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SCANNED ON 4/1/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

Empire Management & Productions, Inc. Petitioner ~~Plaintiff~~,

-v-

The NY State Liquor Authority ~~Defendant~~ Respondent.

INDEX NO.: 115724/07

MOTION DATE: 12-18-07

MOTION SEQ. NO.: 001

MOTION CAL. NO.:

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the annexed Memorandum Decision, Order and Judgment.

Dated: March 26, 2008

J.S.C.

Check one: [X] **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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In the Matter of the Application of
EMPIRE MANAGEMENT & PRODUCTIONS, INC.,
d/b/a THE CHANCE CLUB,

Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

Index No. 115724/07

-against-

THE NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

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JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Empire Management & Productions, Inc. d/b/a The Chance Club ("Empire") moves for a judgment annulling the determination of respondent New York State Liquor Authority's ("Authority") which, after remand, suspended Empire's on-premises liquor licensee for fifteen days and imposed a $5,000 fine. The Authority opposes the petition, which is granted to the extent set forth below.

Background

Empire owns and operates an establishment that sells alcoholic beverages pursuant to an on-premises liquor license issued by the Authority. The Authority possesses the power to, inter alia, issue, revoke and suspend licenses or permits to sell alcoholic beverages subject to certain rules and procedures. (Alcohol Beverage Control Law ("the ABC Law") § 17; Rules of the State Liquor Authority [9 NYCRR 53.1 et seq.]).

By Notice of Pleading dated March 1, 2006, the Authority commenced revocation proceedings against Empire based on the following offenses: (1) selling an unlimited amount of

drinks during a set time for a fixed price prior to January 31, 2006, in violation of § 117-a(1)(a) of the ABC Law, (2) failure to exercise adequate supervision over the premises on February 1, 2006 in violation of Rule 54.2 and Rule 36.1(f) of the Rules of the Authority [9 NYCRR 48.2 and 53.1(f)], (3) selling alcoholic beverage(s) to visibly intoxicated person in violation of § 65(2) of the ABC Law, (4) using unauthorized trade names on February 1, 2006 in violation of Rule 36.1(p) [9 NYCRR 53.1(p)]. The Notice of Pleading indicated the hearing would occur on March 24, 2006 at 11:00 am, and notified the licensee that "...YOUR FAILURE TO PLEAD WILL BE DEEMED A 'NO CONTEST' PLEA AND NO FURTHER HEARING WILL BE HELD."

Empire did not respond to the Notice of Pleading or appear and enter a plea on the March 24th hearing date set forth in the Notice of Pleading. Pursuant to the Rules of the Authority (9 NYCRR 54.2(a)(b)),[1] the default was treated as a plea of no contest. A report dated September 13, 2006 was then prepared by the Authority's Office of Counsel, which described facts that provided a basis for the charges, specifically, an advertisement received by the Authority for an event on January 31, 2006, at which free beer would be served, and a February 1, 2006 on-site investigation of the premises by the Authority where the investigator observed a visibly intoxicated person being served alcohol and patrons under the age of 21 drinking alcoholic

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[1]Section 54.2(a) provides, part, that: "After a disciplinary proceeding has been commenced, the licensee shall be afforded an opportunity to plead either 'not guilty' or 'no contest' to the charges on or before the scheduled date. If the licensee pleads 'no guilty' a hearing shall be scheduled. If the licensee pleads 'no contest,' the charges shall be deemed sustained, and no further hearing shall be held....

Section 54.2 (b) provides that "[f]ailure of a licensee to plead on or before the pleading date shall be deemed and plea of 'no contest.' and no further hearing shall be held."

beverages.

The report also indicated that Empire's adverse history consisted of a "disorderly premises" violation resulting in the imposition of a $1,000 fine, which was paid. The report then indicated that the maximum penalty for the charges was "[r]evocation plus bond claim." Before a meeting of the Authority's Board scheduled for September 20, 2006, counsel for Empire sought to vacate Empire's default. At the meeting, Chairman Daniel Boyle, Commissioner Lawrence J. Gedda, and Commissioner Noreen Healy denied Empire's request to set aside the default, ordered Empire's license suspended for seven days, and imposed a civil penalty of $3,000.

Empire then commenced an Article 78 proceeding (Index No. 114684/06) before this court seeking to vacate its default and to annul the Authority's determination. The Authority submitted a verified answer opposing the relief sought by Empire. Following oral argument and with the permission of the court, Empire submitted supplemental papers, in which Empire argued that the Authority violated its own rules since the Authority's determination was based on a summary prepared by the Authority's Office of Counsel rather than by a Hearing Officer as required by the Rules of the Authority (9 NYCRR § 54.4(h)[2]) Empire further argued that it was harmed as the result of the Authority's failure to follow the rule since the Office of Counsel which prosecuted the case also summarized the facts and recommended the penalty to be imposed.

