

STATE OF MICHIGAN

13TH JUDICIAL CIRCUIT COURT FOR GRAND TRAVERSE COUNTY

GRAND TRAVERSE BILLIARD
COMPANY, INC.,

Petitioner,

v

File No. 99-19417-AA
HON. PHILIP E. RODGERS, JR.

MICHIGAN LIQUOR CONTROL
COMMISSION,

Respondent.

Michael E. Hall (P43718)
Attorney for Petitioner

Irene M. Mead (P31283)
Assistant Attorney General
Attorney for Respondent

**DECISION AND ORDER AFFIRMING THE
LIQUOR CONTROL COMMISSION'S RULING**

Petitioner Grand Traverse Billiard Company, Inc. operates an establishment known as GT's in Traverse City, Michigan. Petitioner possesses a liquor license issued by the Respondent Michigan Liquor Control Commission ("LCC").

On December 8, 1998, the LCC filed a Complaint against Petitioner alleging that the Petitioner did on the 12th day of October, 1998:

1. Sell, serve, furnish or give away a quantity of alcoholic liquor to one James Michael Shepherd, who was then and there in an intoxicated condition, or a visibly intoxicated condition, contrary to Sections 801(2) and/or Section 1025(3) of the Michigan Liquor Control Code, MCL 436.1801(2) and/or MCL 436.2025(3) (formerly Section 22(3) and/or Section 29(2) of the Michigan Liquor Control Act, MCL 436.22(3) and/or MCL 436.29(2);

2. Allow a person, one James Michael Shepherd, who was in an intoxicated condition, to consume alcoholic liquor upon the licensed premises, contrary to Rule 436.1005(2), as promulgated in the Michigan Administrative Code; and

3. Allow a person, one James Michael Shepherd, who was in an intoxicated condition to frequent or loiter upon the licensed premises, contrary to Rule 436.1005(4), as promulgated in the Michigan Administrative Code.

The LCC mailed the Notice of Complaint to Petitioner at its corporate business address. Petitioner did not acknowledge the Complaint and return it signed, so a hearing was scheduled. Notice of Hearing was sent to the Petitioner at its business address. The notice stated: "Rule 436.1913 requires a licensee (individual, co-licensees, partner, corporate officer, general partner, etc.) to personally appear at the hearing."

The hearing was held on March 26, 1999 before Administrative Law Judge Dennis M. Flessland. Neither the Petitioner through a corporate officer nor an attorney retained by the Petitioner appeared for the hearing. Paul Fronczak, GT's General Manager, and Heather Swope, another employee of Petitioner, appeared at the hearing. Pursuant to Commission Rule 436.1915(1)(e), Judge Flessland proceeded with the hearing. Rule 436.1915(I)(e) provides:

(1) If a proper appearance by a licensee is not made at a scheduled violation hearing in accordance with R 436.1913 the presiding hearing commissioner may:

* * *

(e) Proceed with the hearing and render a decision.

Sergeant David Meachum and Deputy Chris Sommerfield of the Grand Traverse County Sheriff's Department and James Shepherd, the alleged intoxicated patron, testified. The officers responded to an accident call during the early morning hours of October 13, 1999 and found a vehicle had been driven into Elk Lake. They determined that James Shepherd was the driver and lone occupant of the vehicle. They suspected that James Shepherd was intoxicated. James Shepherd was transported by ambulance to Munson Medical Center where he was treated for his injuries and underwent a blood analysis as part of the officer's OUIL investigation. His blood analysis confirmed that he was in fact intoxicated.

The officers further testified regarding their interview of Cecilia Boomer, another employee of the Petitioner, who was coincidentally also present at the scene of the accident and,

with her boyfriend, helped to pull Shepherd from the lake. Boomer was present at the hearing, but was not called to testify personally. According to the officers, she was a waitress at GT's on the night of October 12, 1999 and she served drinks to Shepherd. Eventually she refused further service to Shepherd because he appeared to be intoxicated. She received complaints from other patrons that Shepherd was taking their drinks.

