



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

CRUDO NORTH END, LLC, D/B/A CRUDO
78-80 SALEM STREET
BOSTON, MA 02113
LICENSE#:011601886
VIOLATION DATE: 10/05/2015
HEARING DATE: 05/03/2016

Crudo North End LLC d/b/a Sushi Rock (the "Licensee" or "Crudo") holds an alcohol license issued pursuant to M.G.L. c. 138, § 12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, May 3, 2016, regarding alleged violations of:

- 1) 204 CMR 2.01 (7): All applications for licenses and permits shall be made upon blanks furnished by the licensing authorities, shall be fully answered in detail and shall be typewritten or legibly written in ink.
- 2) 204 CMR 2.01 (8): All applications shall be made under the penalties of perjury and any false statement contained in any application shall be a cause or ground for refusing to grant the license or permit or for suspending, cancelling or revoking a license or permit already granted.

The above captioned occurred on October 5, 2015 according to Investigator Egan-Bailey's Report.

The following documents are in evidence:

1. Investigator Egan-Bailey's Report, 10/05/2015;
2. Sushi Rock LLC Approved Transfer Application, 11/26/2014;
3. Broad Street Entertainment LLC Approved Transfer Application, 09/08/2015;
4. Personal Information Forms for S. Spang and N. Leo 2004 Irrevocable Trust; and
5. Worcester REO Services LLC Registration for a Foreign LLC Application, 06/15/2015.

A. Letter from Attorney Toscano dated 03/22/2016 with Attached Documents.

The Commission took administrative notice of the Licensee's record.

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

FINDINGS OF FACT

1. Crudo North End, LLC d/b/a Crudo is a § 12 wine, malt beverages, and cordials licensee with a place of business at 78-80 Salem Street, Boston, Massachusetts. (Exhibit 1, Commission File)
2. On November 26, 2014, the Commission approved an application to transfer a § 12 wine, malt beverages, and cordials license to Sushi Rock LLC ("Sushi Rock Application"). (Commission File, Exhibit 1)
3. On June 17, 2015, the Commission approved a change of corporate name and d/b/a from Sushi Rock, LLC d/b/a Sushi Rock to Crudo North End LLC d/b/a Crudo ("Crudo Application"). (Commission File, Exhibit 1)
4. At an informational hearing on August 11, 2015, regarding another licensing matter, a transfer of a license to Broad Street Entertainment, LLC ("Broad Street Application"), which involved the same owners as Sushi Rock/Crudo, the Commission learned that the Licensee had not made certain disclosures, both on the Broad Street Application and in the Sushi Rock Application. (Commission File, Exhibit 1)
5. On both the Broad Street Application and the Sushi Rock Application, the Application listed those individuals/entities with beneficial interests as follows (Exhibits 1, 2):
 - a. NAL 2004 IRR Trust, Member, 33.3% ownership;
 - b. Worcester REO Services, LLC, Member, 33.3% ownership;
 - c. Jeffrey L. Delpidio, Member, 33.3% ownership;
 - d. Nicholas A. Leo, Manager, 0% ownership, "sole member of NAL 2004 IRR Trust"; and
 - e. Nicholas J. Fiorello, "beneficiary," 0% ownership, "sole member of Worcester REO Service."¹
6. As it relates specifically to the Sushi Rock Application, the Licensee failed to disclose the following:
 - a. the Licensee did not provide any trust documents, and the NAL 2004 IRR Trust disclosure failed to disclose an additional trustee, Stephen D. Spang, and no Personal Information Form for Mr. Spang was submitted (Exhibit 1, 2, 3);
 - b. Worcester REO Services, LLC, a foreign limited liability company, had failed to register with the Secretary of the Commonwealth. After the investigator notified counsel for the application, an Application of Registration for a Foreign Limited Liability Company was filed with the Secretary of the Commonwealth on June 15, 2015 (Exhibits 1, 5);

¹The Broad Street Application was almost identical, except it did not state that Mr. Leo was the "sole member of NAL 2004 IRR Trust" or that Mr. Fiorello was the "sole member of Worcester REO Service." (Exhibit 3)

- c. the applicant left § 11 of the application, which asked whether any individual with a beneficial interest held an interest in any other alcohol license, blank, yet went on to list interests in three other licenses (Exhibits 1, 2);
 - d. the applicant did not disclose in § 12 of the application, which asked whether any individual with a beneficial interest had previously held a beneficial interest in another license, Jeffrey Delpidio as having had a previously held interest in a license (Exhibits 1, 2, 3); and
 - e. in answering § 13 of the application, which requires disclosure of previous license disciplinary action, the applicant indicated “yes” and “see attached,” but nothing was attached to the application regarding § 13 (Exhibits 1, 2).
7. Upon the investigator’s request at the Broad Street Application informational hearing, the Licensee provided requested documentation, including trust documents, to the Commission. It never updated its application or paperwork with the Commission regarding the Sushi Rock Application. (Testimony, Exhibits 1, 2)

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975). The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in Chapter 138.

