

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

Steven Grossman
Treasurer and Receiver General

DECISION

Kim J. Gainsboro, Esq.
Chairman

BAY STATE FOOD SHOPS INC. DBA BAY STATE FOOD & LIQUORS
1420 BEACON STREET
BROOKLINE, MA 02445
LICENSE#: 014800079
HEARD: 05/23/12

This is an appeal of the action of the Brookline Licensing Board (the "Local Board") in suspending the M.G.L. c. 138, §15 retail package store all alcoholic beverages license of Bay State Food Shops, Inc. dba Bay State Food & Liquors (the "Licensee" or "Bay State"). On January 17, 2012, the Local Board held a hearing that resulted in a fifteen (15) day suspension, with ten (10) days imposed and five (5) days held in abeyance for a period of two (2) years until January 17, 2014. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, May 23, 2012.

The following documents are in evidence:

Joint Agreed Upon Exhibits:

1. January 4, 2012 Hearing Notice from the Local Board to Bay State with notice of charge;
2. 2012 Bay State Retail Package Store License;
3. Bay State Retail Package Store License renewal application dated November 15, 2011;
4. Copy of Timothy Paquette's Massachusetts Driver's License;
5. Underage Operative Sting Release Form signed by Timothy Paquette dated October 27, 2011;
6. Brookline Police Department 2011 announcements of compliance checks;
7. Photograph of Timothy Paquette with cap taken on October 27, 2011;
8. Photograph of Timothy Paquette without cap taken on October 27, 2011;
9. Brookline Police Department Special Order 2008-8;
10. 2006 Bay State Retail Package Store License;
11. Bay State Retail Package Store license renewal application dated November 15, 2005;
12. 2009 Bay State Retail Package Store license;
13. Bay State Retail Package Store license renewal application dated November 3, 2008;
14. Local Board Sale of Alcoholic Beverages Regulations, voted October 25, 2011;
15. Local Board Sale of Alcoholic Beverages Regulations in effect prior to October 25, 2011;
16. Bay State's 2010 application for approval of pledge and transfer of stock and new officer/director and related Form 43's;
17. Excerpts from the September 1988 Report of the Selectmen's Subcommittee on Liquor Licensing containing disciplinary action guidelines;
18. January 30, 2012 Notice of Decision from the Local Board to Bay State;
19. Bay State's 2005 application for new officer/director and change of manager;
20. Minutes of the Local Board hearing of January 17, 2012 regarding the violation charged in connection with the October 27, 2011 sting;

21. January 17, 2012 Memorandum from Robert L. Allen, Esq. to Patricia Correa, Associate Town Counsel;
22. 2011 Bay State Retail Package Store license;
23. Bay State Retail Package Store license renewal application dated November 15, 2010.
24. Employee Policy Statement, Bay State;
25. Bay State Acknowledgement Letters;
26. Certificate of Completion of eTIPS On-Premises of Marcello Rullo;
27. Minutes of Local Board hearing dated August 17, 1997.

Licensee's Exhibit:

A. Commission Compliance Check Guidelines.

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

FACTS

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

1. The Licensee holds an all alcoholic beverages retail off-premises license issued pursuant to M.G.L. c. 138, §15. (Exhibit 22)
2. The premises are located at 1420 Beacon Street, Brookline, Massachusetts. Marcello Rullo is the approved License Manager and Bay State's President, Director, and as of August 2010, owner of 100% of Bay State's stock. (Exhibits 2, 3, 16)
3. During all relevant periods, Bay State maintained and maintains an Employee Policy Statement that requires all employees to "CHECK ALL ID'S 30 YEARS OLD AND YOUNGER. The following are accepted as proof of age: *Valid driver's license [,] *Massachusetts liquor ID [,] *Passport [,] *Active military ID." The policy was issued by Marcello Rullo. (Exhibit 22).
4. Bay State had employees sign an "Acknowledgement Letter" that stated that the employee has "received the described training and has reviewed and understand the written policies of Bay State, describing my responsibilities and the disciplinary actions which will be taken for any violations that I make." (Exhibit 23)
5. Mr. Rullo signed an acknowledgement letter stating that he recognizes having done so, and signed acknowledgement letters of other employees as the manager. (Exhibit 23)
6. Mr. Rullo received "TIPS" training on the safe service of alcohol. (Exhibit 24)
7. In August 2010, Mr. Rullo purchased the controlling interest in Bay State, Inc. from its prior owner, Stephan Glickman. That month, the Commission approved a transfer of Bay State's stock to Mr. Rullo and approved him as a director of Bay State. Mr. Rullo continued to serve as the approved manager following this approval. (Exhibit 16)
8. On or about the June 25, 2006, the Local Board found Bay State responsible for selling alcohol to a minor in connection with a compliance check on June 13, 2006. Mr. Rullo was not the individual who sold alcohol to a minor on June 13, 2006. The Local Board suspended Bay State's license for a period of two (2) days, which it withheld and continued through January 25, 2007 pending no further violations for a period of one (1) year. (Attachments to Exhibit 1)