Although given an opportunity to submit supplemental papers regarding the issue of whether the failure of the Hearing Officer to prepare a summary violated the Authority's rules, the

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[2]9 NYCRR 54.4 (h) provides that "[s]ubject to the supervision and control of the authority, in all cases where the licensee has pleaded 'no contest' to the charge or charges, the hearing officer shall summarize the facts of the case and shall recommend the penalty to be imposed by the authority."

Authority did not do so.

By decision, order and judgment dated May 16, 2007, this court found that the Authority did not act irrationally when it declined to vacate Empire's default, noting that the Authority submitted uncontroverted evidence that Empire was served with the Notice of Pleading in accordance with the Rules of the Authority, and that Empire submitted no evidence that it had a meritorious defense to the charges sustained against it, or that it is entitled to equitable relief.

However, the court also found that Empire was correct that the Authority had failed to follow its own rule (9 NYCRR § 54.4 [h]) which requires that the Hearing Officer summarize the facts of the case and recommend the penalty, rather than the Authority's Office of Counsel which prosecuted the case, and that this failure provided grounds for annulling the Authority's determination. See e.g. Squeeze Inn, Inc. v New York State Liquor Authority, 176 AD2d 645 (1st Dept 1991)(trial court properly annulled determination of the Authority based on its failure to set forth maximum penalty that might be assessed in its Notice of Pleading); Ginny Rest. v State Liquor Authority of State of N.Y., 203 AD2d at 973 (same).

Accordingly, by decision, order and judgment dated May 16, 2007, this court granted the petition to the extent of annulling the Authority's determination and vacating any penalty provided therein, and remanding the matter to the Authority for a new determination based on the summary of facts and recommended penalty of a Hearing Office in accordance with 9 NYCRR § 54.4 (h).

On June 13, 2007, the Board Members of the Authority held a regular meeting and directed the Authority's Hearing Bureau to "summarize the facts and recommend penalty then re-submit to the members of the Authority." In accordance with this direction Stephen D. Karlinsky,

the Chief Administrative Law Judge (hereinafter "the Hearing Officer"), wrote a Memorandum dated September 20, 2007 to the Members of the Authority regarding the charges against Empire. The Memorandum listed the four charges against Empire as provided in the March 1, 2006 Notice of Pleading and noted that as Empire did not respond to the duly served Notice of Pleading, Empire was deemed to have pleaded "Not Contest" to the charges.

The Memorandum described the following three complaints contained regarding the premises in the Authority's file: (1) a November 1, 2005 on-line complaint received by the Authority regarding unfair business competition in allowing first three kegs of beer free to college students and other illegal promotions, and over intoxication leading to fights and dangerous crowd motivators (2) a January 24, 2006 on-line complaint received by the Authority regarding advertising that first three kegs of beer were going to be free, and (3) a January 25, 2006 complaint by telephone to the Authority regarding service of alcohol to underage customers. Notably, it appears that no investigation was made regarding these complaints and that no charges were filed as a result of these complaints.

The Memorandum next described an on-site inspection of the premises by an investigator from the Authority during the early morning hours of February 1, 2006. The investigator reported that he observed (i) advertisements for an event on January 31, 2006, involving the sale of free beer, (ii) patrons under 21 years of age consuming alcohol, and (iii) a sale of alcohol to a visibly intoxicated patron. With respect to the license history, the Memorandum indicated one prior violation on October 17, 2004 involving "[d]isorderly premises' in which a $1,000 penalty was imposed, and paid.

The Memorandum concluded that "[b]ased on the information contain in the Authority's

file which was uncontested by the licensee, charges 1,2,3 and 4 are sustained," and recommended a penalty of a 30-day license suspension and a $5,000.00 fine. Empire, by its counsel, submitted written opposition, asserting that the facts recited in the Memorandum were insufficient to make out a prima facie case, and that the recommended penalty was shocking and far in excess of the previous penalty of a seven day suspension, and a civil penalty of $3,000.

At their regular meeting on October 31, 2007 of the Authority's Board, Chairman Boyle and Commissioner Healy voted to sustain the charges against Empire and imposed a penalty of a fifteen day license suspension and a $5,000 fine and ordered that the suspension be carried out between November 29th and December 14, 2007.

This Proceeding

On or about November 27, 2007, Empire commenced this Article 78 proceeding challenging the Authority's October 31, 2007 determination by order to show cause, and this court issued temporary restraining order enjoining interference with Empire's purchase and on-premises sale of alcoholic beverages.

