

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

Steven Grossman
Treasurer and Receiver General

DECISION

Kim J. Gainsboro, Esq.
Chairman

183 STATE STREET, INC. DBA GOODBAR
183 STATE ST.
BOSTON, MA 02114
LICENSE#: 011600710
HEARD: 11/07/2012

This is an appeal of the action of the City of Boston Licensing Board ("Boston" or "Local Board") in suspending the M.G.L. c. 138, §12 all alcohol beverages license of 183 State Street, Inc. d/b/a Goodbar (the "Licensee" or "Goodbar") for three (3) days for the violations of sale of an alcoholic beverage to a minor; failure to properly inspect identification; and allowing a beer pong drinking game on the premises. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, November 7, 2012.

The following documents are in evidence as exhibits:

1. Joint Pre-hearing Memorandum;
2. Local Board's Decision and Statement of Reasons dated February 28, 2012;
3. Local Board's Vote and Hearing Memorandum for Hearing held December 13, 2011;
4. Boston Police Department Violation Notice no. 29987 dated November 19, 2011; and
5. Boston Police Department Incident Report no. 110633564 dated November 19, 2011.

There is one audio recording of this hearing.

FACTS

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

1. The Licensee, 183 State Street, Inc. d/b/a Goodbar, holds a Common Victualler 7-day all alcoholic beverages license, with a 2:00 a. m. closing hour at 183 State Street, Boston, Massachusetts. (Exhibits 1,2,3, Commission records)
2. Detective William Gallagher of the Boston Police Department appeared and testified at the Commission hearing. On November 19, 2011, at approximately 1:20 a. m., he and Boston Police Sergeant Robert Mulvey inspected the licensed premises. Detective Gallagher observed a youthful looking female patron drinking from a glass containing draft beer. Detective Gallagher also observed patrons playing a game of what he knows as "beer pong". (Exhibits 1, 4, 5, Testimony)
3. Detective Gallagher approached the female, identified himself as a police officer, and asked the female who was drinking the beer, to produce identification to show the Detective proof of her

age. (Exhibits 2, 5, Testimony)

4. The youthful looking female stated to Detective Gallagher that she did not have any identification on her. She admitted to Detective Gallagher that she used a fraudulent Connecticut license to gain entrance into the licensed premises, but she no longer had the Connecticut license in her possession. (Exhibit 5, Testimony)
5. Detective Gallagher was able to determine that the underage female was actually nineteen years old, with a date of birth of December 18, 1991. The underage female stated to Detective Gallagher that her friends (whom she admitted to the Officer, were also under twenty-one years of age) were in possession of the fraudulent Connecticut license. However, her friends left the premises when they saw the Officers enter. (Exhibits 2, 5, Testimony)
6. Once inside the premises, Detective Gallagher also observed a game of "beer pong" being played by several patrons. He observed plastic cups filled with water at both ends of a table. He watched the patrons taking turns bouncing a ping pong ball in an attempt to land the ball inside a cup on the opposite side of the table. He observed one of the patrons bounce the ping pong ball into a cup, and then saw a patron at the same end of the table "shoot down" or "chug" his beer down. This "beer pong" game continued throughout the entire time Detective Gallagher was inside the establishment. All of the patrons surrounding the table were in possession of a beer, and that each patron drank from their beer every time they lost at this game. (Exhibits 2, 5, Testimony)
7. The licensee's manager, Ms. Ann Marie King testified that the Licensee presently does not allow the "pong" game at their establishment, and has not allowed it since the Licensee received a notice of violation for this incident. Ms. King testified that they had previously allowed the game, with cups of water at both ends of a table that the Licensee's employees would set up. (Testimony)
8. Employees of Goodbar would set up the table and cups, free of charge, along with a pitcher of water. The employees would then set aside an area for the patrons to play the game. The manager, Ms. King, testified that this game was dissimilar to "beer pong" since this game used water instead of beer. (Testimony)
9. Ms. King stated that the patrons did not "chug" beer, but rather, the patrons each drank from the beverage in their possession. (Exhibit 2, Testimony)
10. The licensee, Mr. Henry Vara, Jr., testified before the Commission that he does not encourage, nor does he permit the game of "beer pong" to be played inside his establishment. He stated that he has never condoned this type of bar game, and that the game which is being played at his establishment is similar in nature to darts, or ring toss. (Exhibit 2, Testimony)
11. Mr. Vara stated that as a result of this game being discontinued, he has lost a lot of revenue. He stated that many establishments in the area set up these games due to their popularity. (Testimony)
12. Mr. Vara testified that he does not encourage the game by pushing drinks or setting up drinks at the table. He did acknowledge, however, that his employees set up the table for the game, free of charge, with water and cups. (Exhibit 2, 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 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).

