

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Oura & Company, Inc.)
d/b/a Johnny O'Hagan's)
for the premises located at)
3374 North Clark Street) Case No. 12 LA 22
)
v.)
)
Department of Business Affairs and Consumer Protection)
Local Liquor Control Commission)
Gregory Steadman, Commissioner)

ORDER

DECISION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER O'CONNELL

Licensee received notice that a hearing would be held pursuant to 235 ILCS 5/7-5 of the State of Illinois Liquor Control Act, and Section 4-4-280 of the Chicago Municipal Code at the Local Liquor Control Commission of the City of Chicago in connection with license disciplinary proceedings concerning the City of Chicago Liquor License, and all other City of Chicago licenses issued to it for the premises located at 3374 N. Clark, Chicago, Illinois. The eight charges alleged that:

1. On April 24, 2003, and August 6, 2010, the licensed premises became ineligible to hold a liquor license pursuant to 235 ILCS 5/6-2(a)(4), and the Municipal Code of Chicago 4-60-030(i) because its President Brendan Carroll was convicted of a felony and was thus ineligible to hold a liquor license under said laws.
2. That since on or about May 23, 2003, and August 6, 2010, the licensee failed to notify the Department of Business Affairs and Consumer Protection of the City of Chicago of the felony convictions as required by the Municipal Code of the City of Chicago 4-60-040(b)(8) within ten days of the effective date of such change, in violation of Municipal Code of Chicago 4-60-040(k).

3. That since on or about May 23, 2003, the licensee, by and through its agent, knowingly included false or incomplete information required by the Municipal Code of Chicago 4-60-040(b)(8) on any renewal thereafter, in violation of Municipal Code of Chicago 4-4-050.
4. That since on or about August 6, 2010, the licensee failed to notify in writing the Department of Business Affairs and Consumer Protection of the City of Chicago of the felony convictions required by the Municipal Code of Chicago 4-60-040(b)(8) within ten days of the effective date of such change, in violation of Municipal Code of Chicago 4-60-040(k).
5. That since on or about August 6, 2010, the licensee, by and through its agent, knowingly included false or incomplete information required by Municipal Code of Chicago 4-60-040(b)(8) on any renewal thereafter, in violation of Municipal Code of Chicago 4-4-050.

This matter proceeded to hearing before Deputy Hearing Commissioner Raymond Prosser. Assistant Corporation Counsel Rachel Berger represented the City of Chicago, and attorney Irene Bahr represented the licensee.

The Deputy Hearing Commissioner entered Findings of Fact that the City of Chicago met its burden of proof on Charges 1-8. He further recommended, in light of the licensee's prior disciplinary history, and the facts of this case which includes two charges for aggravated DUI that revocation is appropriate on all eight charges. The licensee filed a timely Notice of Appeal with this Commission.

Since this case addresses the appeal of a revocation the review of this Commission is limited to the 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.

RELEVANT STATUTES AND ORDINANCES

235 ILCS 5/6-2(a)(4) – Persons Ineligible to be Licensed – Issuance of licenses to certain persons prohibited. (a) Except as otherwise provided in subsection (b) no license of any kind issued by the State Commission or any local commission shall be issued to:

4. A person who has been convicted of a felony under any Federal or State law, unless the Commission determines that such person has been sufficiently rehabilitated to warrant the public trust after considering matters set forth in such person’s application and the Commission’s investigation. The burden of proof of sufficient rehabilitation shall be on the applicant.

235 ILCS 5/6-2(a)(10) – Except as otherwise provided in subsection (b) of the Section and in paragraph (1) of subsection (a) of Section 3-12, no license of any kind issued by the State Commission or any local commission shall be issued to:

- (10) A corporation or limited liability company, if any member, officer, manager or director thereof, or any stockholder or stockholders owning in the aggregate more than 5% of the stock of such corporation, would not be eligible to receive a license hereunder for any reason other than citizenship and residence within the political subdivision.

Municipal Code of Chicago - 4-60-040(b)(8)...The application shall be verified by oath or affidavit, and shall include the following statements and information:

A statement as to whether the applicant has ever been convicted of a felony, gambling offense, violation of the law concerning the manufacture, possession or sale of cannabis or other controlled substances, or violation of the law concerning the manufacture, possession or sale of alcoholic liquor.

Municipal Code of Chicago – 4-60-040(k) – If a change in any information required in subsection (b) of this section occurs at any time in a license period, the licensee shall file a statement executed in the same manner as an application, indicating the nature and effective date of the change. The supplemental statement shall be filed within ten days of the change.

Municipal Code of Chicago – 4-4-050 - ...It shall be grounds for the revocation of any license issued under the provisions of this code whenever the applicant knowingly includes false or incomplete information on the license application.

