

**LICENSE APPEAL COMMISSION
CITY OF CHICAGO**

Ke-Ka's, Inc.)	
Erika Valladolid, President)	
Licensee/Revocation)	
for the premises located at)	
3109 West 59 th Street)	Case No. 19 LA 06
)	
v.)	
)	
Department of Business Affairs & Consumer Protection)	
Local Liquor Control Commission)	
Shannon Trotter, Commissioner)	

ORDER

DECISION OF CHAIRMAN FLEMING

This matter proceeded to hearing based on a First Amended Notice of Hearing that a hearing was to be held pursuant to 235 ILCS 5/7-5 and § 4-4-280 of the Municipal Code of Chicago in connection with disciplinary proceedings regarding the City of Chicago liquor license and all other licenses issued to Ke-Ka's, Inc. for the premises located at 3109 West 59th Street, Chicago, Illinois based on these charges:

1. That since on or about January 26, 2018, the licensee, after reasonable notice by the Chicago Police Department, failed to make complete books and records available for the purpose of investigation and control by the Local Liquor Control Commission, in violation of 235 ILCS 5/6-10.

2. That since on or about June 8, 2018, the licensee, after notice of a public hearing regarding revocation of its licenses had been served, failed to make books and records available for the purpose of investigation and control by the Local Liquor Control Commission, in violation of Municipal Code of Chicago § 4-4-280.

After a hearing on these charges, Hearing Commissioner Khaled J. Elkhatib entered Findings of Fact that the Licensee failed to make complete books and records available for investigation and

control by the Local Liquor Control Commission in violation of 235 ILCS 5/6-10 and failed to make books and records available for purpose of investigation and control by the Local Liquor Control Commission in violation of § 4-4-280 of the Municipal Code of Chicago. The Hearing Commissioner also entered Findings of Fact, based on the totality of the circumstances, that the appropriate punishment on Charges 1 and 2 was Revocation.

The Licensee filed a timely appeal with the License Appeal Commission.

RELEVANT STATUTES AND ORDINANCES

235 ILCS 5/6-10 – Books and Records Available for Investigation and Control; Maintenance

It shall be the duty of every retail licensee to make books and records available upon reasonable notice for the purpose of investigation and control by the Illinois Liquor Control Commission or any local liquor control commission having jurisdiction over the licensee. Such books and records need not be maintained on the licensed premises, but must be maintained in the State of Illinois; however, if access is available electronically, the books and records may be maintained out of state. However, all original invoices or copies thereof covering purchases of alcoholic liquor must be retained on the licensed premises for a period of 90 days after such purchase, unless the Commission has granted a waiver in response to a written request in cases where records are kept at a central business location within the State of Illinois or in cases where books and records that are available electronically are maintained out of state.

235 ILCS 5/4-5 – Examination of Applicant for Local License

The local liquor control commissioner shall have the right to examine, or cause to be examined, under oath, any applicant for a local license or for a renewal thereof, or any licensee upon whom notice of revocation or suspension has been served in the manner hereinafter provided, and to examine or cause to be examined, the books and records of any such applicant or licensee...

Municipal Code of Chicago 4-4-280 – License Revocation

... The Commissioner shall have the right to authorize the examination of the books and records of any licensee upon whom notice of a public hearing has been served.

Municipal Code of Chicago 2-25-050 (b)(10) – Powers and duties of the Department

(b) Powers and duties of the commissioner and the department. The powers and duties of the commissioner and the department shall be as follows:

(10) To require the production and examination of books, papers, records and documents pertinent to any license, registration or permit or lack thereof...

SUMMARY OF THE PROCEEDINGS

Steven Lugo has been employed by the Chicago Police Department for almost twenty years and has been assigned to License Investigations in the Vice Unit since about 2010. In that position, he receives complaints from the Department of Business Affairs for liquor establishments. In January 2018, he was assigned to an investigation of the business known as Ke-Ka's doing business as La Sirena at 3109 West 59th Street. The investigation was to do undercover visits to determine if the business was running as a tavern versus a restaurant.

Officer Lugo conducted undercover visits and at the conclusion of this part of the investigation made a request for books and records. He identified City Exhibit 2, in evidence, as the request for documents sent to Ke-Ka's at 3109 West 59th Street. City Exhibit 3, in evidence, was identified as the documents received from the Licensee in response to the request for documents. Officer Lugo found this response insufficient since it did little as a break down for food and alcohol. These documents show taxes paid for the alcohol for the business.