9. On or about February 9, 2010, the Local Board found Bay State responsible for selling alcohol to a minor in connection with a compliance check on December 18, 2009. Mr. Rullo was not the individual who sold alcohol to the minor on December 18, 2009. The Local Board suspended Bay State's license for a period of six (6) days imposed on February 15, February 27, March 1, March 8, March 15, and March 22, 2010. (Attachments to Exhibit 1)
10. On October 27, 2011, at approximately 6:00 p.m., Lieutenant June Murphy, then the Brookline Police Department Liquor Officer, together with under-aged operative Timothy Paquette, conducted a series of compliance checks. The town of Brookline checked nineteen (19) off-premises, §15 package stores, and three (3) on-premises §12 licensed establishments. (Testimony, Exhibit 1)
11. The compliance checks were advertised in a Press Release dated Tuesday, September 20, 2011 in the Brookline Police News in the Brookline Police Department's Blog, and in the Brookline TAB Newspaper in September, 2011. (Exhibits 1 and 6)
12. Lt. June Murphy was employed as the Liquor Compliance Officer on this evening. (Testimony pages 38, 39, 40)
13. Lt. Murphy's duties that evening were to prepare the underage operative, with whom she was conducting the compliance checks, make sure she took a picture of his identification to show that he is younger than age twenty-one (21), and to make sure his only personal identification and money were left at the station. (Testimony pages 38, 39, 40, 41)
14. After the underage operative completed each compliance check, Lt. Murphy was to go over what happened and get some feedback from him about what occurred inside the establishments. (Testimony pages 38, 39)
15. Timothy Paquette, date of birth, August 23, 1991, age twenty (20) at the time of the compliance check operation, was the underage operative that Lt. Murphy was working with that evening on October 27, 2011 to conduct the compliance checks. (Testimony 22, 23, 24, Exhibit 1)
16. Lt. Murphy discussed the preparation for the compliance checks with Mr. Paquette. (Testimony pages 22 - 26; 38 - 41)
17. Lt. Murphy had Mr. Paquette read the Brookline compliance check guidelines. (Testimony pages 24,25,26; 38, 39, 40; Exhibit 9)
18. Lt. Murphy trained Mr. Paquette and was instructed by Lt. Murphy that if he was asked for his identification, he should turn and leave, according to the Brookline compliance check guidelines. (Testimony, pages 23, 31, 39, 40)
19. Lt. Murphy reviewed with Mr. Paquette how to answer questions. (Testimony pages 23, 24, 31, 32, 38, 39, 40)
20. Lt. Murphy told Mr. Paquette, "If they ask for your identification or your birthday, whatever they ask you, you have to answer truthfully." (Testimony, pages 23, 40)
21. Mr. Paquette signed a release before he participated in the compliance check. (Exhibit 5, Testimony page 24, 26)
22. The Local Board has promulgated compliance check guidelines that must be utilized during compliance checks. These guidelines are in a document titled: "Operation Plans for Stings Conducted of Liquor Stores", Effective Date: November 6, 2008. Special Order #2008-8, Published by the

Brookline Police Department. (Exhibit 9). These guidelines provide:

