



The Commonwealth of Massachusetts

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

*Deborah B. Goldberg
Treasurer and Receiver General*

*Kim J. Gainsboro, Esq.
Chairman*

DECISION

**FUSION RESTAURANT INC. D/B/A FUSION RESTAURANT
12 POND STREET
ASHLAND, MA 01721
LICENSE#: 004000011
HEARD: 8/26/15**

This is an appeal of the action of the Town of Ashland Board of Selectmen (the "Local Board" or "Ashland") for revoking the M.G.L. c. 138, §12, all-alcohol license of Fusion Restaurant, Inc. d/b/a Fusion Restaurant ("Licensee" or "Fusion") located at 12 Pond Street, Ashland, Massachusetts. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Wednesday, August 26, 2015.

The following documents are in evidence as exhibits:

1. Local Board Notice of Hearing, 3/26/15;
2. Minutes of Local Board's Meeting, 4/15/15;
3. Local Board Decision, 4/17/15;
4. Ashland Police Report, 3/21/15;
5. Ashland Police Arrest Report# 15-43-AR, 3/21/15; Narrative for Police Officer Stacy Kaiser, 3/23/15;
6. Report of phone call regarding motor vehicle crash, 3/21/15; Ashland Police Arrest Report# 15-42-AR, 3/21/15; Narrative for Police Officer Robert C. Araujo, 3/21/15;
7. Ashland Police Department Incident Report, 3/25/15; Narrative for Police Officer Robert C. Araujo, 3/25/15;
8. Receipt from Fusion Cuisine, 3/21/15;
9. Local Board Notice of Hearing, 3/13/14 and 3/19/14; Local Board Decision, 5/1/14; Local Board Meeting Minutes, 4/16/14 and 4/30/14;
10. Local Board Notice of Hearing, 2/26/15; Local Board Decision, 4/2/15; Ashland Police Incident Reports, Protective Custody Reports, Police Narratives, and Arrest Report;
11. Affirmation of employees of Fusion Restaurant that they read Ashland's Liquor Policy and M.G.L. c. 138, §34, 11/11/13; Ashland Operational Policies and Procedures concerning Alcohol Licenses, 9/6/06;
12. Email from Scott Rohmer to John Petrin regarding Fusion, 2/17/11.

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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. Fusion Restaurant, Inc. d/b/a Fusion Restaurant, located at 12 Pond Street, Ashland, Massachusetts, holds an all alcoholic beverages restaurant license under M.G.L. c. 138, §12. (Commission Files)
2. In the evening of Friday, March 20, 2015, a female patron ("Female Patron") and a male patron ("Male Patron") were at Fusion with one other person. The receipt for their party reflects that their check was opened at 11:15 p.m., that the customers were served two scorpion bowls as well as some food, and that their check was closed at 12:48 a.m., approximately 1 ½ hours later. (Testimony; Exhibit 8)
3. At some point between 11:30 p.m. and 1:00 a.m., Female Patron fell out of the booth from where she was sitting and onto the floor. Ashland Police Officer Stacy Kaiser, who was at Fusion with Ashland Patrolman Robert Araujo doing an area/compliance check, saw Female Patron fall. Other guests at Fusion helped Female Patron up and told Officer Kaiser that Female Patron was fine. Officer Kaiser did not inquire further and did not speak with Female Patron at Fusion. (Testimony)
4. Fusion closed at 1:00 a.m. on Saturday, March 21, 2015. There was no evidence submitted as to exactly what time Female Patron and Male Patron left Fusion, but by the time Officer Kaiser left the licensed premises shortly after 1:00 a.m., all of the patrons were gone. (Testimony)
5. At approximately 1:25 a.m. on Saturday, March 21, 2015, Female Patron, with Male Patron as her passenger, crashed into a vehicle that was parked in a driveway on Brackett Road in Ashland. When Officer Kaiser and Patrolman Araujo responded to the accident moments later, they determined, through conversation, observation, and testing, that both Female Patron and Male Patron were intoxicated. (Testimony; Exhibits 5, 6)
6. When at Fusion, Patrolman Araujo had seen Male Patron drink from a scorpion bowl, and Male Patron did not appear intoxicated to him. (Testimony)
7. One of the managers of the restaurant, Vin Diep, saw both Female Patron and Male Patron at Fusion on Friday, March 20, 2015, and neither appeared intoxicated to him. (Testimony)
8. There was no evidence submitted about how much of the scorpion bowl(s) Female Patron or Male Patron consumed or whether Female Patron even consumed any alcoholic beverages at Fusion that evening. (Testimony; Exhibits)

DISCUSSION

Pursuant to M.G.L. Ch. 138, §67, “[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed.” Dolphino Corp. v. Alcoholic Beverages Control Comm’n, 29 Mass. App. Ct. 954, 955 (1990) citing United Food Corp v. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978). The findings of a local licensing board are “viewed as hearsay evidence, [and] they are second-level, or totem pole hearsay, analogous to the non-eyewitness police reports in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 – 476 (1989).” Dolphino, 29 Mass. App. Ct. at 955.

