



*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**

**MACFRAGA INC. D/B/A SCOTTIE'S FAMOUS PIZZA**  
**11 RIDGEWOOD AVE**  
**BARNSTABLE, MA 02601**  
**LICENSE#: 007000251**  
**HEARD: 07/20/16**

This is an appeal of the action of the Town of Barnstable Licensing Authority (the "Local Board" or "Barnstable") for revoking the M.G.L. c. 138, § 12 wines & malt beverages license of MacFraga Inc. d/b/a Scottie's Famous Pizza ("Licensee" or "MacFraga") located at 11 Ridgewood Avenue, Barnstable, Massachusetts. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Tuesday, July 20, 2016.

The following documents are in evidence as exhibits:

1. Joint Statement of Agreed Evidence 7/19/2016;
2. Barnstable's Decision re: MacFraga 7/16/2015;
3. MacFraga's § 12 License for 2015;
4. Local Board of Barnstable's Rules and Regulations;
5. Barnstable's Decision re: Box Car Willy's Inc. 11/03/1999;
6. Barnstable's Decision re: Box Car Willy's Inc. 12/06/2001;
7. Minutes of Local Board's Meeting 2/14/2010 in re: Ying's;
8. ABCC Decision re: Club-Passe-Temps of Lowell, MA 10/11/2013; and
9. ABCC Decision re: Newburyport / North End Boat Club 7/23/2013.

There is one (1) audio recording of this hearing, and no testimony was presented.<sup>1</sup> The Commission took Administrative Notice of the Licensee's Commission File.

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<sup>1</sup> No witnesses testified before the Commission. Counsel for each party rested on oral arguments and exhibits submitted to the Commission.

## FINDINGS OF FACT

The Commission makes the following findings based on the evidence presented at the hearing:

1. MacFraga Inc. d/b/a Scottie's Famous Pizza ("MacFraga") located at 11 Ridgewood Avenue, Hyannis, Massachusetts holds a M.G.L. c. 138, § 12 wines and malt beverages license. (Commission File, Exhibits 1, 3)
2. Barnstable granted the § 12 wines and malt beverages license on May 27, 2015; the Commission approved the license application and MacFraga opened for business on June 26, 2015. (Commission File, Exhibits 1, 3)
3. MacFraga's license listed the hours during which Alcoholic Beverages may be sold which were: Monday – Saturday, 11:00 a.m. to 10:00 p.m. and Sundays, 12:00 – 10:00 p.m. In addition, a Restriction on the license specified "No Service of Alcohol after 11:00 p.m." (Exhibits 1, 3)
4. Barnstable Police Patrol Officer Steven Maher, a duly authorized agent of the Local Board, was assigned to patrol the area on June 26, 2015. Officer Maher was in uniform and drove a marked Barnstable police cruiser. (Exhibit 1)
5. On June 26, 2015, MacFraga's opening night, at approximately 11:35 p.m., Officer Maher drove past the licensed premises and observed that the lights were on and several persons were seated at the bar. (Exhibit 1)
6. Officer Maher walked to the door of the premises and observed through the window, that there were beer bottles on the bar, and both men and women were sitting and standing near the bar. (Exhibit 1)
7. Officer Maher attempted to open the door to the premises but found it was locked. He knocked at the door and saw several people turn towards him, however, no one came to door. When Officer Maher knocked again at the door, the license manager and owner of the license, Alex MacDonald, came to the door. (Exhibit 1)
8. Officer Maher asked Mr. MacDonald to unlock the door to which Mr. MacDonald replied, "We're closed." Officer Maher responded "I don't care, open the door." Mr. MacDonald asked "Why?" Officer Maher stated "Because I am a police officer and I said so." MacDonald responded, "We are closed, I don't have to let you in." (Exhibit 1)
9. The exchange between Officer Maher and Mr. MacDonald continued for some minutes. When Officer Maher advised Mr. MacDonald that he had the statutory right as the Local Board's agent to enter the premises, Mr. MacDonald opened the door and stood in the doorway. (Exhibit 1)
10. Officer Maher stated that alcohol service was required to cease at 10:00 p.m., and all service was required to cease at 11:00 p.m., tables to be cleared by 11:15 p.m., and the premises vacated by 11:30 p.m. (Exhibits 1, 3)
11. Officer Maher then directed Mr. MacDonald to look at the § 12 license kept on the premises. The license was brought over to Mr. MacDonald, and he and Officer Maher reviewed its terms. (Exhibits 1, 3)

