



*Commonwealth of Massachusetts  
Department of the State Treasurer  
Alcoholic Beverages Control Commission  
239 Causeway Street  
Boston, MA 02114  
Telephone: (617) 727-3040  
Fax: (617) 727-1510*

**Jean M. Lorizio, Esq.**  
Chairman

## **DECISION**

**PAGA INC. D/B/A ICON  
100B WARRENTON STREET  
BOSTON, MA 02116  
LICENSE#: 0116-00442  
VIOLATION DATE: 04/01/2016  
HEARD: 03/29/2017 and 04/24/2017**

This is an appeal of the action of the Licensing Board for the City of Boston (the "Local Board" or "Boston") for suspending for five (5) days, the M.G.L. c. 138 § 12 license of Paga, Inc. d/b/a Icon (the "Licensee" or "Paga" or "Icon") located at 100B Warrenton Street, Boston, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") and hearings were held on Wednesday March 29, 2017 and Monday April 24, 2017.

The following documents are in evidence as exhibits:

1. Licensed Premise Violation # 002393;
2. Boston Police Reports, NO. 162025434 and 162025801;
3. Boston Licensing Board Hearing Notice;<sup>1</sup>
4. Licensee's Notice of Appeal;<sup>2</sup>
5. Copy of Licensee's Docket Sheet;<sup>3</sup>
6. Photocopy of Four (4) Fraudulent Identifications;
7. Agreed Upon Facts in Joint Pre-Hearing Memorandum;
8. Bank of America Statement of Witness A. Choudhary;
9. General Rules and Regulations of the Licensing Board for the City of Boston.

There are two (2) audio recording of these hearings, and four (4) witnesses testified.

---

<sup>1</sup> The decision/statement of reasons issued by Local Board was not entered in evidence as an exhibit in conjunction with the Hearing Notice issued by the Local Board.

<sup>2</sup> The Notice of Appeal entered in evidence is not the notice of appeal for this de novo matter. The notice of appeal in evidence and marked as an exhibit is for a violation which occurred on April 8, 2016 resulting in the imposition of a ten (10) day suspension.

<sup>3</sup> The Local Board submitted a one page docket sheet for the Licensee for years 2013 and 2014. The Licensee's docket sheets for calendar years 2015 and 2016 were not entered in evidence by the Local Board.

## FINDINGS OF FACT

The Commission makes the following findings and rulings of law based on the evidence presented at the hearing:

1. Paga Inc. d/b/a Icon is the holder of a General on Premise all alcoholic beverages license located at 100B Warrenton Street, Boston, Massachusetts, with a 2:00 a.m. closing hour. (Exhibit 7)
2. On Friday, April 1, 2016, at approximately 11:00 p.m., four Tufts University undergraduate students ordered an Uber car for transportation to the Icon nightclub. (Testimony)
3. Earlier that day, A.C.<sup>4</sup> made reservations online through Icon's website for a table and bottle service for himself and his three friends at Icon for the evening of April 1, 2016. (Testimony)
4. A.C. used his Bank of America card to reserve the table and to purchase alcohol. (Testimony, Exhibit 8)
5. Prior to going to Icon, the four students ate a meal at Chipotle restaurant. They also consumed alcoholic beverages, primarily beer, while they were getting ready to go to the nightclub. (Testimony)
6. The four students had never been to Icon before. They selected Icon because they had heard that it was one of the big nightclubs in Boston. (Testimony)
7. Each of the four undergraduate students was younger than 21 years of age. A.C. was 19 years of age with a date of birth of 10/26/96, H.M. was 19 years of age, with a date of birth of August 3, 1996. A.B. and M.Y. were each also younger than 21 years of age. (Testimony, Exhibit 2)
8. Upon arrival at Icon, there was a huge line to get inside the club. A.C. went to the front of the line to speak to the employee who was checking identifications. (Testimony)
9. A.C. approached this employee and stated that he had made reservations for a table for this evening. The employee asked for A.C.'s name and his identification. (Testimony)
10. The four students presented out of state fraudulent identifications to gain entry inside Icon. A.C. presented a fraudulent State of Connecticut driver's license/identification. He was not asked to present a second form or any other form of identification prior to his admission to Icon. (Testimony, Exhibit 6)
11. H.M. presented a fraudulent State of Ohio driver's license/identification. He was not asked to present a second form of identification prior to entering Icon. (Testimony, Exhibit 6)
12. M.Y. presented a fraudulent State of Ohio driver's license/identification to enter Icon. She was not asked to present a second form of identification. (Testimony, Exhibit 6)

---

<sup>4</sup> Because there are minors involved, the Commission refers to them by their initials only.

