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

PRESENT: HON. WALTER B. TOLUB PART 15

MONJU INC.

-v-

NYS Liquor Authority

INDEX NO. 108854/08

MOTION DATE

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the accompanying memorandum decision.

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).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/4/09

WALTER B. TOLUB

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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In the Matter of the Application of
MONJU, INC.,
Petitioner,

Index No. 108854/08
Mtn Seq. 001

For a Review Pursuant to Article 78
of the CPLR
-against-

NEW YORK STATE LIQUOR AUTHORITY,
Defendants.

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WALTER B. TOLUB, J.:

This Special Proceeding arises out of respondent's issuance of a determination dated June 11, 2008, cancelling petitioner's liquor license as of June 30, 2008.

On May 30, 2007 petitioner received an on-premises liquor license ("the liquor license") for premises located at 305 East 53rd Street in Manhattan ("the premises"). Less than two months after obtaining their liquor license, petitioner's premises were the subject of an unannounced inspection conducted by several New York City Agencies, including respondent, the New York State Liquor Authority ("the State Liquor Authority" or "respondent"). During the inspection, respondent's investigators, Frank Englander and Ricardo Cruz, observed that petitioner's premises did not conform to the diagram submitted by petitioner with their original liquor license application. Petitioner indeed admits to having expanded the premises to create four karaoke rooms and a service bar ("the additional space"), and did so prior to obtaining respondent's approval in accordance with Section 99-d

of the Alcoholic and Beverage Control Law.[1]

After observing the use and storage of alcohol in petitioner's additional space, Investigator Englander instructed petitioner's president, Hisashi Ibata, to immediately remove all alcoholic beverages from the newly created area. Investigator further advised Mr. Ibata that he could neither store nor permit alcoholic beverages in the additional space until an alteration application was filed with and approved by the State Liquor Authority (Order to Show Cause, Exhibit A). Petitioner filed the belated, but required, Application for Permission to Make Alterations with the State Liquor Authority on November 27, 2007 (id., Exhibit B).

On September 10, 2007, respondent sent petitioner a Notice of Pleading, charging petitioner with violations of Sections 111 and 99-d of the Alcoholic Beverage Control Law. Petitioner was additionally charged with violations of State Liquor Authority Rule 54.8 and Rule 36.1(f) (9 NYCRR 48.8 and 9 NYCRR 53.1(f), respectively)(Order to Show Cause, Exhibit C).

At a hearing held on February 4, 2008, in defense of the

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[1]Alcoholic Beverage Control Law §99-d reads, in pertinent part, as follows:

[...] Before any substantial alteration to a licensed premises may be undertaken by or on the behalf of any licensee except a micro-winery or a farm winery, the licensee shall make an application to the liquor authority for permission to effect such alteration [...] (id.).

charges advanced, petitioner argued that their actions were the result of relying upon the advice of prior legal counsel. Prior counsel, according to testimony offered by petitioner, advised petitioner to first make the alterations to the premises, and then file the necessary paperwork with respondent after the alterations were completed (see, Verified Answer, Exhibit 1; see also, Order to Show Cause, Exhibits A, D).

By decision dated April 4, 2008, Administrative Law Judge Nicholas De Cesare sustained the charges against petitioner, determining that notwithstanding claimed reliance on prior counsel's legal advice, petitioner had failed to comply with respondent's applicable laws and rules (Order to Show Cause, Exhibit D). ALJ De Cesare however, did note that the reliance on prior counsel's legal advice should be considered a mitigating factor in assessing petitioner's penalty (id.).[2]

On June 18, 2008, respondent issued petitioner a cancellation order, effectively cancelling and/or revoking petitioner's on-premises license as of June 30, 2008. This special proceeding, seeking to vacate and annul respondent's determination, was commenced shortly thereafter.

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[2] The court notes that ALJ De Cesare also made mention of the fact that during the same July, 27, 2007 investigation, the Department of Health cited petitioner with a total of four Health Code violations. Three of those violations were later upheld in a separate hearing, and petitioner was fined, and paid, a total of $850 (id.; see also (see Verified Answer, Exhibit 1).