Both the Local Board and the Commission have the authority to grant, revoke, and suspend licenses. Their powers were authorized “to serve the public need and . . . to protect the common good.” M.G.L. c. 138, §23, as amended through St. 1977, c. 929, §7. The Commission is given “comprehensive powers of supervision over licensees,” Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 617 (1956), 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).

These “comprehensive powers” are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, §64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§23, 64.

The Commission’s decision must be based on substantial evidence. Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 528 (1988). “Substantial evidence” is “such evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* Evidence from which a rational mind might draw the desired inference is not enough. Blue Cross and Blue Shield of Mass. Inc. v. Comm’r of Ins., 420 Mass. 707 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

The Licensee is charged with service to intoxicated persons in violation of M.G.L. c. 138, §69.¹ “No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person.” M.G.L. c. 138, §69. “[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated.” Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). “The negligence lies in serving alcohol to a person who already is showing discernible signs of

¹ The Licensee was only charged with violations of M.G.L. c. 138, §69 (service to an intoxicated person) and 204 C.M.R. 2.05(2) (permitting an unlawful activity—here, a violation of §69, on the premises). (Exhibits 1, 3, and Testimony) Although there is evidence that Female Patron was under the age of twenty-one, was not asked for identification, and was served alcohol at Fusion, the Local Board did not charge the Licensee with service to an under-age person, and therefore, that issue is not before the Commission.

intoxication.” Id. at 610; accord McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

In order to prove this violation, the Local Board must show: (1) that an individual was intoxicated on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. Vickowski, 422 Mass. at 609. A Local Board must produce some evidence that “the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink.” Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 20 (2010). As explained in Vickowski,

The imposition of liability on a commercial establishment for the service of alcohol to an intoxicated person . . . , often has turned, in large part, on evidence of obvious intoxication at the time a patron was served. See Cimino, 385 Mass. at 325, 328 (patron was “totally drunk”; “loud and vulgar”); Gottlin v. Graves, 40 Mass. App. Ct. 155, 158 (1996) (acquaintance testified patron who had accident displayed obvious intoxication one hour and twenty minutes before leaving bar); Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121 (1994) (sufficient evidence for jury where acquaintance described patron who later had accident as appearing to feel “pretty good”). Contrast Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (commercial establishment could not be liable when there was no evidence of obvious intoxication while patron was at bar); Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (affirming summary judgment for defendant in absence of any evidence of obvious intoxication); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816-817 (1979) (directed verdict in favor of commercial establishment affirmed when there was no evidence that patron was served alcohol after he began exhibiting obvious signs of intoxication). 422 Mass. at 610.

“The [Local Board] may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two.” Vickowski, 422 Mass. at 611 (direct evidence of obvious intoxication not required). “[S]ervice [to a patron] of a large number of strong alcoholic drinks [would be] sufficient to put [a licensee] on notice that it was serving a [patron] who could potentially endanger others.” Cimino, 385 Mass. at 328. It is proper to infer from evidence a patron's excessive consumption of alcohol, “on the basis of common sense and experience, that [a] patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee.” Vickowski, 422 Mass. at 611; accord P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

However, “[e]vidence of apparent intoxication, or of elevated blood alcohol levels, at some later point in time does not, by itself, suffice to show that the patron's intoxication was evident at the time the last drink was served.” Douillard v. LMR, Inc., 433 Mass. 162, 165 (2001). Yet, such evidence may be used to bolster other evidence concerning a patron's condition at the time alcohol was served. Id. at 166. Courts are “reluctant to accept evidence of subsequent, obvious intoxication as a surrogate for evidence of a patron's demeanor at the relevant time.” Vickowski, 422 Mass. at 612. The reluctance to accept this type of evidence “stems from the uncertainties of

the situation, including the possible delayed impact of the consumption of alcohol, and the unknown effect on a patron of the last drink served to him by a licensee.” Id.

