



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

RJA CORPORATION DBA JO ANGELO'S CAFE
216 MAIN & 11 CRESCENT STS.
BROCKTON, MA 02301
LICENSE#: 014400033
HEARD: 10/02/2013

This is an appeal of the action of the City of Brockton Licensing Board (the "Local Board" or "Brockton") for suspending the §12 alcohol license of RJA Corporation dba Jo Angelo's Café ("Jo Angelo's") located at 216 Main Street, Brockton, MA for three (3) 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, October 2, 2013.

On October 18, 2012, the Local Board held a hearing for alleged violations of 203 C.M.R. 2.05 (2) permitting an illegality on the licensed premises, to wit, an assault and battery on a patron, and M.G.L. c. 138, §63A for hindering and delaying an investigator. On November 26, 2012, the Local Board suspended Angelo's license for three days arising out of an incident which occurred at the licensed premises on June 29, 2012. The three day suspension was ordered to be served on January 3-5, 2013; however, the suspension has been stayed pending the result of this appeal.

The following documents are in evidence:

1. Local Board's Decision dated November 26, 2012;
2. Photograph of Victim; and
3. High-Tech Evidence Analysis Team ["HEAT"] Report Dated August 12, 2012 for HEAT Case No. 2012-05647.

A. Application for Criminal Complaint.

There is one (1) audio recording of this hearing, and seven (7) witnesses testified.

The Commission took Administrative Notice of the Licensee's Commission File.

3366-6-242. 1

FACTS

1. Jo Angelo's Cafe, located at 216 Main and 11 Crescent Streets, Brockton, Massachusetts, holds an all alcoholic beverages restaurant license under M.G.L. c. 138, §12. (Commission Records)
2. Joseph Angelo is the sole shareholder of RJA Corp. and the approved license manager. (Commission Records)
3. On June 29, 2012, at approximately 10:30 p.m. Dennis Pietrantonio arrived at Jo Angelo's to meet Colin Angelo. Colin Angelo is Mr. Angelo's son. When Mr. Pietrantonio arrived, there were very few patrons inside the licensed premises. (Testimony)
4. Mr. Pietrantonio saw an individual by the name of Al McCarthy standing at the opening of the bar. There were two bartenders on duty and a bouncer. During the past twenty years, Mr. Pietrantonio has been to the licensed premises five (5) times. (Testimony)
5. Mr. McCarthy is an individual who patronizes Jo Angelo's on a regular, almost daily, basis. He is an electrician by trade, and lives close to the licensed premises. Mr. Angelo described Al McCarthy as a friend and customer to whom he has provided the combination to his office, along with a key to his establishment. Mr. Angelo has designated Mr. McCarthy as the contact person with the Fire Department. When the sprinkler system goes off or when the fire alarm goes off at odd hours during the night, Mr. McCarthy lets the Fire Department into the establishment. Occasionally, Mr. McCarthy opens Jo Angelo's, stands behind the bar, and serves alcoholic beverages. (Testimony)
6. Mr. McCarthy is not on the payroll. Although, he is not compensated for these services, Mr. Angelo will buy him a "beer here and there for electrical work he performs." Mr. McCarthy has been frequenting the licensed premises for over twenty (20) years. (Testimony)
7. Employees of the Licensee have seen Mr. McCarthy perform handy work at the business for Mr. Angelo. (Testimony)
8. After Mr. Pietrantonio entered Jo Angelo's, he went to the bar and ordered a Heineken beer. After sitting at the bar for 10 to 15 minutes, he called Colin Angelo who told him he was on his way. During that time, Mr. Pietrantonio spoke with Mike Paull, Scott Vassall, and a friend of his sister's. (Testimony)
9. Mr. Pietrantonio did not have an altercation or exchange words with anyone. Neither he nor any of the individuals he was speaking with were intoxicated. (Testimony)
10. Mr. Pietrantonio went to the restroom. As he was washing his hands, "a huge guy" came into the restroom and without any prior warning, hit him in the side of his face, threw him against the mirror, threw him on the ground and started hitting him. The individual called him by name and told Mr. Pietrantonio that he was going to kill him. (Testimony)
11. The individual punched Mr. Pietrantonio in the face multiple times, threw him across the bathroom and hit him repeatedly in the left ribs and back area. (Testimony)
12. Mr. Pietrantonio did not know the suspect and had never seen him before. Mr. Pietrantonio began yelling, "911, someone call for help", as the suspect continued to assault him. (Testimony)