13. A.B. presented a fraudulent State of Connecticut driver's license/identification to enter Icon. He was not asked to present a second form of identification. (Testimony, Exhibit 6)
14. The four students were escorted to a table inside Icon. (Testimony)
15. A waitress/employee of Icon then brought a bottle of vodka to the four students at their table, and provided them with glasses, chasers, and ice. (Testimony)
16. The four students consumed the alcohol. A.C. was coherent when he arrived at Icon, and when he left Icon he and his friends were intoxicated. (Testimony)
17. A.C. knew he was intoxicated because he felt his inhibitions lower and he became more social. All four students became more outgoing and started dancing with people they did not know, which was atypical behavior for the four of them. (Testimony)
18. In the past A.C. has witnessed his three friends drink beer, which was their usual beverage. (Testimony)
19. A.C. has previously consumed alcoholic beverages in Singapore, where the legal drinking age is 18 years old. A.C. has been intoxicated before and is familiar with the state of intoxication. This experience at Icon was parallel to his previous experiences of being intoxicated. (Testimony)
20. After dancing for a while, the students returned to their table, and there was a bottle of champagne on the table. They did not see who delivered the champagne, and they did not have a conversation with any employee about the bottle of champagne. (Testimony)
21. Icon charged A.C.'s Bank of America card \$1,006.20 on this evening for the table service and two bottles of alcoholic beverages, a bottle of vodka and a bottle of champagne. (Testimony, Exhibit 8)
22. Close to closing time, while inside Icon, A.C., H.M., and M.Y. noticed that A.B. was missing and not with them. They each texted and called A.B. on his cell phone. He did not reply. They assumed that A.B. had gone back to the Tufts dormitory. (Testimony)
23. At approximately 2:39 a.m. Boston Police responded to 274 Tremont Street, a Tufts Parking Garage, where A.B. was found lying unresponsive on the sidewalk. A.B. was transported to the hospital where he was pronounced deceased. (Testimony, Exhibit 2)
24. The following day, A.C., H.M., and M.Y. discovered that their friend A.B. had died after leaving Icon. (Testimony)
25. Boston Police Detective Victor Evans queried the four out of state identifications. The query system did not produce any information regarding the four drivers' licenses/identifications, indicating they were fraudulent identifications. (Testimony, Exhibit 6)
26. The Local Board charged the Licensee with three violations and held a hearing on June 21, 2016. (Testimony, Exhibit 3)

27. On June 23, 2016, the Local Board found the Licensee committed violations and imposed a five (5) day suspension for the violations of:<sup>5</sup>
- a. Service of alcohol to minors in violation of G.L.ch. 138 §§ 34 <sup>6</sup>and 64;
  - b. Failure to Properly Inspect Identifications in violation of Local Board Rules and Regulation 1.08 (F);
  - c. Over serving alcohol to a patron in violation of G. L. c. 138, § 69.<sup>7</sup> (Exhibit 3)
28. Rule 1.08(F) is a regulation promulgated by the Licensing Board for the City of Boston pursuant to M.G.L. c. 138 section 23. (Exhibit 9)
29. The Licensee has one similar prior violation:
- Jan. 16, 2014, violation # 065803: Local Board found Licensee in violation of a minor in possession of alcohol; Local Board imposed the sanction of a Warning.<sup>8</sup> (Exhibit 5)
30. The General Rules and Regulations for the Licensing Board for the City of Boston are silent regarding the progressive discipline of licensees. (Testimony, Exhibit 9)
31. When imposing progressive discipline, the Licensing Board for the City of Boston evaluates the facts of each violation matter on a case by case basis. (Testimony)
32. The Licensing Board for the City of Boston utilizes and refers to the Applebee's case when determining the severity of sanctions and progressive discipline to be imposed on a Licensee. Applebee's Northeast, Inc. d/b/a Applebee's Neighborhood Bar & Grill ("Applebee's"), Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.) (Testimony)
33. The Licensing Board for the City of Boston utilized the Applebee's case for imposing the sanction of a five (5) day suspension against Icon for this violation. Applebee's Northeast, Inc. d/b/a Applebee's Neighborhood Bar & Grill ("Applebee's"), Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.) (Testimony)
34. The factors the Local Board considered when imposing the sanction of a five (5) days suspension against Icon in this matter were the inspection of the license(s), the physical appearance of the patrons involved, and the quality of the evidence presented at the hearing before the Local Board. (Testimony)

