



*The Commonwealth of Massachusetts*  
*Department of the State Treasurer*  
*Alcoholic Beverages Control Commission*  
*Boston, Massachusetts 02114*

*Steven Grossman*  
*Treasurer and Receiver General*

*Kim S. Gainsboro, Esq.*  
*Chairman*

**DECISION**

**RAINBOW DRAGON CORPORATION D/B/A PAN ASIA**  
**412 WEST BROADWAY**  
**BOSTON, MA 02127**  
**LICENSE#: 011600841**  
**HEARD: 01/16/13**

This is an appeal of the action of the Licensing Board for the City of Boston ("Boston" or "Local Board") in suspending the M.G.L. c. 138, §12 all alcoholic beverages license of Rainbow Dragon Corporation d/b/a Pan Asia (the "Licensee" or "Rainbow") for four (4) days. 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 16, 2013.

The following documents are in evidence as exhibits:

Exhibits of the Local Board:

1. Local Board's Hearing Notice and Vote of the Board, dated March 30, 2012, for hearing to be held May 8, 2012, with Boston Police Department Violation Citation No. 29952 and Incident Report, CC Number: 120159066, both dated March 18, 2012 (5 pages);
2. Local Board's Statement of Reasons dated May 10, 2012 (3 pages)
3. Local Board's Docket Sheet for Rainbow Dragon, Corporation (3 pages); and
4. One (1) Audiotape Recording of Local Board's Hearing held on May 8, 2012.

Exhibits of the Licensee:

- A. Photograph of the Interior of the Premises Showing Warning Signs Re: "Will Not Serve Minors" (1 page);
- B. Photocopy of Four (4) Counterfeit IDs Seized by Licensee (1 page);
- C. Sample of two (2) Wristbands (1 white, 1 green) used by Licensee to Identify Patrons of legal drinking age, white wristband states "Drinking Age Verified";
- D. Copy of TIPS Certificate for License Manager, Peter Chew (1 page);
- E. Floor Plan of Licensed Premises (1 page); and
- F. Alcohol Sales Receipts for March 18, 2012 (67 sales receipts).

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

## FACTS

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

1. Rainbow Dragon Corporation d/b/a Pan Asia is the holder of a Common Victualler 7-Day all alcoholic beverages license issued by the Local Board for the premises located at 412-414 West Broadway, South Boston, Massachusetts, with a 1:00 a.m. closing hour. (Exhibit 3)
2. Detective William Gallagher of the Boston Police Department testified at the Commission hearing. (Testimony)
3. On March 18, 2012, at approximately 2:45 p.m., Sergeant Robert Mulvey, Detective William Gallagher, and Lieutenant Detective Stephen Meade of the Boston Police Department conducted an inspection of the licensed premises.<sup>1</sup> (Testimony, Exhibit 1)
4. This was the day of the 2012 St. Patrick's Day Parade for the City of Boston. (Testimony)
5. Inside the premises, officers observed two young looking female patrons each in possession of full cans of Budweiser Light beer. (Testimony, Exhibit 1)
6. Detective Gallaher testified that they approached the young looking patrons and requested identification. (Testimony, Exhibit 1)
7. He stated that the first female produced a Massachusetts Driver's License in the name of Jamie O'Neil, date of birth March 26, 1987, age twenty-five (25) years. (Testimony, Exhibit 1)
8. Detective Gallagher testified that the person in the license photo did not look like the person who presented the identification. The facial features, hair, and eyes differed from that of the person in the photograph. (Testimony, Exhibit 1)
9. The female who used the identification is 4 ft. 11 inches tall, and Jamie O'Neil's identification stated that she is taller. (Testimony, Exhibit 1)
10. The first female admitted to the Officers that the license did not belong to her and supplied her true information: Jaelyn Leonard, date of birth February 29, 1992, age twenty (20) years.<sup>2</sup> (Testimony, Exhibit 1)
11. The detectives retained possession of the license. (Testimony, Exhibit 1)
12. The second female, later identified as Shaelagh Mansfield, date of birth January 9, 1992, age twenty (20) years, stated that she did not have any identification.<sup>3</sup> (Testimony, Exhibit 1)

