

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Gene's Sausage Shop & Deli, Inc.)
Eugene Luszc, President)
Licensee/Suspension)
for the premises located at)
5330 West Belmont Avenue)
v.)
Department of Business Affairs & Licensing)
Local Liquor Control Commission)
Mary Lou Eisenhauer, Acting Director)

Case No. 08 LA 04

ORDER

OPINION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER SCHNORF

A Notice of Hearing was served on the licensee informing a hearing was to be held on May 24, 2007, in connection with proceedings to revoke the City of Chicago Liquor License and all other City of Chicago licenses issued to the premises at 5330 W. Belmont Avenue. The charge at that hearing was that on January 12, 2007, the licensee through its agent, sold tobacco to an individual under the age of eighteen in violation of Title 4, Chapter 64, Section 190 of the Municipal Code. Deputy Hearing Commissioner Raymond J. Prosser was appointed to hear this case and the case was heard on November 8, 2007 and December 13, 2007. The Deputy Hearing Commissioner made Findings of Fact that the City proved the sale of cigarettes to a minor and recommended a three day suspension. Scott Bruner, then the Director of Business Affairs and Licensing adopted these findings. The licensee filed a timely notice of appeal with the License Appeal Commission of the City of Chicago. Oral argument was heard on August 13, 2008.

Prior to an analysis of the matters in this case dealing with the suspension of the liquor license this Commissioner feels he should address the issue of jurisdiction of the non-liquor related licenses. The License Appeal Commission of the City of Chicago was created by state statute to deal with suspensions and revocations of liquor licenses in the City of Chicago. As such, its powers are limited to what is given by the enabling legislation. No power is set out in the state statute conferring jurisdiction on this Commission to hear and rule on revocations or suspensions of licenses other than liquor licenses. The fact that one or both parties may not object to this Commission's ruling on such matters does not change the fact this Commission does not have the statutory authority to rule on those cases. The fact means that a licensee may need to file a separate appeal of discipline in non-liquor licenses directly to the Circuit Court of Cook County also does not change the fact this Commission does not have jurisdiction to hear non-liquor license suspensions or revocations.

As to this case there is more than substantial evidence in the record as a whole to uphold the finding that the City proved the licensee sold cigarettes to a minor. While a three day suspension for a first time sale of cigarettes to a minor might be too high in the opinion of this Commissioner, it is not so arbitrary or unreasonable so as to require its reversal on that basis. The problem this Commissioner has with this case is that the sale of tobacco in this type of neighborhood deli/grocery store does not constitute a violation of an ordinance fairly related to the sale of alcohol. The authority given to the Mayor to suspend or revoke any license if he feels the licensee shall have violated any of the provisions of this Code or any of the statutes of the state is set out in Section 4-4-280 of the Chicago Municipal Code. Case law interpreting that

provision has construed it to be limited to violations of law fairly related to regulation of the sale of liquor. This Commissioner does not feel a violation of the Municipal Ordinance banning the sale of cigarettes to a minor is so fairly related to the regulation of the sale of alcohol under these circumstances so as to justify the three day suspension of the liquor license.

The three day suspension of the City of Chicago Retail Liquor License is reversed. Since there is no jurisdiction over non-liquor licenses, no decision is made as to the suspension of those licenses.

COMMISSIONER KOPPEL'S CONCURRING OPINION

This matter comes before the License Appeal Commission on the appeal of a three day suspension of the licensee's tobacco license, food license, and liquor license. The appeal follows a finding that the licensee violated 4-64-190, of the Chicago Municipal Code, by selling tobacco to a minor. The appeal presents the License Appeal Commission with three critical matters: 1) the jurisdiction of the License Appeal Commission to hear this appeal; 2) whether the sale of tobacco to a minor constitutes a violation of a law or regulation fairly related to the regulation of the sale of liquor; and 3) whether the three day suspension of the licensee's tobacco license, food license, and liquor license was arbitrary, capricious and against the substantial evidence.

The Liquor Control Act gives Local Liquor Control Commissioners the power to issue licenses to sell liquor. The Act explains that when a licensee seeks to appeal from an order revoking or suspending a liquor license in the City of Chicago, he must appeal to the License

Appeal Commission.

Here, the licensee's tobacco license, food license, and liquor license have all been suspended. With the suspension of the licensee's liquor license, there is simply no arguing the fact that jurisdiction is properly with the LAC to hear this appeal. *Roach Enterprises, Inc. v. License Appeal Commission of the City of Chicago*, 277 Ill.App.3d 523 (1st Dist. 1996). Thus we find the appeal properly within the jurisdiction of the local appeals commission.

Next, the sale of tobacco to a minor during a sting operation is not a violation of a law or regulation fairly related to the regulation of the sale of liquor. As is commonly accepted, the Illinois legislature passed the Liquor Control Act to protect the public health and welfare, and to promote temperance in alcohol consumption by careful control and regulation of the manufacture, sale, and distribution of alcoholic liquors. Based on this express purpose, the authority to revoke or suspend a liquor license is limited to the violation of a law or regulation fairly related to the regulation of the sale of liquor. *Nappi v. License Appeal Commission*, 50Ill.App.3d 329 (1st Dist. 1977). Where the regulation of the manufacture, sale, and/or distribution of alcohol is not in issue, it is entirely inappropriate for the Local Liquor Control Commissioner to act against a liquor licensee. Therefore, it may be said that where the conduct of the licensee does not fall within the scope of the licensee's liquor-related business, and does not pose an immediate threat the public health and safety, the conduct is not fairly related to the regulation of liquor.

In this matter the violation at issue is the first time, and only time, sale of tobacco by the licensee to a minor during a City sting operation. The licensee's sale of tobacco is wholly unrelated, or merely incidental, to the licensee's sale of the liquor. Further, there is no evidence whatsoever that any regulation regarding the manufacture, sale, or distribution of alcohol was before the Local Liquor Commission. Because the conduct of the licensee, selling tobacco to a minor, does not fall within the scope of the licensee's liquor- related business, this conduct is not fairly related to the regulation of liquor, and the suspension is reversed.

Finally, the three day suspension of the liquor license, and of the licensee's non-liquor licenses, for the first time sale of tobacco to a minor is entirely arbitrary, capricious and is not supported by substantial evidence. In this matter, it is clear that the evidence demonstrates that the licensee did allow the sale of tobacco to a minor during a City sting operation. However, the record is void of absolutely and other violations in the licensee's history.

Typically, where there is no evidence of aggravating circumstances, it is routine for the imposition of a fine, or even a lesser warning, for the first time violation by a licensee to found to have sold liquor to a minor. See *Sip & Save Liquors, Inc. v. Daley*, 275 Ill.App.3d 1009 (st Dist. 1995). This standard should be applicable to violations involving the first time sale of tobacco to a minor as well. Here the evidence demonstrates that since opening its doors, the licensee has not even been accused of selling tobacco to a minor, or violation of any other regulation or ordinance. Because the typical penalty in matters akin to this one is a warning or the imposition of a fine, and because the record reveals no substantial evidence to justify the

suspension of any licenses, I find the suspension of the City licenses in this matter to be an arbitrary and capricious departure from the established standards for the type of violation in this case. I would reverse the City.

IT IS THEREFORE ORDERED AND ADJUDGED That the order suspending the liquor license of the appellant for THREE (3) days is hereby REVERSED.

Pursuant to Section 54 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 4, 2008

Dennis M. Fleming
Chairman

Irving J. Koppel
Member

Stephen B. Schnorf
Member