1. The Brookline Police Department will conduct periodic compliance checks ("Stings") in order to determine whether establishments holding liquor licenses ("Licensees") are complying with Town By-Laws, rules and regulations and with state laws prohibiting the sale of alcohol to minors. (Exhibit 9)
2. Stings involve the participation of a minor, i.e., a person seventeen (17) years of age but no more than twenty (20) years of age. The minor will reasonably look his/her age. The Department will not undertake efforts to make the minor appear older. The underage person will not carry identification when taking part in a Sting, nor any money other than that supplied to the minor by the Department for purposes of the Sting. At no time shall the minor attempt to misrepresent his/her age or provide identification. (Exhibit 9)
3. The safety and welfare of all underage participants will be of the utmost importance to the Department when conducting Stings. Underage persons shall not be exposed to any unusual, unnecessary or unreasonable risk. At no time, under any circumstances, shall the minor consume any alcoholic beverage. (Exhibit 9)
4. The minor will enter a liquor store and attempt to purchase alcohol. In the event that a sting involves a compliance check of more than one liquor store, the minor will attempt to purchase the same type of product at each store providing the store offers the same product for sale as all others. If asked for identification, the underage person should leave the establishment. (Exhibit 9)
5. Approximately one month prior to a Sting, the Brookline Police Department will advertise in the local newspaper that the Sting will be taking place. (Exhibit 9)
6. The following guidelines will be adhered to prior to the minor's participation. The minor will:
 - A. Be asked to read this Special Order,
 - B. Be counseled at the police station regarding the provisions and requirements of this Special Order,
 - C. Place all belongings on their person into a bag,
 - D. Be photographed and positively identified,
 - E. Sign a release form. (Exhibit 9)
7. The minor and the Liquor Officer will travel together to the liquor store. As the store, the minor will be instructed again as to what is expected of him/her, be given a twenty (20) dollar bill, and then allowed to proceed into the store. The minor will be within the sight of the Liquor Officer as s/he enters the liquor store, and as much as possible after his/her entry into the store. (Exhibit 9)
8. Once the minor has exited the store the Liquor Officer will approach him/her and determine whether a purchase has been made. If a purchase has been made, the Liquor Officer will take hold of the purchase and the Liquor Officer will then re-enter the store with the minor. (Exhibit 9)
9. Once in the store, the Liquor Officer will:
 - A. Identify himself to the manager;
 - B. Have the minor identify the individual who allowed the purchase; and

- c. Positively identify this individual and the manager.
The incident will then be reviewed with the manager and the person who allowed the purchase.(Exhibit 9)
 10. The Liquor Officer will ask the minor for the receipt of the purchase and the change given to him/her. Both the receipt (if any exists) and the change will be checked for accuracy and placed in an envelope. After exiting the store, the envelope and the alcohol will be properly marked as evidence and submitted to the Evidence/Property Officer according to the Brookline Police Department's policies and procedures for evidence. All evidence will be stored in separate containers that are properly marked. (Exhibit 9)
 11. During the operations, the evidence will be under the control of the Liquor Officer at all times, and should be handled solely by the Liquor Officer. At the end of the operations, the evidence will be submitted to the Evidence/Property Officer according to the Brookline Police Department's policies and procedures for evidence. (Exhibit 9)
 12. The Liquor Officer will sit down with the minor and engage in further debriefing. The minor will be queried regarding any concerns he/she may have. The minor will be paid for his/her assistance and assisted home. (Exhibit 9)
 13. The Liquor Officer will submit a report to the Chief of Police at the end of a Sting operation. (Exhibit 9)
 14. Establishments where the minor was properly identified will be contacted via a letter of congratulations and a telephone call to the manager. If a violation has occurred, the Liquor Officer will notify the Chief of Police for possible enforcement action under Town By-laws, rules and regulations, and state law prohibiting the sale of alcohol to minors. (Exhibit 9)
 15. All attempts will be made to have the minor testify as a witness at any Selectmen's Hearings held with regard to liquor license violations. (Exhibit 9)
23. Photographs were taken of Mr. Paquette before the compliance checks. (Exhibits 7 and 8; Testimony, page 24)
 24. Mr. Paquette was wearing a Bruins baseball hat, Bruins T-shirt, black jacket, blue jeans, and sneakers. (Testimony pages 24, 25, 26)
 25. Mr. Paquette was wearing the baseball hat backwards, with the visor in the back. (Testimony pages 24, 25, 26)
 26. The Brookline Police Department took a photocopy of Mr. Paquette's driver's license. (Exhibits 7 and 8; Testimony, pages 24, 25, 26, 27)
 27. Before the compliance checks, Lt. Murphy took all of Mr. Paquette's identification, money, everything out of his wallet and put it into a plastic bag. (Testimony page 27)
 28. Lt. Murphy gave Mr. Paquette some twenty (20) dollar bills to use on the compliance checks. (Testimony, page 27)
 29. Mr. Paquette was not carrying any identification when he was conducting compliance checks. (Testimony, page 27, 38, 39)