Shepherd briefly testified that he recalled being highly intoxicated, but he could not recall anything after his third drink until he was being questioned in the ambulance. He plead guilty to an alcohol related offense.

Paul Fronczak and Heather Swope were not allowed to question witnesses, make objections or present argument, but they were permitted to make statements about their knowledge of the events relating to the charges against the Petitioner. They confirmed that Shepherd was a patron and was served drinks. Around midnight, Shepherd appeared intoxicated and so they refused him any further service. Shepherd caused a disturbance by taking drinks from other patrons. GT's employees attempted to convince Shepherd to leave the premises. They called him a cab, but he refused to take it. Finally, at 2:00 a.m. closing, they forced Shepherd out the door and locked it behind him.

Judge Flessland issued his Findings of Fact and Conclusions of Law on April 27, 1999, substantiating all charges of the Complaint. He imposed fines of \$1,000 for furnishing alcohol to a visibly intoxicated person and \$300 for each of the remaining violations for a total of \$1,600 or suspension of the Petitioner's license for 80 days should the fines not be paid. In addition, the Judge suspended the Petitioner's liquor license for ten days effective June 11, 1999 and assessed \$90.80 in costs.

Judge Flessland said:

The severity of this penalty is based upon the Licensed Corporation's cavalier attitude to this violation. No corporate officer appeared and no attorney was retained

.... Not only did management systems fail by allowing a patron to become dangerously drunk, let him bother other patrons and then nearly kill himself on the road, but the corporate officers failed to respond with appropriate seriousness to the violation. It has to be made clear to Licensees that sales of alcohol to visibly intoxicated persons is dangerous and that the Licensee's cooperation is expected. Leaving a restaurant manager on his own in a serious legal proceeding is insufficient.

Through retained counsel, the Petitioner sought administrative review of the decision by Request for Appeal dated May 21, 1999. A hearing was held on August 10, 1999 before Chairwoman Jacquelyn A. Stewart and Commissioner Seymour E. Podolsky. David Handley, a stockholder and President of the Petitioner, appeared and advised that the corporation had relied upon their manager to handle the hearing because they were told that he had conducted administrative hearings in the past. They did not nonchalantly “blow off” the administrative hearing.

On August 17, 1999 the LCC issued an Appeal Board Order deciding Petitioner’s administrative appeal. The Commission upheld the decision of Judge Flessland, but reduced the suspension period from ten to five days.

Petitioner filed the instant appeal of September 2, 1999. This Court denied Petitioner’s Motion for Stay of Enforcement of Administrative Order. The Commission’s Order of suspension has been executed and Petitioner has paid the fines and costs as directed.

This appeal presents four issues:

- I. WHETHER THE NOTICE OF COMPLAINT AND NOTICE OF VIOLATION HEARING WERE DEFECTIVE
- II. WHETHER PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW
- III. WHETHER THE ADMINISTRATIVE LAW JUDGE’S DECISION IS SUPPORTED BY COMPETENT, SUBSTANTIAL AND MATERIAL EVIDENCE
- IV. WHETHER MULTIPLE PENALTIES WERE IMPROPERLY ASSESSED AGAINST PETITIONER

I.

WHETHER THE NOTICE OF COMPLAINT AND NOTICE OF VIOLATION HEARING WERE DEFECTIVE

The Administrative Procedures Act (“APA”), MCL 24.271; MSA 3.506(171), provides in pertinent part as follows:

- (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.
- (2) The parties shall be given a reasonable notice of the hearing, which notice shall include:
 - (a) A statement of the date, hour, place, and nature of the hearing . . .

- (b) A statement of the legal authority and jurisdiction under which the hearing is to be held.
- (c) A reference to the particular sections of the statutes and rules involved.
- (d) A short and plain statement of the matters asserted .
- ..

The Notice of Violation hearing in the instant case states among other things that:

Rule 436.1913 requires a licensee (individual, co-licensees, partner, corporate officer, general partner, etc.) to personally appear at the hearing.