The Commission addresses the three alleged violations that were specified in the Notice of Hearing, discussed at the Local Board hearing, and specified in the Local Board’s written statement of reasons issued by the Local Board.

Violation 1: Massachusetts General Laws chapter 138, §34 provides, in part, that “[w]hoever makes a sale or delivery of any alcoholic beverage or alcohol to any person under 21 years of age, either for his own use or for the use of his parent or any other person, ... shall be punished.” The Appeals Court has stated that “the purpose of the statute [is] to protect the welfare of children from the danger of alcohol,” see Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 133-134 (1996).” Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass.App.Ct. 663, 664, 700 N.E.2d 843, 845 (1998). This public policy of the Commonwealth prohibiting the sale or delivery of alcoholic beverages to persons under the age of 21 years old (commonly referred to as “minors” for the purpose of the Liquor Control Act) has been characterized as “strongly paternalistic.” Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 136, 661 N.E.2d 627, 634 (1996); In Re: Alan C. Dinh d/b/a Juliano’s Beer & Wine, Quincy (ABCC Decision April 8, 2005.)

At the hearing before the Commission, the Local Board submitted the Violation Notice (Exhibit 4) and the Incident Report (Exhibit 5). For the reasons stated herein, the Commission rules that the police report may be relied upon for the truth of the matters stated therein.

The Commission finds that the police report, while hearsay, is inherently reliable. See Commonwealth v. Durling, 407 Mass. 108, 551 N.E. 2d 1193 (1990). The police report has substantial indications of reliability. The report contains detailed factual recitations of observations made personally by the reporting police officer, Detective Gallagher, who testified at the Commission hearing. The report does not contain general statements or conclusions. The report details observations made at the scene of the alleged incident inside the licensed premises, which was the subject of an unannounced inspection. According to the report, the under-age individual admitted drinking that night to Detective Gallagher. He testified that he witnessed the underage patron drinking an alcoholic beverage while inside the premises. He also testified that he spoke to the underage patron while inside the establishment and he determined that she was under the legal drinking age of twenty-one, and that in fact she was only nineteen years of age.

The Commission finds that the admissions in the licensed premises by the nineteen year old, to consuming alcoholic beverages that night, are both admissible and credible because they are statements against penal interest. M.G.L. c. 138, § 34B (“[a]ny person in a licensed premises shall, upon request of an agent of ... the local licensing authorities, state his name, age, and address. Whoever, upon such request, refuses to state his name, age or address, or states a false name, age, or address, including a

name or address which is not his name or address in ordinary use, shall be guilty of a misdemeanor."); and M.G.L. c. 138, § 34C ("[w]hoever, being under 21 years of age and not accompanied by a parent or legal guardian, knowingly possesses ... any alcohol or alcoholic beverages, shall be punished."); See Commonwealth v. Dew, 443 Mass. 620, 823 N.E.2d 771 (2005). No evidence was offered by the licensee to suggest that these admissions by the nineteen year old were unreliable. The licensee presented no evidence that it was unable to exercise its right to subpoena the nineteen year old and compel her attendance to testify before the Commission. Embers of Salisbury, Inc. v. Alcoholic Beverages Control Com'n, 401 Mass. 526, 531, 517 N.E.2d 830, 833 (1988).

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, 539 N.E.2d 1052 (1989) cited in Dolphino Corp. v. Alcoholic Beverages Control Com'n, 29 Mass.App.Ct. 954, 955, 559 N.E.2d 1261, 1262-1263 (1990) (rescript).

Even with the evidence furnished by the report, however, the essential elements of the alleged violation of "serving a minor" are not yet proved. No witness for the Local Board testified to seeing, on the date in question, any employee of the licensee make a sale or delivery, or otherwise "serve" an alcoholic beverage to the person under the age of twenty-one years old. The credible evidence proved, at best, only that the nineteen year old possessed alcoholic beverages while inside the Licensee's premises.

In Tiki Hut Lounge, Inc. v. ABCC, 398 Mass. 1001 (1986), the Supreme Judicial Court held that evidence that shows possession of an alcoholic beverage by an underage person is not sufficient to prove an alleged violation of sale or delivery of alcoholic beverages in violation of M.G.L. c. 138, §34. If the state of the law on the date of the alleged violation was so, the result regarding this violation would be controlled by the Tiki Hut decision.