Discussion

Judicial review of agency determinations traditionally limit the court's scope of analysis to whether the challenged determination was rationally based, or whether it was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or an abuse of discretion (CPLR 7803; Pell v. Board of Education, 34 NY2d 222, 231 [1974]; Chinese Staff & Workers Association v. City of New York, 68 NY2d 359, 363 [1986]; Flacke v. Onodaga Landfill Systems, Inc., 69 NY2d 355 [1987]). See generally, Barr Altman, Lipshie and Gerstman; New York Civil Practice Before Trial, [James Publishing 2008] §42:200-244). It is not a *de novo* review (see, Greystone Management Corp. v. Conciliation and Appeals Board, 94 AD2d 614, 616 [1st Dept 1982, *aff'd*, 62 NY2d 763 [1984]). As such, this court will neither entertain issues not previously raised in an administrative hearing (see, Torres v. NYC Housing Authority, 40 AD3d 328 [1st Dept 2007]), nor will it substitute its judgment for that of the agency responsible for making the determination being challenged (see, Purdy v. Kreisberg, 47 NY2d 354 [1979]).

Review of the papers presented indicates that respondent's entire rationale for cancelling petitioner's on-premises license is derived not from the facts adduced at the administrative hearing, but from the claim that the cancellation of petitioner's license was necessary to protect the needs of the surrounding

community (see, Affirmation of Scott Weiner). The problem with this argument however, is that the 64-page administrative hearing transcript is completely devoid of any references community board complaints or expressed community needs and concerns (Verified Answer/ Respondent's Opposition Papers, Exhibit 1). Since these issues were not raised at the administrative hearing, their introduction will not be allowed now (Torres 40 AD3d 328; Slesinger v. Department of Housing Preservation and Development of the City of New York, 39 Ad3d 246 [1st 2007]).

The remaining support for respondent's decision: three first-time New York City Health Code violations[3] and four first-time State Liquor Authority violations, simply do not support the penalty assessed against petitioner (see, Shore Haven Lounge v. New York State Liquor Authority, 37 NY2d 187). There has been no demonstration that petitioner willfully violated any applicable laws and rules involved in this application (see, Matter of Suffolk Manor, Inc., v. State of New York Liquor Authority, 204 AD2d 1075 [4th Dept 1994]; L'Intrigue, Inc. v. State Liquor Authority, 29 AD2d 854 [1st Dept 1968]). To the contrary, when petitioner was told that alcoholic beverages could not be served or stored in the expanded premises because of the failure to

[3] The health code violations were for evidence of mice, sink-hand washing violations (sink not used for intended purpose, no paper towels and soap present at time of inspection), and use of open-bait products (see, Respondent's Opposition Papers).

comply with the respondent's requirements, petitioner removed the offending beverages and filed the proper applications with the State Liquor Authority. Furthermore, even ALJ De Cesare concluded that petitioner's asserted defense, that they expanded first and filed for permission after construction was completed because prior legal counsel advised them to do so, should be taken into consideration when assessing a penalty against petitioner.

Under these circumstances, it is this court's conclusion that while there indeed exists evidence to support the technical violations, the penalty imposed against petitioner by the State Liquor Authority is excessive (see, Mei Chi Liquor Corp. v. New York State Liquor Authority, 195 AD2d 270 [1st Dept. 1993], *leave to appeal denied*, 82 NY2d 660 [1993]. As such it is

ADJUDGED AND DECLARED that the determination of respondent, the New York State Liquor Authority, made on June 11, 2008 to become effective on June 30, 2008, cancelling the on-premises liquor license issued to petitioner for the premises located at 305 East 53rd Street in Manhattan is hereby annulled in its entirety and vacated.

This memorandum opinion constitutes the decision and judgment of the Court.

Dated: 3/2/09

HON. WALTER B. TOLUB, J.S.C.