12. Mr. MacDonald stated that he was having a beer with some friends, they were not selling alcohol, the restaurant was private property, and he did not have to let Officer Maher inside. (Exhibit 1)
13. Officer Maher left the doorway and contacted his supervisor, Barnstable Police Lieutenant John Murphy (Lt. Murphy). (Exhibit 1)
14. When Officer Maher returned to the doorway, Mr. MacDonald stated he could enter the restaurant. Officer Maher stated it was too late and he was waiting for Lt. Murphy. (Exhibit 1)
15. Lt. Murphy was in uniform and on patrol nearby when he received the radio transmission from Officer Maher. Lt. Murphy immediately responded to MacFraga's. (Exhibit 1)
16. Lt. Murphy arrived at the premises and spoke with Officer Maher. Lt. Murphy then walked past Mr. MacDonald into the restaurant. Officer Maher immediately followed Lt. Murphy into premises. (Exhibit 1)
17. The entire exchange from when Officer Maher observed the lights on in the licensed premises to the arrival of Lt. Murphy lasted from 11:35 p.m. to 11:47 p.m. (Exhibit 1)
18. Officer Maher requested a show cause hearing regarding the alleged violation of § 501-9 (B) of Barnstable's Rules and Regulations. (Exhibits 1, 4)
19. The Local Board held a hearing on July 15, 2015. By decision dated July 16, 2015, the Local Board found MacFraga had committed violations of its wines and malt beverages license, specifically two counts of § 501-9B (hindering a police officer in the performance of his duties) and voted to revoke MacFraga's alcoholic beverages license. (Exhibits 1, 2, 4)
20. MacFraga ceased serving beer and wine on July 15, 2015, and ceased all operations on July 20, 2015. (Exhibit 1)
21. Pursuant to injunctive relief, MacFraga resumed full operations, including the selling and service of alcoholic beverages, at the premises on August 1, 2015.<sup>2</sup> (Exhibit 1)

### DISCUSSION

Pursuant to M.G.L. c. 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.

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<sup>2</sup> MacFraga sought injunctive relief in Barnstable Superior Court to stay the license revocation. The Local Board and MacFraga agreed to the stay of the revocation during pendency of the appeal to the Commission. (Exhibit 1)

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. “[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. 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).

#### *Violation of Local Board Rules § 501-9B (2 counts)*

The Local Board has the burden of producing satisfactory proof that the Licensee committed the violations alleged on June 26, 2015.<sup>3</sup> The Local Board revoked MacFraga’s license for violations of Local Board Rules Section §501-9B of the Barnstable Licensing Authority Rules and Regulations arising from this incident.<sup>4</sup> (Exhibit 2) The Licensee is appealing the Local Board’s finding of its violations of Local Board Rules § 501-9B (two (2) counts) and the revocation of its wines and malt beverages alcohol license.

Local Board Rules and Regulations § 501-9 pertains to inspections and investigations. Local Board Rules § 501-9B specifically states:

Any person who hinders or delays a police officer or other authorized agent of the

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<sup>3</sup> In its Notice of Appeal, the Licensee included an appeal of Local Board Rule and Regulation § 501-8A – “failing to maintain a high degree of supervision over the conduct of the licensed establishment at all times.” The Local Board found the Licensee committed a violation of Regulation § 501-8A regarding *only* its common victualler and entertainment licenses, over which the Commission has no jurisdiction, and which are not the subject matter of this appeal. Therefore, the Commission will refrain from addressing this Local Board violation. (Exhibits 2, 4)

<sup>4</sup> The Local Board found MacFraga’s in violation of §501-1A; §501-1C; §501-4A; §501-7B; §501-7Q; §501-7R; and §501-9C. The Local Board voted to place a letter in MacFraga’s file regarding these violations. These violations are not the subject matter of this appeal. Therefore the Commission will refrain from addressing these Local Board violations. (Exhibits 2, 4)

Licensing Authority in the performance of the agent's duties or who refuse to admit to, or locks out any such agent from any place which such agent is authorized to inspect or who refuses to give to such agent such information as may be required for the proper enforcement of the General Laws shall be punished by a fine of not less than \$50 and not more than \$200 or by imprisonment for not more than two months or both. (Exhibit 4).