The notice in the instant case was directed to the corporate licensee, in its corporate name, and at its corporate address. The notice complied with the requirements of the APA. The notice was not vague or misleading. The only logical reading of the notice is that a corporate licensee is required to appear by personal appearance of a corporate officer.

The Petitioner was not required to be represented by counsel. The Notice cannot be logically construed to impose such a requirement.

The Petitioner's arguments regarding the defective nature of the notice are without merit. The notice was not vague or misleading and Petitioner was not denied due process of law.

II.

WHETHER PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW

The Petitioner claims it was denied due process because the Administrative Law Judge proceeded with the hearing in the absence of a proper appearance by the Licensee corporation or its counsel. The Petitioner argues that the Judge's decision not to permit the Petitioner's employees to question witnesses, make objections and present argument deprived it of due process.

The requirements of due process were set out by the Michigan Supreme Court in *Napuche v Liquor Control Comm*, 336 Mich 398, 403-403; 58 NW2d 118 (1953):

Due process of law requires notice and opportunity to be heard. It imports the right to a fair trial of the issues involved in the controversy and a determination of disputed questions of fact on the basis of evidence. *Dation v Ford Motor Co*, 314 Mich 152, 167 (19 NCCA NS 158).

* * *

Unless the right is waived, the person charged is at least entitled to:

- (1) Notice of a time and place of hearing.
- (2) A hearing before a properly authorized body.
- (3) A reasonably definite statement of the charge or charges preferred against the accused.
- (4) The right to cross-examine the witnesses who testify against him.
- (5) The right to produce witnesses in his own behalf.
- (6) A full consideration and a fair determination according to the evidence of the controversy by the body before whom the hearing is had. *Hanson v State Board of Registration in Medicine*, 253 Mich 601, 607.

In *Napuche*, the Appellee was notified of the hearing and advised that he might retain counsel. He decided not to do so. He attended the hearing, but made no objection to testimony offered. He did not request that certain exhibits be made a part of the record. He did not ask that certain persons be called as witnesses. The Court nonetheless concluded that the hearings were "fairly conducted" and that the decision of the commission was based upon "a full consideration and appraisal of all the evidence." *Id* at 406.

In the instant case, the Petitioner had certain rights available to it which it decided to forego. It had the right to a full hearing, to retain counsel, to cross-examine witnesses, to present witnesses on its own behalf, to raise objection to the admissibility of evidence, and to present argument. The Petitioner did not avail itself of these rights. Instead, the Petitioner waived these rights by choosing to send its General Manager and another employee to the hearing.

The Petitioner has not identified any witness it would have presented or any evidence to which its objections would have been sustained or which would have materially altered the Administrative Law Judge's decision. The Petitioner has failed to show that it would have obtained a different result. In fact, the Petitioner's employees testified at the hearing and confirmed that Shepherd was highly intoxicated, that they refused to serve him, that he continued to drink by taking other patrons' drinks, and that he was permitted to remain on the premises until closing. Thus, even if the Administrative Law Judge erred in precluding the Petitioner from questioning witnesses, raising objections and presenting argument, the error was harmless.

III.

WHETHER THE ADMINISTRATIVE LAW JUDGE'S DECISION IS SUPPORTED BY COMPETENT, SUBSTANTIAL AND MATERIAL EVIDENCE

The Petitioner contends that the Administrative Law Judge's decision is not supported by competent, material and substantial evidence. MCL 24.306(1)(c); MSA 3.560(206)(1)(c).

Under the Michigan Constitution, “[a]ll final decisions . . . of any administrative . . . agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions . . . are authorized by law; and in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.” Const 1963, art 6, § 28. *J&P Market, Inc v Liquor Control Commission*, 199 Mich App 646; 502 NW2d 374 (1993).

The parties agree that “substantial evidence” is that which a reasonable mind would accept to support a conclusion. It consists of more than a scintilla of evidence, but less than a preponderance of the evidence. *Great Lakes Sales, Inc v State Tax Comm*, 194 Mich App 271, 280; 486 NW2d 367 (1992); *Ron's Last Chance, Inc v Liquor Control Comm*, 124 Mich App 179,182; 333 NW2d 502 (1983).