30. Mr. Paquette was instructed to walk into Bay State. (Testimony, page 40)
31. Lt. Murphy was right outside at the corner of Beacon Street and Summit Street and in view of the front door of the establishment. Lt. Murphy observed Mr. Paquette walk into the establishment to attempt to purchase alcohol. (Testimony 40, 41)
32. Mr. Paquette walked into Bay State. He looked to his right and saw that there was alcohol in the area.
33. Mr. Paquette walked by it and then went back, picked up a bottle of Burnett's Mango Vodka, and then went to the cash register to buy it. (Testimony, page 28).
34. Mr. Paquette was asked for his identification. (Testimony, pages 28, 29)
35. Mr. Paquette had his wallet with him. (Testimony, pages 32, 33, 34, 35)
36. He reached into the front pocket of his pants and he then took out his wallet. (Testimony pages 32, 33, 34, 35)
37. He opened up his wallet to show the fact that he did not have any identification on him. (Testimony pages 28, 29, 33, 34)
38. Mr. Paquette then placed his wallet back into his pocket. (Testimony, page 34)
39. Mr. Rullo, who was behind the counter, within one (1) to two (2) seconds, asked him, "Are you twenty-one (21)? When is your date of birth?" (Testimony, pages 28,29, 35, 36)
40. Mr. Paquette said, "August 23, 1991." (Testimony pages 28, 34, 36)
41. Mr. Paquette did not answer the question, "Are you twenty-one (21)?" (Testimony page 34)
42. Mr. Paquette then handed Mr. Rullo, the money. Mr. Rullo took the money, stood there for about a second, and then made the transaction. (Testimony page 28)
43. The entire transaction took under one (1) minute. (Testimony, page 28)
44. Mr. Paquette stepped out the front door and he called Lt. Murphy on a cell phone. (Testimony page 41)
45. He was carrying a bag in his hands and he called Lt. Murphy to say that the transaction had been completed. (Testimony page 41)
46. Mr. Paquette left the premises, and he and Lt. Murphy reentered the premises together. (Testimony page 41)
47. Mr. Paquette identified for Lt. Murphy the person behind the counter, Mr. Rullo, as the person who sold him the alcohol. (Testimony page 41)
48. Lt. Murphy informed Mr. Rullo that he had sold alcohol to someone under the age of twenty-one (21). (Testimony, page 42)
49. Mr. Rullo informed Lt. Murphy that he had asked Mr. Paquette for his license and when Mr. Paquette could not provide one, inquired whether he was twenty-one (21) years of age and for his birthdate. (Testimony pages 42, 43)
50. Of the compliance checks conducted at these twenty-two (22) licensed establishments, only Bay State

failed the compliance check and sold alcohol to a minor. (Exhibit 1)

51. There was no testimony submitted regarding the actions and conduct of the underage operative in the licensed premises of those licensees who passed the compliance check, specifically there was no testimony that the operative acted the same way when those other licensees asked for identification.
52. In a Notice of Hearing dated January 4, 2012, the Local Board duly notified Bay State of the charge of selling alcohol to a minor on October 27, 2011, and of a hearing regarding such charge to be held on January 17, 2012 at 8:30 p.m. The notice satisfied M.G.L. c. 138. (Exhibit 1)
53. On January 17, 2012, the Local Board held a hearing in connection with the charge referenced in the notice of hearing. (Exhibits 1, 18)
54. At the conclusion of the January 17, 2012 hearing, the Local Board found Bay State responsible for the violation charged in the notice of hearing.
55. The Local Board imposed a suspension of fifteen (15) days, with ten (10) days to be served from Thursday, February 7, 2012 through Thursday February 16, 2012, and five (5) days held in abeyance pending no further violations for a period of two (2) years. The Local Board imposed these dates after confirming that Super Bowl Sunday was scheduled for February 5, 2012.
56. On January 30, 2012, the Local Board, through its Town Administrator, served Bay State with a Notice of Decision of same date. (Exhibit 18)
57. On or about February 3, 2012, Bay State filed the appeal with the Commission.
58. The Local Board stayed the imposition of the suspension in light of this appeal.

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 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).

This case involves a compliance check which was conducted by the town of Brookline. The town of Brookline published notice in the Brookline newspaper that compliance checks were going to occur, and used an underage operative who was twenty (20) years of age. The town of Brookline established its own guidelines to be used when compliance checks are conducted.

