



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

CASSEYSGRIDIRON CORP. D/B/A CASSEYS GRIDIRON SPORTS BAR
220 O'NEIL BLVD.
ATTLEBORO, MA 02703
LICENSE#: 005000119
HEARD: 06/22/2016

This is an appeal from the action of the City of Attleboro Licensing Board (the "Local Board" or "Attleboro") for suspending the M.G.L. c. 138, §12 All Alcoholic beverages license of CasseysGridiron Corp. d/b/a Casseys Gridiron Sports Bar (the "Licensee" or "Casseys") located at 220 O'Neil Blvd., Attleboro, MA for one (1) day. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Wednesday, June 22, 2016.

The following documents are in evidence:

1. Local Board's Meeting Minutes 2/3/2016;
2. Local Board's Letter 2/4/2016 to Mr. Monte;
3. Email from Mr. Monte to Local Board 2/4/2016;
4. Local Board's New Violation Policy 1/1/2011;
5. Local Board's Subpoena to Lauren Carney;
6. Attleboro Police Department Incident Report 1/9/2016; and
7. Attleboro Police Department Violations Report for 2015;

A. Statement of Lauren Carney.

There is one (1) audio recording of this hearing, and four (4) witnesses testified.

The Commission took Administrative Notice of CasseysGridiron Corp.'s Commission Records.

FINDINGS OF FACT

1. CasseysGridiron Corp. d/b/a Casseys Gridiron Sports Bar is a Massachusetts corporation which has an M.G.L. c. 138 §12 all alcoholic beverages license located at 220 O'Neil Blvd., Attleboro, MA. Casseys closes at 1:00 a.m. and has a last call at 12:30 a.m. (Testimony, Commission Records)
2. Shortly after midnight on January 9, 2016, three male individuals later identified as Sangermano, Darosa, and Crosby ("Crosby's Group") arrived at Casseys. They were not served alcoholic beverages at Casseys. (Testimony, Ex. 6)
3. Crosby's Group began arguing with individuals later identified as Kane and his friends ("Kane's Group") inside the premises. Both parties exchanged words, which quickly escalated to pushing and shoving, followed by all parties throwing punches inside and outside of the bar. (Testimony, Ex. 6)
4. Corey Monte, the approved license manager, called the police. He and his door man forced the group of people outside. (Testimony, Ex. 6)
5. Attleboro Police Officers were dispatched to Casseys as a result of the fight. (Testimony, Ex. 6)
6. When the officers arrived, two of Casseys employees were outside the main entrance and were assisting patrons in leaving the premises. (Testimony, Ex. 6)
7. Mr. Monte pointed the officers to Crosby's Group, which was walking towards a car at the north end of the parking lot. (Testimony, Ex. 6)
8. Kane's group was shouting in the parking lot. Approximately 10 – 15 patrons were watching the incident. (Testimony, Ex. 6)
9. There were no other ongoing disturbances. Any physical altercation had ceased prior to the officers' arrival. (Testimony, Ex. 6)
10. Mr. Kane attempted to walk towards Crosby's Group at the north end of the parking lot. Officer Brillon ordered Mr. Kane to stop and sit down, and not approach this group. Officer Brillon informed Mr. Kane that he was bleeding from his mouth and it would be best for him to sit down. Mr. Kane refused to obey Officer Brillon's order, and he continued to stumble towards the three men. (Testimony, Ex. 6)
11. Mr. Kane was unsteady on his feet and unable to walk in a straight line without leaning to his left. Mr. Kane exhibited poor balance and appeared on the verge of falling down. He was bleeding badly from his mouth and complained of pain in his teeth. Mr. Kane's speech was slurred, he had red, glassy eyes, and he continued to exhibit characteristics of someone suffering from the effects of alcohol overconsumption. (Testimony, Ex. 6)
12. Officers Kelley and Brillon formed the opinion that Mr. Kane was intoxicated. (Testimony, Ex. 6)

