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

BRAINTREE BREW HOUSE LLC DBA THE BREW HOUSE
703 GRANITE STREET
BRAINTREE, MA 02184
LICENSE#: 013000089
HEARD: 2/27/2013

This is an appeal of the action of the Town of Braintree Licensing Board (the "Local Board" or "Braintree") in suspending the M.G.L. c. 138, §12 license of Braintree Brew House LLC dba The Brew House (the "Licensee" or "Brew House") located at 703 Granite Street, Braintree, MA, for one day with said suspension to be held in abeyance for six months. 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 27, 2013.

The following documents are in evidence:

1. Local Board's Notice of Hearing dated August 23, 2012 for Hearing to be held September 11, 2012;
2. Appearance Notice, dated August 27, 2012, for Attorney Thomas J. Cavanagh;
3. Local Board's Decision dated September 28, 2012;
4. Receipt for Mikayla Hazelton dated August 17, 2012, from Braintree Brew House;
5. Petition for Appeal Letter dated October 4, 2012, from Attorney Cavanagh to the Commission;
6. Braintree Police Department Incident Report no. 2012000011502 for Incident at Licensed Premises on August 17, 2012;
7. Email dated November 28, 2012 from Officer David Jordan to Russ Jenkins;
8. Email dated February 19, 2013, from Officer John Twohig to Attorney Carolyn Murray; and
9. Medical Records of Marissa Michalak from South Shore Hospital of Weymouth, service provided on August 17, 2012.

There is one audio recording of this hearing, and five witnesses testified: three police officers who responded to the licensed premises, the mother of the alleged intoxicated patron, and the president/manager/owner of the Brew House.

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FACTS

The Commission makes the following findings of fact based on the evidence presented during the hearing:

1. Braintree Brew House, LLC dba The Brew House holds an All Alcoholic Beverages License issued pursuant to M.G.L. c. 138, §12. The premises is located at 703 Granite St. Braintree, MA. (Commission Records)

2. Alexandros Kesaris is the president/manager with a 50% ownership interest in the stock of the corporation. Edward Cochrane is the clerk/treasurer with a 50% ownership interest in the stock of the corporation. Mr. Kesaris, is the manager of record for the Brew House, and was the manager on duty on August 16-17, 2012. (Testimony, Commission Records)

3. At approximately 12:58 a.m., on August 17, 2012, Braintree Police Officers David Jordan, John Twohig, and James Peters were dispatched to the Brew House for the report of an intoxicated female. When they arrived, Officer Peters observed Marissa Michalak lying on the ground in the parking lot outside of the Brew House, dry heaving. Her friends were holding her head up because she was unable to do so herself. (Ex. 6, Testimony)

4. Ms. Michalak's friends told the officers that she had a couple of drinks at her house prior to drinking for a brief period of time at the Brew House. (Ex. 6, Testimony)

5. Ms. Michalak was visibly intoxicated in the parking lot of the licensed premises. (Testimony)

6. Shortly thereafter, paramedics arrived on the scene and transported Ms. Michalak to South Shore Hospital. (Ex. 6, Testimony)

7. Officers Jordan and Peters went inside the Brew House. Mr. Kesaris, approached the officers, introduced himself, and asked what was taking place in the parking lot. Officer Peters told him that a patron of the bar was severely intoxicated and being transported to the hospital. (Ex. 6, Testimony)

8. Mr. Kesaris was unaware of the incident, until the police appeared at the door to the premises. (Testimony)

9. The Brew House employs two bartenders and a bar back. There is no table service, so that individuals who wish to order a drink must do so from the bartenders. (Testimony)

10. The officers spoke with Mr. Kesaris, and bartenders, Alyssa Dearani, and Michelle Remillard. (Ex. 6, Testimony)

11. Mr. Kesaris had been working the entire night, intermittently stationed at the door checking IDs, and walking the floor to observe customers. (Ex. 3, Testimony)