Chapter 138 gives the 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. c. 138, § 23. “[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) (emphasis supplied). The Commission is given “comprehensive powers of supervision over licensees.” Connolly, 334 Mass. at 617.

Every violation the Commission finds 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, 710 (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).

Based on the five omissions listed in the Findings of Fact ¶ 6(a)-(e), supra, the Licensee is charged with violations of 204 CMR 2.01(7) and 204 CMR 2.01(8). The Licensee, through its counsel, admitted that it had made all five of these omissions, but that they were inadvertent and unintentional. In support of its position, it argued that any time Investigator Egan-Bailey requested additional documents, the Licensee complied immediately, and that the Commission could infer that there was no bad faith because none of these omissions, if they had been included in the application, would have required rejection of its application.

204 CMR 2.01(7)

The first charge against the Licensee is for a violation of 204 CMR 2.01(7):

204 CMR 2.01(7): All applications for licenses and permits shall be made upon blanks furnished by the licensing authorities, shall be fully answered in detail and shall be typewritten or legibly written in ink. Applications written in pencil, in whole or in part, will not be accepted.

The Licensee has admitted to facts supporting a finding that the Licensee did not comply with this Regulation because it did not fully answer all the questions on the application. However, while the Commission finds that the Licensee did not comply with this Regulation, this Regulation was intended to address not the content of an application, but rather provide required formatting, transcription, and scrivener's rules and procedures pursuant to which an application will be accepted by a local board and the Commission. The proper sanction for failing to comply with this Regulation is not an action against the license itself, but rather rejection of the pending application before the local board and/or the Commission. See, e.g., S.D.R. Management Corp. d/b/a AA Restaurant, Framingham (ABCC Decision July 1, 2009) ("The Local Board denied the application for failure to comply with M.G.L. Ch. 138 s.15A and 204 CMR 2.01 (7) and (8) in that the Board found the applicant did not fully answer Section 14 on the application form"). Accordingly, the Commission finds no violation against the Licensee's license for failure to comply with this Regulation.

204 CMR 2.01(8)

The Licensee is also charged with violating 204 CMR 2.01(8):

204 CMR 2.01(8): All applications shall be made under the penalties of perjury and any false statement contained in any application shall be a cause or ground for refusing to grant the license or permit or for suspending, cancelling or revoking a license or permit already granted.

In order to violate this Regulation, an applicant must not only make a false statement on its application, but it must be willfully false on a material matter. See, e.g., M.G.L. c. 268, § 1A ("Whoever signs and issues such a written statement containing or verified by such a written declaration [that the statement is being made under the penalties of perjury] shall be guilty of perjury and subject to the penalties thereof if such statement is willfully false in a material matter"); accord McDonough, Gerald, Massachusetts Practice: Administrative Law and Practice, § 4:11 (July 2016); Charles River Distrib. Corp., Randolph (ABCC Decision December 19, 1994) ("While a material misstatement in an application is serious and is a basis for denying an application, a denial is not compelled. It is the opinion of the Commission that given there is no evidence indicating an attempt to deceive . . . the applicant is of sufficient character and fitness to hold this license").

The Licensee has admitted that it failed to make full disclosures on material matters, specifically who exactly owns the license, within its application. However, the Commission must determine whether these failures to disclose were made willfully, and it finds that they were not. Counsel for the Licensee admitted at the hearing that he should have updated the Sushi Rock Application that had been approved by the Commission when he became aware of the omissions on that Application

at the informational hearing on the Broad Street Application. The Commission accepts counsel's representation that the fault was his own, and not the Licensee's. Failure to include these disclosures was an oversight by the Licensee's counsel, and not a willful failure to disclose material information by the Licensee. The Commission therefore finds no violation of 204 CMR 2.01(8).

However, the Commission cautions the Licensee that while the Commission accepts counsel's acceptance of responsibility for these failures to disclose on the Sushi Rock Application, should there be similar charges in the future, these Sushi Rock Application failures to disclose may in fact establish a pattern of willfulness on the Licensee's part to falsify material information on an application before the Local Board and/or the Commission in violation of 204 CMR 2.01(8) and M.G.L. c. 268, § 1A. "The Commission warns the licensee that any future applications will be reviewed pointedly given the conduct of the [applicants] in this application." Margaret's Restaurant Inc. d/b/a Hokey's, Oxford (ABCC Decision July 12, 2005).

CONCLUSION

Based on the evidence, the Commission finds no violation of 204 CMR 2.01(7) and no violation of 204 CMR 2.01(8).

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Elizabeth A. 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: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Rose Egan Bailey, Investigator
Daniel Toscano, Esq. via facsimile 617-933-1413
Administration, File