

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

GM RESTAURANT ENTERPRISES, INC. DBA RESTAURANTE BAR LA TERRAZA
19 BENNINGTON STREET
BOSTON, MA 02128
LICENSE#: 011600063
HEARD: 01/25/2012

This is an appeal of the action of the Boston Licensing Board (the "Local Board") in suspending the M.G.L. c. 138, §12 wine and malt beverages license (together with a cordials and liqueurs permit) of GM Restaurant Enterprises, Inc. dba Restaurante Bar La Terraza (the "Licensee" or "La Terraza"). On May 5, 2011, the Local Board held a hearing that resulted in a two (2) 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 January 25, 2012.

The following documents are in evidence:

Exhibits

1. Pre-Joint Hearing Memorandum dated January 24, 2012 (10 pages);
2. Local Board Hearing Notice dated April 4, 2011 (4 pages);
3. Local Board Hearing Notice dated November 22, 2010 (3 pages);
4. Local Board Statement of Reasons dated August 31, 2011 (3 pages); and
5. Local Board Docket Sheet (4 pages).

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

FACTS

1. La Terraza is the holder of a C. V. Seven (7) Day Malt Beverages and Wine, and Cordials license with a closing hour of 1:00 A.M. The licensed premises is located at 19 Bennington St, East Boston, MA. The Licensee has owned and operated the licensed premises since 2004. Exs. 1,5
2. On September 24, 1997, the Local Board voted to approve a petition to transfer this license to Humberto Grajales (the previous licensee), which was thereafter approved by the Commission on October 31, 1997. At the time the license was transferred, the Local Board imposed two (2) conditions. The first required that the licensed premises not



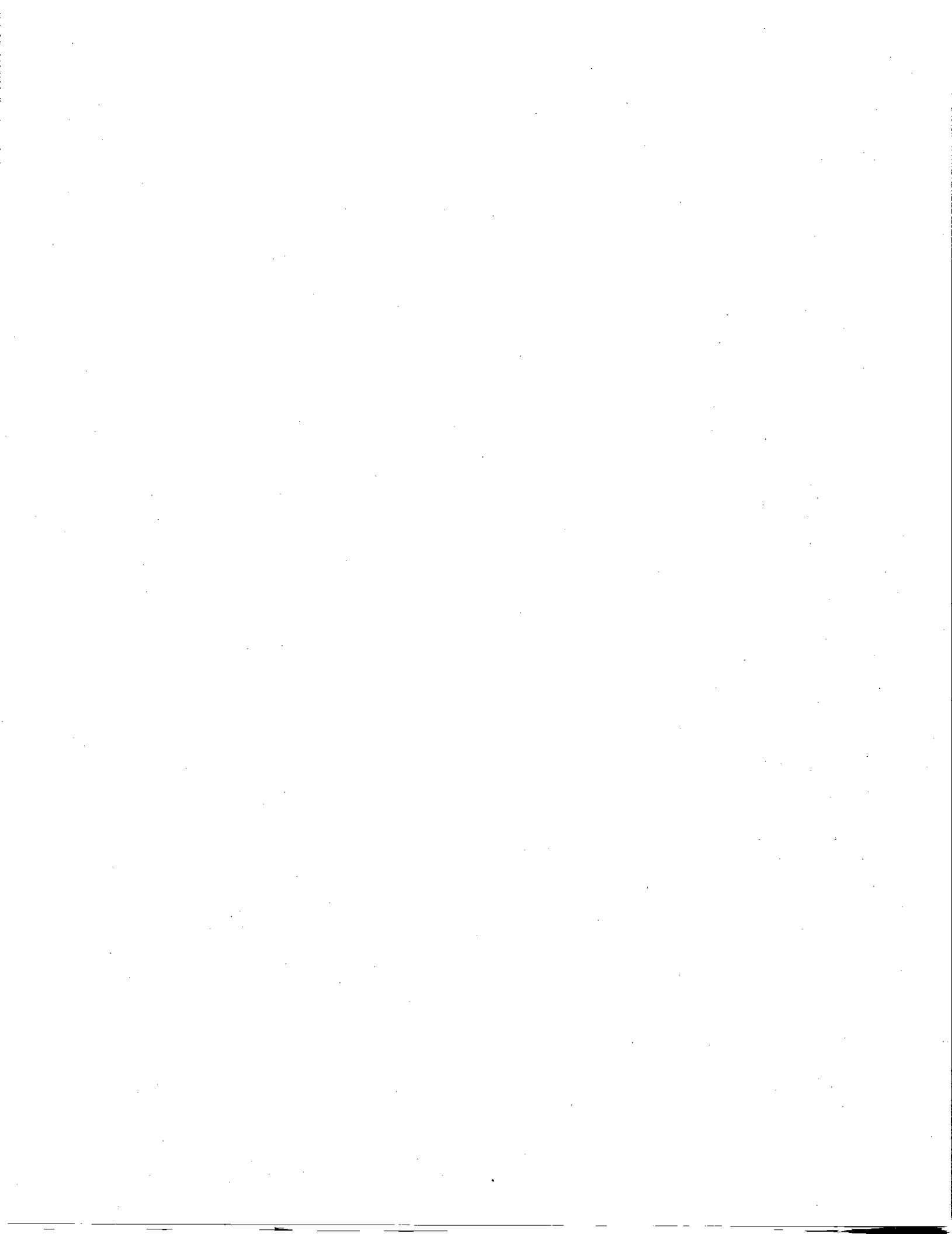
operate a bar, and the second required the licensee to serve alcoholic beverages with food only. Ex. 5