13. Officers Kelley and Brillon escorted Mr. Kane to a seated position where he was handcuffed and subsequently transported to the hospital for further evaluation. (Testimony, Ex. 6)
14. An individual later identified as Ms. Carney approached the officers and began complaining about the incident. Ms. Carney shouted and carried on about unfair treatment and people being arrested. Officer Kelley repeatedly told Ms. Carney to stay away from the police officers as they conducted their investigation. She was restrained several times by her friends. (Testimony, Ex. 6)
15. Ms. Carney continued to shout at Lt. Killough and refused to peacefully leave the scene with her friends and a designated driver. Officers Brillon and Kelley observed that Ms. Carney's eyes were glassy and bloodshot; her speech was slurred; she was unsteady on her feet; and she was unable to be reasoned with and not capable of making rational decisions. (Testimony, Ex. 6)
16. Based on their training and experience, Officers Brillon and Kelley determined that Ms. Carney was intoxicated, and they placed her in protective custody. As the officers attempted to handcuff Ms. Carney, she threw her cell phone on the ground and dropped her purse in a continued tantrum. (Testimony, Ex. 6)
17. Ms. Carney told the officers while she was at the police station that she consumed six Bud Light Platinum beers at Casseys, and a shot of Goldschläger (Schnapps) at the end of the night. However, Officer Kelly testified that Casseys does not carry or serve Bud Light Platinum. (Testimony, Ex. 6)
18. In addition, Ms. Carney subsequently provided a written statement disavowing her statements to the police officers.¹ (Ex. A)

¹ Ms. Carney wrote the following:

To Whom It May Concern:

On the evening of January 9, 2016, I, Lauren Carney, was taken into protective custody by the Attleboro Police Department. I was at Cassey's a local bar located at 220 O'Neil Blvd. in Attleboro, MA.

When I was taken into custody I was intoxicated. I had drank [sp] alcohol before arriving at Cassey's, enough alcohol that the bartenders there refused to serve me.

It has come to my attention that because of that evening, Cassey's has undergone investigation and also lost their liquor license temporarily.

When the altercation occurred with the Attleboro Police out front of Cassey's, I was on my way out of the bar because I was refused service. I left upset, therefore became unnecessarily confrontational with the police.

Cassey's had nothing to do with my intoxication that evening. They made the responsible decision to refuse service. If you have any questions, please contact me. Thank you. Lauren Carney. (Ex. A)

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 one count of service to an intoxicated person in violation of M.G.L. c. 138, §69. “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. In order to prove this violation, the Local Board must prove five elements: (1) that an individual was intoxicated; (2) on the licensed premises; (3) that an employee of the licensed premises (4) knew or reasonably should have known that the individual was intoxicated; and (5) 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 v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996). “[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, 422 Mass. at 609 (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 intoxication.” Vickowski, 422 Mass. at 610; accord McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

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.” See 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 of 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; see P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

In this matter, the Local Board produced no percipient witnesses or direct evidence regarding Ms. Carney's conduct or demeanor at the time she was served her last alcoholic beverage or to the amount of alcohol that she consumed.² The Commission only heard testimony from Attleboro police officers who had no direct knowledge of any of the elements necessary to support a violation of M.G.L. c. 138, §69, specifically Ms. Carney's behavior and outward signs of intoxication at the time she was served her last alcoholic beverage. None of the police officers were present inside Casseys, and therefore, none of them could testify as to Ms. Carney's

² As there is only one count of this violation alleged, the Commission presumes that it involves Ms. Carney, as there was no evidence presented regarding Mr. Kane's consumption of alcoholic beverages at Casseys.

condition at the time she was served her last alcoholic beverage or to the type and amount of alcoholic beverages that she consumed. The police officers only observed Ms. Carney's behavior sometime after she had consumed alcohol, which does not support a finding of a violation of §69.

The only information about what transpired inside the premises came from the police officers' recount of verbal statements made to them by Ms. Carney. The statements introduced during the hearing before the Commission constitute hearsay. The initial hearsay statements made to the police officers at the police station conveyed that Ms. Carney consumed six Bud Light Platinum beers at Casseys, and a shot of Goldschläger (Schnapps) at the end of the night. The second set of hearsay statements were introduced via Ms. Carney's letter, Exhibit A. All of the information presented to the Commission regarding Ms. Carney's consumption of alcoholic beverages while inside of the licensed premises constitutes hearsay. The Local Board's decision also rested exclusively on these hearsay statements. A decision of a board that rests entirely upon hearsay evidence cannot be sustained. See Moran v. School Committee of Littleton, 317 Mass. 591, 596-597 (1945); Braintree Brew House LLC d/b/a The Brew House (ABCC Decision March 27, 2013) (violation of §69 disapproved where all of the evidence presented to the Commission constituted hearsay; all of the witnesses who testified had either arrived at the scene after the patron was outside the premises or were with the patron at the hospital). Therefore, the Commission finds that the Local Board has not proved by substantial evidence that Ms. Carney manifested objective, observable signs of intoxication while inside the licensed premises and, after manifesting such signs of intoxication, was sold or delivered alcoholic beverages. Furthermore, nothing was introduced, let alone by hearsay, to prove that Mr. Kane showed outward signs of intoxication and then was sold or delivered alcoholic beverages.