On cross-examination, Officer Lugo stated he did order food and beverage when he was at the premises in an undercover capacity. The person working the grill was waiting the tables. To the

best of his recall, the order was recorded on a pad of paper. He did notice not notice any POS systems at the premises. He paid the bill in cash on what was the piece of paper the order was on. Barbara Gressel has been employed by the Chicago Department of Business Affairs since 1999 and is currently Deputy Commissioner for the Prosecution and Adjudication Division. She oversees the license discipline process. She is aware that on May 3, 2018, the Local Liquor Control Commissioner issued an order to Licensee Ke-Ka's to produce books and records. It asked the Licensee to provide sales records for food and sales records for liquor for the entire year of 2017. She identified City Exhibit 4, in evidence, as a copy of the Notice to Produce Books and Records issued to Ke-Ka's. The requested records were to be produced on or before June 8, 2018. She received some records on September 28, 2018. Ms. Gressel identified City Exhibits 5A - 5H, in evidence as what purports to be the response from the Licensee. City Exhibit 5(a) shows purchases of liquor and food but did not comply with the request for documents on the sale of food and liquor. City Exhibit 5(b) shows income deposits for 2017, which also did not comply with the production request for sales records for food and liquor. City Exhibit 5(c) shows sales taxes for 2017 but did not answer what was requested. Ms. Gressel could not specifically identify City Exhibit (d) but explained it sets out various 2017 business costs. It did not provide the requested information. The balance of the request documents mirror the other documents but are for 2018. They do not provide a breakdown of food sales versus liquor sales. Ms. Gressel opined the documents provided did not prove the amount of liquor and food served. These documents were important to determine if the Licensee was operating within the scope of its license.

On cross-examination, Ms. Gressel testified she did not know if licensees are advised of any requirements or guidelines on how to keep records of foods versus alcohol. She does not know if the business consultant, in this case, trained the Licensee on books and records. It was possible the Licensee never met with a business consultant except for fingerprinting. She stated the documents in City Exhibit 5 are records of sales tax. She did not know if a licensee with an incidental license needs to provide the City with the amount of food and liquor sales when renewing that incidental license.

The City rested its case.

The case was continued to allow the Licensee to provide additional documentation that could impact any punishment and/or to bring in the owner or the accountant to testify.

The record does not contain any additional documents or testimony from any witnesses for the Licensee.

ANALYSIS

Since this is an appeal of a revocation, the jurisdiction of the License Appeal 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.

Section 5/7-9 specifically states “No new or additional evidence in support of or in opposition to such order or action under appeal shall be received other than that contained in such record of proceedings.”

In this case, the record supports the findings that the local liquor control commissioner did proceed in the manner provided by law. The Licensee was given due and adequate notice of the date, time and location of the hearing and of the charges filed on which the City was seeking discipline. The Licensee was represented by counsel and had the opportunity to cross-examine the City’s witnesses and to present evidence on its behalf. The fact that the Licensee decided to not call any witnesses does not alter the fact it had the opportunity to do so.

The next issue is whether there is substantial evidence in light of the whole record to affirm the finding of the Hearing Commissioner that “Licensee failed to make complete books and records available for purposes of investigation and control by the Local Liquor Control Commission, in violation of 235 ILCS 5/6-10. Substantial evidence has been broadly defined by Illinois courts as any evidence that supports the findings of the Hearing Commissioner.

ILCS 5/6-10 imposes a duty on every retail licensee to make books and records available upon reasonable notice for the purpose of investigation and control by the Illinois Liquor Control Commission or any local liquor control commission having jurisdiction over the licensee. This section of the statute clearly authorized the Local Liquor Control Commissioner to request the Licensee to produce books and records upon reasonable notice. This statute goes on to specifically states that all original invoices or copies covering purchases of alcoholic liquor must

be retained for a period of 90 days after such purchase... This statute is silent as to any other specific books and records that are to be made available.

City Exhibit 4 is the Order to Produce Books and Records that 235 ILCS 5/6-10 as one of the statutes and ordinances authorizing the order for books and records. In summary, it seeks all documents, including invoices, indicating the amount of liquor sold and food sold from December 1, 2016, through December 1, 2017. It is dated May 3, 2018, and the records were due on or before June 8, 2018.

