



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

ADAGIO, LLC d/b/a VLORA
545 BOYLSTON STREET
BOSTON, MA 02116
LICENSE#: 011600008
HEARD: 05/16/2012

This is an appeal of the action of the Licensing Board for the City of Boston (the "Local Board") in suspending the M.G.L. c. 138, §12 license of Adagio, LLC d/b/a Vlora (the "Licensee" or "Adagio") located at 545 Boylston Street, Boston, MA. On August 9, 2011, the Local Board held a hearing that resulted in a four (4) day suspension. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, May 16, 2012.

The following documents are in evidence as exhibits:

1. Local Board Hearing Notice and Vote of the Local Board, dated August 11, 2011 (1 page);
 2. Inspection Citation No.: 043307 dated July 2, 2011 (1 page);
 3. Boston Police Department Incident Report dated July 2, 2011 (2 pages); and
 4. Local Board Statement of Reasons dated September 20, 2011 (5 pages);
- A. Six (6) Invoices from Horizon Beverage dated August 17, 2010; October 26, 2011; May 11, 2011; May 11, 2011; June 15, 2011, June 28, 2011 (6 pages);
 - B. Copy of Adagio, LLC 2012 Wine and Malt Beverages with Liqueurs License;
 - C. Copy of Certificate of Inspection for Vlora Restaurant, issued January 27, 2012, with a capacity of 180 persons;
 - D. Copy of M.G.L. chapter 138, "Definitions".

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

FACTS

1. Adagio, LLC, d/b/a Vlora, is the holder of a Seven Day Wine and Malt Beverages with Liqueurs License, (also known as a 'Cordials' license) under M.G.L. chapter 138, section 12. The licensed premises are located at 545 Boylston Street, Boston, Massachusetts, with a closing hour of 1:00 a.m. (Exhibit B)
2. The Local Board held a violation hearing on August 9, 2011. After the hearing the Local Board issued a four (4) day suspension against Adagio. The Local Board issued a one-day suspension for the overcrowding violation, and a three-day suspension for the violation of

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...serving hard alcohol, for a total of a four (4) day suspension.¹ Adagio timely appealed the Local Board's decision to the Commission. (Joint Pre-Hearing Memorandum, Exhibits 1,2,3,4)

3. On July 2, 2011, Boston Police Sergeant Robert Mulvey and Detective William Gallagher inspected the licensed premises and found it to be overcrowded. (Exhibits 2,3, Testimony)
4. Detective Gallagher and Sergeant Mulvey entered the establishment and observed that it appeared to be very crowded. Detective Gallagher stated that they inquired of the doorman as to the number of people on the premises and he informed them 207 patrons were inside the premises. They further asked the doorman what he knew the capacity of the premises to be, and he replied that he did not know. The capacity on the license was 138. (Exhibits 2, 3, Testimony)
5. Detective Gallagher testified that as they made their way through the establishment, they heard loud "dance music" and observed patrons to be holding and drinking what appeared to be "mixed drinks" and alcoholic beverages. He did not observe anyone eating food. (Exhibits 2, 3, Testimony)
6. Detective Gallagher also found the premises to be overcrowded as he observed so-called "hard alcohol" (a common name reference to distilled spirits) being stored behind the bar and also being sold or delivered to patrons. (Testimony)
7. Detective Gallagher testified that upon inspecting the license, he realized the licensee was not licensed to sell hard alcohol. Detective Gallagher stated that many of the patrons appeared to be drinking mixed drinks and upon inspecting the bar area, they observed hard alcohol on display and for sale. These twelve (12) bottles of alcoholic beverages were seized and were turned into the Property room at the Boston Police Area D-4 Station, and logged in as evidence. (Exhibits 2, 3, Testimony)
8. Detective Gallagher testified that they seized the following bottles (12) twelve bottles of hard alcohol: (Exhibits 2, 3, 4, Testimony)

2 bottles of Maker's Mark Bourbon;
1 Bottle of Canadian Club Whiskey;
1 Bottle of Pyrat Rum;
1 Bottle of Tru Gin;
1 Bottle of Pinnacle Vodka;
1 Bottle of Cupcake Vodka;
1 Bottle of Basil Bourbon;
1 Bottle of Kraken Rum;
1 Bottle of Fire Fly Bourbon;
1 Bottle of Cruzan Spiced Rum; and
1 Bottle of Cursoe Organic Rum.