---

<sup>5</sup> See Footnote 1. The Statement of Reasons in this matter was not entered in evidence as an exhibit.

<sup>6</sup> M.G.L. c. 138 § 34: Sale, delivery or furnishing alcoholic beverages to persons under twenty-one years of age.

<sup>7</sup> M.G.L. c. 138 § 69: Sale or delivery to intoxicated persons.

<sup>8</sup> See Footnote 3. Docket sheet for Licensee's prior history before the Local Board was entered in evidence only for years 2013 and 2014.

## DISCUSSION

Pursuant to M.G.L. Chapter 138, § 67, “[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. 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.” Dolphino Corp. v. Alcoholic Beverages Control Comm’n, 29 Mass. App. Ct. 954, 955 (1990) citing United Food Corp v. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978). 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, 29 Mass. App. Ct. at 955.

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975).

The Commission is given “comprehensive powers of supervision over licensees.” Connolly, 334 Mass. at 617. M.G.L. c. 138 gives the Commission the authority to grant, revoke and suspend licenses. 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, § 64.

The Local Board has the burden of producing satisfactory proof that the Licensee violated M.G.L. c.138, §§ 34, 64, 69, and Local Board Rule 1.08(F), and that the penalty imposed by the Local Board was a reasonable exercise of its lawful discretion.

### I. Sale, Delivery or Furnishing Alcoholic Beverages to Persons Under Twenty-One Years of Age, M.G.L. c. 138, § 34

The law is well-settled that the licensee is responsible for exercising 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 Comm’n, 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. Alcoholic Beverages Control Comm’n, 19 Mass. App. Ct. 1026, 1027 (1985).

The Licensee was charged with a violation of G.L. c. 138, § 34 – Sale or delivery of an Alcoholic Beverage to a Person Under Twenty-One (21) Years of Age. 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.” Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 133-134 (1996); accord Fran’s Lunch, Inc. v. Alcoholic Beverages Control Comm’n, 45 Mass. App. Ct. 663, 664 (1998). General Laws chapter 138, §34C states, in pertinent part, that: “[w]hoever, being under twenty-one years of age and not accompanied by a parent or legal guardian, knowingly possesses any alcohol or alcoholic beverages, shall be punished.”

General Laws chapter 138, § 34B provides, in pertinent part, that “[a]ny licensee, or agent or employee thereof, under this chapter who reasonably relies on such a *liquor purchase identification card or motor vehicle license* issued pursuant to section eight of chapter ninety, *or on an identification card issued under section 8E of chapter 90, or on a valid passport issued by the United States government*, or by the government, recognized by the United States government, of a foreign country, *or a valid United States issued military identification card, for proof of a person's identity and age* shall not suffer any modification, suspension, revocation or cancellation of such license, nor shall he suffer any criminal liability, for delivering or selling alcohol or alcoholic beverages to a person under twenty-one years of age. *Any licensee, or agent or employee thereof, under this chapter, who reasonably relies on such a liquor purchase identification card, or an identification card issued under section 8E of chapter 90, or motor vehicle license issued pursuant to said section eight, for proof of a person's identity and age shall be presumed to have exercised due care in making such delivery or sale of alcohol or alcoholic beverages to a person under twenty-one years of age.* Such presumption shall be rebuttable.” (Emphasis supplied.)

The Commission finds that in this matter, four individuals, each younger than 21 years of age, were allowed to enter Icon by presenting fraudulent out of state identifications. None of them presented the Licensee with a Massachusetts Driver's License, a *Massachusetts* Liquor Identification Card, a *Massachusetts* Identification Card, a passport issued by the United States or a government that is officially recognized by the United States, a passport card for a passport issued by the United States, or a Military Identification Card. Despite not producing any of these six types of identification, the Licensee delivered to the four undergraduate students, while inside the premises, a bottle of vodka and a bottle of champagne.