This Court can not substitute its judgment for that of the Liquor Control Commission, even if it might have reached a different decision had it been in the position of the Commission. *Chicago M, St P & P R C v Public Service Comm*, 74 Mich App 678, 680; 254 NW2d 39 (1977); *Knowles v Civil Service Comm*, 126 Mich App 112, 118; 337 NW2d 247 (1982); and *Lepofsky v Lincoln Park*, 48 Mich App 347, 356-357; 210 NW2d 517 (1973).

The Administrative Law Judge heard testimony from two sheriff's deputies, the alleged intoxicated person, and two employees of the Petitioner. All of the testimony consistently showed that James Shepherd was visibly intoxicated, that he remained on the licensed premises after he had become highly intoxicated, and that he continued to drink by taking other patrons' drinks. These facts were unrefuted. Thus, the Administrative Law Judge's determinations that the Petitioner furnished alcohol to Shepherd when he was visibly intoxicated, allowed Shepherd to consume

alcohol in an intoxicated state, and allowed Shepherd to frequent or loiter on the premises in an intoxicated state were supported by competent, material and substantial evidence.

IV.

WHETHER MULTIPLE PENALTIES WERE IMPROPERLY ASSESSED AGAINST PETITIONER

The Petitioner claims that it has been penalized twice for the same offense by statute and rule punishing identical conduct. The Complaint alleged that the Petitioner did:

1. Sell, serve, furnish or give away a quantity of alcoholic liquor to one James Michael Shepherd, who was then and there in an intoxicated condition, or a visibly intoxicated condition, contrary to Sections 801(2) and/or Section 1025(3) of the Michigan Liquor Control Code, MCL 436.1801(2) and/or MCL 436.2025(3) (formerly Section 22(3) and/or Section 29(2) of the Michigan Liquor Control Act, MCL 436.22(3) and/or MCL 436.29(2);
2. allow a person, one James Michael Shepherd, who was in an intoxicated condition, to consume alcoholic liquor upon the licensed premises, contrary to Rule 436.1005(2), as promulgated in the Michigan Administrative Code; and
3. allow a person, one James Michael Shepherd, who was in an intoxicated condition to frequent or loiter upon the licensed premises, contrary to Rule 436.1005(4), as promulgated in the Michigan Administrative Code.

The first charge is for violation Sections 436.1801(2) and 436.2025(3) of the Michigan Liquor Control Code which prohibits the selling, serving, furnishing or giving of alcohol to an intoxicated person. The second and third charges are different offenses which constitute violations of Commission Rules. Charge 2 is for violation of Commission Rule 436.1005(2) that prohibits a licensee from permitting an intoxicated person to consume alcohol on the licensed premises. Charge 3 is for violation of Commission Rule 436.1005(4) which prohibits the licensee from allowing an intoxicated person to frequent or loiter on the premises.

The Administrative Law Judge found the Petitioner in violation of each of these statutory and administrative rule provisions and assessed a penalty for each violation. There was no double penalty.

CONCLUSION

The Notice of Complaint and Notice of Violation Hearing were not defective. They were not vague and misleading and did not deprive the Petitioner of due process of law. The notices adequately apprised the Petitioner of the proceeding against it. APA, MCL 24.271; MSA .

The Petitioner was not denied due process of law because the Administrative Law Judge proceeded with the hearing in the absence of a proper appearance by the Licensee corporation. The Petitioner was notified that the Licensee corporation was required to personally appear for the hearing. The Petitioner failed to personally appear by corporate officer or counsel as required. The Petitioner waived certain rights by doing so. Further, all of the evidence at the hearing, including evidence from employees of the Petitioner, demonstrated that Petitioner was in violation as charged. The Petitioner has been unable to demonstrate how it could possibly have obtained a different result. Thus, if there was error, it was harmless.

The Administrative Law Judge's decision was supported by competent, substantial and material evidence. The Administrative Law Judge did not impose a double penalty. The decision of the Administrative Law Judge is affirmed.

This appeal is dismissed.

This Decision and Order resolves all pending claims and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____