¹ Adagio was also charged with a violation of "Having a Disc Jockey Operating in the Kitchen While Unlicensed" for which they received a 'warning'. The ABCC does not have jurisdiction over appeals from actions of a local board that are not "modifying, suspending, etc.", therefore, the Commission is not addressing this issue.

DISCUSSION

Pursuant to M.G.L. Ch. 138, section 67, “[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. United Food Corp v. Alcoholic Beverages Control Commission, 375 Mass. 240 (1978). 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. See, e.g. Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Com’n, 29 Mass. App. Ct. 954, 955 (1990) (rescript). 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 Corp. v. Alcoholic Beverages Control Commission, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

M.G.L. Ch. 138 gives the local board and commission the authority to grant, revoke and suspend licenses. Chapter 138 was “enacted to serve the public need and... to protect the common good.” M.G.L. Ch. 138, section 23, as amended through St. 1977, c.929, Section 7. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Board 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., 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 Commission, 11 Mass. App. Ct. 785, 788 (1981).

Overcrowding: General Laws Ch. 138, section 12, provides in pertinent part, that “[n]o license issued under this section shall be subject to any condition or requirement varying the occupancy of the licensed premises as certified by any person or state or local agency charged with the administration or enforcement of the state building code or any of its rules or regulations”. The Local Board argued, and the Commission finds, that, the Inspectional Services Department (“ISD”) is the building authority in the City of Boston which is allowed to set or assign an occupancy limit to the premises. The Local Board argued that ISD is the only agency authorized to assign an occupancy limit to the licensed premises. The capacity certified by ISD was 138 patrons at the time of the violation. The Commission heard evidence and finds that on the evening of the incident, there were 207 patrons inside the premises, and the legal capacity set by ISD at that time was 138.

The Licensee admitted that it was in excess of its posted capacity; however, the licensee argued that it was not overcrowded. The Licensee argued that the number of patrons that evening exceeded its posted capacity, but it submits that it was not overcrowded in a practical sense, meaning in a way that would compromise public safety or the safety of its guests. The Licensee argues that its theoretical capacity at the time of the incident, based upon square footage and other factors used to determine occupancy was 180 individuals.² After the date of this incident, the Licensee renovated the premises and subsequently applied to ISD to have its official capacity increased. The Commission is not persuaded and the Licensee did not furnish any legal authority to support its argument that subsequent curative action is a defense to a violation. At best, such subsequent curative action might mitigate the penalty to be imposed. But in this instance, based on these facts, the subsequent curative action did not eliminate the illegality by increasing the legal capacity to 207 persons or more. Based on the evidence before the Commission, the

² The licensee has since had its legal occupancy increased to 180 persons, which is the current legal capacity stated on Adagio’s 2012 Wines and Malt Beverages with Liqueurs license. (Exhibit B)

Commission finds that there were 207 patrons inside the establishment that evening, which exceeded both the capacity in existence on the evening of the violation (138 patrons), as well as the newly increased capacity (180 patrons). Therefore, the Commission finds that a violation was committed by the Licensee.

Sale and Delivery of Hard Alcohol (Distilled Spirits): Adagio possesses a Wines and Malt Beverages with Liqueurs license, otherwise known as a "Cordials" License. A "Cordials" License allows the Licensee to possess, deliver, and sell malt beverages, wines, and cordials or liqueurs, to be consumed on the premises. Each of these terms, "malt beverages", "wines", and "liqueur or cordial" is a term of art defined in section 1 of chapter 138 of the General Laws.³ This license does not allow the licensee to possess, serve, or sell hard alcohol or distilled spirits. Pursuant to M.G.L. Chapter 138, section 1 defines a "liqueur or cordial" as "all alcoholic beverages manufactured or produced by mixing or redistilling neutral spirits, brandy, gin or other distilled spirits with or over fruits, flowers, plants or pure juices therefrom, or other natural flavoring materials, or with extracts derived from infusions, percolations, or macerations of such materials and containing no less than two and one-half percent sugar by weight."

M.G.L. Chapter 138, section 30H states that "possession on the licensed premise by any licensee under this chapter of any alcoholic beverages or alcohol not authorized to be sold or used under the terms of his license shall be prima facie evidence that such beverage or alcohol is kept for sale in violation of this chapter." The Local Board argued that the Licensee, the holder of a wines and malt beverages and liqueurs license only, violated M.G.L. chapter 138, section 30H by possessing, selling, or delivering distilled spirits on the premises. The Licensee did not present any evidence that the products which it possessed and sold or delivered were in fact liqueurs or cordials as defined in chapter 138.

