

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY COUNCIL OF SAINT PAUL, MINNESOTA

In the Matter of All Licenses Held by
DRJ, Inc., d/b/a Diva's Overtime
Lounge

INTERIM ORDER

The discovery motions discussed below came before Administrative Law Judge Eric L. Lipman during the course of the evidentiary hearing in this matter on March 22, 2007.

Andrew J. Dawkins, Mansfield, Tanick & Cohen, P.A., 220 South Sixth Street, Suite 1700, Minneapolis, MN 55402-4511, appeared on behalf of the Licensee, DRJ, Inc. d/b/a Diva's Overtime Lounge ("DRJ" or "the Licensee"). Rachel Gunderson, Assistant City Attorney, 15 West Kellogg Boulevard, Suite 400, Saint Paul, MN 55102, appeared on behalf of the City of Saint Paul, Office of License, Inspections and Environmental Protection ("the City" or "LIEP").

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED THAT, for the purposes of this proceeding:

1. The City may not rely upon the fact that a shooting occurred on either July 14, 2006 or November 11, 2006, to establish that the Licensee permitted conditions to exist that are contrary to Saint Paul City Code 310.06 (b) (8);

2. The City may submit and adduce testimony that refers to the events of July 14, 2006 or November 11, 2006, in the same manner as to which other historical events in the hearing record – such as meetings, inspections or police calls – are referenced.

Dated this 4th day of April, 2007.

____s/Eric L. Lipman_____
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Among the contentions made by the City of Saint Paul in this litigation is that is that the licensee operated her establishment in such a manner as to give rise to two violent shootings – one on July 14, 2006 and another on November 11, 2006. Further, pointing to section 310 of the Saint Paul Code, the City asserts that the licensee's practices, and the resulting violence, unreasonably annoys and endangers "the safety, health, morals, comfort or repose of a considerable number of members of the public."¹

Unquestionably, the particular facts relating to these shootings are relevant both to the City's proposed action and the licensee's defense. However, as counsel for the City has noted, both shootings are the subject of active police investigations and pending criminal prosecutions. Further, so as to maintain the integrity of the parallel proceedings, counsel for the City will instruct any police officers subpoenaed by the licensee not to testify as to matters regarding events of July 14, 2006 or November 11, 2006 before the conclusion of the related criminal prosecutions.

In cases referred to the Office of Administrative Hearings under Section 310 of the St. Paul City Code, the Administrative Law Judge has the authority to enter orders in aid of the discovery of relevant evidence and to ensure due process of law.²

The case at bar presents a difficult intersection of competing interests and statutory requirements. On the one hand, guaranteed to the licensee are statutory rights of cross-examination³ and due process assurances that she may present a meaningful defense to the City's regulatory action.⁴ Binding the contested case process, however, are specific instructions on the handling of confidential data relating to criminal investigations. The Office of Administrative Hearings is specifically directed to "give effect to the rules of privilege recognized by law"⁵ — and among these is the prohibition on the receipt of testimony by "a public officer" as to "communications made to the officer in official confidence when the public interest would suffer by the disclosure."⁶ The Minnesota

¹ See, St. Paul Leg. Code. Sec. 310.06 ("The licensed business, or the way in which such business is operated, maintains or permits conditions that unreasonably annoy, injure or endanger the safety, health, morals, comfort or repose of any considerable number of members of the public") (<http://www.stpaul.gov/code/lc310.html>).

² See, Minn. Stat. §§ 14.50, 14.51 (2006); Minn. R. 1400.5500 (B) (D), (J) and (Q) (2005).

³ See, Minn. Stat. §§ 14.50, 14.51, 14.60 (3) (2006); Minn. R. 1400.7300 (6) (2005).

⁴ Compare generally, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner").

⁵ See, Minn. Stat. § 14.60 (1) (2006); Minn. R. 1400.7300 (1) (2005).

⁶ See, Minn. Stat. § 595.02 (1) (e) (2006).

Supreme Court has earlier held that “the statutory privilege broadly enunciated in Section 595.02, subd. 1(e) covers communications made to police officers, including those made during the course of ... investigations.”⁷

Likewise important, the Minnesota Data Practices Act designates as “protected nonpublic” information “investigative data collected or created by a law enforcement agency in order to prepare a case against a person, whether known or unknown, for the commission of a crime or other offense for which the agency has primary investigative responsibility ... while the investigation is active.”⁸ Moreover, the data practices act confers upon the District Court for Ramsey County the power to enter orders requiring the disclosure of criminal investigative data of the Saint Paul Police Department while a related investigation is active.⁹

The proper balancing of these various and competing interests is to exclude, as a basis for the City’s regulatory action, the events surrounding the shootings on July 14, 2006 or November 11, 2006. As these matters cannot be the subject of either discovery or examination by the licensee, while the parallel criminal proceedings are underway, due process requires that they not form the basis of an adverse licensing action.

With that said, it is important to emphasize that as the question of whether the Licensee permitted conditions to exist that gave rise to the shootings on July 14, 2006 or November 11, 2006 to occur, is excluded, this question is not one that was, or may be, fully and fairly litigated in this proceeding. Accordingly, in the view of the Administrative Law Judge, application of the doctrines of issue preclusion or merger and bar should not later estop the City from proceeding against the Licensee on these grounds, if and when, the information relating to those incidents becomes discoverable and subject to cross-examination.¹⁰

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⁷ See, *Erickson v. MacArthur*, 414 N.W.2d 406, 408 (Minn. 1987).

⁸ See, Minn. Stat. § 14.82 (7) (2006).

⁹ *Id.*

¹⁰ Compare, generally, *Hauser v. Mealey*, 263 N.W.2d 803, 806 (Minn. 1978) (“The principles of merger and bar operate where a subsequent action or suit is predicated on the same cause of action which has been determined by a judgment”) (citations omitted).