



*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*

**NO. 9 PARK LLC D/B/A NO. 9 PARK**  
**9 PARK STREET**  
**BOSTON, MA 02108**  
**LICENSE#: 011601573**  
**HEARD: 02/12/2014**

This is an appeal of the action of the City of Boston Licensing Board (the "Local Board" or "Boston") for suspending the M.G.L. c. 138 §12 license of No. 9 Park LLC d/b/a No. 9 Park (the "Licensee" or "9 Park") located at 9 Park Street, Boston, MA for one (1) day. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, February 12, 2014.

The following documents are in evidence as exhibits:

1. Local Board's Violation Notice # 23980, dated 12/17/2012;
  2. Boston Police Department Incident Report # 120790052, dated 12/18/2012;
  3. Local Board's Notice of Hearing dated 3/13/2013 with Vote of the Board dated 3/28/2013;
  4. Local Board's Statement of Reasons (no date) ;
  5. Local Board's Docket Sheet for Licensee; and
  6. Local Board's Rules and Regulations.
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- A. Licensee's Docket Sheet;
  - B. Notice of Hearing dated 12/20/2012 with Vote of the Board dated 1/29/2013;
  - C. Letter from Licensee's Attorney dated 2/28/2013 Requesting Continuance;
  - D. Notice of Hearing dated 3/13/2013 with Vote of the Board dated 3/28/2013;
  - E. Local Board's Decision and Statement of Reasons dated 6/18/2013;
  - F. Licensee Letter of Appeal dated 6/28/2013 with Copy of Envelope Annotated "Rec'd 6/24/13";
  - G. Local Board's Docket Sheet for Licensee Located at 531-535 Washington Street;
  - H. Hearing Notice dated 10/24/2011 with Vote of the Board dated 12/01/2011; and
  - I. Local Board's Docket Sheet for Licensee Located at 246 Tremont Street.

There is one (1) audio recording of this hearing, and one witness testified.

The Commission took Administrative Notice of the Licensee's Commission Records, the Local Board's Rules and Regulations, and 2.04 CMR 2.01 (10).

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## FACTS

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

1. No. 9 Park LLC dba No. 9 Park is the holder of a Common Victualler 7-day All Alcoholic Beverage License, located at 9 Park Street, Boston, MA. The License was originally issued on 9/17/1997. (Testimony, Commission Records, Exhibit A)
2. On 12/17/2012 at approximately 10:50 p.m., Detective Sergeant Robert Mulvey and Detective William Gallagher, assigned to the Licensed Premises Unit, conducted an inspection of licensed premise, No. 9 Park. (Testimony)
3. Inside the premises, Detectives observed that the Licensee did not have any of the required licenses posted in a conspicuous place for public inspection, as required by Boston Licensing Board Rule 1.02 (A). (Testimony)
4. Detective Sergeant Mulvey testified that the Officers requested to see the licenses. The manager on duty, Courtney McCall, retrieved the required licenses from a shelf behind the bar, which was out of sight. (Testimony)
5. Detectives also observed that there was no valid Inspectional Services Department (ISD) Certificate posted for calendar year 2012. (Testimony)
6. Detective Sergeant Mulvey issued a violation to the Licensee for not posting licenses in a conspicuous area, as required by Boston Licensing Board Rule 1.02 (A). (Testimony, Exhibits 1, 2)
7. Sergeant Detective Mulvey testified that during the previous year, while conducting a license premise inspection, the same issue had arisen as the licensee failed to post a Valid Boston Fire Permit which resulted in a violation. The Local Board held a hearing on this matter and issued the penalty of a "Warning." (Testimony, Exhibits 5, A)
8. The Local Board held a hearing on 3/26/2013<sup>1</sup>. (Exhibits 5, A, B, C,)
9. The Local Board found a violation and due to the recurrence of the violation, voted to impose a one (1) day suspension against the licensee for this violation. (Exhibits 3, 4, 5, A)
10. The Licensee does not dispute nor contest that this incident occurred as testified by Boston Police Detective Sergeant Mulvey. (Joint Pre-Hearing Memorandum)

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<sup>1</sup>The Local Board held a hearing on 1/29/2013 at which the Licensee did not appear. Thereafter the Local Board issued a one (1) day suspension. Attorney Dennis Quilty, representing the Licensee, requested a re-hearing as a result of the licensee's absence from the 1/29/2013 hearing. A second hearing was held. (Testimony, Exhibits 5, A,B,C)

## 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).

Both the Local Board and the Commission have the authority to grant, revoke and suspend licenses. Their powers were authorized “to serve the public need and... to protect the common good.” M.G.L. C. 138, §23, as amended through St. 1977, c.929, §7. 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).

