



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. Gainstora, Esq.
Chairman

DECISION

INTERNATIONAL INN BAR & GRILL, INC.
D/B/A INTERNATIONAL INN
662 MAIN STREET
BARNSTABLE, MA 02601
LICENSE#: 007000047
HEARD: 04/27/2016

This is an appeal of the action of the Town of Barnstable Licensing Authority (the "Local Board" or "Barnstable") for suspending the M.G.L. c. 138 §12, all alcoholic beverages license of International Inn Bar & Grill, Inc. d/b/a International Inn (the "Licensee" or "International Inn") located at 662 Main Street, Barnstable, MA for forty- one (41) days for violating § 501-14(A)(1) of the Barnstable Licensing Authority's Rules and Regulations. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Wednesday, April 27, 2016.

The following documents have been entered in evidence as exhibits:

1. Licensee's §12 All- Alcoholic Beverages License;
2. Town of Barnstable Licensing Authority Hearing Notice dated 7/17/2015;
3. Town of Barnstable Food Establishment Inspection Report dated 7/16/2015;
4. Town of Barnstable Decision dated 8/12/2015;
5. Town of Barnstable Licensing Authority Rules and Regulations dated 3/17/2016;
6. Town of Barnstable Public Health Division Rating System for Food Service Establishments dated 12/31/2015;

7. Town of Barnstable Public Health Division Rating System for Food Service Establishments dated 7/31/2015;
8. Town of Barnstable Public Health Division Rating System for Food Service Establishments dated 10/30/2014;
9. Town of Barnstable Decision dated 7/10/2014;
10. Town of Barnstable Public Health Division Rating System for Food Service Establishments dated 10/22/2013;
11. Town of Barnstable Decision dated 7/31/2012;
12. Town of Barnstable Decision dated 2/22/2011;
13. Town of Barnstable Licensing Authority Agenda dated 8/12/2015;
14. Town of Barnstable Decision dated 8/19/2015;
15. Town of Barnstable Licensing Authority Rules and Regulations dated 4/25/2016;
16. Town of Barnstable Board of Health Hearing Notice dated 7/25/2015;
17. Town of Barnstable Board of Health Meeting Minutes dated 10/13/2015;
18. Town of Barnstable Board of Health Meeting Minutes dated 10/14/2014;
19. Town of Barnstable Decision dated 11/16/2015;
20. International Inn Alleged Violation Timeline; and
21. Town of Barnstable Decision dated 7/15/2015 with Town of Barnstable Health Inspection Reports.

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

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

FINDINGS OF FACT

1. International Inn Bar 7 Grill, Inc., d/b/a International Inn ("International Inn" or "Licensee"), is located at 662 Main Street, in the Barnstable village of Hyannis, Massachusetts. (Commission File, Testimony)
2. The International Inn holds an all alcoholic beverages § 12 innholder's license. (Commission File)
3. Donna Miorandi has been a health inspector with the Town of Barnstable for twenty-nine years. (Testimony)
4. Part of her duties includes inspecting restaurants and bars for compliance with the Massachusetts health code. (Testimony)
5. After she inspects an establishment, she completes a Public Health Division Food Establishment Inspection Report, which details any observations she makes that, in her opinion, may rise to the level of a health code violation. (Testimony, Exhibit 3)
6. Upon completion of these Reports, Ms. Miorandi gives them to her supervisor. (Testimony)