13. In response to Mr. Pietrantonio's cries for help, three individuals came running into the restroom. Mr. McCarthy and Thomas Williams were two of the individuals. Mr. McCarthy pulled the assailant off of Mr. Pietrantonio and told him, "Stop! You're killing him." (Testimony)
14. The altercation lasted approximately one minute. (Testimony)
15. Once Mr. McCarthy and Mr. Williams pulled the assailant off of Mr. Pietrantonio, he (the assailant) fled the premises. (Testimony)
16. Mr. McCarthy told Mr. Pietrantonio, "You better not call the police; you better not tell them it happened here." Mr. McCarthy left Mr. Pietrantonio in the restroom. (Testimony)
17. Mr. Pietrantonio got up and walked out of the restroom, and found his way outside. He did not speak with any bartenders, waitresses, or bouncers, prior to leaving Jo Angelo's. (Testimony)
18. Once outside, Mr. Pietrantonio called 911, and stated that he had been assaulted at Jo Angelo's. It was approximately 11:16 p.m. (Testimony)
19. France Payne was working that night as a bouncer. He did not see anyone being assaulted or any other incidents at the licensed premises. He noticed people walking by on Main Street who appeared to be focusing on a male and asking him if he was okay, and he observed the male on the phone. (Testimony)
20. Brockton Police Officer Kenneth Ellis, with members of the Brockton Fire Department and an ambulance responded to the scene. (Testimony)
21. Officer Ellis spoke briefly with Mr. Pietrantonio who was very upset and in pain. He told Officer Ellis about the assault inside Jo Angelo's. He said that Mr. McCarthy had pulled his assailant off of him. Mr. Pietrantonio credited Mr. McCarthy with saving his life. (Testimony)
22. Mr. Pietrantonio's left eye was swollen. Officer Ellis told Mr. Pietrantonio he would meet with him at the hospital. (Testimony)
23. Thereafter, Mr. Pietrantonio went to the Brockton Hospital via ambulance. (Testimony)
24. Officer Ellis interviewed Mr. Pietrantonio once he was checked in and assessed at the Brockton Hospital Emergency Room. Mr. Pietrantonio informed Officer Ellis that an unknown male had come into the restroom at Jo Angelo's and assaulted him without any notice or provocation. (Testimony)
25. Eventually, Mr. Pietrantonio walked out of the hospital without treatment because he "got sick of waiting." (Testimony)
26. After speaking with Mr. Pietrantonio, Officer Ellis returned to Jo Angelo's and spoke with Mr. McCarthy and Mr. Angelo. Mr. McCarthy told Officer Ellis that he heard noise coming from the bathroom, went inside, saw the fight and pulled the assailant off of Mr. Pietrantonio. (Testimony)
27. Mr. McCarthy told Officer Ellis that the assailant had fled Jo Angelo's after the incident. Mr. McCarthy was unable to provide Officer Ellis with a description or the identity of the individual. Officer Ellis asked both Mr. Angelo and Mr. McCarthy if they knew Tom Johnson and they both answered "no." (Testimony)
28. Officer Ellis also interviewed Mike Paull and Scott Vassall. They were both drinking at Jo Angelo's with Mr. Pietrantonio on June 29, 2012. They confirmed Mr. Pietrantonio's version of

events. Specifically, that Mr. Pietrantonio did not have a disagreement with any individual prior to going to the restroom. (Testimony)