The Commission has repeatedly held that the policy behind a “sting” operation should be the education of licensees in the risks associated with selling alcoholic beverages without requesting proof of age. Assinippi Liquors, Inc., ABCC (2004). Compliance checks are a tool that should be used to educate licensees.

Bay State argues that the compliance check was not valid because the town of Brookline, while

conducting this "sting", failed to follow its own guidelines, specifically, Guideline Number 4, which states in part: "If asked for identification, the underage person should leave the establishment." (Exhibit 9)

The legality of the use of a minor to conduct underage compliance checks was decided in *Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission*, 45 Mass. App. Ct. 663 (1998). The Appeals Court held that in permitting a person under twenty-one (21) years of age to purchase alcoholic beverages in a "sting" operation at a licensed premises, neither the Commission nor a municipal police department violated M.G.L. c. 138, §34A, the statute prohibiting a person under the age of twenty-one (21) years old from purchasing alcoholic beverages for the use of any other person, because the purchase of alcoholic beverages by the underage person was made for use in ferreting out violators of intoxicating liquor laws, and so promoted rather than hindered purposes of statute.

In *Fran's Lunch*, the Appeals Court held that "[a]bsent entrapment or other abuses violative of fundamental fairness, government involvement in criminal activity for purpose of investigating possible violations of law is permissible, even if technical violations of law occur." *Fran's Lunch*, 45 Mass. App. Ct at 664. The Appeals Court further held that where a "sting operation was conducted in accordance with published guidelines designed to insure that such operations were conducted fairly, the commission could properly rely on this evidence." *Fran's Lunch*, 45 Mass. App. Ct at 665.¹

In conducting this compliance check, there is no dispute as to the facts of this matter. Both the Local Board and Bay State agree that when the underage operative was asked for his identification by the principal of the Licensee, Mr. Rullo, the underage operative, Mr. Paquette, did not leave the store. Mr. Paquette had his wallet with him. There was no evidence or explanation offered as to why the underage operative had the need for a wallet or was allowed to possess a wallet when the written guidelines in place for this compliance check specifically stated that the underage operative must "[p]lace all belongings on their person into a bag" while inside the police station before the compliance check began. (Exhibit 9, Paragraph 6 C) This missing explanation as to why the underage operative even possessed a wallet is more questionable in light of the specific guideline that "[t]he underage person will not carry identification when taking part in a sting, nor any money other than that supplied to the minor by the Department for purposes of the Sting." (Exhibit 9, Paragraph 2) Moreover, the guidelines in effect for this compliance check specifically directed that "[a]t no time shall the minor attempt to ... provide identification." (Exhibit 9, Paragraph 2) In the face of these specific guidelines, when asked for identification, the underage operative did not leave immediately. Rather, this underage operative reached into the front pocket of his pants, and then took out his wallet and opened it up.

The Local Board argues that the underage operative produced his wallet to show the fact that he did not have any identification on him. The Local Board does not explain why the operative was even in possession of a wallet, contrary to the guideline specified in Exhibit 9, Paragraph 6 C. The encounter and activities of the underage operative continued after the request for identification was made by the principal of the Licensee, and the underage operative did not leave the premises immediately. To the contrary, the operative, Mr. Paquette, placed his wallet back into his pocket. Mr. Rullo, who was behind the counter, within one (1) to two (2) seconds, asked him "Are you twenty-one (21)? When's your date

¹ The Appeals Court also acknowledged that the exclusionary rule, which gives rise to many issues in criminal cases, does not extend to administrative cases. *Fran's Lunch*, 45 Mass. App. Ct at 665 citing *Kelly v. Civil Serv. Comm'n.*, 427 Mass. 75, 79 (1998) ("evidence obtained as a result of an alleged unlawful stop and arrest was admissible in an administrative proceeding to determine if the plaintiff's termination from employment was proper.")

of birth?" Mr. Paquette said "August 23, 1991." Mr. Paquette did not answer the question "Are you twenty-one (21)?" Only then, after being asked for identification and not leaving immediately, and then refusing to answer the direct question posed by the principal of the Licensee whether he was twenty-one (21), did the underage operative then hand to the principal of the Licensee the money.