M.G.L. c. 138, § 34B offers protection from license revocation or criminal penalties to license holders who reasonably rely on one of the six pieces of identification specified in the statute. The Commission has established that to obtain the protection accorded to a license holder under § 34B, a license holder must obtain proof of age prior to the purchase of alcoholic beverages through one of the six legislatively-approved forms of identification. The Appeals Court has reviewed this Commission interpretation and upheld it as reasonable. Howard Johnson Company v. Alcoholic Beverages Control Comm'n, 24 Mass. App. Ct. 487 (1987); In Re: Alan C. Dinh d/b/a Juliano's Beer & Wine (ABCC Decision April 8, 2005).

The Commission finds that the Licensee is not afforded the protection of G. L. c. 138, § 34B since none of the six accepted forms of identification was presented prior to the sale and delivery of alcoholic beverages to these four students. The evidence presented to the Commission was that each student presented a fraudulent form of an out of state identification prior to gaining entry to Icon and prior to the Licensee selling and delivering alcoholic beverages to them.

The Commission finds by substantial evidence that the Licensee sold and delivered alcoholic beverages to persons younger than age 21. The Commission upholds the Local Board's finding that the Licensee committed the violation of sale of alcoholic beverages to persons under age 21 in violation of G. L. c. 138 § 34.

II. Failure to Properly Inspect Identification in violation of Licensing Board for the City of Boston Rule 1.08 (f)

The Licensing Board for the City of Boston possesses the authority to promulgate its own rules and regulations pursuant to M.G.L. c. 138 § 23. Pursuant to this statutory authority, the Licensing Board for the City of Boston has promulgated Rule 1.08(F), which states:

“Licensees are responsible for ensuring that minors are not served alcoholic beverages and are not drinking alcoholic beverages on the licensed premises, whether served to them by an employee or handed to them by another patron. Licensees who do not have the ability to keep track of the drinking activity of minors at the premises may exclude minors from coming onto the premises in order to meet the burden of ensuring that there is no underage drinking at the premises. Licensees who choose to permit minors onto the premises, whether pursuant to an “I.D. bracelet” program or otherwise, are held accountable if minors are found to be drinking alcoholic beverages on the premises whether or not the Board’s agents are able to prove that the licensee actually served the drink directly to the minor. Sufficient security personnel should be employed to monitor the premises to ensure that patrons do not pass alcoholic beverages to minors. (See also Rule 5.5., infra, prohibiting deliveries of kegs and cases of alcoholic beverages to dormitories). Rule 1.08 (F).” (Exhibit 9)

The Licensee permitted four patrons younger than 21 years of age to drink alcohol on its premises. The Licensee chose to permit underage patrons onto the premises by not requiring any of the four underage patrons to produce legally acceptable identification under § 34B, and then served the four underage patrons both vodka and champagne.

Based on the evidence presented, the Commission finds that the Licensee committed this violation of Boston Licensing Board Rule 1.08(F), and upholds the decision of the Local Board.

III. Service of Alcoholic Beverages to Intoxicated M.G.L. c.138 § 69

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).

In order to prove this violation, the Local Board must show: (1) that an individual was intoxicated 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).

The Local Board must produce some evidence that “the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink.” Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 20 (2010). The Local Board may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two. See Vickowski, 422 Mass. at 611 (direct evidence of obvious intoxication not required). “[S]ervice [to a patron] of a large number of strong alcoholic drinks [would be] sufficient to put [a licensee] on notice that it was serving a [patron] who could potentially endanger others.” Cimino, 385 Mass. at 328. It is proper to infer from evidence of a patron’s excessive consumption of alcohol, “on the basis of common sense and experience, that [a] patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee.” Vickowski, 422 Mass. at 611; see P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