12. Mr. Kesaris did not observe anyone intoxicated in the bar. (Ex. 6, Testimony)

13. Mr. Kesaris has several years of restaurant management experience. It is his practice to refuse admittance and not serve alcoholic beverages to intoxicated people. Mr. Kesaris had never seen Ms. Michalak, and did not observe any intoxicated person enter or exit the Brew House. The premises were empty by 12:45 a.m., except for staff. (Ex. 3, Testimony)

14. Ms. Dearani and Ms. Remillard also told Officer Peters that they didn't remember Ms. Michalak, and that they didn't see anyone intoxicated inside the bar. (Ex. 6, Testimony)

15. Subsequently, Ms. Michalak had blood drawn at the hospital, which indicated that her Quantitative Alcohol was 228 mg/dl. (Ex. 9)

16. However, there was no evidence introduced that explained the significance of this blood alcohol level.

17. There was no testimony from any expert qualified to deliver a retrograde extrapolation and reconstruction of the blood alcohol curve of Ms. Michalak.

18. As such, there was no testimony regarding how a quantitative blood alcohol level of 228 mg/dl proved that Ms. Michalak was visibly intoxicated at a specific time during the evening.

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).

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 Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations.

The Local Board did not produce any percipient witnesses or direct evidence regarding the events that transpired inside the licensed premises. Officers Jordan, Twohig, and Peters were dispatched to the Brew House as a result of Ms. Michalak's condition in the parking lot outside of the licensed premises. Mrs. Michalak (the mother of the intoxicated patron seen by the police in the parking lot) was not present inside the licensed premises and could only testify regarding her daughter's condition at the hospital. No witnesses testified that they observed the Licensee sell or deliver any alcoholic beverages to Ms. Michalak inside the licensed premises, after they observed that she was visibly intoxicated. Although, the medical records were entered in evidence pursuant to the informal/fair hearing act, alone, without legally admissible explanation, offer no proof as to any element of the violation charged.

Thus, the alleged violation that is the subject of this appeal presents the Commission with issues regarding the admissibility of hearsay evidence and the weight accorded hearsay during an appeal from a local board's enforcement action. A decision of a board that rests entirely upon hearsay evidence cannot be sustained, but decisions based upon hearsay evidence that is supported and corroborated by competent legal evidence have been sustained. Moran v. School Committee of Littleton, 317 Mass. 591(1945) (further citations omitted). The petitioner [was] entitled to have the charges dismissed unless they were substantiated by true and competent evidence, but he is not entitled to have the decision of the committee held invalid if apart from the affidavits there was evidence sufficient to substantiate the charges. Graves v. School Committee of Wellesley, 299 Mass. 80, 86 (further citations omitted)

M.G.L. c.138, §69 provides that "[n]o alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person." Massachusetts' courts have held that negligence cases provide "some guidance" as to what must be proven "to show a violation of the statute [G.L. c. 138, §69]." Ralph D. Kelly, Inc. v. ABCC, Middlesex Superior Court C.A. No. 99-2759 (McEvoy, J.) (May 23, 2000) cited in Royal Dynasty, Inc. v. ABCC, Suffolk Superior Court C.A. No. 03-1411 (Billings, J.)(December 9, 2003). The Massachusetts courts have also held that to prove a claim of negligent service to an intoxicated person, evidence must be presented that a license holder sold or delivered alcoholic beverages to a person at a time **when a reasonable person in the position of that defendant would have known that [the patron] was intoxicated.** (emphasis supplied) See Bennett v. Eagle Brook Country Store, Inc., 408 Mass. 355, 358 (1990); Cimino v. The Milford Keg, Inc., 385 Mass. 323, 327 (1982) cited in Fazio v. Lincoln Restaurant Group, Inc., 18 Mass.L.Rptr. 239, 2004 WL 2049234 (Mass.Super.) (Fabricant, J.)(August 27, 2004).

