2015 IL App (5th) 140358-U

NO. 5-14-0358

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CALLA CALI'S, LLC, d/b/a Callihan's/Cali's,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Jackson County.
	)	
v.	)	No. 13-MR-96
	)	
ILLINOIS LIQUOR CONTROL COMMISSION,	)	Honorable
	)	W. Charles Grace,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Cates and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The administrative decision finding that the appellant violated section 6-16(a) of the Liquor Control Act is not against the manifest weight of the evidence and is affirmed; however, the evidence presented in support of the appellant's citation pursuant to section 6-28(b)(1) was not sufficient to support the administrative decision and is reversed.

¶ 2 The appellant, Calla Cali's, LLC, (appellant) is a holder of a license issued by the Illinois Liquor Control Commission (ILCC or Commission). Based on events that occurred on January 26, 2013, the appellant was cited for violating section 6-16(a) of the Liquor Control Act of 1934 (the Act) (235 ILCS 5/6-16(a) (West 2012)) for selling an alcoholic drink to a person under 21 years of age; the appellant was also cited for

violating section 6-28(b)(1) of the Act (235 ILCS 5/6-28(b)(1) (West 2012) ("Happy Hour" law)) for serving two or more alcoholic drinks to one person for consumption by that one person. A hearing was held before the ILCC, and the appellant was found guilty of both citations. The ILCC issued an order imposing a $500 fine and 21-day suspension of liquor sales for violating section 6-16(a) and a $500 fine for violating section 6-28(b)(1). The appellant filed a petition for rehearing with the ILCC, which was denied. The appellant subsequently made an administrative appeal to the circuit court of Jackson County, which upheld the ILCC's decision. For the following reasons, we affirm the Commission's determination regarding the appellant's violation of section 6-16(a) of the Act, but reverse the Commission's citation pursuant to section 6-28(b)(1) of the Act.

¶ 3 On January 26, 2013, the appellant, along with multiple other Carbondale establishments, was participating in an event known as the Polar Bear festival. That day, an ILCC agent, along with two undercover participants employed by the ILCC, visited the establishment to conduct compliance checks. The events that occurred during this check resulted in the appellant's citation pursuant to section 6-16(a) of the Act. Later in the day, another ILCC officer entered the premises to conduct compliance checks with the "Happy Hour" laws. The observations of the officer during this check resulted in the citation pursuant to section 6-28(b)(1) of the Act.

¶ 4 At an April 11, 2013, hearing, evidence regarding both citations was presented to the commissioners. Evidence adduced from various witness testimony indicates that the building that houses the establishment is separated into two areas, one of which is referred to as Cali's, and the other is referred to as Callahan's. Each has a separate

exterior entrance, and a door connects the areas on the inside. Cali's has two wet bars, while Callahan's has one. Upon entering Cali's front door, a bar is directly on the right-hand side. There are four bartender stations within that bar. Moving towards the rear of Cali's, there is another bar on the left-hand side, which also has four bartender stations.

¶ 5 The following evidence was adduced regarding the underage-sale violation. The State produced three witnesses regarding this charge: ILCC underage participants Jordan Pratt and Reymund Ervy, 19-year-old African-American students at Southern Illinois University, and ILCC Agent Travis Ruffino. Pratt and Ervy both testified that on January 26, 2013, they paid a cover charge to enter Cali's after an employee checked their identification and stamped their hands to indicate that they were underage; they then proceeded to the far end of the bar located on the right-hand side. They each noted that the lighting was dim inside the establishment.

¶ 6 Pratt testified that he sat down on a bar stool, and Ervy stood behind him. He estimated that 20 to 25 people were in the bar area at the time, while Ervy noted it was "crowded." Both Pratt and Ervy testified that Pratt ordered a Bud Light, which was served to him by a bartender who had red highlights in her hair and was clothed in a black North Face jacket and black yoga pants. Pratt testified that the bartender did not ask to see his hand stamp, and that he paid $2.50 for the beer and received change. Ervy stated that he did not remember the price of the beer, but noted that Pratt received change. Pratt and Ervy stated that they waited for the bartender to turn around before exiting the establishment, and then went back to Ruffino's car and informed him of the successful purchase of alcohol. Pratt stated that Ruffino then called for an assistant officer from the

Carbondale police department. Officer Bales responded, and upon his arrival, Ruffino and Bales went into the establishment to identify the bartender matching the participants' description. Pratt testified that Ruffino then returned to the car and told them that he would bring out the bartender who was identified as the alleged perpetrator of the underage sale, and they were to indicate if she was the correct individual. Pratt testified that the individual who was brought outside, Hilary Hofstra, was the bartender who had served him the beer.