These “comprehensive powers” are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, section 64. In addition, the Local Board has the burden of producing satisfactory proof to the Commission that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, sections 23 and 64.

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, 710 (1995). Disbelief 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, 467 (1981).

The law is well-settled that 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). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter. Rico’s of the Berkshires, Inc., v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985) (rescript).

The Licensee does not contest the facts as they occurred on the date of the alleged violation. The Licensee admits that its licenses were not located in a conspicuous place at the time of the alleged violation. The Licensee argues that the Local Board’s imposition of a One (1) Day Suspension is unreasonably punitive and an unfair penalty, as it has been in operation for more than 16 years and has a nearly unblemished record. The Licensee further argues that the previous violation for which it received the disposition of a “Warning” was not the same charge as for this violation, and therefore, the one (1)

day suspension is based on incorrect factors, is unreasonable, unfair, and inconsistent with past practices regarding substantially similar circumstances.

The Local Board's argues that pursuant to M.G.L. Ch. 138, section 23, the Licensing Board for the City of Boston has promulgated its own rules and regulations. The Local Board, after notice and a hearing, found that the licensee violated Rule 1.02(A) of the Board's Rules and Regulations. Rule 1.02 (A) states: "Licenses issued by the Board shall be posted in a conspicuous place easily seen by the public where they can be read without difficulty or assistance of employees."<sup>2</sup>

The Local Board argues that a penalty of a one (1) day suspension is warranted and reasonable, because, as a matter of practice, it employs progressive discipline. Upon reviewing the record of the licensee, the Local Board noted a similar violation in December of 2011 for which the Licensee was issued a "Warning"

As the Licensee did not contest the facts of this violation, the Commission needs to determine if the decision by the Local Board to suspend this license was an arbitrary and capricious sanction, or if the penalty was a reasonable exercise of the Local Board's discretion.

A discussion of progressive sanctions is developed and found in Applebee's Northeast, Inc. dba Applebee's Neighborhood Bar & Grill ("Applebee's"), Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.) and in Alcoholic Beverage Control Commission vs. the Licensing Board of the Town of Weymouth. In Applebee's, the Licensee complained that the five (5) day suspension it received was too severe. The Court laid out the criteria that the town of Weymouth used for its calibration of penalties. "These included: (i) the number of prior offenses; (ii) the degree of inspection (of customers) exhibited by the licensee; (iii) the severity and type of offense; (iv) the efforts to identify purchasers of alcohol, if any; (v) the appearance of the purchaser receiving the illegal sale; (vi) the quality of evidence of the violation, i.e. clear violation versus questionable one; and (vii) the general reputation of the licensee." Id. at 7.

The Court in the Applebee matter found, "that for several reasons, the resulting sanction does not fall outside the boundaries of rationality." In reviewing the Town of Weymouth's sanctions that they imposed, and their system of progressive discipline, the Court found that the system, "avoided abrupt or draconian punishment." "Instead, it implemented graduated penalties and afforded the warnings of graduated penalties to offenders." Id. at 6.

Applying a similar rationale and analysis as the Court in the Applebee matter, the Commission finds this violation of failing to post licenses in a conspicuous manner, very similar to the licensee's previous violation of failing to conspicuously post the Fire Assembly Permit, for which the licensee received a Warning in December of 2011. The Commission finds that the Local Board considered the prior violation and sanction when imposing the one (1) day suspension in this matter.

The Commission is persuaded that the Local Board's practice of progressive discipline in this matter was intrinsically fair and rational. The Commission finds that the imposed sanction of suspension was one that was not arbitrary and capricious, but rather a graduated penalty for the recurrence of a similar violation.


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<sup>2</sup> Commission Regulation 204 CMR 2.01(10) states in pertinent part: "Every license or storage permit shall be displayed on the premise covered by the license or permit, in a conspicuous place where it can easily be read." See Commission Regulations [www.mass.gov/abcc/](http://www.mass.gov/abcc/)

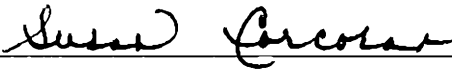
CONCLUSION AND DISPOSITION

Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Licensing Board for the City of Boston in suspending the M.G.L. c. 138 §12 license of No. 9 Park LLC d/b/a No. 9 Park for a period of one (1) day. This is a reasonable exercise of the Local Board's lawful discretion for the violation approved by the Commission.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kathleen McNally, Commissioner 

I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Susan Corcoran, Commissioner 

Dated: May 5, 2014

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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Frederick G. Mahony, Chief Investigator  
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