

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Mexicaltitan, Inc.)
Edgar Garcia, President)
Licensee/Fine)
for the premises located at)
6560 West Fullerton) Case No. 10 LA 58
)
v.)
)
Department of Business Affairs and Consumer Protection)
Local Liquor Control Commission)
Gregory Steadman, Commissioner)

ORDER

CHAIRMAN FLEMING’S OPINION JOINED BY COMMISSIONERS SCHNORF AND O’CONNELL

The Licensee received notice that hearing would be held in connection with license disciplinary proceedings regarding the City of Chicago liquor license and all other City of Chicago licenses issued for the premises located at 6560 West Fullerton, upon this charge:

1. That on or about January 27, 2010, the Licensee, by and through its agent, advertised or promoted a prohibited practice, to wit: selling or offering to sell or serve any drink of alcoholic liquor to any person on any one date at a reduced price other than that charged other purchasers of drinks on that day where the reduced price is a promotion to encourage consumption of alcoholic liquor, in violation of 235 ILCS 5/6-28 (b)(6).

This matter proceeded to hearing before Deputy Hearing Commissioner Juliana Wiggins Stratton. Assistant Corporation Counsel Daniel Rubinow represented the City and attorney Dale Golden represented the Licensee.

Deputy Hearing Commissioner Stratton entered Findings of Fact that the City proved this charge and further found that in light of the present violations and the

Licensee's prior disciplinary history that \$1,000.00 was an appropriate fine. Those findings were adopted as the findings of the Local Liquor Control Commission by the Local Liquor Control Commissioner Gregory J. Steadman. The Licensee filed a timely appeal with this Commission.

Since this case involves an appeal of a fine jurisdiction of this Commission is limited to consideration of the following 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.

Section 235 ILCS 5/6-28 states Happy hours prohibited. Section (b)(6) states no retail licensee or employee or agent of such licensee shall:

sell, offer to sell or serve any drink of alcoholic liquor to any person on any one date at a reduced price other than that charged other purchasers of drinks on that day where the reduced price is a promotion to encourage consumption of alcoholic liquor.

Section (b)(6) adds that no retail licensee or employee or agent of said licensee shall advertise or promote in any way, whether on or off the licensed premises any of the practices prohibited.

A review of the evidence presented at the hearing will be helpful in understanding this decision.

Lisa Wallace has been a Chicago Police Officer for twenty years and is assigned to the license investigations unit of the organized crime division. They do compliance checks of any licensed businesses in Chicago. On January 27, 2010, at approximately 8:00 p.m. she was working as a Chicago Police Officer. She entered the Las Islas Marias Restaurant at 6560 West Fullerton. The corporation that holds the license at that location is Mexicaltitan, Inc. It has a Consumption on Premises – Incidental Activity liquor license and a PPA license.

She and her partner were dressed in plain clothes in an undercover capacity. She noticed that affixed to the glass door on the outside of the premise was a poster advertising an event to be held at the location two days later on January 29, 2010. The sign was in English and it was advertising that the Modelo Beer girls would be there and they were offering Modelo Beer for \$1.00 from 10:00 p.m. until 11:00 p.m. After they sat down a waitress came to take their drink orders. When Wallace asked for a dollar Modelo the waitress stated it was not until Friday that she could get Modelo's for a dollar. She and her partner ordered an entrée, ate and noticed nothing else unusual. Wallace did not take the poster or take a picture of the poster because she did not want to jeopardize her undercover capacity.

Wallace described the poster as stating Modelo and having color pictures of group of women in bikinis. The girls were referred to as the Modelo girls. In the other corner was \$1.00 Modelo Beers from 10:00 p.m. until 11:00 p.m. The poster was in English and the witness does not speak Spanish.

