

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

Steven Grossman
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

NOTICE OF SUSPENSION

October 16, 2012

BOSTON BALLROOM CORPORATION D/B/A ROYALE
279 TREMONT STREET
BOSTON, MA 02116
LICENSE#: 011600760
HEARD 2/07/2012

After a hearing on February 7, 2012 the Commission finds Boston Ballroom Corporation d/b/a Royale in violation of 204 CMR 2.05 (2), to wit: M.G.L. c. 138 §69 (2 counts).

The Commission **suspends the licensee's license for a total of nine (9) days to be served. The suspension shall commence on Wednesday, November 28, 2012 and terminate on Thursday, December 6, 2012.** The license will be delivered to the Local Licensing Board or its designee on Wednesday, November 28, 2012 at 9:00 A.M. It will be returned to the licensee Friday, December 7, 2012.

You are advised that pursuant to the provisions of M.G.L. c.138 §23, you may petition the Commission to accept an offer in compromise in lieu of suspension within twenty (20) calendar days following such notice of such suspension. If accepted, you may pay a fine using the enclosed form. All checks must be certified and accompanied by the enclosed form, which must be signed by a Massachusetts Licensed Accountant.

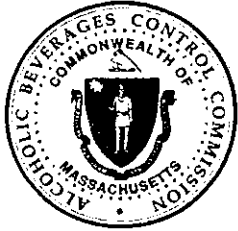
You are advised that you have the right to appeal this decision under M.G.L. c. 30A to Superior Court within thirty (30) days upon receipt of this notice.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro
Chairman

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Dennis Keefe, Investigator
Evan T. Lawson, Esq., via facsimile
Administration
File

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

Steven Grossman
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DECISION

BOSTON BALLROOM CORPORATION D/B/A ROYALE
279 TREMONT STREET
BOSTON, MA 02116
LICENSE#: 011600760
HEARD 2/07/2012

Boston Ballroom Corporation d/b/a Royale (the "Licensee") holds an all alcohol license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, February 7, 2012, regarding an alleged violation of 204 CMR 2.05 (2), to wit: M.G.L. c. 138 §69 (2 counts) which occurred on October 29, 2011 according to Investigator Keefe's Investigative Report.

The following exhibit is in evidence:

1. Investigator Keefe's Investigative Report dated October 29, 2011.

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

FACTS

1. On Friday, October 29, 2011 at approximately 11:40 p. m., Chief Investigator Mahony with Investigators Bailey, Kujawski, and Keefe investigated the business operation of Boston Ballroom Corporation d/b/a Royale to determine the manner in which their business was being conducted.
2. Investigators Baily and Keefe entered the licensed premises and proceeded to the bar area located in the rear, on the right side of the establishment.
3. Investigators observed a male and a female patron standing next to a table which was located to the left of the rear bar.
4. Investigators observed the female patron was swaying from side to side, and at times she needed to hold onto the male patron to maintain her balance.
5. Investigators observed that the male patron was also slightly unsteady on his feet.
6. At approximately 12:08 a.m., investigators observed the male patron, (later identified as Mr. Gerald Thetrioult, from Derry, New Hampshire), and a female patron, (later identified as Ms. Amanda Kawa from Danielville, New Hampshire), approach the bar to order drinks.
7. Investigators observed that Mr. Thetrioult, while ordering drinks, had difficulty removing his wallet from his back pocket. On his second attempt, he was able to remove his wallet from his back pocket, and took out a twenty (\$20) dollar bill.
8. Mr. Thetrioult ordered drinks from a female bartender with dark hair.