The Licensee, to support its position that the compliance check was invalid, relies on a recent Commission decision, In Re: Days End Tavern, Inc., Oxford, (Commission Decision dated March 7, 2012), whereby the Commission discussed the consequences of a Local Board's failure to comply with guidelines during execution of a compliance check operation. Citing issues of fairness and uniform compliance, the Commission determined that failure to comply with the local guidelines by an underage operative during execution of a compliance check operation constituted an error in the Local Board's decision, echoing Fran's Lunch, 45 Mass. App. Ct. at 665 ("courts and the Commission rely on Local Boards to follow stringent and identical procedures in order to uphold the validity of compliance checks.") Bay State argues that the same result is warranted here as in the *Days End* case, because the underage operative did not comport with compliance check guidelines.

The underage operative in the compliance check operation was given explicit instructions, consistent with the Local Board and Commission guidelines, that if asked for his license, he should leave the establishment. But Mr. Paquette did not leave the establishment after being asked for his identification. To the contrary, Mr. Paquette stayed on the premises, produced his wallet, purportedly to indicate that he did not have his license on him and continued to engage in the transaction and compliance check operation. By the authority and precedent set in *Days End* and an earlier decision, In Re: BBRG Massachusetts, Inc. dba Papa Razzi (Commission decision May 21, 2007) affirmed in Fay v. Jenkins, Middlesex Superior Court C.A. No. 2007002652-F (Muse. J.), the Commission has held that a single violation of written and express guidelines undermined the fundamental fairness of the compliance check operation. As a result, the compliance check is not valid.

Bay State also argues that the Commission Compliance Check Guidelines further codify these requirements. §10 of the Commission Guidelines states: "At no time shall the underage person...provide any identification. "§11 states: "[i]f asked for identification, the underage person should leave the establishment." The underage operative did not follow the compliance check guidelines of the Local Board, he did not follow the compliance check guidelines of the Commission, and he did not follow the protocol as instructed by Lt. Murphy. After being asked for identification, the operative continued to pursue the purchase of alcohol.

The Local Board puts forth arguments that this compliance check is valid and should be upheld because there is no indication of entrapment, or of unfairness posed to the Licensee by accepting the results of the compliance check. The Local Board argues that the Licensee's violation resulted not from deception or fundamental unfairness by the town of Brookline, but by inexplicably reckless conduct by the Licensee. The Local Board further argues that by adopting the Licensee's argument, licensees would in effect be insulated from compliance checks, as they would be able to ascertain whether or not a compliance check is underway simply by asking the apparent customer for identification, and determining whether or not the customer immediately turns and leaves. If the customer does not leave, the licensee then could confidently proceed with the sale. The Local Board observed that in this case, the Licensee/manager was responsible for the failed compliance check, and appears to have intended to make the sale in violation of the law, even after learning the operative's birthdate, which was provided truthfully, and demonstrated the operative was less than twenty-one (21) years old. Under applicable law the manager has legal responsibility for the conduct of the premises and the licensee's compliance with the law.

The Local Board also argues that the case of Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass. App. Ct. 663 (1998) does not apply in this matter. There is no entrapment or

unfairness by the underage operative. The Local Board argues that in this matter the facts are similar to those in the Commission decision Rockland Wine & Spirits (ABCC Jan. 10, 1991), where a sales person asked for identification, the operative stated that he had no identification with him and had not walked out yet when a supervisor instructed the sales agent to make the sale. The Local Board argues that to the contrary, after the operative failed to produce identification, the Licensee immediately directed questions to the operative with the apparent purpose of make the sale despite the lack of identification, and in fact then made the sale in the face of information that the operative was only twenty (20) years old. Faced with the correct information regarding Mr. Paquette's age, twenty (20) years old, the Licensee still made the sale.

The Commission is not persuaded by the Local Board's argument that the case Fran's Lunch does not apply. Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass. App. Ct. 663 (1998). Fran's Lunch holds that based on the violations of the written guidelines in place "to insure that such operations were conducted fairly", Fran's Lunch, 45 Mass. App. Ct. at 665, the Commission cannot approve the action of the Local Board in finding a violation and then imposing a license suspension for that violation. See Fay v. Jenkins, Suffolk Superior Court, C.A. No. 2007-02652-F, Memorandum of Decision And Order (Muse, J.) ("Conducting compliance checks in strict conformance to the written guidelines is essential to the validity of the checks. Local authorities' failure to follow the guidelines ... undermines the legitimacy and integrity of the compliance checks throughout the state and fails to adequately preserve their fairness.")

