



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358*

Jean M. Lorizio, Esq.
Chairman

DECISION

**HARVARD WINE COMPANY D/B/A HARVARD WINE
1664-1666 MASS. AVENUE
CAMBRIDGE, MA 02138
LICENSE#: 00217-PK-0166
HEARD: 8/10/2022**

This is an appeal of the action of the Cambridge Board of License Commissioners ("Local Board") in suspending the M.G.L. c. 138, § 15 all alcoholic beverages license of Harvard Wine Company d/b/a Harvard Wine ("Licensee" or "Harvard Wine") located at 1664-1666 Massachusetts Avenue, Cambridge, Massachusetts, for two days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a remote hearing via Microsoft Teams was held on Wednesday, August 10, 2022.

The following documents are in evidence as agreed upon exhibits:

1. ABCC Compliance Check Guidelines.
 - A. License of Underage Operative with Affidavit of Manisha Tibrewal, Director of Planning, 7/7/2022;
 - B. Rules and Regulations of the City of Cambridge Board of License Commissioners Relating to All Holders of Common Victualer, Innholders, Alcoholic Beverages, and/or Entertainment Licenses;
 - C. Photograph of Underage Operative taken 8/29/2019;
 - D. Bank Note Photographs (3);
 - E. Compliance Check Agreement of Participation, Waiver of Liability & Guidelines Form, 8/29/2019;
 - F. Local Board's Decision, 12/19/2019;
 - G. Audio clip of Local Board's Disciplinary Hearing on 10/23/2019;
 - H. Licensed Premises Inspection Report and Recorded Observations of Harvard Wine Company, Inc. by Licensing Investigator Tyler Bubenik dated 8/29/2019 along with Photograph of a Six Pack of Heineken Beer.

There is one (1) audio recording of this hearing, and two (2) witnesses testified.

FINDINGS OF FACT

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

1. Harvard Wine Company d/b/a Harvard Wine ("Licensee" or "Harvard Wine") holds an M.G.L. Ch. 138, § 15 all alcoholic beverages retail package store license located at 1664-1666 Massachusetts Avenue, Cambridge. (Commission Records)
2. Jim Black has been the owner of Harvard Wine for approximately forty years. (Testimony)
3. The Local Board advertised notice of their 2019 compliance checks on their website and published notice in the Cambridge Chronicle at the beginning of 2019. Id.
4. The Local Board conducted compliance checks on August 29, 2019, with the assistance of a 20-year-old male underage operative. (Testimony, Exhibits A, G, H)
5. Prior to conducting compliance checks on August 29, 2019, the underage operative was photographed. (Testimony, Exhibit C)
6. Before conducting the compliance check in question, a marked \$20 bill to be used was photographed. (Testimony, Exhibit D)
7. On August 29, 2019, the underage operative and Investigator Bubenik signed a 2019 Compliance Check Agreement of Participation, Waiver of Liability & Guidelines. (Testimony, Exhibit E)
8. On August 29, 2019, Licensing Investigator Bubenik, accompanied by an underage operative, conducted a compliance check at Harvard Wine. The underage operative purchased a six-pack of beer with a marked \$20 bill without being asked for identification. (Testimony; Exhibits D)
9. Jim Black made the sale of a six-pack of Heineken beer to the underage operative. (Testimony)
10. Investigator Bubenik entered the establishment and spoke with Mr. Black. He informed Mr. Black that he had just sold alcoholic beverages to an underage operative and returned the six pack of beer and the change which had been furnished to the underage operative. Investigator Bubenik retrieved the marked \$20 bill from Mr. Black. Id.
11. Mr. Black confirmed he had not asked the underage operative for identification. Investigator Bubenik completed Licensed Premise Inspection Form #1058 describing the violation as "sale of a six-pack of beer to an underage individual." (Testimony, Exhibit H)
12. The Local Board held a hearing on October 23, 2019, regarding the alleged violations of M.G.L. c. 138 §§ 23, 34, 41, 64, 64A and Local Board Rules 2 and 5B.6. (Testimony; Exhibits F, G)
13. By decision dated December 19, 2019, the Local Board found Harvard Wine in violation and voted to suspend its license for two (2) days. (Exhibits F, G)

14. On December 20, 2019, the Licensee filed its petition to appeal to the Commission. (Commission Records)

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. 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.” Dolphino Corp. v. Alcoholic Beverages Control Comm’n, 29 Mass. App. Ct. 954, 955 (1990) citing United Food Corp v. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978). 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, 29 Mass. App. Ct. at 955.

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. 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. Bd. 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’n, 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 Comm’n, 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. 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. Blue Cross and Blue Shield of Mass. Inc. v. Comm’r of Ins., 420 Mass. 707 (1995). “The Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations.” Jaman Corp., d/b/a Crossroads (ABCC Decision Nov. 4, 2010).