Municipal Code of Chicago – 4-60-030(e) – No license for the sale of alcoholic liquor shall be issued to “A person who has been convicted of a felony under any federal or state law, if the local liquor control commissioner determines, after investigation, that such person has not been sufficiently rehabilitated to warrant the public trust.”

Municipal Code of Chicago – 4-60-030(i) – No license for the sale of alcohol shall be issued to “A person who at the time of application or renewal of any license pursuant to this chapter would not be eligible for such license upon a first application.”

Municipal Code of Chicago – 2-21-060(k) – The Department of Business Affairs and Licensing shall have the following powers and duties:

- ✓ To make and enforce rules and regulations under Section 2-21-070

Municipal Code of Chicago – 2-21-070 – The Director is authorized to adopt such rules and regulations as the Director may deem expedient for the proper administration and enforcement of the provisions of this code pertaining to licensing, the procedures of administrative hearings, and other matters pertaining to the public interest.

SUMMARY OF THE PROCEEDINGS

Prior to the start of testimony City Exhibits 3 and 4, which are certified records of the convictions of Brendan Carroll for felony driving under the influence charges in 2003 and 2010, were allowed in evidence without objection.

Bryan Knipper has been a Business Consultant Supervisor in the Department of Business Affairs and Consumer Protection for four years. He works in hospitality licensing which processes new applications for liquor licenses. That department keeps records of licenses in operation and adjudicates issues that arise when licenses are not in compliance with the code. The records are made by a person with knowledge of the events and acts appearing on them, are made at the time of or near to the time of the events, and are maintained by the Department.

Mr. Knipper recently checked the records for 3374 N. Clark. The licensee at that address is Oura and Company, Inc., it currently has a Retail Food License and a Consumption on Premises- Incidental Activity License. Brendan Carroll is listed as the 100% owner.

Knipper explained that renewal applications at that time were done on paper. It asks if there were any changes in officer or any changes that should be brought to the attention of the City and the Department. It is then signed off by the officer. City's Exhibit 5, in evidence without objection, was identified as renewal applications for the licensee. One renewal form was signed by Brendan Carroll on February 10, 2011. That form contains language in Paragraph 4 that the licensee is certifying that the answers on the original application are still true and correct, and are reaffirmed unless the Department of Business Affairs and Consumer Protection has been otherwise notified.

City's Exhibit 6, in evidence without objection, was identified as an application dated September 23, 1998, and signed by Brendan Carroll for Oura and Company at 3374 N. Clark. On that application, Mr. Carroll marked "no" to the question of whether the applicant...or stockholder owning more than 5% of the stock of the corporation has ever been convicted of any Felony under State or Federal law.

Based on the records of the Department of Business Affairs and Consumer Protection, Mr. Carroll did not notify the Department of his felony convictions in 2003 and 2010.

Knipper agreed that at the time of the original application the Chicago Police Department did the fingerprinting and background checks. The police department recommended approval of the original application. That application did reveal two prior DUI's in San Francisco in 1982. Respondent's Exhibit 1, which was the same documents as City's Exhibit 6, was allowed in evidence.

The City rested its case. The respondent moved for a directed verdict on Counts 1 and 5. The basis for this motion was that the ordinance requires the Local Liquor Control Commissioner to determine after investigation if the person convicted of the felony has been sufficiently rehabilitated to warrant the public trust. The Hearing Officer took the matter under advisement, but did not address this motion on his findings of fact.

In the course of argument in this motion, the Assistant Corporation Counsel referenced Rule 5, of the Department of Business Affairs and Consumer Protection, which requires two years to pass from the date of the completion of sentence before one could be considered for rehabilitation. Those rules in general, and that specific rule, were not introduced into evidence.

Brendan Carroll is the President and 100% shareholder of Oura and Company which is doing business as Johnny O'Hagan's at 3374 N. Clark. It is a restaurant/bar which he opened in 1998. The property went into foreclosure and is presently under contract. He holds no other liquor licenses in the Chicago and does not intend to hold any such licenses in the future.

The original application was filed in 1998, but the license did not issue until June of 2000. In that original application, he disclosed criminal history relating to DUI's. He was not aware that his 2003 conviction was for a felony since he was given a fine and community service. He did not think the 2003 DUI was a problem because he had revealed the previous DUI's. Attorney Robert Weber represented Carroll when the original application was filed and after consulting with Mr. Weber, Carroll revealed the two DUI's.

In August of 2010, Carroll pled guilty to one count of Aggravated DUI and was sentenced to three and a half years in the Department of Corrections. He was released on November 14, 2011. Carroll did not report that conviction to the City because it was a traffic offense and that would not stop him from having a liquor license. Carroll admitted he signed and read City's Exhibit 5, which was the last renewal form filed in 2011. He felt the felony was a traffic offense and since his license had been renewed since 2003, he did not think it had anything to do with liquor. He thought the reporting requirement dealt with a change of officers or in the construction of a building.

