

LICENSE APPEAL COMMISSION  
CITY OF CHICAGO

Norflo Holding Corp. )  
Norman Bolden, President )  
Licensee/Suspension )  
for the premises located at )  
1041-1043 East 43<sup>rd</sup> Street ) No. 10 LA 67  
)  
v. )  
)  
Department of Business Affairs and Consumer Protection )  
Local Liquor Control Commission )  
Gregory Steadman, Commissioner )

ORDER

OPINION OF CHAIRMAN FLEMING JOINED BY COMMISSIONERS SCHNORF AND O'CONNELL

Licensee received notice that pursuant to 235 ILCS 5/7-5 and Title 4, Chapter 4, Section 280, of the Municipal Code of Chicago, a hearing was scheduled in connection with disciplinary proceedings regarding the City of Chicago Liquor License and all other city licenses issued to it for the premises located at 1041-1043 E. 43<sup>rd</sup> Street. The charges alleged in Counts 1 through 4 that the licensee on or about March, 2010, June 2010 and July 2010, by and through its agent, did produce, present or conduct upon the licensed premises, for gain or profit, an amusement without a Public Place of Amusement License, in violation of Title 4, Chapter 156, Section 300, Municipal Code of Chicago. Count 5 alleged that on May 26, 2010, the licensee allowed the number of persons in the licensed establishment to exceed 99 in violation of an agreed order of the Circuit Court of Cook County. Counts 6, 7, and 8 alleged that on August 20, 2010, the licensee produced, presented or conducted on the licensed premise, for gain or profit, an amusement without a Public Place of Amusement License; failed to display a Public Place of Amusement

license in a conspicuous place on the licensed premises in violation of Title 4, Chapter 4, Section 210, Municipal Code of Chicago, and operated in violation of a cease and desist order in violation of Title 4, Chapter 4, Section 015, Municipal Code of Chicago. Counts 9, 10 and 11 alleged similar violations as Counts 6, 7 and 8 with reference to August 22, 2010.

This matter proceeded to hearing before Deputy Hearing Commissioner John Lyke on November 15, 2010. Assistant Corporation Counsel Rachel Berger and Jami Zehr represented the City and Arnim Johnson and James M. Childs, Jr., represented the licensee.

The Deputy Hearing Commissioner entered Findings of Fact that the City met its burden of proof on Counts 1 through 4 and Counts 9 through 11. He found the City did not meet its burden of proof on Count 5, and Counts 6 through 8 were withdrawn prior to the end of the hearing. He further found that the licensee should be suspended for 30 days. This finding was adopted by Gregory Steadman in his position as the Local Liquor Control Commissioner. Licensee filed a timely Notice of Appeal with this Commission.

The relevant sections of the Municipal Code are:

Title 4, Chapter 156-300 Municipal Code of Chicago:  
...It shall be unlawful for the owner, lessee or manager of any property, or for any other person, to produce, present, or conduct thereon, for gain or profit, any amusement unless the owner, lessee or manager of such property has first obtained a public place of amusement license.

Title 4, Chapter 156-305 exempts one from the requirement of a public place of amusement license if the only amusement to be produced, presented or conducted is:

(c) music, dancing or other amusement, if it is offered in a venue with a capacity of less than 100 persons; and (ii) no admission fee, minimum purchase requirement, membership fee or other fee or charge is imposed for the privilege of entering the premises or the portion of the premises where the music, dancing or other amusement is provided or permitted.

Title 4, Chapter 4, Section 210 states:

It shall be the duty of every person conducting, engaging in, maintaining, operating, carrying on or managing a business or occupation for which a license is required by any provision of this Code to post said license in a conspicuous place at the premises where the business or occupation is being conducted.

Since the history of this case merges with facts in a case before the Circuit Court of Cook County and an earlier case at the License Commission a summary of the evidence in this case will assist in an understanding of this decision.