¶ 7 ILCC Agent Travis Ruffino testified that the interior was "very dark" when he and Officer Bales entered the establishment. They approached a female individual who they thought matched the description, but subsequently learned that this individual had been tending the rear bar, and not the front bar where the participants were allegedly served. Ruffino testified that he then gave the alleged seller's description to another employee, who pointed them to Hofstra. Ruffino testified that he advised Hofstra that she had sold alcohol to his underage participants, and that Hofstra responded that "she was on cold medication, that she had served six other persons prior to us−our confrontation, and that none of them were African-Americans." In order to allow Ervy and Pratt to identify Hofstra as the seller, Officer Bales placed Hofstra in the back seat of the squad car and drove her by Ruffino's vehicle, in which Pratt and Ervy were sitting. Ruffino testified that they positively identified Hofstra, and that they were "absolutely sure" that she was the bartender who sold to Pratt.

¶ 8 On cross-examination, Ruffino agreed that he did not witness anyone sell alcohol

to Pratt, and he never saw Pratt in possession of alcohol. When asked about the compliance violation report that he wrote that day, he testified that he mistakenly wrote the wrong date of birth for Hofstra, and agreed that other information that he recorded about the sale was also mistaken. Specifically, the report stated that the underage participants bought two beers for $2, not one beer for $2.50 as Pratt had testified. Though Ruffino agreed that the price of beer that day was, in fact, $1 per beer, he nevertheless testified that the information he recorded in the report was "[his] mistake." He also agreed that his report indicated that evidence was destroyed during his investigation because the beer that Pratt had purchased was destroyed by one of the bartenders. In regards to the procedure of compliance checks, Ruffino stated that he did not enter the bar immediately after Pratt made a purchase because "typically we do not do that because we do not want to blow their cover." He also stated that he was "not aware" that the Polar Bear weekend is a thorn in the side of law enforcement, nor was he aware of a lot of police activity that day based on the Polar Bear events. However, when questioned by Chairman Schnorf, Ruffino stated that both his team and another team were conducting underage compliance checks that day; he was also aware of two other ILCC agents conducting happy hour checks. Additionally, he agreed that "this [ILCC activity] was a part of a preplanned effort to monitor this Polar Bear event" in coordination with the Carbondale police department.

¶ 9 Hilary Hofstra testified that she began her shift around 11 a.m. on January 26, 2013. She stated that eight bartenders were working that day, and that she was tending at the bar nearest the entrance, on the right-hand side of the establishment. She was in the

fourth bartender station, which is the furthest station from the door. She agreed that she was wearing black pants and a black North Face jacket that day. Hofstra stated that she would describe the premises as brightly lit, as it was daytime and the sunlight was coming in through the door.

¶ 10 Hofstra testified that she was working for approximately one hour when she was approached by a Carbondale police officer and his partner regarding an underage patron. Hofstra noted that the establishment was not busy yet, with perhaps 30 to 40 patrons in what she noted is "a really big space." She stated that she had served six people before being questioned by the officers, two white males and a group of four white females, all of whom ordered mixed drinks. Hofstra testified that she asked the officers to describe the underage patrons she had allegedly served. She noted that she was then shown photocopies of the patrons' licenses, and "had never seen them in [her] life before." She told the officers that she did not serve anyone who fit the description that they provided to her. She agreed that due to the expected volume of patrons that day and her awareness of an ILCC citation issued to the establishment on the previous day, she was being extra cautious in the performance of her duties. She noted that while she has a right to ask patrons to see their identification, patrons are asked to present identification at the door, and their hands are marked either in red to indicate underage or black to indicate legal age. She agreed that she did not card patrons that day, but relied on the hand stamps; she felt that the ones that she viewed were accurately marked.