29. On July 3, 2012, Detective Santiago Cirino conducted a follow up investigation into the assault and battery, and interviewed Mr. Pietrantonio. Mr. Pietrantonio repeated the same account of the events that he told Officer Ellis on the night of the incident. (Testimony)
30. On July 4, 2012, at 10:15 a.m., Detective Cirino and Sgt. George Khoury went to Jo Angelo's to interview Mr. McCarthy for a second time. As the officers entered, they observed two males inside the bar; one was sitting at the bar with an open beer bottle and a glass of beer in front of him and Mr. McCarthy was standing behind the bar and appeared to be working. Mr. McCarthy acknowledged that he had opened the bar for Mr. Angelo and that he had a set of keys to the business. (Testimony)
31. Mr. McCarthy told the detectives that on June 29, 2012, he was a customer and was waiting for Mr. Angelo to arrive. Mr. McCarthy stated he walked into the bathroom and as he did so, both males walked out and went in separate directions. Mr. McCarthy informed Detective Cirino that he went in to use the bathroom, he had been at the bar approximately 15 minutes prior to going into the bathroom, he did not observe any altercations in the bar or in the bathroom, he did not separate the two men, and he did not say anything to the victim. (Testimony)
32. The Commission finds Mr. McCarthy's statements on the night of the incident, in which he claimed knowledge of the assault and battery and in fact stopped the assault and battery, to be more reliable than that statement made five days later.
33. Detective Cirino took out a complaint against Al McCarthy for Witness Intimidation. The clerk in the Brockton District Court did not issue the complaint. (Testimony)
34. Mr. Angelo gave the Brockton Police Department his entire video system. Lt. Paul Bonanza testified that Mr. Angelo has always been cooperative with the Brockton Police Department in terms of providing videotapes and access to the licensed premises. (Testimony)
35. The video system from Jo Angelo's was sent to the HEAT Lab of the Plymouth County Sheriff's Department for the purpose of extracting any evidence of the incident that might be available. The results were negative. The Lab found the system to be inoperable and it was reported that no software was detected that was able to record. The hardware inside the unit was missing a couple of screws, and the hard drive was inconsistent with the device. (Testimony)

DISCUSSION

Pursuant to M.G.L. Ch. 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. Ch. 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).

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. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§ 23, 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).

In this matter, the Licensee has been charged with two violations. The first is permitting a disorder, disturbance or illegality on the licensed premises in violation of 204 C.M.R. 2.05 (2), and the second is hindering or delaying an investigator in violation of M.G.L. c. 138, §63A¹. The Local Board must also demonstrate that the penalty it imposed upon the Licensee was a reasonable exercise of its lawful discretion. Id.

204 CMR 2.05 (2) no licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises.

Although the Local Board did not articulate in its decision the specific illegality committed by the Licensee, based on the evidence presented, as well as the arguments made during the hearing, the Commission understands the illegality that the Local Board found Jo Angel’s permitted was a patron on patron assault. The legal framework to assess the licensee’s responsibility in a patron on patron assault and battery case has been detailed in Christopher v. Father’s Huddle Café, Inc., 57 Mass. App. Ct. 217, 223 (2003).

In the Father’s Huddle case, a doorman had been apprised of a past altercation between two (2) patrons. Id. During the night, the doorman had observed the patrons exchange words and unpleasant looks. Id. When one of the patrons began to leave the premises, the doorman observed the other follow. Id. The doorman inquired as to whether there was going to be further trouble and the patron confirmed that he and his friends were going to rough someone up. Id. The doorman stood at the door and observed these individuals fighting for ten minutes, and did nothing. Id. One of the patrons was chased into traffic, hit by a car, and killed. Id.

In finding the licensee liable, the Appeals Court held that, “[t]o be liable for negligent conduct, one must have failed to discharge a duty of care owed to the plaintiff, harm must have been reasonably foreseeable,

¹ “Any person who hinders or delays any authorized investigator of the commission or any investigator, inspector or any other authorized agent of local licensing authorities in the performance of his duties, ... shall be punished ...”

and the breach or negligence must have been the proximate or legal cause of the plaintiff's injury." Id. See Stamas v. Fanning, 345 Mass. 73, 75-76 (1962); Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 141 (1996). [A] tavern has a duty of reasonable care to prevent foreseeable harm to its patrons. A duty has been found to exist where patrons suffer injury on the premises as the result of acts of other patrons. Id.; See Westerback v. Harold F. LeClair Co., 50 Mass. App. Ct. 144, 146-147 (2000) (citing cases).

The duty to protect patrons ... does not require notice of intoxication, but may be triggered when the conduct of another patron puts a tavern owner or its employees on notice that harm is imminent. Id. at 222-223; See Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 641 (1961) (bartender observed a boisterous patron engage in "words back and forth," "loud talk," and "a lot of commotion" before the patron charged the plaintiff and landed on him); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 451 (1969) (patron, who was part of a group at a booth across the aisle from the plaintiff that was "making a lot of noise," "talking loud," "getting up and jumping around," shot the plaintiff). A licensee may discharge the duty by taking reasonable steps to prevent the harm -- such as, denying service to or "shutting off" a patron who appears intoxicated or who has requested too many drinks, or calling police when a fight occurs or an aggressive patron threatens assault. See, e.g., Greco v. Sumner Tavern Inc., 333 Mass. 144, 145 (1955); Carey v. New Yorker of Worcester, Inc., *supra*.