Prior to the start of evidence on November 15, 2010, the licensee's attorney made a request that the record reflect a standing objection to any evidence that pertains to any events that occurred on the premises prior to July 29, 2010. Apparently a Motion to Dismiss such events was filed on September 20, 2010. The City filed a written response and the licensee a written reply. It seems that the Hearing Officer on a date prior to November 15, 2010, ruled that the matter would be disposed of in his ruling. The Findings of Fact is silent on this issue. Since there is no ruling to review, this Commission cannot issue a decision on the motion. It will consider matters alleged in these pleadings if it becomes appropriate to do so in this decision.

Robert Hodge was called as a witness by the City. He is an attorney and is familiar with Room 43 at 1041-43 E. 43<sup>rd</sup> Street from his attending live music performances presented at that location on Sunday nights by the Hyde Park Jazz Society. He is a board member of the society. To the best of his recollection, the Hyde Park Jazz Society conducted live performances at Room 43 on March of 2010. On some dates admission was charged and on other dates no admission was charged and on some occasions donations were taken. He did not know the dates admission was charged. The witness identified City's Exhibit 3, as a printout of the Hyde Park Jazz Society's web page as of July 2010. It advertised an upcoming event at Room 43 that was presented on July 15, and it requested a \$10 minimum donation. Chris Foreman, Bobby Broom and Greg Rockingham performed in Room 43, but does not recall specifically if a cover was charged that day. In May of 2010, the Hyde Park Jazz Society had events on Sunday nights at Room 43. It also had these events in June and July of 2010. To his knowledge, Room 43 did not have a Public Place of Amusement license in those months. Events had been moved in April because of an issue with the PPA license. Hodge also stated he was not the webmaster for Hyde Park Jazz Society and he did not put information on their website.

Norman Bolden was then called as an adverse witness by the City. He is the owner-operator of 1041-1043 East 43<sup>rd</sup> Street. He believes that the Hyde Park Jazz Society held events at his location in March, May, June and July 2010. Bolden testified that as of August, 2010, a special use license was issued to the Hyde Park Jazz Society for the location of 1041-1043 East 43<sup>rd</sup> Street. Bolden did admit that he currently does

not hold a PPA license at the 43<sup>rd</sup> Street location. He believes the special use license issued to the Hyde Park Jazz Society was in effect from March through July, 2010. Bolden identified City's Exhibit 4, as an agreed order dated March 31, 2010. This order was entered by Judge Ann Houser in case 08 M1 402834, and was signed by Assistant Corporation Counsel Glenn Angel for the City and by attorney Arnim Johnson, Jr. for Mr. Bolden. This order specifically limited the occupancy at 1041-43 East 43<sup>rd</sup> Street to 99 occupants on the first floor and no occupancy whatsoever in the basement.

Tyrone Jackson has been an investigator for the Department of Business Affairs and Consumer Protection for three and a half years. He was at 1041-1043 East 43<sup>rd</sup> Street on May 26, 2010. Room 43 was located there and he went to that location to conduct an investigation concerning public place of amusement activity. He arrived in plain clothes with his partner Michelle Murray about 6:10 p.m. The establishment was open and operating with tables and chairs set up. Patrons were sitting, eating food and standing around. There was music being played by a DJ. They did a count that found 118 people in the premises. This was above the approved occupancy set by the March 31, 2010 agreed order. Jackson explained he and his partner counted the patrons. His count was in excess of 100 people and he did not recall how many his partner counted. He never observed anyone taking admissions to get in the premises on that May 26, 2010 date.

Nikita Sanders has worked as an investigator for Business Affairs and Consumer Protection for four and a half years and is currently a Revenue Investigator II. Her duties

are to ensure that the local businesses operate under the City of Chicago ordinances. She was on duty on August 22, 2010, at 7:50 p.m. when she was at 1041-43 East 43<sup>rd</sup> Street. She went there to ensure the business was complying with City of Chicago ordinances. At that time the location had a restaurant food license, a liquor incidental activity – consumption on premises license and a limited business license. The system also showed that the establishment had been issued a cease and desist order for a public place of amusement on March 15, 2010. City’s Exhibit 6 was allowed in evidence as a copy of the cease and desist notice. This order barred conducting the business or occupation of advertising/promoting for live music entertainment for an occupancy of 300 and an admission charge for which a Public Place of Amusement license, Code 1050 is required. The establishment was open and operating with patrons on the first floor and no patrons in the basement. The patrons were listening to live entertainment. The first level had an occupancy of 164 and the basement had occupancy of 99. There were 71 patrons on the premises. She issued three violations to Mr. Bolden. They were:

1. Operating after a cease and desist notice was given for a public place of amusement activity;
2. Operating without the proper Public Place of Amusement license, and
3. Failure to display the Public Place of Amusement license.