¶ 11 Hofstra testified that the first time that an individual had identified himself as an ILCC agent was after she had been issued a ticket from the Carbondale police, when she

was taken outside and asked to stand for a photo holding her ticket. She stated that she did not speak with an ILCC agent prior to this exchange; inside the establishment, she spoke to a male and a female, both in blue police officer uniforms. Hofstra agreed that the City of Carbondale had charged her personally for selling underage, and that she had pled not guilty in the pending case.

¶ 12 Taylor Grigsby testified that she was bartending at Cali's on January 26, 2013, and was wearing a black North Face jacket. She agreed that it was dim inside the establishment, but sunlight was coming through the door. At approximately 12 p.m., she was approached by three blue-uniformed police officers, two white males and one white female, concerning a possible sale of alcohol to minors. She stated that the officers asked if she had served alcohol to two underage black patrons, and she told them that she had not. Grigsby noted that no one identified themselves as ILCC agents, and, based on their uniforms, she "thought for sure that they were [Carbondale police officers]." She noted that she was tending at the bar near the rear of the establishment, in the second bartender station; she agreed that the officers would have had to walk by Hofstra to get to her station.

¶ 13 Agent Ruffino was present for Hofstra and Grigsby's testimonies. When called in rebuttal, Ruffino stated when he approached Grigsby, he was accompanied by two Carbondale police officers, a white female and an African-American male.[1] He stated

[1]The record does not indicate which officer was Bales, though the context of the testimony indicates Bales is the male officer. It is unclear to this court the reason for

that he was wearing a black jacket with his name on the back, and an ILCC logo on both the front and the back. He stated that when he first approached Hofstra, the male officer was next to him, and the female police officer was "more towards the door."

¶ 14 The following evidence was adduced regarding the "Happy Hour" violation. ILCC Agent David O'Dell testified that on January 26, 2013, he was conducting compliance checks for the Polar Bear festival. O'Dell noted that he, along with a fellow agent, had notified the local bar owners and managers that they would be looking for happy hour violations, overservicing of alcohol, and underage service of alcohol. He stated that he visited the establishment three or four times that day, and the second time was around 3 p.m. O'Dell testified that while the door between Cali's and Callahan's was closed for periods of time that day, he witnessed people passing back and forth through the door on his visits, and agreed that the door could have been closed but unlocked. O'Dell testified that he saw bartenders serving more than one drink to one person, patrons participating in "hand-offs" to fellow patrons, patrons having two drinks in their hands, and individual patrons drinking beer directly from pitchers as opposed to cups. He noted that this was occurring in plain view, and 25 or more people were drinking from pitchers. Against opposing counsel's objection, O'Dell testified that he asked the patrons if the drinks in their hands were theirs and if the drinks were served to them that way. He

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which the State included no evidence regarding the presence of multiple Carbondale police officers until this rebuttal testimony.

stated that he observed this behavior in both Cali's and Callahan's sections. The following testimony was elicited on cross-examination of O'Dell:

"Q: Well, it's legal to sell two men six beers as a bucket; correct?

A: *** Two people, correct, but both people have to be drinking from it or more. Two or more people.

Q: But if−say they sold a bucket of beer to three people. If those three people decided to walk their own way, they could each take two beers and be walking around with two beers in their hands and nobody's done anything illegal.

A: In [*sic*] they're consuming−if they're drinking from them, it's illegal, sir.

Chairman Schnorf: Counsel, I think that you may get into and might even have some success on a semantics argument about whether someone that had two beers in their hands was drinking both of them or not; but I think, from the testimony we've heard so far, what you've got to do is convince us that there's nothing wrong with selling people pitchers of beer to drink individually−40 ounce pitchers of beer to drink individually."

O'Dell testified that in his opinion, "if you're standing there individually and drinking from a pitcher individually, that's your pitcher. And if you tell me that's your pitcher, I believe you that that's your pitcher. And that's more than one drink to a person." In response to the appellant counsel's inquiry of whether O'Dell observed this activity long enough to see if the patrons were simply holding drinks for fellow patrons "maybe in the restroom," O'Dell testified that "[the patrons] told us it was their pitcher."

¶ 15 In regards to the "Happy Hour" law citation, both Hofstra and Grigsby testified that the door between Cali's and Callahan's was closed that day, and Hofstra specifically noted that anyone wishing to go from one side to the other would have to walk around the building and enter through the outside door. Both women also testified that neither Cali's nor Callahan's serves pitchers of beer, and that the Cali's side of the establishment does not even have a draft system.