9. Investigators observed the female bartender deliver two (2) glasses, believed to contain a mixture of cranberry juice and vodka.
10. Mr. Thetrioult and Ms. Kawa proceeded back to stand next to the table at which they had been standing.
11. Investigator Keefe alerted Chief Investigator Mahony of the possible violation.
12. Investigators then observed Mr. Thetrioult, Ms. Kawa, and another female patron walk directly past them towards the restrooms.
13. Investigators observed Ms. Kawa swaying from side to side and having to hold onto the other female patron to maintain her balance.
14. Investigators observed Mr. Thetrioult and Ms. Kawa return from the restrooms and proceed to the dance floor.
15. Investigators Keefe and Bailey proceeded to the front of the licensed premises to find Investigator Kujawski and Chief Investigator Mahony, who were speaking to the manager of record, Mr. Brig Dauber.
16. Chief Investigator Mahony informed Mr. Dauber of the condition of two (2) individuals, Mr. Thetrioult and Ms. Kawa.
17. Investigators identified these two (2) individuals to staff members, and Mr. Thetrioult and Ms. Kawa were brought to the front of the licensed premises.
18. In a slightly slurred voice, Mr. Thetrioult said "he is sorry for any inconvenience he caused" several times to investigators.
19. Investigators determined that Mr. Thetrioult and Ms. Kawa arrived at the licensed premises on a party bus, and that they would leave on the same bus.
20. Investigators determined that they would be provided safe transportation home.
21. Investigators and staff members escorted Mr. Thetrioult and Ms. Kawa to the bus which was downstairs, and outside of the licensed premises.
22. While walking down the stairs, Ms. Kawa lost her balance and needed to be assisted by the staff members.
23. Investigators informed Mr. Brig Dauber, the manager of record, and Mr. Lou Delpidio, one of the owners, of the violation, and that a report would be submitted to the Commission for further review.
24. Investigators thanked Mr. Brig Dauber and the staff members for their cooperation, and left the licensed premises without incident.

DISCUSSION

Massachusetts General Law chapter 138, section 69 provides that "[n]o alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person". To prove a violation of M.G.L. Ch. 138, section 69, there must be proof of four elements:

1. In or on a licensed premises;
2. a visibly intoxicated person;
3. was sold or delivered;
4. an alcoholic beverage.

To prove this violation there must be evidence that the licensee served alcohol to an individual when it knew or should have known that he was intoxicated. See Bennett v. Eagle Brook Country Store, Inc., 408 Mass. 355, 358 (1990); Cimino v. Milford Keg, Inc. 385 Mass. 323, 327 (1982).

Massachusetts' courts have held that negligence cases provide "some guidance" as to what must be proven "to show a violation of the statute [G.L. Ch. 138, s.69]." Ralph D. Kelly, Inc. v. ABCC, Middlesex Superior Court C.A. No. 99-2759 (McEvoy, J.) (May 23, 2000) cited in Royal Dynasty, Inc. v. ABCC, Suffolk Superior Court C.A. No. 03-1411 (Billings, J.) (December 9, 2003). The Superior Court

has also held that to prove a claim of negligent service to an intoxicated person, evidence must be presented that a license holder sold or delivered alcoholic beverages to a person at a time when a reasonable person in the position of that defendant would have known that [the patron] was intoxicated. See Bennett v. Eagle Brook Country Store, Inc., 408 Mass. 355, 358 (1990); Cimino v. The Milford Keg, Inc., 385 Mass. 323, 327 (1982). To meet that burden, "a plaintiff must come forward with some evidence that the patron's intoxication was apparent at the time he was served by the defendant [emphasis added]." Douillard v. LMR, Inc., 433 Mass. 162, 164-165 (2001). "The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication." Vickowkki v. Polish American Citizens Club, 422 Mass. 406, 610 (1996), and cases cited.

In this case we have undisputed proof that two individuals (Mr. Thetrioult and Ms. Kawa) were inside a licensed premises. We also have persuasive evidence in the testimony of Investigator Keefe that a sale and delivery occurred. Investigator Keefe testified that he observed the patrons, Mr. Thetrioult and Ms. Kawa, approach the bar. He observed Mr. Thetrioult order drinks from a female bartender with dark hair. He then observed the patron, Mr. Thetrioult, take money out of his wallet. Investigator Keefe testified that he observed the bartender deliver two (2) glasses to the patrons. There is also persuasive evidence that the two individuals displayed visible signs of intoxication.