Even if the evidence regarding Ms. Carney's alcohol consumption was not introduced as hearsay, it still would not have risen to a level of substantial evidence that Ms. Carney appeared intoxicated such that the bartender knew or reasonably should have known that Ms. Carney was intoxicated at the time of service of an alcoholic beverage. First, Ms. Carney's statement that she was even served an alcoholic beverage at Casseys is not credible. While she initially told officers that she had consumed six Bud Light Platinum beers and a shot of Goldschläger (Schnapps) at Casseys, Officer Kelley's investigation revealed that Casseys did not carry or sell Bud Light Platinum. Furthermore, Ms. Carney provided a subsequent letter wherein she disavowed her prior statement to police and insisted that Casseys refused service to her because she was intoxicated. The contradictions to Ms. Carney's initial statement to police cannot be ignored. The Commission's "determination of the substantiality of the evidence must be made upon consideration of the entire record, including whatever in the record fairly detracts from its weight." Med. Malpractice Joint Underwriting Ass'n of Massachusetts v. Comm'r of Ins., 395 Mass. 43, 55 (1985) (quotations and citations omitted). Particularly where Ms. Carney did not testify before the Commission, the Commission is left to speculate as to her credibility and which version of Ms. Carney's statements, if either, is true. Such speculation can never rise to the level of substantial evidence.

Second, even if Ms. Carney had consumed six beers and a shot of schnapps at Casseys, this alone would be insufficient to buttress the hearsay evidence because there is no evidence to indicate that Ms. Carney outwardly appeared intoxicated. Seven drinks, while at first glance is a significant number of drinks, alone is insufficient to presume an outward appearance of

intoxication. Nothing was introduced regarding the length of time she allegedly took to consume that many drinks or what her physical demeanor was at Casseys. Likewise, the Local Board presented nothing regarding Ms. Carney's tolerance to alcohol or her size to indicate what effects, if any, seven drinks would have had on her. Contrast Cimino v. Milford Keg, Inc., 385 Mass. 323, 328 (1982) (combination of patron's "loud and vulgar conduct" plus his being served six "strong alcoholic drinks" was sufficient to prove intoxication); Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 21 (2010) (that patron was "served fourteen drinks over a two-hour period and drank 'most' of them" sufficient to prove intoxication); and O'Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64, 64 (1981) (combination of patron's service of fifteen Heineken beers and six martinis pull his falling down was sufficient to prove intoxication) with Vickowski, 422 Mass. at 611 (1996) (patron "who was in the habit of drinking beer, 'sipped' four to five bottles over the course of approximately two hours – clearly would not warrant an inference of obvious intoxication based on excessive consumption"); Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 312 (1995) (consumption of five to six cans of beer insufficient to support inference of obvious intoxication); and Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (consumption of eight beers insufficient to support inference of obvious intoxication). And because Ms. Carney did not testify before the Commission, these questions remain unanswered so that the Commission is compelled to find a lack of substantial evidence that Ms. Carney was demonstrating outward signs of intoxication at Casseys.

The Local Board has the burden of proving that the Licensee was on notice that Ms. Carney was showing discernible signs of intoxication at the time she was served her last alcoholic beverage. In the present case, no substantial evidence was offered to prove Ms. Carney was showing signs of intoxication, and no evidence whatsoever was offered to prove Mr. Kane was showing signs of intoxication, and then was served an alcoholic beverage by the Licensee. Given these circumstances and the evidence presented, this Commission finds that it cannot draw an inference of obvious intoxication at the time of a sale with the requisite degree of certainty.

CONCLUSION

The Commission **DISAPPROVES** the action of the Local Board in finding a violation of M.G.L. c. 138, §69, and for suspending the M.G.L. c. 138, §12 all alcoholic beverages license of CasseysGridiron Corp. d/b/a Casseys Gridiron Sports Bar for one (1) day. As such, the Commission remands the matter to the City of Attleboro License Commission with the recommendation that it find no violation and that no further action be taken against the Licensee, as any penalty would be discrepant with this Decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Elizabeth A. Lashway, Commissioner _____

Dated: September 14, 2016

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: William A. Flanagan, Esq.
Robert Mangiaratti, Esq. via facsimile 508-222-3046
Local Licensing Board
Frederick G. Mahony, Chief Investigator
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