¶ 16 Robert Delre testified that he is the owner of several establishments, including Cali's and Callahan's, for which he holds a single license. During the Polar Bear festival, he was "back and forth" from his various establishments. He testified that the door between Cali's and Callahan's is generally closed during special events, and that he saw that the door was closed that day when he went to speak with O'Dell at Callahan's, around 12 or 1 p.m. Delre stated that pitchers of beer are not sold in the building, and that the only "standard" pitchers that were in the establishment were used to soak the soda guns. He testified that the only item sold in quantity were beer "towers," which are sold only on Sundays at Callahan's, and that it is served, with cups, to tables with multiple patrons.[2]

¶ 17 After closing arguments, the commissioners offered the parties an opportunity to come to an agreement. After an off-record discussion, the parties were unable to do so. The Commission noted that they had hoped for an agreement, but entered an order

[2]The "tower" is approximately three feet tall, six inches in diameter, and has a spigot at the base, and therefore does not meet the description of a "standard" pitcher from which patrons were allegedly drinking on that day.

finding that the establishment had violated the relevant sections of the Act. During a discussion of penalties, Commissioner Morris noted that "we had terrible problems in Carbondale in the past," while Commissioner O'Connell told the appellant that "if you come back here on one of these, I'm with Commissioner Morris for revocation [of the establishment's license], ever, on any of this stuff." "[Polar Bear weekend] should be out. You guys need to control it."

¶ 18 The appellant filed a petition for rehearing with the ILCC, primarily based on a claim that new evidence existed in the case, which was unknown and unavailable to it at the time of the hearing. Specifically, the appellant asserted that one of the underage participants was allegedly wearing a camera that recorded the events that day, and that this information was discovered by Hofstra's attorney in the proceedings against her individually by the City of Carbondale. The appellant attached Hofstra's motion to his petition.

¶ 19 Hofstra's motion asserted that she had requested from the city attorney's office "copies of any and all reports detailing the specifics of the allegation against her," but the city attorney was then informed by the ILCC that there were no written reports, but there was a videotape of the incident. The Commission could not produce the videotape. Hofstra's motion asserted that pursuant to *People v. Kladis*, 2011 IL 110920, dismissal of the action was appropriate because the Commission, and therefore the State, failed to produce a videotape of the incident giving rise to the charges against her. Hofstra's motion included an order dismissing her cause with prejudice. Based on this exhibit, the appellant argued that, as in the case against Hofstra, *Kladis* stands for the proposition that

the State's failure to preserve the video of the alleged event is a basis for dismissal of the charges against it.

¶ 20 The petition also asserted that there was inconsistent testimony regarding both citations. Attached to the petition were affidavits from two employees that related that Cali's was charging $1 for a Bud Light on the relevant date, that neither Cali's nor Callahan's sold pitchers of any kind, and that no one was walking around the premises with pitchers of beer that day. The appellant also attached a printout from a Facebook page indicating that Cali's was charging $1 for a Bud Light on the relevant date.

¶ 21 The ILCC denied the petition for rehearing, and included its findings in a written order. The ILCC found that Pratt, Ervy, Ruffino, and O'Dell were credible witnesses. It also found that the appellant's reliance on the circuit court's dismissal of Hofstra's case was misguided because *Kladis* was based on a criminal burden of proof; that the appellant's counsel was fully aware that video surveillance was part of the ILCC investigation process; and, unlike the case against Hofstra, the appellant's counsel did not make a request for discovery of the video surveillance, and no best evidence argument was ever made by the appellant about the video surveillance before or during the hearing.

¶ 22 The ILCC's denial of the petition was appealed, and a hearing was held before the circuit court of Jackson County on May 22, 2014. On July 8, 2014, the court upheld the decision of the ILCC.

¶ 23 Decisions of the ILCC and local liquor control commissions are subject to review under the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2012)). On appeal, we review the administrative agency's decision, not the circuit court's ruling.