In August, 2000, however, M.G.L. c. 138, §34 was amended to further provide that "whoever furnishes any such beverage or alcohol for a person under 21 years of age shall be punished." At the time this statute was amended, the word "furnish" was expressly defined to mean, in part pertinent here, to "allow a person under 21 years of age except for the children and grandchildren of the person being charged to possess alcoholic beverages on premises or property owned or controlled by the person charged." The Appeals Court has noted that:

General Laws c. 138, §34, is a patchwork of several related, but distinct, provisions. At issue in this appeal is the so-called "furnishing" provision, which the Legislature inserted deep into the existing text in 2000 as the result of an emergency act known as the Social Host Act. ... G. L. c. 138, §34, inserted by St. 2000, c. 175. This portion of §34 was enacted in response to public outcry over a series of drunk driving incidents that occurred after parties at private homes.

Commonwealth v. Kneram, 63 Mass.App.Ct. 371, 826 N.E.2d 733 (2005). The Appeals Court held that "it appears clear that the intent in passing this legislation was to hold persons criminally responsible for furnishing those under twenty-one with alcohol."

The Local Board notice of hearing specified the allegation that the licensee violated M.G.L. c. 138, §34. While the Local Board quoted a portion of that statute, there is no evidence that the Local Board issued, or the licensee requested, any specific particulars on which of the many provisions of §34 the licensee is alleged to have violated. The Commission finds that the notice of hearing provided by the Local Board coupled with the hearing process before the Local Board, and the Joint Prehearing Memorandum filed by the Local Board provided the Licensee with adequate notice of the issues in order for the Licensee to

obtain a reasonable opportunity to prepare and present evidence and argument in defense to the issues. See Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission (No. 1), 374 Mass. 547, 374 N.E.2d 1181 (1978). The Commission also finds that the Licensee has made no showing that its substantial rights have been prejudiced. Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission (No. 1), 374 Mass. 547, 374 N.E.2d 1181 (1978). The Licensee presented two witnesses on the substantive matter of this alleged violation.

The Commission's discussion must therefore determine whether the Local Board presented credible evidence that persuades the Commission that the Licensee furnished alcoholic beverages to a person under 21 years of age, in violation of the plain language of §34. Based on the police report that contained the statements against penal interest made by the nineteen year old, that she was drinking alcoholic beverages in the Licensee's establishment, coupled with the eyewitness testimony of Detective Gallagher, who testified before the Commission that he observed her drinking an alcoholic beverage inside the premises, and that he had a conversation with her whereby she admitted to him that she was under the age of twenty-one, and she was unable to produce any documentation indicating that she was of legal age, the Commission approves the action of the Local Board in finding that the Licensee violated M.G.L. c. 138, §34.

Violation 2: In the Local Board's Notice of Hearing, the Local Board alleged that the Licensee had committed a violation because of an alleged "failure to properly inspect identification." No provision of M.G.L. c. 138, Commission regulation or regulations of the Local Board was cited. Nowhere does M.G.L. c. 138 require or otherwise address the alleged "failure to properly inspect identification." See, e.g., Murray's Liquors, Inc. v. Alcoholic Beverages Control Commission, 48 Mass. App. Ct. 100 (1999). The notice does not properly allege, based on the plain language or any judicial construction of the statute, that the Licensee failed to comply with "any law of the commonwealth", M.G.L. c. 138, §64, nor does it otherwise properly allege that the Licensee failed to "maintain compliance with [General Laws chapter 138]" or that it "appear[ed] that alcoholic beverages are being or have been sold, served or drunk therein in violation of any provision of [General Laws chapter 138]." M.G.L. c. 138, §23.

The action of the local Board in finding this second violation as alleged or construed is disapproved. The Commission also disapproves any penalty resulting therefrom.

Violation 3: Under Commission Regulation 204 CMR 4.03 (1) (h), "no licensee or employee or agent of a licensee shall encourage or permit, on the licensed premises, any game or contest that involves drinking or the awarding of drinks as prizes."

The Supreme Judicial Court has described a "drinking game called Beirut, in which ping pong balls are thrown into plastic cups of beer. When a ball lands in a player's cup, the player must drink the beer." Commonwealth v. Arano, 453 Mass. 214, 216 (2009).¹ This activity has also been referred to in various states and social media web-sites as "beer pong."