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<sup>1</sup> The police report written by Detective Gallagher states that the inspection and incident occurred at 4:45 p.m. It was reported during the hearing that this was not the correct time and is a typographical error. (Exhibits 1, 2, Testimony)

<sup>2</sup> The police report states that this woman's name is Jacyn Leonard. Detective Gallagher, in his testimony before the Commission and the Local Board referred to her as "Jaelyn Leonard". (Exhibits 1, 4, Testimony)

<sup>3</sup> The Statement of Reasons issued by the Local Board states that Ms. Mansfield's date of birth is 01/09/1991, which Attorney Lorizio stated to the Commission was a typographical error on the part of the Local Board. (Exhibits 1, 2, Testimony)

13. Detectives spoke with the employee/waiter who waited on the minors and asked if he requested identification from the female patrons. He told Officers that he did not ask for identification as the female patrons did not order the alcohol from him. (Testimony, Exhibit 1)
14. Detectives informed the manager on duty, Peter Chew, of the violation, and escorted the two (2) females off the property. (Testimony, Exhibit 1)
15. Peter Chew, the licensee and manager, appeared at the Commission hearing. He testified that he is the owner and the manager of the licensed premises. He is TIPS trained in the service of alcoholic beverages. He has owned this establishment for more than twenty (20) years. (Testimony)
16. He stated that this was the day of Boston's St. Patrick's Day Parade and he went to a meeting with the Licensing Board to be prepared for parade day. (Testimony)
17. Mr. Chew was working at the front door and he was checking identifications that day. (Testimony)
18. Mr. Chew stated that because it was parade day, he took extra precautions that day. He utilized a wristband system on that day in case people left his premises to go out and smoke. This was the first time he implemented the wristband system. (Testimony, Exhibit C)
19. A white wristband indicates that the age is verified. A green wristband indicates that the age is not verified. (Testimony, Exhibit C)
20. As this is a restaurant, some patrons only come here to eat. If people are either underage, or not drinking and only come to eat, patrons are issued a green wristband. (Testimony)
21. Mr. Chew testified before the Commission that both underage patrons were wearing green wristbands while inside his premises, and they were in the dining room portion of the premises, not the bar. (Testimony)
22. However, Mr. Chew testified before the Local Board that patrons twenty-one (21) and over were given a white wristband, and those patrons under twenty-one (21) were given green wristbands. Mr. Chew told the Local Board that he gave the minor female who presented the identification a white wristband. Mr. Chew stated that the two (2) minor females were seated at a table with other people who were twenty-one (21) years of age or older. Mr. Chew surmised from his own investigation that the minor female with the white wristband must have gone to the bar and purchased two (2) beers – one (1) for herself and one (1) for her friend. (Exhibits 2, 4)
23. Ms. Eva Shek testified before the Commission. She is a bartender at the premises and has worked there for five (5) years. She was on duty on parade day and she was working at the bar. Mr. Chew was working at the front door. She testified that she did not see the two underage patrons come to the bar and buy drinks. (Testimony)
25. The Licensee received a two (2) day suspension in November 23, 2011 for the same violation. (Exhibits 2, 3)

## DISCUSSION

The City of Boston alleges that Rainbow Dragon Corp. d/b/a Pan Asia Restaurant violated the provisions of its license, specifically M.G.L. Ch. 138, section 34, for service of alcohol to a minor, and failure to properly inspect identification.

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).

M.G.L. Chapter 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, section 23, as amended through St. 1977, c. 929, Section 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 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).

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.)

At the hearing before the Commission, the Local Board submitted the Violation Notice and the Incident Report (Exhibit 1). For the reasons stated herein, the Commission rules that the violation notice and police report are admissible, and may be relied upon for the truth of the matters stated therein.

The Commission finds that the violation notice and the incident report, while hearsay, are inherently reliable. See Commonwealth v. Durling, 407 Mass. 108, 551 N.E. 2d 1193 (1990). The notice and the report each 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 individuals were observed by Detective Gallagher, to be in possession of full cans of beer. He testified that he witnessed both underage patrons each in possession of a can of Budweiser Lite beer while inside the premises. He also testified that he spoke to the underage patrons while inside the establishment, and he determined that each patron was under the legal drinking age of twenty-one (21).

