

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

SNP RESTAURANT GROUP, LLC DBA RED HAT CAFE
9 BOWDOIN ST.
BOSTON, MA 02110
LICENSE#: 011600091
HEARD: 04/18/2012

This is an appeal of the action of the Boston Licensing Board (the "Local Board") in suspending the M.G.L. c. 138, §12 all alcohol beverages license of SNP Restaurant Group, LLC dba the Red Hat (the "Licensee" or "Red Hat"). On December 13, 2011, the Local Board held a hearing that resulted in four (4) day suspension. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, April 18, 2012.

In a decision dated January 12, 2012, the Local Board found that the Red Hat served alcoholic beverages to persons under the age of twenty one (21) in violation of M.G.L. c. 138, §34 and suspended the Red Hat's license for a period of four (4) days. The Licensee contends that the action of the Local Board was unsupported by substantial evidence and was an arbitrary and capricious decision. The Licensee contends that the Board's decision was unfair in that it sought to punish the Licensee unfairly in seeking out this particular Licensee and did not act in a manner that was consistent with past practice.

The following documents are in evidence:

1. Local Board's Violation Notice no. 048235 dated November 10, 2011;
2. Boston Police Incident Report no. 110617597 dated November 11, 2011;
3. Local Board Hearing Notice dated November 15, 2011 for hearing to be held December 13, 2011;
4. Local Board's Original Vote for Four (4) Day Suspension on Hearing Notice dated January 12, 2012;
5. Local Board's Decision and Statement of Reasons dated January 18, 2012; and
6. Photocopy of Drivers' Licenses.

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

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FACTS

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

1. The Licensee is a Massachusetts Limited Liability Company, doing business under the name of the Red Hat with a principal place of business located at 9 Bowdoin Street, Boston, Massachusetts.
2. The Red Hat is the holder of a seven day all-alcoholic restaurant license issued by the Board and the Alcoholic Beverages Control Commission, pursuant to M.G.L. c.138 §12.
3. On November 10, 2011, the Boston Police conducted a license premise inspection and observed two youthful looking male patrons sitting at the bar in possession of alcohol.
4. The first male gave the officers a fraudulent Virginia driver's license with his photo and a birth date of May 1, 1990.
5. It was later determined by the Boston Police that this individual's date of birth was in fact March 1, 1991.
6. The second male gave a fraudulent Connecticut driver's license with his photo indicating a birth date of May 22, 1989.
7. It was later determined by the Boston Police that this individual's date of birth was in fact May 29, 1992.

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).

M.G.L. c. 138, §34 provides, in part, that “[w]hoever makes a sale or delivery of any alcoholic beverage or alcohol to any person under twenty-one (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 twenty-one (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 dba Juliano's Beer & Wine, Quincy (ABCC Decision April 8, 2005.)

M.G.L. c.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." M.G.L. c 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 Commission is persuaded that the Licensee violated M.G.L. c. 138, §34. The Licensee argued that the penalty that he was given was too severe and was arbitrary and capricious. He stated that he should not have received a penalty of four (4) days but rather a lesser sanction since it was his second offense and he did not receive any suspension of time for the first offense. He also argued that "he intended" to appeal the first offense but he did not. This is irrelevant since a licensee cannot appeal a warning.¹ The Licensee's first offense for the same type of offense, sale of alcohol to a minor, occurred less than two (2) weeks prior to the incident in which he received the four (4) day suspension.

The Licensee failed to mention that the prior offense was of the same exact nature and that it was less than a month prior to the current offense. He also did not present to the Local Board similarly situated licensees, thereby negating the arbitrary and capricious argument. What he did present were licensees who had first offenses for this type of offense who did not receive a four (4) day suspension, which would clearly present an argument of an arbitrary and capricious. However, the Local Board clearly took into consideration the prior offense which took place close in time to this offense, and was of the same exact nature, thereby justifying the number of days the suspension was given.

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.) 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 because the Commission failed to weigh the restaurant's acknowledged in-house efforts to identify or to "card" younger patrons so as to avoid service to minors. The Court found, "that for several reasons, the resulting sanction does not fall outside the boundaries of rationality." ² In reviewing the Town of Weymouth's sanctions that they imposed, and their system of progressive sanctions, the Court found that the system, "avoided abrupt or draconian punishment." ³ "Instead, it implemented graduated penalties and afforded the warnings of graduated penalties to offenders." *Id* at 6.

In Applebee's, 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.

¹ Under M.G.L. c. 138 §67, since the licensee was merely given a warning, there is no right of appeal.

² Page 5 of the Decision

³ Page 6 of the Decision

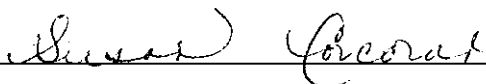
The Applebee Court found the system of sanction to be one that was intrinsically fair and rational. Here, in the case before us, the Local Board has considered much the same elements and has not acted in a draconian measure but in a more rational and fair manner in imposing the sanction upon the Licensee. The Local Board took into account all of the factors presented and concluded that the sanction imposed was one that was not arbitrary and capricious, but one that was well thought out and one of a graduated penalty, considering the licensee had a prior offense. The approach used by the Town of Weymouth was similar to the approach used by the City of Boston. The Local Board did not act in an unreasonable or unfair manner.

CONCLUSION

The Commission **APPROVES** the action of the Local Board in finding the Licensee violated M.G.L. c. 138, §34. The Commission **APPROVES** the action of the Local Board in suspending the licensee's license for four (4) days. This penalty was a reasonable exercise of the Local Board's lawful discretion.

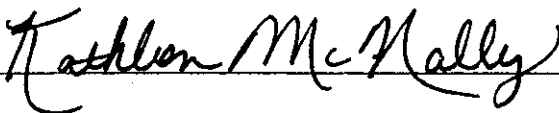
ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner



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

Kathleen McNally, Commissioner



DATE: September 4, 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: Louis A. Cassis, Esq. via Facsimile
Jean Lorizio, Esq. via Facsimile
Frederick G. Mahony, Chief Investigator
Administration
File