The evidence presented during the hearing before the Commission persuades the Commission to find that like Beirut, beer pong is a drinking game in which players throw a ping pong ball across a table with the intent of landing the ball in a cup on the other end. The game usually consists of two, two-to-four player teams, and multiple cups set up in a triangle formation on each side of the table. Typically, there are six to ten plastic cups arranged in a triangle on each side of a table. Each team takes turns attempting to shoot

¹ In Arano, the Supreme Judicial Court identified this game by the name "Beirut." This name has been used interchangeably with the name "Beer Pong." While aficionados of this activity may posit there is a difference between the game named Beirut and the game named Beer Pong, for the purposes of this decision, this would be a distinction without a legal difference.

ping pong balls into the opponent's cups. If a ball lands in a cup, then the contents of that cup are consumed by the other team when beer is used to fill that cup. The cup is either placed aside or reinserted into the triangle. If the cup is reinserted and then the other team knocks the cup over, it is removed. If the opposing team throws the ball into an empty cup, they must consume the contents of one of their cups when beer is used to fill those cups. The first side to eliminate all of the opponent's cups is the winner. For sanitary or economic reasons, the game may also be used with water instead of beer, or with cups full of water that players do not drink from, instead using another cup of beer or alcohol.

In the case before the Commission, the Licensee clearly encouraged and permitted a game that involves drinking in that it set up a table with a pitcher of water and cups alongside both ends of the table. The question then is whether or not there was any encouraging of drinking that is prohibited by this regulation. In this case there clearly was. The detective testified that when he arrived on the premises, he observed several patrons around a table playing a game which he had become familiar with as "beer pong". The detective had previously observed it in another establishment where patrons there had played the game and had indulged in alcoholic beverages in the same manner. He stated that the rules of the game were the same as what he had observed at prior establishments whereby if a customer lost, he had to "chug" his beer, thus the game garnered its nickname "beer pong". The detective stated that every time the customer did get a ball in the cup, the opponent would have to drink from his beverage.

The Licensed Manager on duty testified that the bar, on its own account, set up the table along with the ping pong balls and the pitchers of water, at no cost to the patrons.² The tables were also set up in a cordoned off area in the establishment in clear view of all patrons once they entered. None of the patrons needed to pay anything to play the game of pong, yet the purchases of all of the alcoholic beverages were strictly made at the establishment. The rules under which the game was conducted were, if one patron were to lose, the losing patron drank the alcoholic beverage purchased at the licensee's premises, and nowhere else. It is clear that the alcohol consumed when one plays this game is only consumed on premises, and is purchased at the establishment.

Beer pong and its variants by other names involve drinking as a consequence of not performing successfully in the game. Neither darts, nor pool, nor bean bag toss, involves drinking as a consequence of poor performance. Where, as here, a licensee provides the equipment for a game that has its genesis and current existence strongly embedded in encouraging drinking, and has actual drinking as a consequence of not performing successfully in the game, the licensee violates the Commission regulation, 204 C.M.R. 4.03(1)(h).

To avoid violating this regulation when providing equipment for a game such as beer pong, a licensee cannot permit drinking as a consequence of poorly performing in the game, and must take reasonable steps not to permit it. Such reasonable steps may include prohibiting possession of alcoholic beverages while playing. Here, the record is silent on any such reasonable steps taken by the licensee so as not to "encourage or permit, on the licensed premises, any game or contest that involves drinking." The weight of the evidence falls against the Licensee.

Based on the evidence, the Commission approves the action of the Local Board in finding that the Licensee violated 204 C.M.R. 4.03(1) (h).

² No allegation was made that the Licensee had failed to obtain any license required to offer this activity to the public in its licensed premises.


CONCLUSION AND DISPOSITION


Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding the Licensee committed violations of: furnishing alcoholic beverages to a person under the age of 21 in violation of M.G.L. c. 138, §34, and Commission Regulation 204 CMR 4.03 (1) (h), "no licensee or employee or agent of a licensee shall encourage or permit, on the licensed premises, any game or contest that involves drinking or the awarding of drinks as prizes." 204 C.M.R. 4.03(1)(h).

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding the Licensee committed a violation by failing to properly inspect identification.

The Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in suspending the license for a period of three (3) days. This is a reasonable exercise of the Local Board's lawful discretion for the two (2) violations approved by the Commission.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner 

Kathleen McNally, Commissioner 

Dated: April 2, 2013

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: Carolyn Conway, Esq. via Facsimile 617-269-5923
Jean Lorizio, Esq. via Facsimile 617-635-4742
Frederick G. Mahony, Chief Investigator
Administration
File