Pursuant to M.G.L. c. 138, §34, the sale of alcohol to minors is prohibited, and imposes both criminal and civil sanctions. M.G.L. c. 138, § 34 provides: Whoever makes a sale or delivery of any alcoholic beverages 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...or whoever furnishes any such beverage or alcohol for a person under twenty-one (21) years of age shall be punished by a fine of not more than two thousand (2,000) dollars or by imprisonment for not more than one (1) year or both. To enforce the provisions of M.G.L. c. 138, § 34, both the Commission and Local Boards commonly perform compliance checks, also known as “stings”, at licensed establishments.

The legality of using an underage operative to conduct compliance checks was established in Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass. App. Ct. 663 (1998). 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." *Id.* at 664. The Appeals Court further held that where a "sting operation was conducted in accordance with published guidelines designed to ensure that such operations were conducted fairly, the commission could properly rely on this evidence." *Id.* at 665.

Harvard Wine admittedly sold alcoholic beverages to the underage operative but argued the Local Board did not follow its own compliance check guidelines nor the ABCC's compliance check guidelines in that the operative did not reasonably look his age, that he looked 35 years old, and further that his clothing choice made him appear older. Based on the photograph of the underage operative taken the day of the compliance check in question and the testimony offered at the hearing, the Commission finds that the underage operative reasonably looked his age and the operative's "business casual" attire was not worn in an effort to make him appear older.

It is important to note that Local Boards are not required to follow the Commission's compliance check guidelines and may follow their own compliance check guidelines. Epicure Package Store, Inc. (ABCC Decision March 28, 2007). "Conducting compliance checks in strict compliance to the written guidelines is essential to the validity of the checks. Local authorities' failure to follow the guidelines ...for compliance checks undermines the legitimacy and integrity of the compliance checks throughout the state and fails to adequately preserve their fairness." Fay, et al v. Jenkins et al, 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 ABCC was constitutional where strict procedure for fair control check was observed); BBRG Massachusetts, Inc. dba. Papa Razzi (ABCC decision May 21, 2007); Assinippi Liquors, Inc. (ABCC decision April 7, 2004); Epicure Package Store, Inc. (ABCC decision March 28, 2007).

The Commission finds that the underage operative and Investigator Bubenik followed the Local Board's guidelines on August 29, 2019, when a compliance check was conducted at Harvard Wine.

In assessing penalties for violations occurring solely as the result of a "sting," penalties imposed should never be draconian. *See* Applebee's Northeast, Inc. dba Applebee's Neighborhood Bar & Grill, Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.), *See* Epicure Package Store, Inc. (ABCC decision dated 03/28/2007). The Commission has consistently held that [t]he policy behind a "sting" operation should be the education of licensees in the risks associated with selling alcoholic beverages without requesting proof of age. *In re: Assinippi Liquors, Inc.*, Wareham (ABCC decision dated 06/08/2004), Epicure Package Store, supra. (ABCC decision dated 03/28/2007), *See* Saba Foodmarket, Inc., dba Bradford Shell (ABCC decision dated 05/16/2012). While small suspensions may further that purpose by imposing a consequence for taking a risk, a heavy-handed suspension does not. *See* Assinippi Liquors, supra. (ABCC decision dated 06/08/2004 where the Commission held that a twenty (20) day suspension of the alcoholic beverages license for a compliance check was unreasonable.); 75 Purchase Street Corporation, (ABCC Decision dated 5/30/2014 where the Commission held that a thirty (30) day suspension of the alcoholic beverages license for a compliance check was unreasonable.); Eddie-Moe LLC, (ABCC Decision dated 7/22/2010 where the Commission held that a forty-five (45) day suspension of the alcoholic beverages license for a compliance check was unreasonable.).

In this matter, Harvard Wine was suspended for two days which is neither draconian nor unreasonable and is a "small suspension." The Commission has upheld a compliance check violation finding from a Local Board with a suspension of two days for a first offense. See True Flavors LLC (ABCC Decision dated 10/2/2017). The Commission finds that the Local Board's decision to suspend Harvard Wine for two days was within its discretion.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission ("Commission") **APPROVES** the action of the Cambridge Board of License Commissioners ("Local Board") in finding that Harvard Wine committed a violation of M.G.L. c. 138, § 34 and Local Board Rule 5B.6.

The Alcoholic Beverages Control Commission ("Commission") also **APPROVES** the action of the Cambridge Board of License Commissioners in suspending the alcoholic beverages licenses of Harvard Wine for a period of two (2) days.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman




We, the undersigned, hereby certify that we have reviewed the hearing record.

Crystal Matthews, Commissioner



Deborah Baglio, Commissioner



Dated: January 8, 2025

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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cc: Hillary J. Black, Esq.
Sydney Wright, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File