The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

DECISION

211 LOWELL ST CORP D/B/A EAST GATE LIQUORS
14 MAIN ST
NORTH READING, MA 01864
LICENSE#: 083800014
HEARD: 07/15/2015

This is an appeal of the action of the North Reading Board of Selectmen (the "Local Board" or "North Reading") for suspending the M.G.L. c. 138, §15, (all-alcohol) package store license of 211 Lowell St. Corp. d/b/a East Gate Liquors ("Licensee" or "East Gate") located at 14 Main Street, North Reading, Massachusetts, for three days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") and a hearing was held on Wednesday, July 15, 2015. The suspension has been held in abeyance pending this appeal.

At the commencement of the hearing before the Commission, the Licensee stipulated to the violation. On appeal, the Licensee argued that the penalty was arbitrary and capricious. As a result, the Commission decision will only address the penalty.

The following documents are in evidence:

1. North Reading Town Administrator Michael Gilleberto's 3/10/2015 Letter to East Gate Liquors
2. North Reading Police Chief Michael Murphy 2/4/2015 Memorandum regarding violation
3. North Reading Police Department 1/8/2015 Publication for Compliance Checks
4. North Reading Police Department Minimum Age Compliance Check Guidelines
5. North Reading Spreadsheet of Sale to Minor Violations

A. Local Board Meeting Minutes for 7/11/1995
B. Local Board Meeting Minutes for 9/19/1995
C. Local Board Meeting Minutes for 10/10/1995
D. Local Board Meeting Minutes for 11/28/1995
E. Local Board Meeting Minutes for 6/27/2005
F. ABCC Decision, 6/17/1996
G. Local Board Meeting Minutes for 1/21/1997
H. Local Board Meeting Minutes for 2/3/1997
I. Local Board Meeting Minutes for 3/2/1998
J. Local Board Meeting Minutes for 5/1/2000
K. Local Board Meeting Minutes for 1/7/2002
L. Local Board Meeting Minutes for 6/3/2002

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M. Local Board Meeting Minutes for 7/25/2005
N. Local Board Meeting Minutes for 8/8/2005
O. Local Board Meeting Minutes for 9/8/2014
P. Local Board Meeting Minutes for 4/22/2014
Q. Local Board Meeting Minutes for 3/9/2015
R. Local Board Meeting Minutes for 4/7/2015
S. Local Board Meeting Minutes for 1/9/2006
T. Licensee Chart showing North Reading sale of alcohol to minors violations by year

There is one (1) audio recording of this hearing, and five (5) witnesses testified.

The Commission took Administrative Notice of the Licensee's Commission file.

FACTS

1. 211 Lowell St. Corp. d/b/a East Gate Liquors, holds an alcoholic beverages license issued pursuant to M.G.L. c. 138, §15, at 14 Main Street, North Reading. East Gate has held this license since 1989. (Testimony, Commission file)

2. On Thursday, January 15 2015, North Reading Police Lieutenant Romeo and Detective Thomas Hatch were conducting alcohol compliance checks while using an underage person. This was part of a statewide grant and was advertised in the local newspaper and the North Reading Patch. (Exs. 2, 3)

3. The police officers gave the underage operative twenty dollars in U.S. currency and instructed the underage operative to purchase a six pack of Bud Light beer cans. The underage operative was instructed to leave the premises if a state identification card/license was requested by a cashier. (Exs. 2, 4)

4. At approximately 6:07 p.m., the underage person walked into the East Gate Liquors. The clerk, Mr. Guilespe, sold the underage operative a six-pack of beer without asking for identification. The police officers entered the establishment immediately thereafter and discussed the violation with the cashier and the store manager. (Ex. 2)

5. After a hearing, the Local Board suspended the alcoholic beverages license for three days. The Local Board based its penalty in part on information from the Town Administrator that East Gate had not had a violation in five years. (Testimony, Ex. 1)

6. The Local Board treated this violation as a first offense. (Testimony)

7. Hess and Tedeschi Food Mart in North Reading also failed the compliance checks on January 15, 2015. The Local Board suspended both alcoholic beverages licenses for three days. (Exs. 2, 5)

8. The Local Board has imposed the following penalties on other §15 licensees found violating M.G.L. c. 138, § 34, sale to minors:

    - In 2015, Hess and Tedeschi Food Shops received a 3-day suspension for a first offense (failed a compliance check);
    - In 2014, One Stop Liquors and Sports, Spirits, and Steaks received a 3-day suspension for a first offense (failed a compliance check);

- In 2006, Kippy's received a 3-day suspension for a first offense (method unknown);
- In 2005, Convenience Plus received a 3-day suspension for a fourth offense (police observation);
- In 2002, Convenience Plus received a 3- day suspension (police observation third offense) and Christopher's Market received a 3- day suspension for a first offense (failed compliance check);
- In 2000, Big Dog Sports Grille and Ristorante Daniela received a 3-day suspension for a first offense (failed a compliance check);
- In 1998, Moose Lodge received a 3-day suspension for a first offense (failed a compliance check);
- In 1997, Café Amore and Kappy's received a 3-day suspension for a first offense (failed a compliance check);
- In 1995, Convenience Plus received a 7- day suspension for a first offense (surveillance) and had their license revoked by the Board of Selectman for a second offense (police observation). Convenience Plus appealed to the Commission, which overturned the Board's revocation. (Exs. 5, A-T)