Carroll acknowledged he is an alcoholic. While in the Department of Corrections he had treatment three hours a day, seven days a week for 11 months. He attended AA meetings in the evening, two or three times a week. He finished the Alcohol and Drug Behavior Services program and received a Certificate of Completion, in evidence as Respondent's Exhibit 2. Respondent's Exhibit 3, in evidence, is certification he attended an extra program at the Department of Corrections in Sheridan. As part of his probation, he started treatment after his release from jail. He was released on November 14, and started on November 17. He went to

this program three hours, three times a week for a total of 75 hours. He still participates in aftercare once a month. Licensee's Exhibit 5, is a document from a Behavioral Services Center which is the aftercare he mentioned previously. He is currently sober. City's Exhibit 7, is the contract for the sale of the property at 3374 N. Clark.

On April 30, 2012, the Deputy Hearing Commissioner denied licensee's motion to supplement the record to add documents provided to licensee's attorney after the hearing date of April 16, 2012.

The usual inquiry into whether the Local Liquor Control Commissioner in the manner provided by law deals with whether the licensee received due and adequate notice of the date, time, and location of the hearing and of the charges filed seeking disciplinary action. Another review would be directed as to whether the licensee was provided a hearing that comported with due process.

This case raises an unusual matter that must be reviewed with respect to the procedure followed or not followed by the Local Liquor Control Commission with respect to Counts 1, 2, 5, and 6. Counts 1, 2, and 5 allege that the licensee and the premises are not eligible for a liquor license because the corporate president was convicted of felonies in 2003 and 2010. The Findings of Fact specifically refer to and rely on the BACP's Rules and Regulations for Rehabilitation of Ex-Offenders. Those rules were referred to oral argument of counsel on licensee's motion for a directed verdict but those rules were never put into evidence. Although

the Deputy Hearing Commissioner does not state so, this decision will proceed on the bases that the Deputy Hearing Commissioner felt it was appropriate to take judicial notice of these rules.

The Municipal Code does not automatically bar a felon from holding a liquor license. Section 4-60-030(e) allows for ineligibility for a felon to hold a liquor license “if the local liquor control commissioner determines, after investigation (*emphasis added*) that such person has not been sufficiently rehabilitated to warrant the public trust. This suggests to this Commissioner that the investigation and determination of rehabilitation is to be made by the Local Liquor Control Commissioner. Rule 2 of BACP requires the written notice denying a license application on the basis of felony conviction. Also, advise the ineligible person that rehabilitation may be sought by requesting a hearing before the mayor or his designee in accordance with the requirement of Section 4-4-060. While not specifically mentioned it can be inferred that if discipline and revocation is being sought on the basis of ineligibility due to a felony conviction, the Department of Business Affairs and Consumer Protection must advise the licensee of its right to a separate rehabilitation hearing.

The Amended Notice of Hearing which listed the charges did not advise the licensee that it had an opportunity to such a rehabilitation hearing at the Department of Business Affairs and Consumer Protection/Local Liquor Control Commission.

Since the procedures mandated by the rules of the City of Chicago and referenced by the Municipal Code of Chicago were not followed, the findings of the Deputy Hearing

Commissioner on Charges 1 and 5 must be reversed. This reversal is based on the failure of the City to proceed in the manner provided by law.

Counts 2 and 6 in the Amended Notice of Hearing alleged Brendan Carroll was ineligible to hold a license pursuant to state statute. That statute does not set out an absolute ban on eligibility for felons to hold a liquor license since it contains language that sets out an exception to a ban on felons holding liquor licenses if “the Commission determines that such person has been sufficiently rehabilitated to warrant the public trust.” After considering matters set forth in such person’s application and the Commission’s investigation, the decision as to whether Brendan Carroll was rehabilitated in the mind of the State Liquor Commission is to be determined by the State Local Liquor Commission. The findings on Counts 2 and 6 are reversed since the City did not proceed in the manner provided by law as there is no evidence the State Commission did any investigation or made any decision as to whether Brendan Carroll was rehabilitated.

As to the remaining counts dealing with the failure of the licensee to timely notify the Department of Business Affairs and Consumer Protection of the City of Chicago in a timely fashion of the felony DUI convictions in May of 2003 and August 2010, and the charges that the licensee has since May of 2003 and August 2010, included false information on renewals the City did proceed in the manner provided by law and the findings are supported by substantial evidence in light of the whole record. If the licensee had properly and timely notified the City of his felony convictions the City and State might very well have been in a position to conduct the

investigations as to the fitness of the licensee. The defense that he did not know the significance of a felony conviction is not credible.

The revocation of the liquor license issued to Oura and Company, Inc., for the premises located at 3374 N. Clark based on the findings to Counts 3, 4, 7, and 8 is sustained.

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 28, 2012

Dennis M. Fleming
Chairman

Donald O'Connell
Member