However, “[e]vidence of apparent intoxication, or of elevated blood alcohol levels, at some later point in time does not, by itself, suffice to show that the patron’s intoxication was evident at the time the last drink was served.” Douillard v. LMR, Inc., 433 Mass. 162, 165 (2001). Yet, such evidence may be used to bolster other evidence concerning a patron’s condition at the time alcohol was served. Id. at 166. Likewise, expert opinion about an average drinker’s response to alcohol is not sufficient by itself to demonstrate whether a particular drinker showed signs of intoxication, but such expert testimony “may ... be sufficient when conjoined with other direct evidence of the patron’s customary reactions to alcohol consumption.” Soucy v. Eugene M. Connors Post 193, Inc., 79 Mass. App. Ct. 1109, \*2 (2011) (memorandum and order pursuant to Rule 1:28); see Douillard, 433 Mass. at 167-168 (finding sufficient evidence to permit inference of visible intoxication at time final drink was served where patron and his friend confirmed patron usually showed signs of intoxication after consuming seven drinks, expert opined that patron likely had nine drinks, and expert opined that one usually shows signs of intoxication at a blood alcohol level lower than patron’s was). In Soucy, there was direct evidence of the number of drinks that the patron consumed as well as expert opinion about the patron’s blood alcohol levels at the bars, “levels at which average persons would have shown signs of intoxication.” Soucy, 79 Mass. App. Ct. at \*1. Despite such evidence and expert opinion, there was no evidence of the number of drinks it customarily would take for the patron to become intoxicated. Id. at \*2. Consequently, the Soucy Court determined that “a fact finder could not conclude . . . that [the patron] passed his normal point of intoxication and thus likely appeared intoxicated while at the [bars].” Id.

A.C. and H.M. each admitted to being intoxicated while inside the licensed premises and prior to being served by the Licensee. However, that does not end the inquiry. The question before the



Commission is whether the Licensee knew or reasonably should have known the individuals were intoxicated prior to being served. Also, there was no objective evidence of intoxication. While A.C. testified that the four friends were more outgoing than normal and dancing with strangers because of their intoxication, dancing and socializing is normal behavior for a nightclub that would not reasonably alert staff that the patrons were intoxicated. While they were served a bottle of vodka, there is no evidence of how much vodka was in the bottle or of its proof. Likewise, they were served champagne, but they were not sure how the champagne was delivered to their table, and they not sure who ordered it, nor was there proof of the size of the bottle of champagne. There was no evidence presented to the Commission that any of the four students spoke to any wait staff, or employees prior to the champagne bottle appearing on their table.

The Commission was not presented with any evidence that any Icon employee or wait staff knew or observed the patrons after they had consumed the vodka, and prior to the bottle of champagne being delivered to the table. The Commission was not presented with any evidence that the student patrons were exhibiting behavior or manifesting open and obvious signs of intoxication that put the Licensee or its employees on notice that the student patrons were visibly intoxicated, before serving the student patrons more alcohol, the bottle of champagne. Furthermore, there is no evidence of how much alcohol each individual patron consumed. With no evidence of outward signs of intoxication or evidence of how much alcohol each patron consumed, the Local Board has not sustained its burden in proving the Licensee knew or reasonably should have known these individuals were intoxicated prior to service. Rivera, 77 Mass. App. Ct. at 20.

This Commission itself has yielded to the temptation presented by horrific facts surrounding an accident with serious injuries or a fatality, and reasoned backwards to find that a person was manifestly intoxicated before being involved in or causing a horrific accident. In a previous decision that both directly sanctioned a licensee for allegedly violating M.G.L. c. 138, § 69 and approved on appeal the action of a local licensing authority in sanctioning a licensee for allegedly violating M.G.L. c. 138, § 69, the Superior Court reversed such Commission decision on appeal.

The Superior Court reversed the decision of the Commission approving a local board decision finding a violation of G.L. c. 138, § 69, in the Royal Dynasty case. Royal Dynasty, Inc. v. ABCC, Suffolk Superior Court C.A. No. 03-1411 (Billings, J.) (December 9, 2003). The Superior Court described the facts in that case as “a horrific fatal accident, the extraordinarily reckless behavior by two recently-departed Royal Dynasty patrons that caused it, the failed PBT [portable breathalyzer test] and field sobriety tests at the scene, and the evident absence of another source of alcohol for either man.” Royal Dynasty, at page 10. In that case, the Superior Court acknowledged that with those facts “it is tempting to reason backward to the conclusion that they [the allegedly intoxicated patrons] must have been visibly intoxicated when served.” Id. But the elements necessary to prove a violation of M.G.L. c. 138, § 69 require the presence of a visibly intoxicated person in or on a licensed premise, followed by a sale or delivery of an alcoholic beverage to that visibly intoxicated person.