In this matter, there was no evidence as to whether Female Patron or Male Patron consumed alcoholic beverages before or after their time at Fusion. (Testimony) While at Fusion, two scorpion bowls were ordered for their table of three, but the only evidence as to the consumption of those drinks is that Male Patron was seen drinking from a scorpion bowl. Id. There is no evidence as to how much of the scorpion bowl(s) Male Patron consumed, and there is no evidence that Female Patron actually consumed any portion of either of the scorpion bowls. Id. There was no evidence that either Female Patron or Male Patron exhibited signs of intoxication at Fusion on the night in question,² *let alone that either of them “exhibit[ed] outward signs of intoxication by the time [s/he] was served his[/her] last alcoholic drink.”* Rivera, 77 Mass. App. Ct. at 20 (Emphasis added). (Testimony) In fact, there was direct evidence that neither of them exhibited signs of intoxication at Fusion that night. (Testimony)

Likewise, there was no evidence that Fusion served Female Patron or Male Patron a “large number of strong alcoholic drinks . . . sufficient to put [Fusion] on notice that it was serving a [patron] who could potentially endanger others [or herself/himself].” Cimino, 385 Mass. at 328 (where patron had been served six or more White Russians); see O’Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64, 65 (1981) (inference of obvious intoxication could be drawn where patron consumed at least fifteen beers and six martinis). “When evidence of excessive consumption is lacking, as matter of common sense and experience, the inference may not be drawn.” Vickowski, 422 Mass. at 611; see Kirby, 34 Mass. App. Ct. at 632 (consumption of eight beers insufficient to support inference of obvious intoxication); Makynen, 39 Mass. App. Ct. at 312 (same, as to consumption of five to six cans of beer). The evidence in this case -- that over the course of about an hour and a half Fusion served two scorpion bowls to a table of three, which included Female Patron, Male Patron, and another person -- would not be sufficient to support an inference of obvious intoxication based on excessive consumption. (Testimony); see Vickowski, 422 Mass. at 611 (insufficient proof where patron, “who was in the habit of drinking beer, ‘sipped’ four to five bottles over the course of approximately two hours”); compare Rivera, 77 Mass. App. Ct. at 21 (where patron was served fourteen drinks over a two-hour period and drank “most” of them, it was for jury to decide whether he likely appeared intoxicated before he was served his last drink).

The Local Board has the burden of proving that Licensee was on notice that Female Patron and/or Male Patron was showing discernible signs of intoxication at the time Licensee served them the alcoholic beverage. In the present case, no evidence was offered to prove the Patrons’ intoxication at the time of purchase. That Female Patron and Male Patron exhibited signs of intoxication after the accident was not alone sufficient to show that either of them was intoxicated when Fusion last served their table. Soucy v. Eugene M. Connors Post 193, Inc., 79 Mass. App. Ct. 1109, *2 (2011) (memorandum and order pursuant to Rule 1:28); Douillard, 433 Mass. at 167-168. For the aforementioned reasons, this Commission cannot draw an inference of obvious intoxication at the time of sale with the requisite degree of certainty, and therefore, the Commission concludes that there is insufficient evidence to prove that Fusion violated 204 CMR 2.05(2) to wit: M.G.L. c. 138, §69.

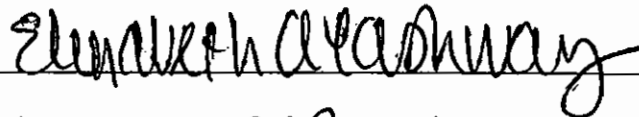
² Although it is possible that Female Patron fell out of her seat at Fusion because she was intoxicated, there is an absence of evidence linking her fall to intoxication.

CONCLUSION

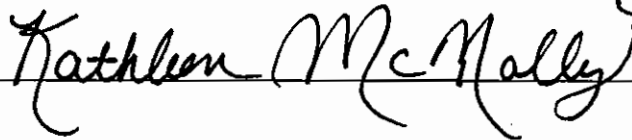
Therefore, the Commission **DISAPPROVES** the action of the Local Board in finding Fusion Restaurant, Inc. d/b/a Fusion Restaurant in violation of M.G.L. c. 138, §69 or in violation of 204 C.M.R. 2.05(2) relative to M.G.L. c. 138, §69. The Commission also **DISAPPROVES** the action of the Local Board in revoking the license. The Commission remands the matter to the Local Board with the recommendation that no further action be taken against the Licensee, as any penalty would be discrepant with this decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner



Kathleen McNally, Commissioner



Dated: September 29, 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.

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cc: Michael Bozza, Esq., via facsimile 617-451-8808
Michael J. Kennefick, Esq., via facsimile 508-376-8440
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