3. Both of those requirements were accepted by Mr. Grajales as terms and conditions to operate his license, were emblazoned on the license, and have run with the license ever since. Ex. 5, testimony.
4. On February 4, 2004, the Local Board voted to grant the petition to transfer the license from Huberto Grajales to La Terraza, the current licensee, which was thereafter approved by the Commission on September 16, 2004. At the time, the Local Board voted to approve the petition with the aforementioned "existing conditions to remain." Ex. 5
5. Both of those requirements were accepted by La Terraza as terms and conditions to operate its license, are emblazoned on the license, and continued to run with the license on March 15, 2011. Ex. 5, Testimony
6. On March 15, 2011, at approximately 12:30 a.m., Lieutenant Christopher Hamilton of the Boston Police Department conducted an inspection of the licensed premises and observed a bar on the second floor. Ex. 2
7. Lt. Hamilton observed about eight (8) to ten (10) patrons standing at the bar drinking and being served at the bar. Ex. 2, testimony
8. The bar is a wooden L-shaped bar. Exs. 1, 2
9. There are shelves behind the bar that display bottles of alcohol, and there are coolers behind the bar that are used to store beer. Ex. 2
10. During the hearing Ramiro Villada, testified that no bar stools remain at the bar, and no patrons drink alcoholic beverages at the bar. He also admitted that patrons and wait staff ordered and were served alcoholic beverages at the bar. Testimony

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. 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 Appeals 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 Comm'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 Comm'n, 29 Mass.App.Ct. 954, 955 (1990) (rescript).

"The provisions for the issue of licenses and permits hereunder imply no intention to create rights generally for persons to engage or continue in the transaction of the business authorized by the licenses or permits respectively, but are enacted with a view only to serve the public need and in such a manner as to protect the common good and, to that end, to provide, in the opinion of the licensing authorities, an



adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made." M.G.L. c. 138 §23. As such, the local licensing authority is permitted to impose reasonable requirements on a licensee regarding the operation of their business.

In this case, the Local Board required the licensee not to operate a bar. This condition was existing and remained imposed when the licensee purchased the license. It was stamped on the license as a condition of the licensee, and the licensee accepted the terms of the license when it began operating the licensed premises. Moreover, the licensee acknowledged that it knew about the conditions and had been cited just three (3) months prior for the same violation.

At hearing before the Commission, the Local Board submitted Lt. Hamilton's police report. La Terraza argued that this report is hearsay, should not be admitted into evidence, and should not be considered by the Commission as evidence on the issue of the alleged illegality. For the reasons stated herein, the Commission rules that the police report is admissible and may be relied upon for the truth of the matters stated therein.