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Connolly v. Alcoholic Beverages Control Comm'n., 334 Mass. 613, 619 (1956), Opinion of the Justices, 368 Mass. 857, 861 (1975). M.G.L. chapter 138 gives the local board and commission the authority to grant, revoke and suspend licenses. Chapter 138 was "enacted . . . to serve the public need and . . . to protect the common good." M.G.L. c. 138, §23. "[T]he purpose of discipline is not retribution but the protection of the public." Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given 'comprehensive powers of supervision over licensees, Connolly" 334 Mass. at 617, as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Comm'n, 11 Mass. App. Ct. 785, 788 (1981).

Section 67 of chapter 138 provides that "[a]ny person who is aggrieved by the action of the local licensing authorities in modifying, suspending, cancelling, revoking or declaring forfeited their license may appeal therefrom to the Commission . . . . If the Commission approves the action of the local licensing authorities it shall issue notice to them to that effect, but if the Commission disapproves of their action it shall issue a decision in writing advising said local authorities of the reasons why it does not approve, and shall then remand the matter to the said local authorities for further action."

As noted above, the Licensee does not challenge the Local Board's finding that a violation occurred. Therefore, the Commission must review whether the penalty imposed by the Local Board for this violation was reasonable. In assessing penalties for violations occurring solely as the result of a "sting," penalties imposed should never be draconian. Applebee's Northeast, Inc. dba Applebee's Neighborhood Bar & Grill, Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.); Epicure Package Sore, Inc. (ABCC decision dated 1/31/2007). The Commission has consistently held that "policy behind a 'sting' operation should be the education of licensees in the risks associated with selling alcoholic beverages without requesting proof of age." In Re: Assinippi Liquors, Inc., (ABCC Decision dated 6/8/2004). Accord ; Epicure Package Store, supra; Saba Foodmarket, Inc., d/b/a Bradford Shell (ABCC decision dated 5/16/2012).

While small suspensions may further that purpose by imposing a consequence for taking a risk, a heavy handed suspension does not. See Assinippi Liquors, supra (twenty day suspension of the alcoholic beverages license for a compliance check was held to be unreasonable because a suspension of that length steps over the line of measured education and becomes unreasonably punitive); Saba Foodmarket, supra (Commission held that a revocation of the alcoholic beverages license for a compliance check was unreasonable); Peter's Market (ABCC decision dated 5/30/2014) (thirty-day suspension for a failed compliance check was unreasonable).

As an administrative review of the Local Board's decision, the Commission will give reasonable deference to the discretion of the local authorities. It is the Licensee's burden to establish that the penalty imposed was unreasonable. In reviewing the evidence in this matter, the Commission finds that the Local Board was justified in imposing the sanction. All of the establishments that sold alcoholic beverages to underage individuals on January 15, 2015, in violation of M.G.L. c. 138, §34 received a three day suspension. Furthermore, the Local Board has demonstrated that since 1995, all but one licensee on a first offense for the same violation has received a 3-day suspension. As such, the Commission is persuaded and finds that the penalty was a reasonable exercise of the Local Board's discretion and not arbitrary and capricious. The Local Board has consistently imposed a 3-day license suspension for licensees that have violated M.G.L. c. 138, §34, and have no other violations.

The Commission has consistently held that compliance checks are educational tools and thus, the penalty should not be draconian, punitive, or unfair, but rather a sanction resulting in the measured education of the licensee about the risks of selling alcoholic beverages to persons younger than the statutorily required age of twenty-one years. The Local Board has imposed a penalty consistent with this policy. A three day suspension for a failed compliance check or otherwise as a result of a sting operation have been consistently upheld by this Commission as a "small suspension," see Assinippi Liquors, supra, and not as draconian, punitive, or unfair. See Peter's Market, supra (Commission recommended five-day suspension for failed compliance check); The Wine Messenger, Inc. (ABCC decision dated 9/14/2004) (five-day suspension for failing sting operation); DHL Worldwide Express, Inc. (ABCC decision dated 9/14/2004) (three-day suspension as result of sting operation); Acoreana Band Club (ABCC decision dated 5/27/1998) (eight-day suspension as result of sting operation); Oceanview Associates, Inc., d/b/a Illusions (ABCC decision dated 10/26/1995) (six-day suspension as result of sting operation). Therefore, the Commission upholds the violation and penalty assessed by the Local Board.

CONCLUSION

The Commission **APPROVES** the action of the Local Board for suspending the M.G.L. c. 138, §15 all alcoholic beverages license of 211 Lowell St. Corp. d/b/a East Gate Liquors for three (3) days.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Kathleen McNally, Commissioner _____

Elizabeth A. Lashway, Commissioner _____

Dated: July 22, 2015

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

cc: Brian W. Riley, Esq. via facsimile 617-654-1735
Daniel Walls, manager
Frederick G. Mahony, Chief Investigator
Local Licensing Board
Administration
File