The Local Board found that the Licensee committed two violations of this regulation as to both Barnstable Police Officer Maher and Lt. Murphy. The Local Board found that the Licensee refused to allow Barnstable Police Officer Maher to enter the premises when he observed people inside the premises, and alcoholic beverages on the bar at 11:35 p.m. The license states that alcohol service is until 10:00 p.m., and no service of alcohol after 11:00 p.m.<sup>5</sup> (Exhibit 3) Officer Maher was told by Mr. MacDonald, the license manager and a principal of the Licensee, that Officer Maher could not enter the premises. This was opening night and the first day of operations for this Licensee. Officer Maher then called his superior officer, Lt. Murphy to report the situation. After Officer Maher notified Lt. Murphy that he was not allowed entry to the premises, the license manager, Mr. MacDonald then told Officer Maher that he could enter the premises. Officer Maher stated he would await Lt. Murphy's arrival.

Upon arrival, Lt. Murphy was allowed immediate entry to the premises. Officer Maher followed Lt. Murphy inside. Accordingly, the Commission finds no violation as to the count of hindering a police officer as it pertains to Lt. Murphy. The Licensee argued that as to the count of hindering/refusing to allow entry to Officer Maher, this was a misunderstanding, and shortly after telling Officer Maher that he was denied entry, the license manager told Officer Maher that he could enter the premises. The Commission does find that the Licensee refused entry to Officer Maher, and committed the violation of hindering an officer as to the allegation pertaining to Officer Maher. The Commission does not find a violation for the second count of hindering an officer, as it pertains to Lt. Murphy. Therefore, the Commission finds that the Licensee committed the violation of one (1) count of hindering a police officer.

#### *Severity of the Sanctions Imposed by Barnstable Local Board*

The Local Board revoked the wine and malt beverages license of MacFraga as result of these violations. The Barnstable Rules and Regulations do not address progressive discipline for imposing sanctions against licensees found in violation of its rules and regulations. (Exhibit 4) Therefore the Commission will consider decisions issued by the Local Board for sanctions

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<sup>5</sup> A § 12 licensee cannot be prohibited from serving alcohol between 11:00 a.m. and 11:00 p.m. M.G.L. c. 138, § 12: "The hours during which sales of such alcoholic beverages may be made by any licensee as aforesaid shall be fixed by the local licensing authorities either generally or specially for each licensee; provided, however, that no such sale shall be made on any secular day between the hours of two and eight o'clock antemeridian and that, except as provided in section thirty-three, **no such licensee shall be barred from making such sales on any such day after eleven o'clock antemeridian and before eleven o'clock postmeridian . . .**" M.G.L. chapter 138, § 12. (emphasis supplied)

imposed for similar violations of hindering an officer.

The Local Board argues that it revoked MacFraga's license because it was a brand new license, and the Licensee committed these violations the very first night it was open and operating. The Local Board requested the Commission review two Commission decisions for similar violations of hindering an officer in support of its revocation of MacFraga's license. (Exhibits 8, 9)