Here the Local Board presented a number of witnesses who testified about the atmosphere inside the premises prior to the assault and the assault itself. The Commission has had the opportunity to weigh the credibility of all witnesses and finds that all of the Brockton Police Officers are credible witnesses and professional officers. The Commission also reviewed the photograph of the victim, the statements of individuals that were present at Jo Angelo's on the night in question, as well as the testimony of the victim, Mr. Pietrantonio. All of the statements made to the police officers and the testimony of Mr. Pietrantonio regarding the assault were consistent. None of the individuals present at the bar witnessed any provocative behavior prior to the quick unilateral assault and battery by a patron on a patron in the men's room. See Rypan, Inc. dba The Shooters Café (Commission Decision issued December 2012).

At approximately 10:30 p.m. Mr. Pietrantonio arrived at Jo Angelo's, to meet his friend Colin Angelo. Mr. Pietrantonio went to the bar, sat down and ordered a beer. Mr. Pietrantonio spoke with three individuals that he was friendly with for approximately 15 minutes.

During this time, Mr. Pietrantonio did not argue with anyone. He did not exchange angry words with anyone. He was not upset with anyone nor was anyone upset with him. There were very few people in the licensed premises. No individuals inside the premises were intoxicated. There were no loud or boisterous people.

At approximately 10:45 p.m., Mr. Pietrantonio got up from the bar, and went to the men's room. When he was washing his hands, an individual came in and began assaulting him. Mr. Pietrantonio did not know his assailant and had never seen him before. Mr. Pietrantonio began yelling, "911, someone call for help," as the individual continued to hit him.

Mr. McCarthy and Mr. Williams heard banging coming from inside the restroom, and went inside. They opened the door, saw Mr. Pietrantonio being attacked, and pulled the assailant off of him. The entire incident lasted approximately sixty (60) seconds. Prior to the assault, there was no indication that an altercation was about to ensue. Indeed Mr. Pietrantonio and Mr. Williams each testified that there was absolutely no provocation prior to the incident. Moreover, Mr. Paull and Mr. Vassall told the police that Mr. Pietrantonio did not fight, have a verbal altercation or exchange looks with anyone while seated at the bar.

In a patron assault case, the question is whether the bartender or any other licensee employee could have foreseen the scuffle and/or prevented it. From statements of patrons regarding how the scuffle began and terminated, it is clear that the Licensee could not have foreseen the manner in which the assault developed. There was no evidence that the establishment was overcrowded. There was no evidence introduced regarding the issue of intoxication.

The facts of this case are analogous to those in Trois, Inc. dba The Hide-A-Way Millbury, (Commission Decision issued August 17, 2007) as well as the facts in Rypan, Inc. dba The Shooters Café (Commission Decision issued December 19, 2012). In The Hide-A-Way case, Millbury Police Officers were called to The Hide-A-Way on a report from the bartender that an unidentified patron had struck another patron and then fled. Id. The officer spoke with the victim who said he was struck in the face by an unknown assailant following a dart game. Id. The officer testified that none of the patrons including the victim, injured third party, or alleged perpetrator appeared intoxicated. Id. The officer testified that there were approximately twelve (12) people in the establishment and it did not appear overcrowded. Id.

One of the witnesses testified that a scuffle took place and lasted a minute and that about the time it took him to walk over to break up the fight, the perpetrator had already left the bar. Id. There were video cameras in the bar area which could be monitored by the owner at home. The video of that assault and battery showed patrons sitting at the bar. Similarly to the facts in this case, neither the patrons' or bartender's attention were drawn to any particular behavior. Id.

