



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358*

Jean M. Lorizio, Esq.
Chair

DECISION

**HIGH STREET RESTAURANT GROUP LLC
D/B/A HOWL AT THE MOON AND DOWN ULTRA LOUNGE
184 HIGH STREET
BOSTON, MA 02110
LICENSE#: 01441-RS-0116
VIOLATION DATE: 8/10/2019
HEARD: 11/26/2019**

High Street Restaurant Group LLC d/b/a Howl at The Moon and Down Ultra Lounge (the "Licensee") holds an alcohol license issued pursuant to M.G.L. c. 138, § 12. The Alcoholic Beverages Control Commission ("Commission" or "ABCC") held a hearing on Tuesday, November 26, 2019, regarding an alleged violation of M.G.L. c. 138, § 69 Sale or Delivery of an Alcoholic Beverage to an Intoxicated Person.

The following documents are in evidence:

1. Investigator Quinn's Investigative Report;
2. Copy of License Transfer Approval, 4/21/2010.

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

FINDINGS OF FACT

1. On Saturday, August 10, 2019, at approximately 1:15 a.m., Investigators Temple and Quinn, along with Chief Investigator Mahony, ("Investigators") conducted an investigation of the business operation of High Street Restaurant Group LLC d/b/a Howl at The Moon and Down Ultra Lounge to determine the manner in which its business was being conducted.
2. At approximately 1:20 a.m., Investigator Quinn's attention was drawn to an unidentified female ("UF1") seated at the bar, hunched over with her head in her hands. The Investigator observed that the UF1 appeared to have great difficulty holding her head up and leaned on the bar for support. The UF1's eyes were half-open, she had slow movements, appeared drowsy and closed her eyes while resting her head on the bar.
3. At approximately 1:24 a.m., an unidentified male ("UM") approached the UF1 at the bar and attempted to initiate a conversation with her. The Investigator observed UF1 speak with slow, slurred speech, asking the UM "who are you and why are you talking to me?"

4. Investigator Quinn observed the UM continue to interact with the UF1 and stated that he would buy the UF1 a drink. The UF1 responded with slurred speech, "who are you? I am not drinking anything from you." The Investigator observed that the UF1 appeared skeptical and agitated.
5. The Investigator observed that this exchange between the UM and the UF1 took place in front of the female bartender on duty.
6. At approximately 1:25 a.m., the UM ordered two alcoholic beverages from the female bartender on duty. Investigator Quinn observed the UF1 state, "No, I don't want that;" while the UM continued to order the drinks.
7. The Investigator observed the UM seemingly implying that one of the drinks was for the UF1 as he motioned to the bartender to continue making the beverage.
8. Investigator Quinn observed the bartender reach into the well and pour vodka into a glass with tonic/soda water. The bartender then handed a beer directly to the UM and placed the vodka drink on the bar in between the UM and UF1. The UF1 appeared to scowl at the UM and then reach for the vodka beverage until she realized that it was not a glass of water. The UF1 then quickly redirected her hand and picked up a glass of water instead.
9. The Investigator then observed that several friends of the UF1 came over to the bar area to ask if she was ok. Her friends then helped the UF1 get out of her seat and assisted her home. Investigator observed that the UF1 had difficulty standing and walking unassisted.
10. Investigator Temple and Chief Investigator Mahoney then identified themselves to the manager on duty and informed him of the alleged violation. The manager was informed that a report would be submitted to the Chief Investigator for review.
11. The Licensee has held a license under M.G.L. c. 138, § 12 since 2010 with no previous violations.

DISCUSSION

The Licensee is charged with service to an intoxicated person in violation of M.G.L. c. 138, § 69. "No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person." M.G.L. c. 138, § 69. "[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated." Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). "The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication." Id. at 610; see McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

To substantiate a violation of M.G.L. c. 138, § 69, there must be proof of the following elements: (1) that an individual was in or on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. See Vickowski,

422 Mass. at 609. “The imposition of liability on a commercial establishment for the service of alcohol to an intoxicated person ..., often has turned, in large part, on evidence of obvious intoxication at the time a patron was served.” Id.; see Cimino, 385 Mass. at 325, 328 (patron was “totally drunk”; “loud and vulgar”); Gottlin v. Graves, 40 Mass. App. Ct. 155, 158 (1996) (acquaintance testified patron who had accident displayed obvious intoxication one hour and twenty minutes before leaving bar); Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121 (1994) (sufficient evidence for jury where acquaintance described patron who later had accident as appearing to feel “pretty good”). Contrast Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (commercial establishment could not be liable when there was no evidence of obvious intoxication while patron was at bar); Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (affirming summary judgment for defendant in absence of any evidence of obvious intoxication); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816-817 (1979) (directed verdict in favor of commercial establishment affirmed when there was no evidence that patron was served alcohol after he began exhibiting obvious signs of intoxication).

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.” Douillard v. LMR, Inc., 433 Mass. 162, 164-165 (2001).

The Commission’s decision 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 (1995). “[D]isbelief 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, 472 (1981).

The Commission must determine whether substantial evidence was presented to support a finding that the Licensee, its staff or employees, sold or delivered an alcoholic beverage to an intoxicated person in violation of M.G.L. c. 138, § 69. In this case, there is evidence that the UF1 was inside the licensed premise and was observed by the Investigator to be exhibiting signs of intoxication while seated at the bar, in front of the bartender. While the evidence shows that the UM ordered two alcoholic beverages from the bartender and was directly delivered one of them, the evidence does not show that the bartender delivered the other alcoholic beverage to the UF1. In fact, Investigator Quinn acknowledged both that the UF1 stated that she did not want an alcoholic beverage, and that the bartender placed the second alcoholic beverage in between the UM and UF1 with the UF1 ultimately reaching for a glass of water rather than the alcoholic beverage.

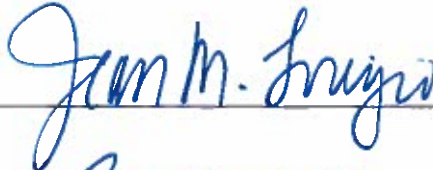
The Commission is not persuaded that substantial evidence exists to support a finding that the Licensee violated M.G.L. c. 138 § 69.

CONCLUSION

Based on the evidence presented at the hearing, the Commission finds that NO VIOLATION of M.G.L. c. 138, § 69 occurred.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Crystal Matthews, Commissioner



Dated: January 15, 2020

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
Kyle E. Gill, Esq., Associate General Counsel
Katelyn Quinn, Investigator
Christopher Temple, Investigator
Michael Ford, Esq.
Administration, File