

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL, MINNESOTA

In the Matter of all Licenses Held by JB1 Enterprises, Inc., d/b/a/ Peppercorn's, for the Premises Located at 1178 Arcade Street, St. Paul, Minnesota. License ID No. 94464; City File No. G95-0050.

FINDINGS OF FACT,
CONCLUSIONS AND RECOMMENDATION

The above-captioned matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on Wednesday, July 5, 1995 at Room 40A of the City Hall in St. Paul, Minnesota. The hearing was held pursuant to a Notice of Hearing dated June 12, 1995.

Reyne M. Rofuth, Assistant St. Paul City Attorney, Civil Division, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, appeared on behalf of the City of St. Paul (City). No one appeared on behalf of JB1 Enterprises, Inc., 1178 Arcade Street, St. Paul, Minnesota 55101, appeared on behalf of (Licensee or Respondent). The record closed at the conclusion of the hearing on July 5, 1995.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the St. Paul City Council shall not be made until this Report has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the City Council, which, after reviewing the record, may adopt, reject, or modify the Findings of Fact, Conclusions and Recommendation contained herein. The parties should contact Nancy Anderson, Council Secretary, St. Paul City Council, 310 City Hall, St. Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues in this case are: 1) whether the Respondent engaged in the receipt of receive stolen property; 2) whether such action is reasonably related to the licensed activity; 3) whether such action is evidence of a lack of fitness and good moral character to hold licensure; 4) whether Respondent's employees served alcoholic beverages on the licensed premises after hours without obtaining the required approval from the City; 5) whether one of Respondent's employee falsely indicated to police that the after-hours party had been properly authorized; and 6) what penalties are appropriate, should any or all of the foregoing issues be substantiated.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent is a corporation, with Robert K. Carlson and John Kwakenat as shareholders. Carlson and Kwakenat are the persons who perform all the functions of the corporation. Respondent operates Peppercorn's, a bar located at 1178 Arcade Street, St. Paul, Minnesota. Respondent holds on-sale liquor, gambling, entertainment, and restaurant licenses. City's Exhibit 8.

2. In the second week of October, 1994, Brian Nelson approached Robert Carlson at Peppercorn's and offered Carlson a 52"-screen television set, new in its box, for \$2,000. The television normally retails for \$3,000. Carlson offered \$1,000. Three weeks later, Nelson contacted Carlson and agreed to sell the television for \$1,000. Nelson gave Carlson directions to his house at 792 Lake Street, St. Paul.

3. Carlson called John Kwakenat and passed on the directions so Kwakenat could pick up the television set. Kwakenat arrived at the St. Paul address, which is a residence. The television set was in the garage, in its box. Kwakenat and Nelson loaded the television in Kwakenat's truck. Both men drove to Sharkey's Bar (also owned by Kwakenat and Carlson) in Hilltop, Minnesota. Carlson met them at Sharkey's Bar and paid Nelson \$1,000 for the television. Kwakenat suspected the television set might be stolen, so he telephoned a pawn broker who operates near Peppercorn's. After hearing Kwakenat's description of the transaction, the pawn broker responded "its hot. Don't buy it." Kwakenat raised the issue of whether the television set was stolen and Nelson repeatedly reassured Kwakenat and Carlson that the television set was not stolen.

4. The television had been obtained from the Rochester Best Buy store by Nelson by having an accomplice forge a stolen check. The accomplice used a stolen driver's license, altered by Nelson, to obtain acceptance of the check as payment for the television.

5. On February 14, 1995, criminal Complaints were filed by the Anoka County Attorney alleging that Kwakenat and Carlson had received stolen property, a television set, from Brian Nelson. City Exhibits 5 and 6. The Complaints alleged felony violations of Minn. Stat. §§ 609.53, subd. 1; 609.52, subd 3(3)(a); and 609.101, subd. 4. On April 5, 1995, Carlson and Kwakenat entered guilty pleas to the felony offense of receiving stolen property. *Id.* In exchange for the guilty pleas, the Anoka County Attorney diverted the matter to the Anoka County Pretrial Diversion Project. Successful completion of that program will result in the dismissal of all charges against both Carlson and Kwakenat. Both men agreed to testify against Nelson if Nelson's criminal case went to trial.

6. Kristine Schweinler, also known as Kristine Van Horn, is a senior license inspector for the City of St. Paul. She is employed in the License Inspection and Environmental Protection (LIEP) division, where she has worked for the past 13 years.