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 case 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 in the licensed premises by both underage patron who were in possession of alcoholic beverages, are both admissible and credible because they are statements against penal interest. 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 the underage patrons were unreliable. The licensee presented no evidence that it was unable to exercise its right to subpoena the underage patrons 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).

The credible evidence proved, at best, only that the underage patrons 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 was 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.”

The Local Board notice of hearing specified the allegation that the licensee violated M.G.L. c. 138, §34. While the Local Board quoted a portion of that statute, there is no evidence that the Local Board issued, or the licensee requested, any specific particulars on which of the many provisions of §34 the licensee is alleged to have violated. The Commission finds that the notice of hearing provided by the Local Board coupled with the hearing process before the Local Board, provided the Licensee with adequate notice of the issues in order for the Licensee to obtain a reasonable opportunity to prepare and present evidence and argument in defense to the issues. See Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission (No. 1), 374 Mass. 547, 374 N.E.2d 1181 (1978). The Commission also finds that the Licensee has made no showing that its substantial rights have been prejudiced. Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission (No. 1), 374 Mass. 547, 374 N.E.2d 1181 (1978). The Licensee presented one witness on the substantive matter of this alleged violation.

The Commission’s discussion must therefore determine whether the Local Board presented credible evidence that persuades the Commission that the Licensee furnished alcoholic beverages to two persons under 21 years of age, in violation of the plain language of §34. The police report contained the statements against penal interest made by each underage patron that each was underage. The eyewitness testimony of Detective Gallagher, who testified before the Commission that he observed Ms. Leonard and Ms. Mansfield seated at a table inside the premises and that they each had a full can of Bud Lite beer in front of them is credible to the Commission. Detective Gallagher and the other officers spoke with each patron, whereby Officers determined that Ms. Leonard and Ms. Mansfield were not of legal drinking age and younger than twenty – one (21) years of age. Ms. Leonard and Ms. Mansfield were unable to produce any documentation indicating that they were of legal age. See M.G.L. c. 138, § 34B (“Any 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 shall be punished.”) Based on this evidence, the Commission is persuaded that the Licensee furnished alcoholic beverages to the two (2) under-aged persons in violation of M.G.L. c. 138, § 34. The Commission approves the action of the Local Board in finding that the Licensee violated M.G.L. c. 138, §34.

In the Local Board’s Notice of Hearing, the Local Board alleged that the Licensee had committed a violation because of an alleged “failure to properly inspect identification.” No provision of M.G.L. c. 138, Commission regulation, or regulations of the Local Board were cited. Nowhere does M.G.L. c. 138 require or otherwise address the alleged “failure to properly inspect identification.” See, e.g., Murray’s Liquors, Inc. v. Alcoholic Beverages Control Commission, 48 Mass. App. Ct. 100 (1999). The notice does not properly allege, based on the plain language or any judicial construction of the statute, that the Licensee failed to comply with “any law of the commonwealth”, M.G.L. c. 138, §64, nor does it otherwise properly allege that the Licensee failed to “maintain compliance with [General Laws chapter 138]” or that it “appear[ed] that alcoholic beverages are being or have been sold, served or drunk therein in violation of any provision of [General Laws chapter 138].” M.G.L. c. 138,§23.

The action of the local Board in finding this second violation of failure to properly inspect identification, as alleged or construed, is disapproved. The Commission also disapproves any penalty resulting therefrom.

CONCLUSION AND DISPOSITION

Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding the Licensee committed violation of: furnishing alcoholic beverages to a person under the age of 21, two (2) counts, in violation of M.G.L. c. 138, §34.

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding that the Licensee committed a violation of failing to properly inspect identification.

The Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in suspending the license for a period of four (4) days. 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 \_\_\_\_\_ *Kathleen McNally* (b2)

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

Susan Corcoran, Commissioner \_\_\_\_\_ *Susan Corcoran*

Dated: May 8, 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: Michael L. Mahoney, Esq., via Facsimile 617-338-9225  
Jean Lorizio, Esq., via Facsimile 617-635-4742  
Frederick G. Mahony, Chief Investigator  
Administration  
File