Adagio argued that they did not intentionally or knowingly purchase, stock, sell, or serve "hard liquor". Adagio argued that all alcoholic beverages at Adagio were obtained from a licensed wholesaler, Horizon Beverage, who was fully aware that Adagio possesses a beer, wine, and cordials license, and does not hold an all alcoholic beverages license. The Licensee offered as evidence in the hearing the invoices from Horizon Beverage⁴ for all of the alcoholic beverages at issue. The invoices herein directly state that "All Goods Sold Hereunder are intended to be resold in the regular course of business". The Licensee argued that determining whether or not a beverage constitutes a cordial or liqueur under this definition essentially requires knowledge of the manufacturing process of the beverage in question, and this information would only be available to the wholesaler or manufacturer. In other words, Adagio has no practical way, other than by relying on its wholesaler, to determine whether a product it seeks to buy from wholesalers and sell to consumers is liqueur or cordial within the meaning of chapter 138. According to the Licensee's argument, no restaurateur, Adagio included, could reasonably be expected to separate out the sugar in an alcoholic beverage and then weigh the two separate components. It is far beyond the capability of Adagio, or any other retailer to perform such a complicated - if it is even possible - chemistry experiment. Adagio argued that because the wholesaler allowed them to purchase the alcohol, the products must be allowed under their malt, wine and cordials license. The Licensee further argued that since the labels on the bottles of alcohol do not state that they do not contain fruits or flavorings making them cordials, it is impossible for anyone, other than the manufacturer, to make a determination as to whether or not they are, in fact, cordials.

³ Under the Massachusetts Liquor Control Act, General Laws chapter 138, there are four (4) classifications of alcoholic beverages; i) malt beverages, ii) wines, iii) liqueur or cordial, or iv) alcoholic beverages. If a particular product does not fall within one of the first three classifications ("malt beverages", "wines", or "liqueur or cordial") it falls into the general classification of "alcoholic beverages". This terminology runs throughout chapter 138 of the General Laws. See, e.g., M.G.L. c. 138, sections 11, 12, 15, 17, 18, 19, 19B, 19C, 19D, 19E, and 22.

⁴ The matter will be referred to the Commission's Investigative and Enforcement Division for investigation and appropriate action under M.G.L. c. 138, section 56.

The burden is on the Licensee to conduct its operations within the scope of the authority granted to it under its license. The law is well-settled that it is the responsibility of the Licensee 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, 7 Mass. App. Ct. 186, 190 (1979). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter. Rico's of the Berkshires, Inc., v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985) (rescript).

The Commission finds that Adagio did possess, serve, and sell hard alcohol/distilled spirits in violation of its cordials license. There was evidence that the Licensee was in possession of twelve (12) bottles of hard alcohol/distilled liquor. The Licensee admitted that these twelve (12) bottles were inside their premises and patrons were being sold and served distilled spirits. Adagio's argument that they did not knowingly violate the law, and that it was Horizon Beverage's fault because Horizon is the wholesaler which supplied the alcohol to Adagio, is a feeble excuse, and not persuasive to the Commission. Adagio is the holder of this license. The Commission reiterates that it is the Licensee's duty and responsibility, and NOT the responsibility of any other licensee or entity, to ensure that the alcoholic beverages laws of the Commonwealth are being complied with and adhered to at Adagio. Therefore, the Commission approves the action of the Local Board in finding that the Licensee was in violation of its license by possessing, serving, and selling hard alcohol on the premises in violation of its license to sell beer, wine, and cordials.

The Commission, after a hearing, finds that there was sufficient evidence presented that the premises was overcrowded, and that the Licensee possessed, served, and sold hard alcohol/distilled spirits in violation of its Cordials license. The Commission approves the action of the Local Board in finding that the Licensee committed these violations of M.G.L. chapter 138. The Commission approves the action of the Local Board in ordering a four (4) day suspension of the license.

CONCLUSION

The Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding the violation was committed by the Licensee. The Commission approves the action of the Local Board in **SUSPENDING** the License of Adagio for four (4) days. The penalty is a reasonable, if not generous, exercise of the Local Board's lawful discretion.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner

Kathleen McNally

Susan Corcoran, Commissioner

Susan Corcoran

Dated: October 16, 2012

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: Jean Lorizio, Esq.
Howard Wayne, Esq.
Licensing Board for the City of Boston
Frederick G. Mahony, Chief Investigator
Administration
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