The Commission is also not persuaded by the Local Board's argument that the Commission's decision and analysis should be guided by the Commission decision In Re: Rockland Wine and Spirits (1991) The Rockland Wine and Spirits case was decided before the Appeals Court ruled in the Fran's Lunch decision, before the Commission and Superior Court ruled in the In Re: BBRG Massachusetts, Inc. d.b.a. Papa Razzi decision, and before the Commission ruled in the Days End decision. The Commission hereby rules that the decision in Rockland Wine and Spirits, and any other cases with a similar holding, is of limited precedential value, if any, to the Commission

Furthermore, the Local Board argues that the Commission's Days End decision does not apply, nor are the fact similar to the Bay State matter because in the Days End case the Commission found that the bartender had been unfairly induced into making the sale. According to the Local Board, this decision does not apply because it is in stark contrast to these facts, whereby the Licensee was recklessly intent upon making a sale heedless to its legality or illegality demonstrated.

Since the Commission first addressed the legality of compliance check operations conducted by the Local Board, the Commission has required that the underage operative leave the premises if asked for identification. In the case of In Re: Cape Cod Grocery, Inc., (Commission Decision dated December 13, 1985) the Commission found that the use of underage compliance check operations was not contrary to the public policy of the Commonwealth so long as the compliance check operations were conducted fairly. The Commission rejected the licensee's claim of entrapment where the underage operative was instructed to leave the premises if questioned or asked for identification and in fact did so.

The Commission, in reviewing the facts of this matter, in conjunction with the cases and positions argued by both the Local Board and the Licensee, finds that the compliance guidelines of the town of Brookline were not appropriately followed in this matter. Upon review of the guidelines that controlled the lawful operation of this compliance check, the Commission finds that this operation was not conducted appropriately. Although the Local Board puts forth many arguments in support of the validity of this compliance check, the Commission does not find that this compliance check was valid. Fay, et al v. Jenkins, Middlesex Superior Court C.A. No. 2007002652-F (Muse, J.) See also Fran's Lunch, Inc., 45 Mass. App. Ct. at 655; 700 NE 2d 846 (1998) (sting operation conducted by the Commission was

constitutional where strict procedure for fair control check was observed); *In Re: BBRG Massachusetts, Inc. d.b.a. Papa Razzi* (Commission decision May 21, 2007); *In Re: Assinippi Liquors, Inc.* (Commission decision April 7, 2004); *In Re: Epicure Package Store, Inc.* (Commission decision January 31, 2007).

The Commission finds, as it did in the *Days End* and *BBRG Massachusetts, Inc. d.b.a. Papa Razzi* decision, that even a single violation of written compliance check guidelines undermines the fairness of the operation, jeopardizes the entire compliance check, and results in the Commission finding that the compliance check is invalid. The Commission repeats that in order for there to be validity to the compliance checks, there must be conformity to the guidelines promulgated by the local licensing authority. The Commission finds that this compliance check is invalid, and DISAPPROVES the action of the Local Board.

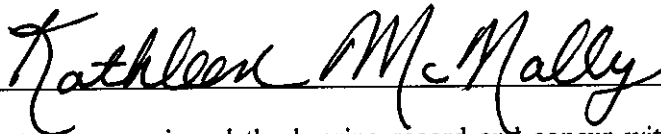
CONCLUSION

Based on the evidence, the Commission finds that the compliance check conducted by the Local Board was invalid and unfair, as it was not conducted according to its own compliance check guidelines. Therefore, the Commission DISAPPROVES the action of the Local Board in finding the Licensee committed a violation. The Commission remands the matter to the Local Board with the recommendation that no modification, suspension, revocation, or cancellation of the license be ordered by the Local Board.

The Commission found it unnecessary to determine the reasonableness of the penalty imposed by the Local Board since our disapproval would render any sanction by the Local Board discrepant with our decision.²

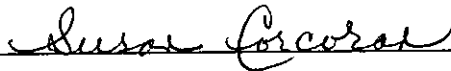
ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



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

Susan Corcoran, Commissioner,



Dated: November 21, 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.

² Had the Commission reached this issue, which it does not, the Commission would have considered the prior history of violations personally committed by the current license manager. See *Gottlin v. Herzig*, 40 Mass.App.Ct.163 (1996).

cc: Patricia Correa, Esq. [Attorney for the town of Brookline, Local Board]
Robert L. Allen, Jr., Esq. [Attorney for the Licensee]
Adam Barnosky, Esq. [Attorney for the Licensee]
Frederick G. Mahony, Chief Investigator
Administration
File