Koehler v. Illinois Liquor Control Comm'n, 405 Ill. App. 3d 1071, 1078 (2010). Our review of the agency's factual findings is highly deferential; its findings "are considered *prima facie* true and correct," and we review them only to determine if they are against the manifest weight of the evidence. *Bailey v. Illinois Liquor Control Comm'n*, 405 Ill. App. 3d 550, 553 (2010). However, we review agency's conclusions of law *de novo*. *Bailey*, 405 Ill. App. 3d at 553. We reverse the agency's determinations as to the legal effects of the facts before it if they are "clearly erroneous." *Bailey*, 405 Ill. App. 3d at 553-54. Under this standard, we reverse the administrative agency's decision only if, after considering the entire record, we are "left with the definite and firm conviction that a mistake has been committed." *Bailey*, 405 Ill. App. 3d at 554.

¶ 24 Section 6-16(a)(i) of the Act provides: No licensee nor any officer, associate, member, representative, agent, or employee of such licensee shall sell, give, or deliver alcoholic liquor to any person under the age of 21 years. 235 ILCS 5/6-16(a)(i) (West 2012).

¶ 25 The appellant first argues that the evidence regarding the underage-sale allegation was based on totally conflicting testimony, justifying reversal of the citation. However, the weight to be given evidence and the credibility of the witnesses are within the province of the administrative agency. *Rodriguez v. Weis*, 408 Ill. App. 3d 663, 670 (2011). The fact that a reviewing court may have come to a different conclusion over the weight to give conflicting evidence cannot justify reversal. *Kramarski v. Board of Trustees of the Village of Orland Park Police Pension Fund*, 402 Ill. App. 3d 1040, 1049 (2010). While we agree that the evidence provided by the State's witnesses was

conflicting, confusing, and outright contradictory at times, we must also note that the majority of the inconsistencies noted by the appellant−namely, the price of the beer, the amount of police activity, the busyness of the bar, and whether the undercover agents were both sitting−are largely tangential to the issue of whether or not a sale to an underage patron indeed occurred on the day in question. We share the appellant's concerns regarding the facts presented to the Commission. However, whether or not we agree with the agency's credibility determinations, we find that sufficient evidence was presented to prohibit a conclusion by this court that the ILCC's factual findings were against the manifest weight of the evidence.

¶ 26 The appellant next asserts that the ILCC made an improper ruling based on either assumptions or improper communications with the prosecution. Specifically, the appellant argues, while Ruffino testified that ILCC agents typically do not go into an establishment after an undercover agent successfully "buys" in order to not "blow [their] cover," this explanation is called into doubt where potentially exculpatory evidence was discovered after the hearing. The appellant cites specifically to the alleged existence of video documentation of the events that day, discovered after the dismissal of the charges brought against Hofstra. The appellant asserts that, pursuant to *People v. Kladis*, the Commission's failure to produce the video in this case warrants a reversal of the ILCC's decision or, in the alternative, a new hearing before the ILCC regarding the underage-sale violation. The State responds that *Kladis* is inapplicable, because unlike the *Kladis* defendant, the appellant was neither charged with a criminal misdemeanor nor requested discovery of the alleged video.

¶ 27 We first note that *People v. Kladis* is a criminal case that derives its authority from a defendant's right to receive exculpatory evidence in the State's possession. See *Kladis*, 2011 IL 110920, ¶ 25; *Brady v. Maryland*, 373 U.S. 83 (1963). However, though they may be penal in nature, the statutes within the Act are civil, not criminal. See 735 ILCS 5/3-112 (West 2012); *People v. Graf*, 93 Ill. App. 2d 43, 46-47 (1968); *Matusak v. Chicago Transit Authority*, 165 Ill. App. 3d 1032 (1988). Thus, we must agree with the State that *Kladis* is inapplicable on these grounds, as the appellant cites no authority stating that *Brady* and its progeny apply to cases under administrative review. However, even if this court made such an assumption, *Kladis* remains distinguishable because its application hinges on providing notice to the State.

