

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

MYUNG DONG CORPORATION
92 HARVARD AVENUE
BOSTON, MA 02121
LICENSE#: 011600427
HEARD: 07/27/2011

This is an appeal of the action of the Licensing Board of the City of Boston (the "Local Board") for suspending the M.G.L. c. 138, §12 license of Myungdong Corporation (the "Licensee" or "Myungdong") located at Boston, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on July 27, 2011.

The following documents are in evidence:

1. Joint Pre-Hearing Memorandum dated June 19, 2012;
 2. Licensed Premises Violation Notice no. 043383 dated September 23, 2011;
 3. Boston Police Incident Report no. 110519023 dated September 24, 2011;
 4. Local Board's Notice of Suspension dated April 4, 2012 and Statement of Reasons and Subsidiary Findings dated December 15, 2011.
- A. Local Board's Original Vote for One (1) Day Suspension dated November 3, 2011;
 - B. Local Board's Original Notice of Vote Rescinded and Hearing Rescheduled dated November 10, 2011;
 - C. Local Board's Original Vote for Three (3) Day Suspension on Hearing Notice dated November 28, 2011 for Hearing held December 13, 2011.

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

FACTS

1. Myungdong Corporation is the holder of a Common Victualler 7-Day Malt, Wine and Liqueurs license issued by the Licensing Board for the City of Boston for the premises located at 92 Harvard Avenue, Allston, Massachusetts.
2. On September 23, 2011, at approximately 11:30 p.m., Sergeant Robert Mulvey and Detective William Gallagher of the Boston Police Department inspected the licensed premise and observed two female patrons who appeared to be under twenty one (21) years of age sitting at a table in possession of what appeared to be alcoholic beverages.
3. The City of Boston scheduled a hearing for November 1, 2011. The licensee failed to appear at the hearing. The Boston Police were present and the Board heard testimony as to the officer's

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observations on the night of September 23, 2011. The Board voted on November 3, 2011 to issue a one day suspension.

4. The Board subsequently received a letter, dated November 7, 2011, from the licensee explaining the licensee's absence from the initial hearing, citing medical issues. This resulted in a subsequent hearing in which a harsher penalty was imposed.
5. The Licensee was first given a penalty of a one (1) day suspension. At the subsequent hearing, she was given a three (3) day suspension.
6. Detective Gallagher from the Boston Police attended both hearings and testified that upon entering the premises, he and Sgt. Mulvey observed two (2) males and two (2) females seated at the table. They requested identification and learned that the two (2) females were under the age of twenty-one (21). One of the females was in possession of a glass of Korean Soju Rice Wine and the other in possession of a glass of OB Golden Lager. Detective Gallagher testified that the two (2) females stated that they were never asked for any identification by their server before being served the alcoholic beverages.
7. The Licensee appeared before the Board at the second hearing and explained the establishment had a policy of not allowing any patrons under the age of twenty one (21) onto the premises after 9:00 p. m. She testified that the underage females had entered the premises earlier in the evening, eaten dinner and paid the check prior to 9:00 p. m. She stated that rather than leaving, the two (2) females moved to a different table and her employees had assumed they had left the premises.
8. The Licensee informed the Board that they have since changed their policy in that each table is checked at 9:00 p.m. and anyone who is not twenty one (21) years of age or older is asked to finish their meals and leave the premises.

DISCUSSION

Pursuant to M.G.L. Ch. 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).

M.G.L. Ch. 138 gives the local board and commission the authority to grant, revoke and suspend licenses. Chapter 138 was “enacted to serve the public need and... to protect the common good.” G.L. Chapter 138, §23, as amended through St. 1977, c. 929, §7. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given ‘comprehensive powers of supervision over licensees,’ Connolly v. Alcoholic Beverages Control Comm., 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 788 (1981).

The law is well-settled that ‘under the regulation, the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is “bound at his own peril to keep within the condition of his license.” Commonwealth v. Gould, 158 Mass. 499, 507 (1893). Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 186, 190 (1979).


In reviewing the facts presented on appeal, it seems clear that the Boston Board penalized the Licensee for requesting an additional hearing. The evidence showed that the Licensee was issued a one day suspension when she did not appear for her initial hearing. When she requested to be present at a later hearing and did appear for said hearing, she was given a three day suspension. While it is clear that there was a violation that took place on the Licensee's premises, it is unclear as to why the Board would penalize a licensee for appearing at a subsequent hearing to "plead her case". The licensee on several occasions stated that she appeared and testified before the Board to explain what had happened on her premises on the night in question. To penalize her for coming before the Board seems unjust. If she had not appeared before the Board and remained in default on her appearance, then she would have incurred the one day penalty. Instead, by appearing, she received a more significant penalty. There is no evidence, testimonial or documentary, to show that the Board heard additional evidence that would sway them to rule more harshly against the licensee. She argued that she did not believe that the employees knew the underage was at the establishment and was served alcohol on the night in question and that, in fact, the one day suspension was too harsh. This Board would disagree with that contention and find the one day suspension to be a reasonable penalty. Regardless of whether or not her employees knew this individual was in the establishment on the night in question, it is without dispute that the underage was served and was never asked for any identification.

CONCLUSION

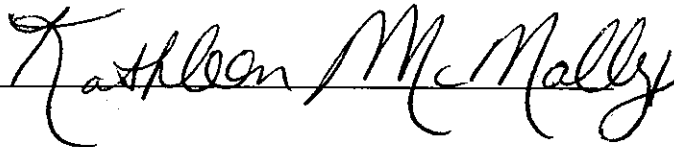
The appeal from the decision of the licensing board for the city of Boston to suspend the license of Myundong Corporation for three (3) days is hereby remanded back to the local licensing board **WITH THE RECOMMENDATION OF A PENALTY NOT TO EXCEED MORE THAN A ONE (1) DAY SUSPENSION.**

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated: August 21, 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: Dennis A. Quilty, Esq. via Facsimile
Jean Lorizio, Esq. via Facsimile
Frederick G. Mahony, Chief Investigator
Administration
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