The licensee, Boston Ballroom Corp., d/b/a Royale, presents two arguments that a violation of M.G.L. Chapter 138, section 69 did not occur.

First, the licensee puts forth its argument that there is no evidence presented that the bartender knew, or should have known, that the patrons were intoxicated inside the premises. Investigator Keefe testified that he observed the female patron (Ms. Kawa) swaying from side to side, and at times she needed to hold onto the male patron (Mr. Thetrioult) to maintain her balance. He also testified that Investigators observed that Mr. Thetrioult was also unsteady on his feet. He watched Mr. Thetrioult and Ms. Kawa approach the bar to order drinks. He observed that Mr. Thetrioult, while ordering drinks, had difficulty removing his wallet from his back pocket, and had to make two (2) attempts to remove it successfully.

He then observed Mr. Thetrioult, Ms. Kawa, and another female patron walk directly past him towards the restrooms. He also observed Ms. Kawa swaying from side to side, and having to hold onto the other female patron to maintain her balance. Mr. Thetrioult and Ms. Kawa were observed returning from the restrooms and proceeding to the dance floor.

Investigator Keefe further testified that Mr. Thetrioult spoke in a slightly slurred voice to the Investigators.

The Commission finds that there is sufficient evidence presented that both patrons exhibited visible, generally recognized, signs of intoxication, and finds that the bartender knew, or should have known, that these patrons were intoxicated.

The second argument presented by the licensee is that the evidence is not established there was alcohol in the two (2) glasses served to both patrons. Investigator Keefe testified that he observed patron, Mr. Thetrioult, order drinks from the female bartender with dark hair. He testified that he observed the same female bartender deliver two (2) glasses to the patron. Investigator Keefe testified at the hearing on this matter that the two (2) patrons, Mr. Thetrioult and Ms. Kawa, admitted to him that they were drinking vodka and cranberry juice.

The law is well-settled that it is the responsibility of the licensee is 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). By regulation, it is illegal for a licensee to substitute alcoholic beverages ordered by a consumer. 204 CMR 2.07 ("The substitution of any alcoholic beverages of a kind or brand different from that ordered by a purchaser is prohibited unless it is done with the consent of the person or licensee making the purchase.") The two intoxicated patrons admitted to drinking alcoholic beverages identical to those observed by the investigator to be sold. The licensee thus argues that it is not guilty of violating a prohibition against serving alcoholic beverages because it substituted non-alcoholic beverages for an alcoholic beverage ordered and paid for by a patron. This argument is not persuasive to the Commission.

The Commission finds that given the evidence and the testimony presented during the course of the hearing that the bartender knew, or should have known, that this patron was intoxicated. The Commission finds that these patrons were obviously intoxicated and the licensee's employee served them alcoholic beverages. The Commission finds that there were violations of M. G.L. c. 138 §69.

CONCLUSION

Based on the evidence, the Commission finds the licensee violated 204 CMR 2.05 (2), to wit: M.G.L. c. 138 §69 (2 counts). Therefore, the Commission **suspends the license for a period of seven (7) days with four (4) days to be served and three (3) days to be held in abeyance for a period of two (2) years, provided no further violations of Chapter 138 or Commission Regulations occur.**

By decision dated May 4, 2011, the Commission had previously ordered a five (5) day suspension, which was to be held in abeyance for a period of two (2) years provided no further violations occurred. Based on the violation found above, the licensee violated the conditions of that five (5) day suspension being held in abeyance. The Commission hereby orders that suspension to be served on and after the four (4) day suspension. The licensee will serve a total nine (9) days.

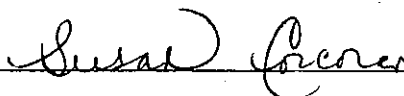
ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Susan Corcoran, Commissioner



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: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Dennis Keefe, Investigator
Evan T. Lawson, Esq., via facsimile
Administration
File