Gerson Pinedo works for Mexicaltitan, Inc., with the responsibility of handling the advertising. He proofreads posters to ensure the advertising is done correctly. He identified Licensee's Exhibit 1, in evidence without objection, as a special events poster prepared by printer and himself with help from the beer distributor. This poster was passed out in other businesses and posted inside the restaurant. Their posters are always printed in Spanish since the majority of their clientele are Hispanic. At no time has he posted an English language poster promoting a Friday Modelo Beer event. A copy of this poster was on the wall of the restaurant. The restaurant's policy on happy hours was based on Bassett training. You cannot have a happy hour. If there is a promotion you put it on all day. At this time the beer distributors would sell beer at a special price so it could be sold at a certain price the whole day. Pineda said there would usually be two promotional posters in the foyer by the door and a poster in the men and women's bathroom. He recalled an event involving the Modelo Beer girls but could not remember the specific date. He recalled a poster of Modelo girls but that poster would have been made by Modelo. It said the restaurant would have the girls from 10:00 p.m. until 11:00 p.m. It promotes the hours the girls would be present. Those posters are printed in English and Spanish but they do not refer to two-tiered pricing.

Edgar Garcia is the owner of Mexicaltitan, Inc., and Las Islas Marias restaurant. He was not present at the location on January 27, 2010. His assistant, Alex Armando Gomero was in charge. Gomero does not speak English and only one or two of his ten to twelve person wait staff does speak English. He has instructed his staff there is no happy hour. He has told his staff it is a whole day promotion. The Modelo girls poster did not

list different prices for different drinks on January 29, 2010. He has never promoted or advertised happy hour promotions, and has never authorized any employees to implement any happy hour advertising or promotions.

Licensee's Exhibit 1, in evidence without objection, is for an event at the Licensee's premises scheduled for Friday, January 29. It promotes a \$1.00 Modelo Beer special. It does not state that this beer special was limited to certain hours on January 29.

The substantial evidence standard requires that this Commission sustain the decision of the Local Liquor Control Commission if there is any evidence in the record upholding the decision. While it is not usual for this Commission to decide that a finding is not supported by substantial evidence in the record as a whole, that is the decision on this case. The evidence in the City's case is solely the oral testimony of Officer Lisa Wallace that she saw a poster advertising \$1.00 Modelo Beer, two days later from 10:00 p.m. to 11:00 p.m. That poster itself and no picture of that poster was introduced in evidence. Licensee's Exhibit 1, in evidence without objection, promotes a \$1.00 Modelo Beer special for January 29, without any restrictions on the hours the special was being held. The poster described by Officer Wallace would violate the state statute if the \$1.00 Modelo Beer special was only available from 10:00 p.m. to 11:00 p.m. Since the evidence is that this promotion was promoted as an all-day event in the other posters there was no happy hour violation under the state statute. The evidence of the conversation between Wallace and the waitress only confirms that there was a \$1.00 Modelo Beer special on that Friday. Wallace described the waitress as saying the

Modelo special was not until Friday. Wallace did not say the waitress told her the Modelo special was only on Friday from 10:00 p.m. until 11:00 p.m.

The finding of fact with respect to Mr. Pinedo's testimony is not supported by substantial evidence. Mr. Pinedo specifically testified they did special events every Friday, and that City's Exhibit 1, was an advertising poster for January 29. While he did testify that the Modelo girls would only be present from 10:00 p.m. until 11:00 p.m., but gave no testimony about a beer special during this time. In fact, the testimony of Mr. Pinedo and Mr. Garcia denied any happy hour specials ever occurred.

There is also no direct evidence that if a Modelo girls poster as described by Officer Wallace was posted on the door on January 27, 2010, that the posting was done by an agent of the licensee. While such a poster might be attributed to the licensee circumstantially, there is no evidence who put the poster up, when the poster was put up and that agents of the licensee were aware the poster was up.

IT IS THEREFORE ORDERED AND ADJUDGED that the order to Fine the Appellant the sum of \$1,000.00 is REVERSED.

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 4, 2011

Dennis M. Fleming
Chairman

Stephen B. Schnorf
Member

Donald O'Connell
Member