In response to this Order to Produce, the Licensee tendered these documents on or about September 28, 2018:

- City Exhibit 5(a) - a breakdown of 2017 purchases
- City Exhibit 5(b) - 2017 deposits
- City Exhibit 5(c) - sales taxes for 2017
- City Exhibit 5(d) - 2017 debits
- City Exhibit 5(e) - 2018 purchases and expenses
- City Exhibit 5(f) - 2018 deposits
- City Exhibit 5(g) - 2018 sales tax records
- City Exhibit 5(h) - 2018 debits

City Exhibit 2 was identified as the demand for documents served by Investigator Steven Lugo from the Chicago Police Bureau of Organized Crime on January 18, 2018, requesting documents be provided by January 26, 2018. This document contains no reference to any state statute or section of the Chicago Municipal Code authorizing this request. It requested:

1. The name, address and telephone number of the accountant or keeper of the records of the business in question.
2. Receipts for all sales of alcoholic beverages and food service items for the last twelve months, December 2016 through December 2017.

3. Any additional documentation deemed necessary by the Department of Business Affairs and Consumer Protection and the Chicago Police License Investigation Section.

In response to this demand, Officer Lugo received the documents in City's Exhibit 3, which include:

2017	Purchases and Expenses
3-20-17	Sales Tax Return
4-20-17	Sales Tax Return
5-22-17	Sales Tax Return
6-20-17	Sales Tax Return
7-20-17	Sales Tax Return
8-21-17	Sales Tax Return
9-20-17	Sales Tax Return
10-20-17	Sales Tax Return
11-20-17	Sales Tax Return
12-20-17	Sales Tax Return
1-22-18	Sales Tax Return

Charge 1 alleged a failure to make complete books and records available for the purpose of investigation and control by the Local Liquor Control Commission in violation of 235 ILCS 5/6-10 arising from the notice sent to the Licensee by the Chicago Police Department on January 26, 2018. 235 ILCS 5/6-10 is alleged as the source of the authority for Officer Lugo to request these records but City Exhibit 2 does not reference this statute or any state statute or section of the Chicago Municipal Code as a basis for requesting these records. City Exhibit 2 requires that the Licensee make an appointment, not with the Department of Business Affairs and Licensing, but with Vice/Asset Forfeiture Division of the Bureau of Organized Crime.

There is substantial evidence in the record that the Licensee failed to provide the requested receipts for all sales of alcohol and food from December 2016 through December 2017. There is

not substantial evidence in the record that the request for these records was made by the Local Liquor Control Commission for the purpose of its investigation and control.

The finding of the Hearing Commissioner that the City met its burden of proof on Charge 1 is reversed.

Charge 2 is based on Chicago Municipal Code 4-4-280 which specifically allows the Commissioner to review books and records of a licensee upon whom notice of a public hearing has been served. The Order to Produce specifically references Municipal Code 4-4-280 as well as Municipal Code 2-25-050 and 235 ILCS 5/4-5 and 5/6-10 as the statutory bases empowering this request. The records sought are not complicated. It requested documents showing the amount of liquor sold and food sold from December 1, 2016, through December 1, 2017. The Order to Produce is dated May 3, 2018.

Based on those cited statutes and ordinances, there are statutory bases authorizing the Order to Produce Books and Records of the Licensee. These statutes and ordinances do not list what books and records a liquor licensee is required to maintain except of 235 ILCS 5/6-10. A section of that statute specifically requires a liquor licensee to retain original invoices or copies of invoices for the purchase of alcoholic liquor for ninety days after the purchase of alcoholic liquor. This section of the statute is not relevant to this case since the Order to Produce was served on May 3, 2018, seeking records of documents indicating the amount of food and liquor sold through December 1, 2017. Records of purchases of alcohol in the requested period were more than 90 days old before this Order to Produce was served.

It is relevant to this analysis to note that no objection was made by the Licensee pre-hearing as to the request for documents or to the scope of the request. No objection to testimony from Officer Lugo or Barbara Gressel was made at the hearing.

