

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

Steven Grossman
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

OMOTO GARDEN INC. DBA OMOTO GARDEN
1501 BEDFORD STREET
ABINGTON, MA 02351
LICENSE#: 000200004
VIOLATION DATE: 03/21/2014
HEARD: 06/10/2014

Omoto Garden Inc. dba Omoto Garden (the "Licensee") holds an alcohol license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, June 10, 2014, regarding an alleged violation of 204 CMR 2.05 (2) – Permitting an illegality on the licensed premises, to wit: c. 138, §34C – Possession of an alcoholic beverage by a person under twenty-one (21) years of age (1 count), which occurred on March 21, 2014 as alleged in Investigator Kenny's Report.

The following documents are in evidence:

1. Investigator Kenny's Investigative Report dated March 21, 2014
 2. Printout of MA Driver's License of Michaela Lesage; and
 3. Printout of MA Driver's License of Justine Lane.
- A. DVD of Security Tape of Licensee for the evening of incident.

There is one (1) audio recording of this hearing.

FACTS

1. On Friday, March 21, 2014 at approximately 11:30 p.m., Investigators Keefe, Kenny, and Chief Investigator Mahony along with Deputy Chief Cutter of the Abington Police Department conducted an investigation of the business operation of Omoto Garden Inc. dba Omoto Garden to determine the manner in which its business was being conducted.
2. Investigator Keefe entered the premises in an undercover capacity, where he observed several youthful appearing individuals in possession of alcoholic beverages. Investigator Keefe also observed that the licensee's staff was not checking for identification when delivering alcoholic beverages.
3. Investigator Kenny, also in an undercover capacity, then joined Investigator Keefe.
4. At approximately 11:30 p.m., Deputy Chief Cutter and Chief Investigator Mahony entered the premises to assist in checking the identification of the youthful appearing individuals. On their way in to the premise, they observed a female individual vomiting in the parking lot next to her

vehicle. The individual stated that she was aware that she was in no condition to drive. Deputy Chief Cutter called for assistance to ensure that the individual did not drive and had safe transportation home.

5. All investigators identified themselves and requested identification from the youthful appearing individuals. One female individual initially presented a license, stating that it was hers, and then admitted that it was not her license. She was identified as Michaela Lesage, actual date of birth, [REDACTED] (age 20). Ms. Lesage was observed in possession of a bottle of a Budweiser Light beer.
6. Ms. Lesage was in possession of a Massachusetts Driver's License in the name of Justine Lane actual date of birth [REDACTED] (age 26). While there was some resemblance to Ms. Lesage in the photograph on Justine Lane's license, investigators determined that a reasonable person would have, or should have, observed that Ms. Lesage's obvious youthful facial features were not that of a 26 year old individual.
7. Deputy Chief Cutter recorded Ms. Lesage's information in order to file an application for a criminal complaint. Ms. Lesage was then provided transportation from a friend.
8. Investigators informed the manager Melody Huang of the violation and advised her that a report would be filed with the Chief Investigator for review.

DISCUSSION

A Commission regulation promulgated at 204 CMR 2.05(2) provides in pertinent part, that "[n]o licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to the place in or on the licensed premises. The licensee shall be responsible therefore, whether present or not." The law is well-settled that 'under the regulation, [204 C.M.R. 2.05(2)] the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is "bound at his own peril to keep within the condition of his license." Commonwealth v. Gould, 158 Mass. 499, 507, (1893). Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 788 (1981). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter. The licensee is responsible for illegalities that occur on the licensed premises. Rico's of the Berkshires, Inc. v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985) (rescript).

M.G.L. chapter 138, section 34C states, in pertinent part, that: "Whoever, being under twenty-one years of age and not accompanied by a parent or legal guardian, knowingly possesses any alcohol or alcoholic beverages, shall be punished." Although the Licensee argues that the minor presented an identification before she was served and possessed alcoholic beverages at the Omoto Garden, presenting an identification which purports to show that the patron is 21 years of age, or older than 21 years of age, is not an affirmative defense available for the statutory violation of a minor in possession of alcoholic beverages pursuant to M.G.L. Chapter 138, section 34C.

General Laws chapter 138, §34B provides, in pertinent part, that "[a]ny licensee, or agent or employee thereof, under this chapter, who reasonably relies on such a liquor purchase identification card, or an identification card issued under section 8E of chapter 90, or motor vehicle license issued pursuant to said section eight, for proof of a person's identity and age, shall be presumed to have exercised due care in making such delivery or sale of alcohol or alcoholic beverages to a person under twenty-one years of age. Such presumption shall be rebuttable. (Emphasis supplied.)

M.G.L. c. 138, §34B offers protection from license revocation or criminal penalties to license holders who reasonably rely on one (1) of four (4) pieces of identification specified in the statute, including a valid Massachusetts driver's license. However, the Commission has established that to obtain the protection accorded to a license holder under §34B, a license holder must obtain proof of age prior to the

purchase of alcoholic beverages, and also must obtain proof of age on the day of the alleged sale to a minor. The Appeals Court has reviewed this Commission interpretation and upheld it as reasonable. Howard Johnson Company v. Alcoholic Beverages Control Commission, 24 Mass. App. Ct. 487, 510 N.E.2d 293 (1987); In Re: Alan C. Dinh d/b/a Juliano's Beer & Wine, Quincy (ABCC Decision April 8, 2005.)

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M.G.L. c. 138, Section 34B refers only to the activities of delivery and sale, and omits any reference to the act of possession, this statute offers no relief from liability for allowing possession of alcoholic beverages in violation of M.G.L. c. 138, § 34C. (Emphasis supplied.)

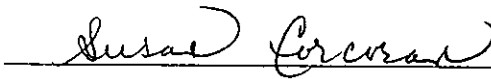
The Commission is persuaded by the evidence that the individual, Michaela Lesage, was younger than 21 years of age and was in possession of an alcoholic beverage in the licensed premises of Omoto Garden Inc. On the date of this offense, the above mentioned under-aged patron of Omoto Garden Inc. was 20 years old.

CONCLUSION


Based on the evidence, the Commission finds the licensee violated 204 CMR 2.05 (2) – Permitting an illegality on the licensed premises, to wit: c. 138, §34C – Possession of an alcoholic beverage by a person under twenty-one (21) years of age (1 count). Therefore, the Commission **suspends the license for three (3) days of which three (3) days will be held in abeyance for a period of two (2) years provided no further violations of Chapter 138 or Commission Regulations occur.**

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated: June 23, 2014

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: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Dennis Keefe, Investigator
Mark Kenny, Investigator
Deputy Chief Cutter of the Abington Police Dept.
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Administration
File