

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Selective Publishing, Inc.)	
Simon Gordon, President)	
Licensee/Suspension)	
for the premises located at)	Case No. 08 LA 07
209 West Lake Street)	
)	
v.)	
)	
Department of Business Affairs & Licensing)	
Local Liquor Control Commission)	
Mary Lou Eisenhauer, Acting Director)	
)	
)	

ORDER

OPINION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER SCHNORF

Licensee was charged with violating Title 13, Chapter 36, Section 020 of the Municipal Code of the City of Chicago in that the Licensee, by and through its agent, allowed the number of persons in the licensed premises on February 10, 2007, to exceed the occupancy limit certified by the Building Commissioner. Hearings were held by Hearing Commissioner Juliana Wiggins Stratton on October 5, November 16 and December 14, 2007. Subsequent to these hearings, Hearing Commissioner Wiggins made findings of fact that the City met its burden of proof and based on the present finding and the Licensee's prior disciplinary history, recommended a ten day suspension. Scott Bruner in his position as the Director of Business Affairs and Licensing adapted the findings of fact and recommended suspension and an order for a ten day suspension was entered on January 14, 2008. This matter is before this Commission on the Licensee's appeal of this ten day suspension. The arguments presented by the Licensee on the appeal before

this Commission can be summarized as follows:

- a. The finding of fact that the City met its burden of proof must be reversed since it was based on the testimony of Sergeant Edward Schwarz and such testimony was so unbelievable and uncredible that it cannot support the finding.
- b. The prior order of disposition should not have been admitted into evidence since none of the present shareholders or officers of Selective Publishing, Inc., were in control of the licensee or contributed to the events set out in the prior order of disposition.
- c. That the prior orders of disposition should not have been considered by the Hearing Commissioner in her recommendation of a ten day suspension since the current shareholders had no control over conduct that occurred prior to their ownership.

Since this Commission sits as a reviewing body in this case the issues to be decided are:

1. Whether the Mayor, as Local Liquor Control Commissioner, proceeded in the manner provided by law;
2. Whether the order is supported by the findings;
3. Whether the findings are supported by substantial evidence in light of the whole record.

There is no need to discuss issue 1 since there has been no argument that the Mayor, as Local Liquor Control Commissioner, proceeded in the manner provided by law. Issue 3 will be addressed first and then issue 2.

The findings of the Local Liquor Control Commissioner relative to the occupancy issue are supported by substantial evidence in light of the whole record. There is no question that the certificates of occupancy issued to Licensee and in effect on February 10, 2007, limited occupancy to 201 people. Sergeant Edward Schwarz testified that he counted people as they left the club that evening and that his count was originally 280 and later increased to 292 to account

for people still in the premises. He admitted he could not ascertain if those people still in the club were patrons or workers who would not be identified in an occupancy count. Counsel for Licensee did cross-examine and was able to bring out in cross that Schwarz did not have a counter, that Fire Department regulations were not followed and that there were no notes reflecting that count. Counsel for Licensee introduced into evidence a CD containing about two and a half minutes of video downloaded from the video system of Wet on the night in question. The time appears to be from 12:40 am and ends at 12:42 am with 23 seconds. Counsel for Licensee pointed out in argument why this videotape impeached the testimony of Sergeant Schwarz. Counsel for Licensee correctly stated in his closing that this case was a matter of credibility. The person who is in the best position to judge the credibility of witnesses in trier of fact. Hearing Commissioner Wiggins specifically found that Sergeant Edward Schwarz testified credibly on the issue of the count of the number of patrons that left the club. The burden of proof required to establish substantial evidence in light of the record as a whole has been defined as any evidence in the record supporting the finding. That burden has been met.

Arguments B and C both relate to the relevance of the orders of previous dispositions and can be addressed together. The gist of both arguments are that it was improper to allow the prior orders of disposition in evidence and also improper for them to be used in aggravation in imposing a penalty because the events in the prior orders of disposition took place prior to the present shareholders purchasing the stock of the corporation and prior to the present officers taking control of the corporation. Since only the currently qualified shareholders can act on behalf of the corporation and since none of the individuals who caused the bad acts in the prior

disposition are currently involved in the business, those prior orders of disposition cannot be used against the Licensee. In support of this position counsel for Licensee referred this Commission to the case of O.F.A. Limited Partnership, Inc., d/b/a Zentra, 923 W. Weed, Chicago, Il. v. City of Chicago, et al, 05 CH 12879 in which Judge Flynn adapted the Licensee's position. The members of this Commission are also aware that other Cook County Circuit Court judges have also accepted that argument. This Commissioner has consistently declined to accept that position and has asserted that the licensee is the corporation and history of the corporation remains the history even if no shareholders purchase the stock of the company. At least one other Commissioner has also adopted this position.

The Appellate Court in case 1-06-0532, First District - Sixth Division rendered an opinion on this point on May 23, 2008, in Addison Group, Inc. v. Richard M. Daley, et al. Addison made the argument that evidence of a 1990 voluntary payment of a fine should not have been allowed because the current owner did not own Addison at that time. The Court rejected this argument and stated:

...the Commission here correctly considered prior misconduct by the corporate licensee in assessing the penalty to impose on the corporation for the new violation. (Opinion p.11)

The Appellate Court added that such a change in ownership might be argued as a basis for mitigation and, in fact, counsel for the Licensee did make such a argument. The opinion does not require that such a change in ownership be considered in mitigation.

Counsel for Licensee did not directly address whether the order is supported by the

findings. This Commissioner will address this matter to have a complete record. The 10 day closing was based on the present violation and the past disciplinary history which included a 7 day closing for a sale to minor in June 2003. It should be noted that no disposition is listed of case 03 LR 0085 which alleged an occupancy violation and failure to display. Even without a prior disposition on those matters, the 10 day suspension in this case is supported by the findings.

COMMISSIONER KOPPEL'S CONCURRING OPINION

The facts in this case are that the Licensee was given a ten day suspension because it allowed the number of persons in the licensed premises to exceed the occupancy limit certified by the Buildings Commissioner. The Licensee contends that the officer who took the count was interrupted on several occasions and therefore did not take an accurate count. The facts show that there was a count of 292, this exceeded the count by a large margin and that is a violation.

The next issue is whether the penalty of a ten day suspension was proper. The Licensee contends that a previous violation of the corporation by another owner of the corporation should not be considered attributed to the new owner. The previous owner was charged with a sale of alcohol to a minor with a seven day suspension.

With regard to the penalty, the count cannot disregard the previous penalty of the corporation. This board has no authority to modify a penalty as being too severe. Predicated on that fact the penalty must stand.

IT IS THEREFORE ORDERED AND ADJUDGED That the order suspending the liquor license of the appellant for TEN (10) 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 5, 2008

Dennis M. Fleming
Chairman

Irving J. Koppel
Commissioner

Stephen B. Schnorf
Commissioner