Pictures of the band playing and the singer providing live entertainment were allowed in evidence as City’s Exhibit 7, without objection.

The witness stated that for a violation of the PPA ordinance there is either 100 patrons, a cover charge at the door or there is live entertainment. She saw no one

charging at the door that night and there were less than 99 people in the location. She observed less than five people performing.

City's Exhibit 8, which is an order of full compliance and dismissal signed by Judge Houser on August 12, 2010, with respect to case 08 M1 402834 was allowed in evidence. This order shows full compliance with all violations cited in the First Amended Complaint and imposed a \$3,000.00 fine on Norman Bolden.

The City then withdrew Charges 6, 7 and 8 with respect to August 20, 2010.

Norman Bolden testified as a witness in his defense. He denied violating the PPA ordinance in March of 2010, in May of 2010, in June of 2010, and in July of 2010. Bolden did admit on May 26, 2010, the number of persons in the licensed establishment exceeded the occupancy limit of 99, as set by an agreed order of the Circuit Court of Cook County. He paid a \$3,000.00 fine with respect to this matter. The witness denied violating the PPA statute on August 22, 2010, and did not feel he needed to display a Public Place of Amusement license on August 22, 2010, because there were less than 99 people. He did not violate a cease and desist order since that order was over as a result of the initial case being settled. As the owner of Room 43, he did not make any money on any amusement. Bolden did admit the Hyde Park Jazz Society performed at Room 43 on March 7, March 14, May 23, May 30, June 14, June 27, July 15 for a fundraiser, and July 18, 2010. He did not charge the Jazz Society a fee when it has functions at his location. He did serve food and alcohol on these dates and payment is made to him and his

employees directly. He also served food and alcohol on August 22, 2010, and accepted payment. His current occupancy is 164 on the main level and 99 on the lower level. The investigator saw the occupancy cards for these levels on August 22, 2010. There had been a 99 person limit based on the court order entered in March of 2010. That case was dismissed on August 12, 2010. On May 26, 2010, he provided a complimentary buffet with a cash bar. The Hyde Park Jazz Society presented live music on the dates mentioned previously.

City's Exhibit 9, the prior history of the licensee, was admitted without objection. It shows a \$2,500.00 fine and a ten-day suspension for operating without a PPA license and Failure to Display a PPA license on March 15, 2010, in case 10 LR 0025.

It should be noted that the Deputy Hearing Commissioner stated the licensee's Motion for Directed Finding on Counts 1, 2, 3, 4, 5, 9, 10 and 11 would be taken under advisement.

The Findings of Fact issued in this case did not address the Motion to Dismiss and the Motion for Directed Findings made by the licensee.

Since this case deals with an appeal of a fine the scope of review of this Commission 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.

Since our scope of review is limited this Commission does not have the power to rule on constitutional arguments or arguments relating to constitutional issues. Those matters and arguments are of record.

The first matter to be determined is whether the Findings of Fact by the Deputy Hearing Commissioner that the City proved that the licensee violated the Public Place of Amusement Ordinance on March 2010, May 2010, June 2010, July 2010, and on August 22, 2010, are supported by substantial evidence in light of the whole record. This Commissioner is aware of the substantial evidence standard is a law standard and that cases have suggested any evidence supporting the findings of a deputy hearing commissioner may be sufficient to meet that standard. Nevertheless, it seems appropriate in this case to review what must be proved by the City and whether there was substantial evidence on those points with respect to the specific allegations.

The first issue to be addressed material to this case is whether an “amusement” is defined by the ordinance being presented. Amusement as defined in 4-156-010 – Definitions of the Municipal Code includes in relevant part any exhibition or performance including but not limited to any musical performance. The performances sponsored Hyde Park Jazz Society and described in evidence at this hearing are sufficient

to establish that the licensee's premises were used at various times from March through August of 2010 for presentation of an amusement.