7. It is then up to the Board of Health, after a hearing and considering evidence, to determine whether or not an establishment has actually violated the Massachusetts health code. (Testimony)
8. The Board of Health ordered Ms. Miorandi to conduct three inspections of the International Inn for the period of April to August 16, 2015. (Testimony)
9. On July 16, 2015, Ms. Miorandi conducted an inspection of the International Inn. (Testimony, Exhibit 3)
10. After conducting her inspection, Ms. Miorandi made the following observations of the International Inn, which she concluded that, in her opinion, amounted to health code violations:
 - a. "no ServSafe person on site; dishwasher has left, general manager has left";
 - b. "inaccurate thermometer in fridge reads 50+ degrees. Actual at 44°F. Must discard";
 - c. "No soap at handwash sink";
 - d. "wiping cloths not in bucket of sanitizing solution";
 - e. "Ant & roach killer under sink. Need a licensed person to apply these chemicals in a food establishment";
 - f. "much debris on floor under the cooking area";
 - g. "food stored on floor in walk-in cooler";
 - h. "scoops with foreign debris inside buckets of sugar, flour & rice with much debris; shaker of powdered sugar has much foreign debris";
 - i. "no log on site for LTDW [low temperature dishwasher]. No dishwasher coming in until tonite";
 - j. "Raid for flying insects on floor at bar. Windex on bar counter";
 - k. "many fruit flies in kitchen & at bar area"; and
 - l. "foreign debris inside soda gun holders at bar" and "LTDW = 50 ppm (DZM test strips)" (Testimony, Exhibit 3)
11. Based on these observations, the International Inn was immediately shut down. (Testimony)
12. The day following Ms. Miorandi's inspection, July 17, 2015, the Town of Barnstable Licensing Division ("Local Board") issued a Show Cause hearing notice to the International Inn, charging a violation of Town Regulation §501-14(A)(1), "due to a number of Health violations" as cited in Ms. Miorandi's Report. (Exhibit 2)
13. The hearing was held on August 12, 2015. (Exhibit 4)
14. Ms. Miorandi was called to testify before the Local Board regarding her Report and observations at the International Inn. (Testimony)
15. While she had been a health inspector for twenty-nine years, she had never been called before the Local Board to testify in a licensing matter before. (Testimony)

16. On August 12, 2015, the Local Board found a violation of Town Regulation §501-14(A)(1), to wit: health code violations. The Local Board issued a forty-one day suspension to the International Inn for this finding of a violation. (Exhibit 4)
17. The Local Board did not have before it any determination of the Board of Health as to whether or not the International Inn actually violated the Massachusetts Health Code, as the Board of Health's hearing on the matter was not until six days later, on August 18, 2015. (Testimony)
18. Ms. Miorandi has shut down several other restaurants over the years for potential health code violations, but none of them had gone before the Local Board for licensing issues based on their health code violations. (Testimony)
19. Several establishments that have been put on probation by the Board of Health other than the International Inn have never had to appear before the Local Board, including Bangkok Kitchen, Schooner's, Ying's Restaurant, Egg & I, Village Fudge Shop, Tiki Port, Persy's Place, and Duck Inn Pub (Exhibits 16-21).

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. ch. 138, §23, as amended through St. 1977, c. 929, §7. "[T]he purpose of discipline is not retribution but the protection of the public." Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981). 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. See 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. See 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 Local Board has the burden of producing satisfactory proof that the Licensee committed the alleged violation that occurred on July 16, 2015. The Local Board found a violation of § 501-14(A)(1) of the Barnstable Licensing Authority Rules and Regulations, which states:

Any license issued pursuant to General Laws Chapter 138 and Chapter 140 for the service of food or beverages to the public may be modified, suspended, or revoked for any of the following causes:

- (1) Violation by the licensee of any provision of the relevant General Laws of the Commonwealth or the relevant Ordinances of the Town of Barnstable or of any rule or regulation of any Town of Barnstable agency or of the Alcoholic Beverages Control Commission or of any rule or regulation of the Licensing Authority

The Local Board found the violation to be that of a number of health code violations as cited in a Public Health Division Food Establishment Inspection Report dated July 16, 2015 ("Report") at the licensed premises (Exhibits 3, 4). The Massachusetts Health Code, 105 CMR 590.00 ("Mass. Health Code"), adopted the 1999 Recommendations of the United States Public Health Service Food and Drug Administration, colloquially known as the 1999 Food Code. The 1999 Food Code is 500 pages of recommended health code regulations. In addition to adopting the 1999 Food Code, the Mass. Health Code made several modifications to certain provisions in the 1999 Food Code.