¶ 28 Although the State's discovery obligations require it to provide the defense with certain types of evidence, that duty is not automatic. See Ill. S. Ct. R. 412(a) (eff. Mar. 1, 2001) (requiring, in felony cases, that the State "shall, upon written motion of defense counsel" disclose certain enumerated items). While Rule 412 does not apply to misdemeanor offenses, Illinois case law provides guidance regarding the scope of discovery in such cases. Expanding on the Illinois Supreme Court's holding in *People v. Schmidt*, 56 Ill. 2d 572, 575 (1974), *Kladis* found that in misdemeanor cases, the State is required to furnish relevant evidence negating the defendant's guilt, and the failure to produce the relevant videotape evidence in the defendant's DUI conviction was a violation of discovery procedures. *Kladis*, 2011 IL 110920, ¶¶ 25, 28-29. Though the *Kladis* court indeed found that a videotape that was destroyed by the State was relevant evidence, the court's finding that the State violated the applicable discovery procedures

was based on the fact that the State was on notice that the defendant wanted the evidence preserved. *Id*. ¶ 38. The *Kladis* defendant had made a request to produce before the videotape was destroyed; therefore, the State was placed on notice and should have taken the appropriate steps to ensure that it was preserved. *Id*. ¶ ¶ 37-38.

¶ 29 Unlike in *Kladis*, then, there is no evidence attached to the appellant's petition for rehearing, or indeed, any evidence in the entirety of the record before us, that the appellant requested that the city attorney or the ILCC produce reports detailing the allegations against it. There is no way of knowing whether the tape was exculpatory or even relevant. Without a provision of such notice to the opposing party, the rationale of *Kaldis* cannot support a reversal of this citation based on the ILCC's failure to produce the alleged recording. We thus affirm the appellant's citation for selling an alcoholic drink to a person under 21 years of age (235 ILCS 5/6-16(a) (West 2012)).

¶ 30 We turn next to our discussion of the "Happy Hour" violation. Section 6-28(b)(1) of the Act provides that no retail licensee or employee or agent of such licensee shall "serve 2 or more drinks of alcoholic liquor at one time to one person for consumption by that one person." 235 ILCS 5/6-28(b)(1) (West 2012). Unlike the appellant's assertions regarding the underage sale, which were in part based on the agency's credibility determinations following the State witnesses' inconsistent testimonies, the appellant argues here that O'Dell's testimony was legally insufficient to prove that he witnessed a violation of the law. Thus, we may reverse the agency's determinations as to the legal effects of the facts before it if they are "clearly erroneous." Bearing this in mind, we cannot agree that O'Dell's testimony supports a conviction on this particular citation; after

consideration of the entire record, we are "left with the definite and firm conviction that a mistake has been committed."[3] *Bailey*, 405 Ill. App. 3d at 553-54.

¶ 31 Our conclusion stems from the lack of evidential support in regard to the final element of the statute, which prohibits a licensee from (1) serving 2 or more drinks of alcoholic liquor, (2) at one time, (3) to one person, (4) for consumption *by that one person*. 235 ILCS 5/6-28(b)(1) (West 2012). O'Dell testified that he saw "pass backs" and multiple drinks being held by a single patron; this eyewitness testimony, found to be credible by the ILCC, could perhaps establish the first three elements of the statute. However, we find that the remaining testimony in the record is insufficient to support the ILCC's finding that these beverages were served for consumption by one person.

¶ 32 O'Dell testified that he saw patrons drinking directly from pitchers, and that "[the patrons] told us it was their pitcher." From this, the commissioners inferred that "their" pitcher meant one pitcher to one patron, individually−which is evidence that perhaps would complete the elements required to demonstrate a violation of the law. However, we find O'Dell's testimony did not establish the one patron-one pitcher dynamic, as

[3]While we apply the same deferential standard of review to the ILCC's credibility determinations as we did for the underage-sale citation, we are compelled to note that again, the State witness's testimony regarding this violation was startlingly contradictory to the appellant's witnesses, most notably regarding the very existence of the pitchers. With some trepidation, we assume that O'Dell witnessed Cali's patrons drinking from pitchers.

"their" pitcher could just as easily insinuate the patron and a companion. O'Dell's testimony establishes only that patrons were consuming multiple drinks, and that patrons were being served multiple drinks. Without additional evidence proving that one patron was served a pitcher (or any form of multiple beverages) for the express purpose of consuming the entirety of the purchase on his or her own, the State did not establish each element of the violation. Indeed, even in the order denying the petition for rehearing, the ILCC found that O'Dell was a credible witness, and had "stated that he observed numerous instances on the licensed premises of single people drinking from pitchers of beer and many patrons having two drinks in their hands. He also observed bartenders serving more than one drink to one person." Again, what remains is any evidence in the record of this activity resulting in multiple drinks being sold to an individual *for that individual's personal consumption*. Without, for example, testimony that O'Dell watched a patron purchase and then imbibe an entire pitcher without sharing it, or additional witness testimony, perhaps from a patron confirming that he or she bought a pitcher to consume individually, we simply cannot agree with the Commission's finding on this final element.