In Rypan, individuals were arguing outside the men's restroom. Rypan, supra. Immediately thereafter, the victim left the men's restroom and was stabbed by the suspect. Id. The entire incident lasted approximately thirty (30) seconds. Id. As the fight broke out, the security person responded to the area, separated the individuals, and escorted them out of the licensed premises. Id. There was no evidence presented, that prior to the fight, there was any indication that an altercation was about to ensue. Id. As in this case, all of the witnesses stated that there was absolutely no provocation prior to the incident. See Id. As in this case, there was no testimony that the individuals involved were intoxicated or that the premises was overcrowded. Id.

In both The Hide-A-Way and Rypan, the Commission held that the licensee had not permitted an illegality on the licensed premises, to wit, a patron on patron assault. Id. The Commission held that the licensee could not have foreseen the assault and therefore could not have prevented it. Id. The duty to protect patrons may be triggered when the conduct of another patron puts a licensee or its employees on notice that harm is imminent. Father's Huddle, supra. In both these cases, as in this case, there was no conduct that put the licensee on notice of an imminent harm that it could have prevented. See also Rypan, supra.

Hindering or Delaying Investigator, Inspector or Agent Pursuant to M.G.L. c. 138, §63A.

The Licensee was also charged with hindering or delaying any investigator, inspector or any other authorized agent of the local licensing authorities in the performance of his duties... M.G.L. c. 138, §63A "Any person who hinders or delays any authorized investigator of the commission or any investigator, inspector or any other authorized agent of local licensing authorities in the performance of his duties, ... or who refuses to give to such investigator, inspector or agent such information as may be required for the proper enforcement of this chapter, shall be punished ..." Id.

The elements of this charge require that a licensee hinder or delay an authorized agent of the local licensing authorities. (emphasis supplied). Although there was testimony and argument regarding Mr. McCarthy's conduct as well as his status as a patron versus an employee, there was no testimony regarding the status of the Brockton Police Officers.

It is clear that the Brockton Police Officers appropriately responded to the premises and conducted criminal investigations pursuant to their police powers. The Brockton Police Department applied for criminal complaints and the individual responsible for perpetrating the assault and battery was apprehended. The matter is pending in the criminal court system.

However, the issue becomes somewhat murkier within the context of this statute as it applies to administrative hearings. The statute requires that the investigators, or inspectors, that are being hindered, be authorized agents of the local licensing authorities. There was no evidence presented that any of the officers who questioned Mr. McCarthy were even agents of the local licensing authorities. The investigation was criminal in nature and conducted to ascertain Mr. Pietrantonio's assailant.

The Commission has held on many occasions that the elements of a criminal case differ from that of an administrative hearing. See Guzman, Inc. dba Raffi's Place (Commission Decision issued March 19, 2010) (Local Board's case built on a panoply of facts necessary to conduct a criminal investigation, and thereafter a prosecution. Although these facts are critical to any criminal investigation or prosecution of the alleged underlying offenses, alone they fall short of proving that the Licensee committed the alleged violations.) The same is true for obstructing a criminal investigation versus obstructing an administrative investigation. This statute specifically applies to investigations related to alcoholic beverages licensees. As such, it requires that the hindering involve an agent of the local licensing authority. The Commission is mindful that the local licensing authorities in different municipalities give different levels of authority to their police officers.

Many municipalities have one officer specifically named as their liquor control officer. As we are required to read a statute and give effect to every word, we cannot say that in this context "authorized agent" is meaningless. As there was no evidence presented that any of the officers who responded were **authorized investigators, inspectors or authorized agents of the local licensing authorities** as required by M.G.L. c. 138, §63A (emphasis supplied), the Commission must find that there was no violation.

CONCLUSION

It is the Commission's decision that the Licensee had no notice that harm was imminent from the impulsive behavior of a patron who assaulted another patron in the men's room. The Commission also finds that the Local Board did not prove all of the essential elements regarding M.G.L. c. 138, §63A. Therefore, the Commission **DISAPPROVES** the action of the Local Board in finding the Licensee in violation of 204 CMR 2.05 (2), and M.G.L. c. 138, §63A.

The Commission also **DISAPPROVES** the action of the Local Board in suspending the license for three (3) days, for said violations that were disapproved. The Commission remands the matter to the Local Board with the recommendation that no further action be taken against the licensee as any penalty would be discrepant with this Decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman, _____

Susan Corcoran, Commissioner _____

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

Kathleen McNally, Commissioner _____

Dated: March 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.

cc: Louis A. Cassis, Esq. via Facsimile 617-472-9028
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Administration
File