Since the Commission cannot draw an inference of obvious intoxication at the time of delivery or sale with the requisite degree of certainty, the Commission concludes that there is insufficient evidence to prove that Paga, Inc. d/b/a Icon violated M.G.L. c. 138, § 69.

#### IV. Progressive Discipline and the Appropriateness of Sanctions Imposed by Local Board

The Licensee further argues that the penalty of a five (5) day suspension is excessive. Therefore, the Commission must review whether the sanction of a five (5) day suspension imposed by the Local Board for these violations was reasonable. “The burden is on the licensee to prove the penalty imposed should not be approved.” Metrowest Tropical Foods, Inc. (ABCC Decision Sept. 20, 2006). The Licensing Board for the City of Boston Local Board Rules and Regulations do not address progressive discipline. Thus, the Commission must consider, in the absence of these regulations, the totality of the evidence, including but not limited to the prior violation history of the Licensee, the testimony of Local Board Chairman Pulgini regarding the factors utilized in determining the sanctions imposed, and the egregiousness of the violation(s) in making this determination.

The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in M.G.L. c. 138. Chapter 138 was “enacted ... to serve the public need and ... to protect the common good.” M.G.L. c. 138, § 23. “[T]he purpose of discipline is not retribution, but the protection of the public.” Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981) (emphasis supplied).

The Commission was presented with no evidence regarding other licensees charged with similar violations, and was presented with no evidence regarding what sanctions the Local Board imposed upon other licensees for these or similar violations. In reviewing the prior history of Icon, the Commission does find that Icon had a similar prior infraction for a minor in possession of alcohol which occurred in January of 2014. The Commission was unable to determine if there were similar prior violations in 2015 and 2016, as the Commission was only presented with the Licensee’s history before the Local Board for years 2013 and 2014.

The Commission finds that the Rules and Regulations of the Local Board do not address progressive discipline. However, Chairman Christine Pulgini of the Licensing Board for the City of Boston testified before the Commission about the factors which the Local Board utilizes in assessing violations and determining sanctions to be imposed, specifically in cases involving progressive discipline. The Commission finds two of these violations were committed by the Licensee, which are extremely egregious in nature. The Commission finds that based on the Licensee’s prior history of a similar violation, and the factors utilized by the Local Board regarding progressive discipline (inspection of license, the physical appearance of patrons, the quality of the evidence presented at hearing) the Commission approves the Local Board’s five (5) day suspension of the M.G.L. c. 138 § 12 license of Paga, Inc. d/b/a Icon as a reasonable exercise of the Local Board’s lawful discretion.

### CONCLUSION AND DISPOSITION

The Commission **APPROVES** the action of the Licensing Board for the City of Boston in finding that the Licensee committed the violations of service of alcoholic beverages to persons under twenty-one years of age, in violation of G.L. c. 138 §§ 34, 64, and failure to properly inspect identifications in violation of Local Board Rules and Regulation 1.08 (F);

The Commission **DISAPPROVES** the action of the Licensing Board for the City of Boston in finding that the Licensee committed a violation of service to an intoxicated person in violation of G.L. c. 138, § 69.

The Commission **APPROVES** the action of the Licensing Board for the City of Boston in suspending the license of Paga, Inc. d/b/a Icon for five (5) days. The Commission finds this penalty to be a reasonable exercise of the Local Board's lawful discretion.

### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kathleen McNally, Commissioner



Elizabeth Lashway, Commissioner



Dated: June 20, 2017

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.

This document is important and should be translated immediately.  
Este documento es importante y debe ser traducido inmediatamente.  
Este documento é importante e deve ser traduzido imediatamente.  
Ce document est important et devrait être traduit immédiatement.  
Questo documento è importante e dovrebbe essere tradotto immediatamente.  
Το έγγραφο αυτό είναι σημαντικό και θα πρέπει να μεταφραστούν αμέσως.  
这份文件是重要的，应立即进行翻译。

cc: Lesley St. Germain, Esq. via facsimile  
William A. Kelley, Jr., Esq.  
Mark Evogliadis, Esq.  
William Doyle, Esq.  
Hugh Curran, Esq.  
Frederick G. Mahony, Chief Investigator  
Administration, File