To meet that burden, "a plaintiff must come forward with some evidence that the patron's intoxication was apparent at the time he was served by the defendant [emphasis added]." Douillard v. LMR, Inc., 433 Mass. 162, 164-165 (2001). "The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication." Vickowski v. Polish American Citizens Club, 422 Mass. 406, 610 (1996), and cases cited. A plaintiff can make the

required showing by either direct or circumstantial evidence, or a combination of the two. See Doullard v. LMR, Inc., 433 Mass. at 165; see also Cimino v. Milford Keg, Inc., 385 Mass. at 328 (evidence that patron was served six or more white Russians and became "loud and vulgar" sufficed).

The patron's consumption of a large quantity of alcohol is a circumstance that, in itself, can support the necessary inference. See Vickowski, supra, at 611 ("a jury confronted with evidence of a patron's excessive consumption of alcohol properly could infer, on the basis of common sense and experience, that the patron would have displayed obvious outward signs of intoxication while continuing to receive service"). In Vickowski, however, the Court held that four or five bottles of beer over approximately two hours did not suffice to support the necessary inference, in the absence of any direct evidence that the patron showed signs of intoxication when served. Other cases, similarly, have held substantial quantities insufficient absent other evidence. See Kirby v. Le Disco, Inc., 34 Mass.App.Ct. 630, 632 (1993) (eight beers); Makynen v. Mustakangas, 39 Mass.App.Ct. 309, 314 (1995) (five or six cans of beer).

As noted above, the Local Board presented no witnesses with direct knowledge of any of the elements necessary to support a violation of M.G.L. c. 138, §69, specifically Ms. Michalak's behavior and outward signs of intoxication when she was served alcoholic beverages. The Commission only heard testimony from Braintree Police Officers regarding statements made to them in the early morning hours on August 17, 2012.

To be sure, the officers took comprehensive statements from three individuals who were with Ms. Michalak that evening. These statements related to the events that transpired at the premises. However, the manner in which they were introduced during the hearing before the Commission constitutes the text-book definition of hearsay.[1] These hearsay statements conveyed to the police officers the following information:

a) Marissa Michalak and some friends went to the Brew House between 9:30-10:00 p.m., where they met several friends.

b) These individuals related their best memory of how many alcoholic beverages Ms. Michalak consumed during the evening, although none of them were watching her constantly. They also related the number of alcoholic beverages they each had consumed. It appears from their statements that they each consumed between four-six drinks in a three to three and a half hour time period.

c) Some of the individuals told the officers that Ms. Michalak appeared "fine". One of the individuals, Ms. Johnson, who had met Ms. Michalak that evening, told the officers that she was with Ms. Michalak on and off during the night. Towards the end of the night, she noticed that Ms. Michalak was really drunk and helped her get outside. She described Ms. Michalak's gait

[1] Each statement would not be hearsay if the individual who made the statement(s) appeared to testify before this Commission. But this did not happen.

as staggering, and said she guided her out of the Brew House as she "one armed" her.

d) Ms. Johnson told the officers during a subsequent conversation, several months later that she had seen Ms. Michalak become visibly intoxicated, as the evening wore on. She stated that Ms. Michalak was visibly drunk inside the Brew House and "they were still serving her."

The officers who testified before the Commission observed Ms. Michalak visibly intoxicated outside of the premises. Hours later, Ms. Michalak had a blood test which indicated a Quantitative Alcohol level of 228 mg/dl. However, a subsequent blood alcohol level does not suffice in itself to meet the plaintiff's burden, but such evidence may bolster other evidence to form a set of facts sufficient to support an inference. See Douillard, supra, at 165- 166.

In Douillard, on review of a grant of summary judgment, the Supreme Judicial Court accepted proffered expert testimony as part of the circumstantial evidence that it held sufficient. The expert extrapolated from a subsequent blood alcohol level to form opinions as to the amount of alcohol the patron had consumed, his blood alcohol concentration at the time he was last served, as well as the signs of intoxication most people would show at that level. Id.