7. Among other things, Schweinler is responsible for processing requests for employee parties taking place after hours. By City ordinance, such parties are allowed, with thirty days written notice. Carlson spoke to Schweinler at end of November, 1994, while paying the license fee for Peppercorn's. At that time, Carlson mentioned that Peppercorn's would be having its holiday party for the employees again that year. Schweinler reminded Carlson of the need to send a letter once the date of the party was determined. City Exhibit 3. Due to a lack of communication between Carlson, Kwakenat, and Wayne Peterson, Peppercorn's manager, the letter was never sent.

8. At 1:36 a.m. on the morning of January 3, 1995, St. Paul police officer John Wuorinen observed persons in Peppercorn's playing pool and drinking. Officer Wuorinen noted the front door was locked. The back door was unlocked and the officer entered the bar. Inside, Officer Wuorinen noted that the people present were drinking beer. Peterson informed Officer Wuorinen that this was the annual holiday party and that the party had been cleared in advance with Schweinler. The officer told Peterson to lock the back door and then he left the premises.

9. On January 23, 1995, an assistant city attorney notified Peterson that the City might take adverse action against all the licenses held by Peppercorn's because of after-hours consumption of alcoholic beverages, failure to submit a written notice of the after-hours party, and falsely informing a police officer that the party had been approved by the City's Licensing Office. The letter requested that Peterson advise the attorney if an administrative hearing would be required. By letter dated February 9, 1995, Carlson responded that their right to an administrative hearing would be waived in favor of appealing directly to the matter to the St. Paul City Council.

10. On April 24, 1995, an assistant city attorney notified Carlson and Kwakenat that the City might take adverse action against all the licenses held by Peppercorn's because of the receipt of a stolen television set and delivery of that television set to premises licensed for on-site sale of intoxicating liquors. The letter requested that Peterson advise the attorney if an administrative hearing would be required. The letter also advised Carlson and Kwakenat that the earlier licensing action, relating to the after-hours party, would be combined with this appeal. No response was made to the April 24, 1995 letter.

11. On June 13, 1995, a hearing notice was served on Robert K. Carlson and John Kwakenat, and a copy was filed with the Office of Administrative Hearings.

Based upon the forgoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The St. Paul City Council and the Administrative Law Judge have authority to consider the charges brought against JB1 Enterprises, Inc. under Minn. Stat. §§ 14.55 and 340A.415 and §§ 310.05 and 310.06(b)(6)a of the St. Paul Legislative Code.

2. The Licensee received timely and appropriate notice of the charges against it and the time and place of the hearing.

3. The City has complied with all relevant substantive and procedural requirements of statute and rule.

4. Under § 310.06(b)(6)a of the St. Paul Legislative Code, a licensee whose conduct violates a law reasonably related to the licensed activity is a basis for taking adverse action against a license.

5. Under § 310.06(b)(6)c of the St. Paul Legislative Code, a licensee whose conduct evidences a pattern or practice of violating laws reasonably related to the licensed activity from which a lack of fitness or good moral character can be drawn is a basis for taking adverse action against a license.

6. Under § 310.06(b)(7) of the St. Paul Legislative Code, a licensee whose activities in the licensed business caused a serious danger to the public health, safety or welfare is subject to adverse action against a license.

7. Under § 409.07(c) of the St. Paul Legislative Code, display or consumption of intoxicating liquors is prohibited on licensed premises after hours of sale. Under § 409.07(a) of the St. Paul Legislative Code, no intoxicating liquors may be sold between 1:00 a.m. and 8:00 a.m. on a weekday.

8. An exception is made to the limitations on display and consumption prohibition of intoxicating liquors by § 409.07(d) of the St. Paul Legislative Code, which provides for an annual holiday party by a licensee if the party is at no charge and a written request for approval of such party is submitted to the City license inspector.

9. The City has the burden of proof to establish, by a preponderance of the evidence, that the Licensee violated the statute and ordinances under which it has been cited.

10. The Licensee is subject to adverse licensing action for the actions of Carlson and Kwakenat as principal shareholders.

11. The receipt of stolen property by Carlson and Kwakenat is reasonably related to the licensed activity in this matter. That conduct demonstrates that neither Carlson nor Kwakenat is fit and able to hold a license to sell intoxicating liquors. That conduct created a serious danger to public safety.