- A. Club Passe Temps of Lowell (ABCC Decision October 11, 2013) The Commission found the licensee in violation of Hindering/Delaying a Commission Investigator, in violation of c. 138, section 63A, along with the violation of Changing Officers and Directors without Local Board and Commission Approval. The Commission issued an Indefinite Suspension as to the violation of Changing Officers and Directors without approval. The Commission imposed a 30 (thirty) day suspension for the violation of hindering a Commission investigator, after the indefinite suspension was lifted, due to the licensee filing corrective applications to change the officers and directors. (Exhibit 8)
- B. North End Boat Club, Newburyport (ABCC Decision July 23, 2013) The Commission found the licensee in violation of Hindering/Delaying a Commission Investigator, in violation of c. 138, section 63A, along with Changing Officers and Directors without Local Board and Commission Approval. The Commission issued an Indefinite Suspension as to the violation of Changing Officers and Directors without approval. The Commission imposed a 30 (thirty) day suspension for the violation of hindering a commission investigator, after the indefinite suspension was lifted, due to the licensee filing corrective applications for a change of officers and directors. (Exhibit 9)

The Licensee argues that the sanctions imposed by the Local Board were unduly harsh, arbitrary and capricious, and inconsistent with past practices of the Local Board. The Licensee further argues that the Local Board exceeded its authority in issuing the revocation, and the Licensee has been open and operating for one year since this incident without issues or violations. The Licensee requests the Commission to compare its revocation to previous Local Board sanctions imposed for the same violation of hindering a police officer, however, the underlying incidents were far more egregious than that committed by MacFraga. (Exhibits 5, 6, 7) The Commission will review the Local Board penalties issued against other licensees for similar violations of hindering a police officer. (Exhibits 5, 6, 7)

- A. R&Y Enterprises, Inc., d/b/a Ying's Sushi Bar & Lounge, (Barnstable Local Board Decision February 14, 2010) This incident involved a disturbance at the premises, whereby the licensee was charged with violations including hindering a police officer, while the officers were investigating a shooting at the premises. The Local Board found the licensee in violation of hindering a police officer and imposed the sanction of a 30 (thirty) day suspension. (Exhibit 7)
- B. Box Car Willy's, Inc. (Barnstable Local Board Decision December 6, 2001) The licensee was found in violation (along with other violations) of the Local Board Rules and Regulations 1.09b - hindering and delaying a police officer in the performance of his duties. The sanction imposed by the Local Board was a 180 (one hundred and eighty day) suspension. (Exhibit 6)

- C. Box Car Willy's, Inc. (Barnstable Local Board Decision November 3, 1999) The Local Board found Box Car Willie's in violation (along with other violations) of the Local Board Rules and Regulations 1.09b - hindering a police officer in the performance of his duties while investigating an incident of drug use on the premises. The Local Board found the licensee committed a violation of Rule 1.09b. The Local Board issued the sanction of a thirty (30) day suspension. (Exhibit 5)

Upon review of prior Local Board decisions for hindering a police officer, the Commission finds the Local Board's revocation of MacFraga's license for the same violation to be inconsistent with penalties imposed on other licensees for the same violation, and as a result, an arbitrary and capricious sanction. Therefore, the Commission disapproves the Local Board's revocation of MacFraga's license.

### CONCLUSION

Based on the evidence presented at the hearing, the Alcoholic Beverages Control Commission **APPROVES** the action of the Town of Barnstable Board of License Commissioners for finding a violation of hindering a police officer (1 count). The Commission **DISAPPROVES** the Local Board action of finding a violation for the second count of hindering a police officer.

The Commission **DISAPPROVES** the Local Board's decision revoking the M.G.L. c. 138, § 12 wines & malt beverages license of MacFraga Inc. d/b/a Scottie's Famous Pizza. The Commission remands this matter to the Local Board with the recommendation that it impose the sanction of a thirty (30) day suspension, consistent with similar decisions issued by the Local Board and the Commission.

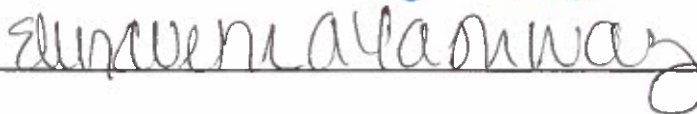
The Commission remands the matter to the Local Board with the recommendation that no further action be taken against the Licensee, as any penalty would be discrepant with this decision.

### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kathleen McNally, Commissioner



Elizabeth Lashway, Commissioner



Dated: August 30, 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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Local Licensing Board  
Frederick G. Mahony, Chief Investigator  
Administration, File