

*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*

**MASSACHUSETTS SPORTSERVICE, INC. d/b/a TD GARDEN**  
**100 LEGENDS WAY**  
**BOSTON, MA 02114**  
**LICENSE#: 011600177**  
**HEARD: 01/23/2013**

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 Massachusetts Sportservice, Inc. d/b/a TD Garden (the "Licensee" or "TD Garden") for one (1) day, to be held in abeyance for six (6) months. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, January 23, 2013.

The following documents are in evidence as exhibits:

Exhibits of The Licensing Board for the City of Boston:

1. Vote of the Local Board, dated March 29, 2012, for hearing held March 27, 2012;
2. Boston Police Department Licensed Premise Inspection Notice no. 050212, dated February 14, 2012;
3. Boston Police Department Incident Report complaint no. 120090446, dated February 16, 2012; and
4. Decision and Statement of Reasons of the Local Board, dated November 27, 2012.

Exhibits of Massachusetts Sportservice, Inc. d/b/a TD Garden:

- A. Local Board's Notice of Hearing dated February 21, 2012, for hearing to be held March 27, 2012;
- B. Local Board's Notice of Action dated March 29, 2012, for One (1) Day Suspension to be held in abeyance six (6) months;
- C. Local Board's Notice Suspension, dated November 27, 2012, of One (1) Day Suspension to be held in abeyance for six (6) months;
- D. Local Board's Statement of Reasons, dated March 29, 2012;
- E. Licensee's Notice of Appeal, dated December 3, 2012, of One (1) Day Suspension Held in Abeyance;
- F. Local Board's Notice of Hearing, dated June 15, 2012, for hearing to be held July 10, 2012;
- G. Attorney Felter's Letter dated July 25, 2012 to the Local Board;
- H. Local Board's Notice of Action dated July 26, 2012, for One (1) Day Suspension;
- I. Local Board's Decision and Notice of Suspension, dated September 4, 2012;
- J. Local Board's Statement of Reasons, dated July 26, 2012, for hearing held on July 24, 2012;
- K. Licensee's Notice of Appeal dated September 18, 2012, of One (1) Day Suspension;
- L. Affidavit of James Mayall, dated January 22, 2013; and
- M. Affidavit of Gary M. Elsmore, dated January 23, 2013.

There is one (1) audio recording of this hearing, and two (2) witnesses testified.

### FACTS

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

1. Massachusetts Sportservice, Inc. d/b/a TD Garden located at 100 Legends Way, Boston, holds a 7-day all alcoholic beverages restaurant-type license with a 1:00 a. m. closing hour.
2. On February 14, 2012, at approximately 9:30 p. m., Sergeant Robert Mulvey and Detective William Gallagher of the Boston Police Department, while inside the licensed premises, observed two (2) youthful looking females drinking alcoholic beverages. (Exhibits 2, 3)
3. Detective Gallagher and Sergeant Mulvey observed the women with the alcoholic beverages on the balcony concourse and watched them pose for a picture with the drinks in their hands. The officers believed the women were under twenty-one (21) years of age so they approached them, identified themselves, and requested identification. (Exhibits 2, 3)
4. The first female, who was in possession of a margarita, an alcoholic beverage, admitted that she was under twenty-one (21) years of age. Her date of birth was June 15, 1991, age twenty (20) years old. (Exhibit 3)
5. The second female had a date of birth of February 4, 1991, age twenty-one (21) years old. (Exhibit 3)
6. Detective Gallagher escorted the two (2) female patrons to the licensee's security manager who then escorted them both from the premises. (Exhibit 3)
7. AlliedBarton Security Services LLC ("AlliedBarton") is a Delaware corporation that provides private security services and personnel for the licensee during TD Garden events.
8. AlliedBarton Security Supervisor Robert Donahue recorded the name, address, and date of birth for each patron. According to TD Garden policy, Mr. Donahue confiscated the alcoholic beverage from the underage female, and escorted her to the First Aid station for evaluation by an EMT. He then contacted the parent of the underage patron and arranged for the underage patron to be picked up.
9. The Local Board held a hearing on March 27, 2012. (Exhibit A)
10. The Local Board issued a Statement of Reasons dated March 29, 2012.
11. The Licensee timely appealed the Local Board's decision to the ABCC by letter dated December 3, 2012.<sup>1</sup> (Exhibit E)

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<sup>1</sup> Counsel for the Licensee raises an unspecified objection regarding the time at which the Statement of Reasons was issued by the Local Board for this violation. The Licensee timely appealed the Local Board action after receipt of this Statement of Reasons. The Commission found above that the appeal was timely filed. The Commission held a hearing on this appeal, and by this decision resolves the issues in this appeal.