However, in this case, there was no evidence regarding the significance of the blood alcohol level. There was no testimony from any expert qualified to deliver a retrograde extrapolation and reconstruction of the blood alcohol curve of Ms. Michalak. Moreover, there was no testimony on how a quantitative blood alcohol level of 228 mg/dl proves visible intoxication at a specified time.

This Commission itself has yielded to the temptation presented by horrific facts surrounding a fatal accident and reasoned backwards to find that a person was manifestly intoxicated before causing such a horrific accident. In previous decisions that both directly sanctioned licensees for allegedly violating M.G.L. c. 138, §69 and approved on appeal the action of a local licensing authority in sanctioning licensees for allegedly violating M.G.L. c. 138, §69, the Superior Court reversed such Commission decisions on appeal. In Re: Winh Wah Co., Inc. dba Winh Wah Restaurant, Freetown (ABCC Decision January 19, 2005).

The Commission has acknowledged the Ralph D. Kelly, Inc., supra , where the Superior Court reversed the Commission's decision suspending a license for violating M.G.L. c. 138, §69. In that case, a single, fatal car accident occurred down the street from the licensed premises, minutes after the decedent/operator left the licensed premises. The deceased operator had a blood alcohol level of .189%. The Superior Court held that in order to find a violation, "there must be evidence that the violator knew or should have known that the person he served was intoxicated." Ralph D. Kelly, Inc., at page 4. The Superior Court further held that without any "expert testimony to say that a man with a blood alcohol level of .189% taken sometime after death probably would have shown outward signs of intoxication at a certain time prior to death," a violation of M.G.L. c. 138, §69 is not proven. Ralph D. Kelly, Inc., supra at page 4.

Again, the Superior Court reversed a decision of the Commission approving a local board decision finding a violation of G.L. c. 138, §69, in the Royal Dynasty, supra. 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 premises followed by a sale or delivery of an alcoholic beverage to that visibly intoxicated person. In this case, no evidence establishes a nexus between Ms. Michalak's quantitative blood alcohol level and visible intoxication at a specified time.

All of the evidence presented to the Commission constitutes hearsay. All of the witnesses either arrived at the scene after Ms. Michalak was outside of the licensed premises, or were with her at the hospital. Furthermore, there was very little evidence regarding Ms. Michalak's level of intoxication at the time of service. In fact, there was only one statement that the Local Board introduced into evidence relative to the issue of visible intoxication at the time of service.

Ms. Johnson told Officer Jordan during a follow up investigation with him in February of 2013, that, "she had seen Ms. Michalak become visibly intoxicated, as the evening wore on." Ms. Johnson added that, "Ms. Michalak was visibly drunk inside the Brew House and they were still serving her." These statements are hearsay and are not supported or corroborated by other competent legal evidence.

All of the evidence regarding Ms. Michalak's consumption of alcoholic beverages while inside the licensed premises and her state of intoxication before she was being sold or delivered any alcoholic beverages while inside the licensed premises was hearsay. A decision of a board that rests entirely upon hearsay evidence cannot be sustained... See Moran v. School Committee of Littleton, supra. In this case, there has been no evidence introduced to corroborate these hearsay statements. Therefore, pursuant to the controlling law as determined by binding court decisions, the Commission is persuaded and finds that the Local Board has not proved by legally competent evidence that Ms. Michalak manifested objective, observable signs of intoxication while inside the licensed premises and, after manifesting such signs of intoxication, was sold or delivered alcoholic beverages.

CONCLUSION

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding this violation of M.G.L. c. 138, § 69 as alleged. The Commission also disapproves any penalty resulting therefrom as any penalty would be discrepant with today's decision of the Commission.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman, _____

Kathleen McNally, Commissioner _____

Dated: March 27, 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.

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Frederick G. Mahony, Chief Investigator
Administration
File