Since there was a legitimate Order to Produce Books and Records of Licensee and the record contains no pre-hearing or in hearing objection to the Order, the remaining issue is whether the Licensee failed to make its books and records available for the purpose of an investigation as alleged in Charge 2. The answer to that question is yes. While the Licensee did provide the documents set out in City Exhibits 3 and 5, those documents did not comply with the Order to Produce properly served on the Licensee.

Counsel for the Licensee in an opening statement and in a closing statement states his client was in the process of reviewing documents and that his client was attempting to get the number the City is requesting. The case was even continued to determine if the Licensee would put on evidence. Apparently, that did not happen but the record does not contain any transcripts except for the April 1, 2019, hearing. Outside of these statements of counsel, which are not in evidence, the record contains no evidence from the Licensee to explain the lack of production of these requested documents or to give testimony in mitigation for not responding to the Order to Produce.

Based on these factors, the record contains substantial evidence that Ke-Ka's Inc. after a notice of a public hearing regarding revocation of its license had been served failed to make the

requested books and records available for the purpose of investigation and control by the Local Liquor Control Commission in violation of Municipal Code of Chicago 4-4-280.

The final issue to be analyzed is the order of revocation supported by the finding on Charge 2. Section 4-4-280 of the Chicago Municipal Code empowers the Local Liquor Control Commissioner to revoke any license issued under the provisions of this code for good and sufficient cause or if the Commissioner determines that the licensee violated any of the provisions of this code on any statutes of the State. Since the proven failure to comply with the Order to Produce Books and Records violated that same section of the Municipal Code, the Local Liquor Control Commissioner would be within their right to revoke the liquor license of Ke-Ka's Inc.

It should also be noted that the License Appeal Commission does not have the authority to remand the case for a penalty other than revocation or to impose itself a suspension and/or a fine in lieu of the revocation. The sole disposition available to this License Appeal Commission, in this situation, would be to reverse the case outright based on a finding that the revocation is so arbitrary and capricious that it must be reversed. While it would be much easier to not make such a finding if the Hearing Commissioner had articulated the circumstances that led him to recommend revocation, the fact is that those circumstances were not articulated. If remand to the Local Liquor Control Commissioner for a factual basis to support revocation was allowed, this Commissioner would have remanded the case.

The Hearing Officer did make specific findings that the License was represented by counsel and failed to present any evidence to contradict the City's evidence and it did not present any evidence in mitigation.

The City referred the Commission to the case of Vintage '76, Inc., v. Illinois Liquor Control Commission 78 Ill App 3d 463, 397 N.E. 2d 166, in support of its position that revocation, in this case, was not arbitrary or an abuse of discretion. In that case, the Appellate Court found revocation of a liquor license after a licensee was given repeated opportunities to comply with a request for production of documents was not an abuse of discretion. In this case, the Licensee was given opportunities to comply and failed to do and failed to provide evidence in mitigation for why it had complied. Revocation under these circumstances is not so arbitrary or capricious or an abuse of discretion so as to require reversal of the revocation.

The revocation of the liquor license issued to Ke-Ka's Inc. based on the finding that there was substantial evidence in the record as a whole to affirm the finding on Charge 2 is upheld.

CONCURRING OPINION OF COMMISSIONERS GIBBONS AND BERG

If this case was before us in our positions with the State of Illinois Liquor Control Commission, we would have remanded it with directions that the Hearing Commissioner more fully detail the circumstances of this case that led him to decide revocation of the liquor license was the appropriate discipline. Since one of the questions this Commission needs to decide is "Whether the order supports the findings," the Hearing Commissioner should set out the reasons why

revocation is appropriate. This is especially true in this case since the Assistant Corporation Counsel did not argue for revocation as the appropriate punishment.

Under a different factual situation, the lack of this information could lead us to reverse a finding of revocation. Under the facts of this case, as set out in Chairman Fleming's opinion, with which we agree, there is no evidence in the record to explain the failure to produce the requested records or testimony of mitigating circumstances leading to failure to comply with the Notice to Produce. There is no evidence that the order of revocation was so arbitrary and unreasonable as to require a reversal.

We affirm the revocation of the liquor license issued to Ke-Ka's, Inc. for the premises located at 3109 West 59th Street.

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: February 14, 2020

Dennis M. Fleming
Chairman

Thomas W. Gibbons
Member

Cynthia A. Berg
Member