¶ 33 Chairman Schnorf noted at the hearing that the appellant "may have some success on a semantics argument" but followed that statement by telling the appellant that it was there to "convince [the ILCC] that there's nothing wrong with selling people pitchers of beer to drink individually." We wholly disagree with the latter statement, as the appellant was not there to argue the relative merit of the law, but to present evidence in defense of its alleged violation of the law. In other words, the appellant was indeed at its hearing to

argue semantics;[4] in this context, the appellant's hearing was held so that the Commission could determine whether the evidence presented by the State amounted to sufficient proof of each and every element of the statute for which the appellant was charged. Violation of the "Happy Hour" law, like any other statute, requires credible evidence in support of each element. We must conclude that when we apply the evidence to the law in this case, the State's proof falls short. Without further evidentiary support, the Commission's finding of guilt in this instance was clearly erroneous.

¶ 34 Finally, the appellant asserts that reversal is warranted because the Commission was biased against it, noting that one commissioner called the hearing a "circus," while another told the appellant's counsel that "[he] needed to convince [them]" that there was nothing illegal about selling patrons pitchers of beer to drink individually, indicating that the commissioners had improperly shifted the burden of proof to the appellant. The appellant also pointed to the statements by Commissioners O'Connell and Morris at the conclusion of the hearing, indicating that the Commission was pursuing the defendant because of their dislike of Polar Bear weekend; the appellant asserts the hearing was "a witch hunt over an event that the Commission clearly disapproved of and they wanted it stopped." The State responds that the appellant waived the issue when it was not raised at the hearing, citing *Kimball Dawson, LLC v. City of Chicago Department of Zoning*,

[4]Semantics is defined as "the meaning of words and phrases in a particular context." Merriam–Webster Online Dictionary, at http://www.merriam-webster.com/dictionary/semantics (last visited Mar. 4, 2015).

369 Ill. App. 3d 780, 792 (2006) (holding that a party must promptly assert a claim of bias upon knowledge of the alleged disqualification, and the failure to object to a comment that allegedly disclosed an agency's bias results in a forfeiture of that claim). The State additionally asserts that even if the claim is not waived, the appellant did not establish that the comments were indicative of the agency's bias.

¶ 35 For brevity, we assume *arguendo* that the appellant has not waived the issue; however, we agree with the State that the appellant has not satisfied its burden. Review of a claim of bias on the part of an administrative agency begins with the presumption that the agency was objective and capable of fairly judging the issues, and bias may be shown only if a disinterested observer might conclude that the administrative body had in some measure adjudged the facts and the law of the case prior to hearing it. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 330 (2009). We cannot say that any of the comments by the commissioners in question contained a level of prejudice that could overcome that presumption. Chairman Schnorf's comment was made in the context of a hypothetical question and on the basis of the testimony "[the Commission had] heard so far." Also, while clearly opinionated, Commissioners O'Connell and Morris made their comments after the Commission had heard all of the evidence. An administrative official's strong views on an issue do not alone overcome the presumption of objectivity and capability, and inherent in the agency's responsibility is to decide which party presented stronger evidence, essentially developing a prejudice against one side. See *Kimball*, 369 Ill. App. 3d at 792 (finding that despite the hearing officer's "cavalier" attitude, where the plaintiff was given an opportunity to present evidence, have

his witnesses heard, cross-examine the opposing party's witnesses, and present closing arguments, the plaintiff's allegations did not overcome the presumption). We therefore cannot agree that the appellant has presented sufficient evidence to support a finding that the ILCC prejudged the case against it.

¶ 36 For the foregoing reasons, we affirm the agency's citation of the appellant for selling an alcoholic drink to a person under 21 years of age, (235 ILCS 5/6-16(a) (West 2012)); however, due to insufficient supporting evidence, we reverse the agency's finding regarding the appellant's "Happy Hour" citation (235 ILCS 5/6-28(b)(1) (West 2012)).

¶ 37 Affirmed in part and reversed in part.