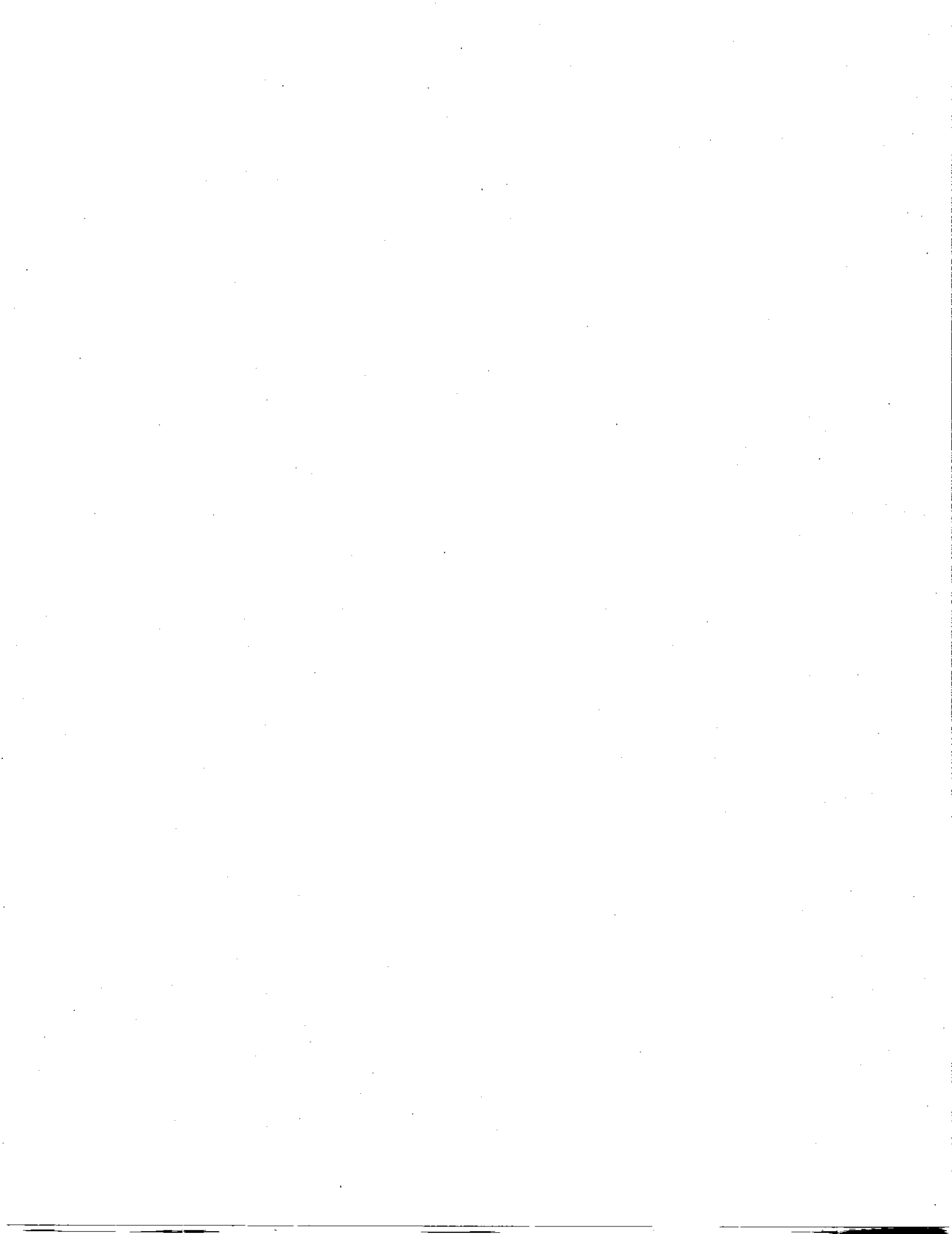
The Commission finds that Lt. Hamilton's report, while hearsay, and is inherently reliable. See Commonwealth v. Durling, 407 Mass. 108 (1990). Lt. Hamilton's report has substantial indications of reliability. Lt. Hamilton's report contains detailed factual recitations of observations made personally by Lt. Hamilton, not general statements or conclusions.

The Commission finds that the statements by Mr. Villard regarding service of alcoholic beverages to wait staff and patrons at the "bar" that night are both admissible and credible because they are admissions by a party opponent. As the Supreme Judicial Court found in Durling, the Commission finds in this case that, as to Lt. Hamilton's police report, "the factual detail is indicative of reliability. [citation omitted]." As the Supreme Judicial Court noted in Durling, the Commission notes in this case that, "it is a crime for police officers to file false reports. M.G.L. c. 268, § 6A." The Commission finds that the police report in the instant case is distinguishable from the non-eyewitness reports that are not inherently reliable as discussed and reviewed in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass.App.Ct. 470, 473-476 (1989) cited in Dolphino Corp. v. Alcoholic Beverages Control Com'n, 29 Mass.App.Ct. 954, 955 (1990) (rescript).

Whenever, in the opinion of the commission, any holder of a license or permit originally issued by it fails to maintain compliance with the requirements of this chapter, or any other reasonable requirements which it may from time to time make with respect to any such license or permit or to the conduct of business by any such licensee or permittee, it may, after hearing or opportunity therefor, modify, suspend, revoke or cancel such license or permit. Id. (emphasis supplied). The licensee did not argue that the conditions imposed were unreasonable or that it did not have notice of the conditions. Moreover, the licensee admitted that bartenders were pouring alcoholic beverages at a structure on the second floor and serving them to patrons and wait staff. As such, the licensee was using the structure on the second floor as a bar in violation of the conditions of its license.

CONCLUSION

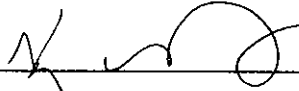
Based on the evidence and testimony at the hearing, the Commission APPROVES the action of the Boston Licensing Board in finding that GM Restaurant Enterprises, Inc. dba La Terraza violated the conditions of its license imposed by the Board pursuant to Massachusetts General Laws c. 138, §23 and §64.



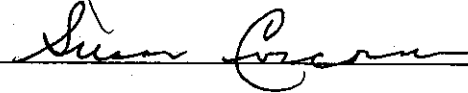
The Commission also APPROVES the action of the Boston Licensing Board in suspending the license of GM Restaurant Enterprises, Inc. dba La Terraza for two (2) days as this is a reasonable exercise of the Local Board's lawful discretion.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

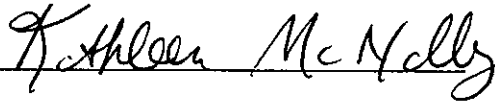
Kim S. Gainsboro, Chairman



Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated: February 8, 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
Michael W. Ford, Esq.
Administration
File