Empire argues that the imposition of a greater penalty after this matter was remanded for a new determination based on the summary of facts and recommended penalty of the Hearing Officer, was retaliatory, shocking to one's sense of fairness, and disproportionate given the circumstances of the case. Empire also argues that the Authority's failure to promulgate rules and regulations necessary to implement section 117-a(1)(a), regarding the sale of free alcoholic beverages, deprives licensees, like Empire, of notice regarding the proscribed conduct and precludes the establishment of a prima facie case.

In opposition, the Authority argues that section 117-a(1)(a) of the ABC Law, which

provides that a licensee shall not "offer, sell, serve, or deliver to any person or persons an unlimited number of drinks during any set period of time for a fixed price," is sufficiently clear and specific without the promulgation of implementing rules and regulations. The Authority also argues that given the charges sustained against Empire, the penalty was not irrational or an abuse of discretion and was not retaliatory.

As a preliminary matter, contrary to Empire's position, it was not necessary for the Authority to promulgate rules or regulations in order to enforce section 117-a(1)(a), since the purpose of the statute is specific and its enforcement here is consistent with that purpose. See Ellis Center for Long Term Care v. De Buono, 261 AD2d 791, 795 (3d Dept), appeal dismissed, 93 NY2d 1037 (1999)("[w]hen the purpose of the statute is specific, it is unnecessary for an agency to promulgate formal rules or regulations as long as the intent of the statute is effectuated").

Next, given the charges sustained against Empire, it cannot be said that the $5,000 fine and the fifteen-day suspension imposed as a penalty in this case was irrational, "disproportionate to the offense or shocking to the sense of fairness." Papadakis v. Brezenoff, 103 AD2d 704, 705 (1st Dept 1984), aff'd, 64 NY2d 878 (1985), citing, Matter of Pell v. Board of Education, 34 NY2d 222 (1974). In this regard, the court notes that the charges sustained against Empire, particularly the advertising of free alcoholic beverages, are serious and disturbing.

However, the substantial increase in the penalty imposed after remand to the two of the three same members of the Authority's Board based on the same charges sustained prior to Empire's application for Article 78 relief raises an issue as to whether the penalty was vindictive or retaliatory. See Anonymous v. Commissioner of Health, 21 AD3d 841, 844 (1st Dept

2005)(record raised a triable issue of fact as to whether agency refused to executed consent agreement in retaliation for petitioner filing an Article 78 proceeding with respect to matters not covered by agreement); People v. Hilliard, ___ AD3d ___, 2008 WL 596166, * 3 (3d Dept 2008)(holding that sentence imposed after retrial by same judge is presumed to be vindictive in the absence of "new facts or events ...articulate to justify the increased sentence"); compare Bezar v. De Buono, 240 AD2d 978 (3d Dept 1997)(element of vindictiveness was not present since administrative review board which increased penalty upon appeal was composed of different individuals than the hearing committee which imposed the initial penalty).

Moreover, an examination of the record provides no rational basis for the increased penalty which more than doubled the period of suspension and substantially increased the fine. Notably, the Board's October 31, 2007 determination provides no explanation for the increased penalty for the same sustained charges.[3] Furthermore, the factual summary of the violations observed by the investigator which provide that basis for the charges and penalty are substantially the same in the Hearing Officer's Memorandum written after remand and in the earlier report prepared by the Authority's Office of Counsel. Moreover, while the Hearing Officer's Memorandum contains an additional summary of facts as to complaints regarding the premises that preceded the February 1, 2006 inspection of the premises, such complaints, which were

[3]Minutes from the Board meeting evidencing the October 31, 2007 determination, refer to a violation under Empire's adverse history that was not included in the Hearing Officer's Memorandum, the minutes from the first determination of the Board in this matter on September 20, 2006, or the report from the Authority's Office of Counsel. Specifically, the minutes indicate that there was a sale of alcohol to a minor on February 2, 2003, which resulted in the imposition of a $5,000 fine on October 17, 2007, which was due on November 17, 2007. Even assuming that the violation occurred on February 2, 2007 and not on February 2, 2003, which would be after this matter was remanded, there is nothing in the record to suggest that this additional violation provided the basis for the Authority's substantial increase in the imposed penalty.

apparently not investigated and are not the basis for the relevant charges, cannot justify the substantial increase in the penalty imposed after remand.

Accordingly, as the record does not support an increase in penalty imposed after remand, the petition is granted to the extent of annulling the Authority's October 31, 2007 determination, vacating the penalty and remanding this matter to the Authority for further determination consistent with this decision, order and judgment.

In view of the above, it is

ORDERED AND ADJUDGED that the petition is granted to the extent of annulling the determination of October 31, 2007 and vacating any penalty provided therein, and remanding the matter to the Authority for a new determination consistent with this decision order and judgment.

Dated: March 26, 2008

J.S.C.