The health code violations that the Local Board found were as follows:

- "no ServSafe person on site; dishwasher has left, general manager has left";
- "inaccurate thermometer in fridge reads 50+ degrees. Actual at 44°F. Must discard";
- "No soap at handwash sink";
- "wiping cloths not in bucket of sanitizing solution";
- "Ant & roach killer under sink. Need a licensed person to apply these chemicals in a food establishment";

- “much debris on floor under the cooking area”;
- “food stored on floor in walk-in cooler”;
- “scoops with foreign debris inside buckets of sugar, flour & rice with much debris; shaker of powdered sugar has much foreign debris”;
- “no log on site for LTDW [low temperature dishwasher]. No dishwasher coming in until tonite”;
- “Raid for flying insects on floor at bar. Windex on bar counter”;
- “many fruit flies in kitchen & at bar area”; and
- “foreign debris inside soda gun holders at bar” and “LTDW = 50 ppm (DZM test strips)”

(Exhibit 3). As a result of these findings, the Local Board suspended the Licensee’s license for forty-one days.

The evidence introduced by the Local Board in support of its allegation that the Licensee had several health code violations was the July 16, 2015, Report and the testimony of the Report’s author, Ms. Miorandi.¹ The Report documents Ms. Miorandi’s observations from her inspection of the Licensee’s premises, but it does not include official findings of violations of the health code – a factual finding and legal conclusion that is reserved solely for the Board of Health to make, and not one of its inspectors, who are fact witnesses before Board of Health hearings. See 105 CMR 590.014(A)-(B), 105 CMR 590.015. All the Commission has before it are Ms. Miorandi’s observations made during her inspection at the licensed premises. This evidence does not rise to the level of substantial evidence. Reasonable minds could not accept that observations such as having a can of Raid on the floor of a bar or Windex on a bar counter or fruit flies in the bar area, for example, necessarily constitute a violation of the health code, particularly where citations to the specific health code regulation(s) alleged to have been violated were not introduced. Embers of Salisbury, 401 Mass. at 528 (“Substantial evidence” is “such evidence as a reasonable mind might accept as adequate to support a conclusion”); accord Blue Cross and Blue Shield of Mass. Inc., 420 Mass at 710. The Commission will not speculate as to what particular Mass. Health Code regulations may have been violated, and the Commission cannot turn to its own technical expertise in determining whether the observations testified to by Ms. Miorandi constitute health code violations because it has none. Cf. M.G.L. c. 30A, § 14(g) (“The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency”). The Commission accordingly finds no violation of § 501-14(A)(1).

¹ At the hearing before the Commission, the Commission prohibited the Local Board from introducing evidence from the Barnstable Board of Health’s August 18, 2015, hearing regarding the Licensee’s alleged health code violations, and from introducing the Board of Health’s findings regarding the health code violation allegations, because they were not considered by the Local Board in its August 12, 2015, decision.

While the Commission finds no violation of § 501-14(A)(1) of the Barnstable Licensing Authority Rules and Regulations, the Commission feels compelled to admonish the Local Board for its apparently arbitrary and capricious treatment of the Licensee in both its charge of a violation, the finding of a violation, and the punishment imposed in comparison to similarly situated licensees. Several other Barnstable licensees have had similar health code violations and have been on probation yet none of them have been subjected to violation hearings before the Local Board that this Licensee has been subjected to, let alone lengthy suspensions of forty-one days for violations of the health code. Even if there was substantial evidence that the Licensee violated Local Board Regulation § 501-14(A)(1), such arbitrary and capricious enforcement of a regulation by a Local Board against a licensee as was demonstrated here cannot be condoned by the Commission.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission finds that the evidence presented at the hearing was insufficient to prove that International Inn Bar & Grill, Inc. d/b/a International Inn committed a violation of Local Board Rules § 501-14(A)(1). Therefore the Commission **DISAPPROVES** the action of the Local Board in finding a violation for Local Board Rules § 501-14(A)(1).

The Commission also **DISAPPROVES** the action of the Local Board in suspending the license for forty- one (41) days, for said violation that was disapproved.

The Commission recommends that no further action be taken against this Licensee as any penalty or sanction would be discrepant with the Commission's decision disapproving the violation findings.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman

Kathleen McNally, Commissioner

Dated: September 20, 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: David Lawler, Esq. via facsimile 508-778-4600
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Frederick G. Mahony, Chief Investigator
Local Licensing Board
Administration, File