in the record as a whole.

Based on that finding being upheld, there is substantial evidence in the record as a whole to support the findings of the Deputy Hearing Commissioner that the City met its burden of proof on all counts.

The respondent has also raised the issue that revocation of this license is too severe a penalty and an abuse of discretion. This argument is based on the fact that the respondent has been in business since 1989, and the only discipline imposed, according to City's Exhibit 7, was a 14-day suspension in Case 98 LR 0114. In addition, there was no evidence presented that the licensee had prior personal knowledge or involvement in the cocaine sales.

The power of this Commission on these types of matters is limited to an outright reversal of the revocation or affirming the revocation. This Commission cannot remand to the Local Liquor Control Commission and cannot impose discipline less than revocation. This is so even in cases in which the Commissioners may feel that the facts of a particular case do not merit revocation. That is an issue to be determined by the Circuit Court of Cook County.

Since there have been factual findings sufficient to support the decision of the Local Liquor Control Commissioner, an outright reversal would lead to no discipline for these findings. Such a result cannot be allowed unless this Commission were to feel that revocation was such an abuse of discretion that it must be reversed. That is not the fact in this case. Revocation is not such an abuse of discretion as to require reversal.

The revocation of the retail liquor license for the 1040 Club at 1040 West 18th Street is affirmed.

OPINION OF COMMISSIONER O'CONNELL IN DISSENT

Before this Commission is yet another in a recent line of cases involving agency in a Mexican bar that begs the question of whether there may be a cultural phenomenon which is being overlooked. Nowhere in the transcripts does the City place the alleged agent ("Rosie") behind the bar. It is possible that "Rosie" was simply grooming customers for her own alleged illegal activity (unbeknown to licensee's agents) by acting very socially. This Commissioner recognizes that the local hearing officer has ruled that the police officer was a credible witness

and is not questioning credibility. There is a nagging feeling, however, that a socially adept individual's behavior is perceived as agency of a licensee who is unaware of the illegal activity.

This Commissioner is also concerned that the restrictions placed on this Commission's rulings hinder the rendering of a decision that can be both legally correct and fair at the same time in this case. Unlike the rules at the State of Illinois Liquor Control Commission on which this Commissioner also serves, this panel has neither the authority to adjust the penalty nor the authority to remand the case back to the local for review. This leaves this panel, once again, with only two options: either affirming an extremely harsh penalty or reversing which results in no penalty at all.

As a resident of the city of Chicago, this Commissioner is a strong supporter of efforts to end drug activity in our neighborhoods but, unfortunately, does not believe that a preponderance of the evidence clearly points to agency in this case. Given limited options, this Commissioner votes to reverse the order of revocation.

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: November 2, 2012

Dennis M. Fleming
Chairman

Stephen Schnorf
Member