The second issue that needs to be analyzed is whether this licensee presented these amusements "for gain or profit." If the presentation of the amusement was not for gain or profit there is no violation of the ordinance.

The definition section of the Municipal Code with respect to amusements 4-156-010 does not define gain or profit. While not directly on point, the case of City of Chicago v. Severini, 91 Ill.3d 38, 414 N.E.2d 67 is instructive. In this case, admission to a club licensed as a non-for-profit corporation was granted indiscriminately to any member of the public upon payment of the prescribed amount for each visit. The amusement in this case were females dancing on stage in various stages of dress and undress. There was a \$4 membership fee payable each time a customer returned to the club. There was also a \$6 per person table charge per person for all the near beer and soda one could drink. The Court specifically found that this \$4 membership fee was indistinguishable from the customary entrance or admission charges required by the establishments open to the public. The Court then stated that the ordinance did not require proof that the amusement was successful in making a gain or profit since the ordinance applies to any amusement presented "for gain or profit." The evidence of a positive income resulting from money being paid each time an individual patronized the club from the \$4 dues and \$6 per person table charge without more supports a purpose and plan to have a profitable operation.

There is no evidence in the record that the licensee charged any admission fee or imposed a table charge on customers at any time in which amusements were presented at his club from March through August 22, 2010. At best the evidence from Mr. Hodge is that the Hyde Park Jazz Society on occasion charged a cover but there were occasions when no admission was charged. There were occasions when donations were taken. He specifically stated he did not know the dates admission were not charged.

The evidence regarding the web page reflects the Hyde Park Jazz Society was seeking a minimum donation of \$10 is not evidence that on the night of the event the licensee charged a cover to hear the entertainment. There was no specific testimony that on a specific date in March, April, June, July or August that either the Hyde Park Jazz Society or the licensee collected a cover charge or had a table charge or had a required minimum drink for customers listening to the music. Investigator Sanders' testimony on her investigation of August 22, 2010, establishes patrons on the premises listening to live music but she specifically stated there was no cover charge on August 22, 2010. There was no evidence from Investigator Tyrone Jackson that he observed a cover charge on May 26, 2010.

Counsel for the City argues that the fact the licensee was open and sold food and liquor on the dates alleged in the notice is sufficient to prove there was a gain or profit for Mr. Bolden. This argument would require any establishment with live music that did not fall into the exemptions listed in the ordinance to have a public place of amusement license. This now seems to conflict with the wording of this ordinance that suggests the

particular amusement must be presented for gain or profit. This seems to this Commissioner to not be the proper reading of the statute. In dealing with statutory construction one must assume that the city council added the words for gain or profit for a specific reason. The legal assumption is that it meant to differentiate premises that had live music on their premises from those locations that had live music on their premises for the purpose of making a gain or profit. The licensee as the owner might be liable if the Hyde Park Jazz Society was shown to have done the performances for gain or profit. A request for a minimum donation or voluntary donations on a website is not sufficient to show a gain or profit to the Hyde Park Jazz Society.

Since the City failed to prove a need for a PPA license, the City failed to prove a failure to post the license in plain view as alleged in Count 10, and failed to prove the licensee violated a cease and desist order as alleged in Count 11.

Since this Commissioner had ruled that the findings were not supported by substantial evidence in light of the whole record, it is not necessary to address whether the Local Liquor Control Commission proceeded in the manner provided by law. If this matter did need to be addressed this Commissioner might have been persuaded the lack of specific dates in March, April, May, June and July of 2010, in which the licensee violated the Municipal Code would be encompassed in this clause and would not be a purely constitutional due process issue this Commission did not have jurisdiction to review.

In general pleadings in administrative proceedings do not need to be as specific as in a civil lawsuit but it would seem necessary even in administrative proceedings to state the date or dates on which violations were alleged to have occurred.

The 30-day suspension is reversed.

IT IS THEREFORE ORDERED AND ADJUDGED That the order suspending the liquor license of the appellant for THIRTY (30) 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: June 2, 2011

Dennis M. Fleming  
Chairman

Stephen B. Schnorf  
Member

Donald O'Connell  
Member