## DISCUSSION

Pursuant to M.G.L. Ch. 138, section 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).

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.)

The Commission finds that the police report, in this case, 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 was with another female patron, each of whom were observed in possession of an alcoholic beverage. Detective Gallagher testified before the Commission that he witnessed the underage patron and her friend, each holding an alcoholic beverage while posing for pictures on the balcony concourse, inside the licensed premises. Detective Gallagher spoke to the underage patron, who was in possession of a margarita, an alcoholic beverage, while inside the establishment, and she informed the officers that she was younger than the legal drinking age of twenty-one, and that in fact, she was only twenty years of age.

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 matter, 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).

The Commission finds that the admissions inside the licensed premises by the twenty year old, to being younger than the legal drinking age of 21 (twenty-one) years and to possessing an alcoholic beverage, 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 both female patrons were unreliable. The licensee presented no evidence that it was unable to exercise its right to subpoena the twenty year old and the other patron, and compel their 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).

Even with the evidence furnished by the report, however, the essential elements of the alleged violation of M.G.L. c. 138, § 34 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, that the twenty (20) 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 were 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.”

Based on the police report that contained the admissions and statements against penal interest made by the twenty (20) year old, that she possessed an alcoholic beverage in the Licensee’s establishment, coupled with the eyewitness testimony of Detective Gallagher, who testified before the Commission that he observed her possessing an alcoholic beverage inside the premises, and he had a conversation with her whereby she admitted that indeed she was younger than the age of twenty-one (21), the Commission finds the Licensee violated M.G.L. c. 138, § 34.<sup>2</sup> The Commission is persuaded and finds that the Licensee furnished alcoholic beverages to a person under 21 years of age in violation of M.G.L. c. 138, § 34.

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<sup>2</sup> The Commission notes the receipt of a letter, dated January 22, 2013, from The Boston Red Sox signed on their behalf by their Senior Vice President/Special Counsel. No permission was requested by or issued to The Boston

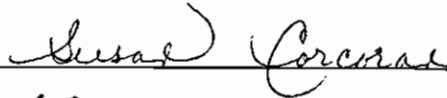
CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding the Licensee violated M.G.L. c. 138 §34.

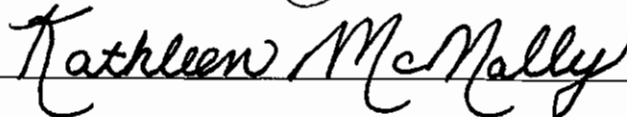
The Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in suspending the license for a period of one (1) day, to be held in abeyance for six (6) months, as a reasonable, if not generous, exercise of the Local Board's lawful discretion.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated: May 17, 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: John Kenneth Felter, Esq. via Facsimile 617-235-9830  
J. Andrew Binkley, Esq. via Facsimile 617-235-9980  
Jean Lorizio, Esq. via Facsimile 617-635-4742  
Frederick G. Mahony, Chief Investigator  
Administration  
File

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Red Sox to intervene in this matter. No permission was requested by or issued to The Boston Red Sox to submit any submission including, but not limited to, a self-characterized "*Amicus Curiae* letter." The Commission itself did not solicit the submission of any *amicus curiae* positions. The Boston Red Sox do not claim in this letter to be the holder of any alcoholic beverages license; rather, the letter is submitted "on behalf of Pitcher's Mound, LLC, the licensee that handles alcoholic beverages service at Fenway Park." This letter dated January 22, 2013 from The Boston Red Sox is procedurally defective, and therefore disregarded. If considered *arguendo* by the Commission, this letter from The Boston Red Sox is not persuasive. The letter ignores any discussion of the applicable law since 2000. The Commission discussed above this applicable law created and in effect since 2000. Thus, even if the letter was not procedurally defective, the letter advances an incomplete legal analysis, and is unpersuasive.