12. Under § 409.14 of the St. Paul Legislative Code, the Licensee is responsible for the acts of its employees at its place of business.

13. The Licensee violated § 409.07(c) of the St. Paul Legislative Code, by allowing display or consumption of intoxicating liquors on the licensed premises after the hours of sale ended at 1:00 a.m. on January 3, 1995.

14. Under the penalty matrix in § 409.26(b) of the St. Paul Legislative Code, a one-day suspension of the Licensee's licenses is presumptively appropriate for the offense of allowing after-hours display and consumption of intoxicating liquors. Under the penalty matrix, revocation is the presumptive penalty for conviction of a criminal offense related to the licensed operation by a licensee.

15. Under § 310.05(k) of the St. Paul Legislative Code, the City Council may impose upon any licensee or license applicant some or all of the costs of a contested

hearing before an independent hearing examiner. The costs of a contested hearing which may be imposed upon a licensee include, but are not limited to, the cost of the administrative law judge or independent hearing examiner, stenographic and recording costs, copying costs, city staff and attorney time for which adequate records have been kept, rental of rooms and equipment necessary for the hearing, and the cost of expert witnesses.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the licenses of JB1 Enterprises, Inc. be revoked due to the acts of Robert Carlson and John Kwakenat in receiving stolen property. The licenses of JB1 Enterprises, Inc. should not be suspended or revoked for the after-hours consumption or display of intoxicating beverages on January 3, 1995. The costs of the administrative hearing should be paid by Licensee.

Dated this 2nd day of August, 1995

/s/ by GAB

JON L. LUNDE

Administrative Law Judge

Reported: Taped: One Tape.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the City is requested to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

There is no question that Carlson and Kwakenat received stolen property. An issue arises as to whether this criminal conduct is sufficiently related to the conduct for which JB1 Enterprises, Inc. is licensed. The Judge concludes that the receipt of stolen property under the facts of this case is reasonably related to the operation of the licensed activity. The initial offer to sell the television took place at Peppercorn's, on the licensed premises. The property was picked up in the City of St. Paul. Acting as a conduit for stolen property encourages additional theft of property which is a threat to public safety. There is a sufficient nexus between the licensed activity and the illegal conduct to take action against the licenses held by JB1 Enterprises, Inc. This conduct is evidence of the lack of fitness of Carlson and Kwakenat to operate a corporation licensed to sell intoxicating liquors. The City has jurisdiction and authority to take adverse action against the licenses of JB1 Enterprises, Inc.

The City presented multiple grounds for taking action on the after-hours display and consumption charge. The after-hours violation, the failure to follow the rules for obtaining approval for an after- hours party, and making a false statement to a police officer are all cited in the initial notice as reasons for taking adverse action against the

Licensee. The after-hours consumption would not have been illegal if it was a properly-approved holiday party under § 409.07(d) of the St. Paul Legislative Code. The Licensee failed to submit a request for approval in writing for the party. Thus, the holiday party was not approved and the after-hours consumption is a violation of the Code.

The analysis does not end there, however. There is a significant difference between allowing illegal consumption and display in the normal course of business, and allowing that conduct when it is believed to be legitimate and pursuant to the City Code. In this matter, the only difference between illegal after-hours display and consumption and a legal holiday party is a letter. Carlson spoke to a representative of the City and mentioned the holiday party long before the date of the party. The facts of this violation support imposition of a penalty lower than the one-day suspension called for in the penalty matrix. The allegation that Peterson made a false statement to a police officer is not sustained by the evidence in this matter. Peterson did not state that he had sent a letter to the City requesting approval of the party. He merely said that the party had been “cleared” with the Licensing Office. There is no evidence in the record to suggest that Peterson was aware that the required letter had not been sent or that he was trying to mislead the officer. The violation is de minimus and should be treated as such. In the event of repetition or evidence of willful conduct violating the rule, a harsher penalty would be appropriate.

Under the St. Paul Legislative Code, the City is authorized in section 310.05(k) to require a licensee in a case like this to pay all of the costs of a contested case hearing. The decision to impose those costs is discretionary with the City Council. The Judge has considered both the lack of a request for an appeal from the Licensee and the ease by which the Licensee could have informed the City that no hearing need be undertaken. The Administrative Law Judge has concluded that the Council may require the Licensee to pay the costs of the proceeding.

J.L.L.