



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

CHRISTOPHER PROST D/B/A P.G. HUNTER'S PUB
182 CHICOPEE STREET
CHICOPEE, MA 01013
LICENSE#: 022000017
HEARD: 09/13/16

This is an appeal of the action of the City of Chicopee License Commission (the "Local Board" or "Chicopee") for suspending the M.G.L. c. 138 §12 license of Christopher Prost¹ d/b/a P.G. Hunter's Pub (the "Licensee" or "Hunter's Pub") located at 182 Chicopee Street, Chicopee, MA for thirty-four (34) days.² The Licensee timely appealed the Local Board's decisions to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") and a hearing was held on Tuesday, September 13, 2016.

The following documents are in evidence as exhibits:

1. Letter from Chicopee Chief of Police William Jebb, with police report to Local Board, 4/4/2016;
2. Local Board's Notice of alleged violations, 4/6/2016;
3. Local Board's Decision 4/6/2016;
4. Licensee's Letter of Appeal to ABCC, 4/29/2016;
5. ABCC Notice of Appeal Hearing, 5/26/2016;
6. Minutes of Local Board hearing, 4/21/2016;
7. List of prior violations by Licensee;
8. D.V.D recording of Local Board's hearing 4/21/2016; and
9. Local Board's Regulations, Policies, and Procedures.

¹ Mr. Christopher Prost, license manager and principle of the Licensee, refers to this Licensee as "Round of Nine, Inc. d/b/a P.G. Hunter's Pub." The 2016 Renewal of the Commission records reflects that the name of the Licensee is "Christopher Prost, d/b/a P.G. Hunter's Pub." The Local Board also refers to this Licensee as Christopher Prost d/b/a P.G. Hunter's Pub. (Commission records, 2016 license renewal, Exhibits 1, 2, 3, 5, 6, 7)

² The Licensee was suspended for thirty days (count one), suspended for one day (count two) to run concurrently with the thirty days on count one, and suspended for three days (count four) to run concurrently with the thirty days on count one. The Licensee was suspended for thirty-four days in total. However, four days run concurrently with the thirty day suspension.

There is one (1) audio recording of this hearing and three (3) witnesses testified.

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

FACTS

The Commission makes the following findings of fact and rulings of law:

1. Christopher Prost d/b/a P.G. Hunter's Pub is the holder of a M.G.L. c. 138, § 12 all alcoholic beverages license located at 182 Chicopee Street, Chicopee, MA. Christopher Prost is the principle of the Licensee and the license manager of record. (Commission Records, Testimony)
2. In March of 2016, the Chicopee Police Department received anonymous phone calls about minor/underage high school students being served alcoholic beverages at Hunter's Pub. (Testimony, Exhibit 1).
3. The Chicopee Police Department, under the direction of Detective Michael Dion, conducted compliance checks at the licensed premises. (Testimony, Exhibit 1)
4. Minor females between the ages of 17 and 20 years old were used as underage operatives for the sting. (Testimony, Exhibit 1)
5. The underage operatives were advised to enter the licensed premises with the undercover police officers and attempt to purchase alcoholic beverages. The underage operatives were instructed that if they were asked to produce an identification, they were to say that they did not have one on their person. The minor and police officer were then to leave the establishment. Pre-marked currency was used to purchase the alcohol. (Testimony, Exhibit 1)
6. On Tuesday evening March 15, 2016, a compliance check was conducted at Hunter's Pub. (Testimony, Exhibit 1)
7. First Incident: On Tuesday March 15, 2016 at 9:55 p.m. two undercover police officers and one 20 year old female operative went inside Hunter's Pub and sat at the bar. The minor ordered a Mike's Hard Lemonade. The bartender went over to a gentleman seated at the other side of the bar drinking a beer in front of a computer (identified as license manager Christopher Prost). The bartender asked Mr. Prost, "Should I check their I.D's?" Mr. Prost replied "They look old enough." The bartender served the minor an alcoholic beverage of Mike's Hard Lemonade. (Testimony, Exhibit 1)
8. Second Incident: On Tuesday March 15, 2016 at 10:15 p.m., Detective Nicole Devlin entered Hunter's Pub with a 19 year old minor female. The minor female sat at the bar with Detective Devlin, and both women ordered alcoholic beverages from the bartender. (Testimony, Exhibit 1)
9. The bartender asked to see identifications and the minor female responded that her identification was at home. Immediately thereafter, the bartender walked over the

Christopher Prost, who was still seated at the bar. The bartender told Mr. Prost that the female left her identification at home. Prost told the bartender, "They're old enough." The bartender served the minor a mixed drink of vodka and soda. (Testimony, Exhibit 1)

10. Third Incident: On Tuesday March 15, 2016 at 10:30 p.m., Detective Jusino was inside Hunter's Pub with another minor. The minor ordered and was served three shots of "pickle back," an alcoholic beverage. The bartender did not ask the minor for any identification. (Testimony, Exhibit 1)
11. Detective Jusino also observed a game of "beer pong" set up on top of the pool table inside the premises. (Testimony, Exhibit 1)
12. On Thursday evening March 17, 2016, another compliance check was conducted at Hunter's Pub. (Testimony, Exhibit 1)
13. Fourth Incident: On Thursday March 17, 2016 at approximately 9:30 p.m., an underage female went into Hunter's Pub with two undercover Chicopee Police detectives. The police officers posed as patrons. At 9:45 p.m. the minor ordered a Budweiser Light beer from the bartender. The bartender did not request an identification and served the minor the alcoholic beverage. License manager Prost was sitting at the bar during this transaction. (Testimony, Exhibit 1)
14. Fifth Incident: On Thursday March 17, 2016 at approximately 9:55 p.m., a minor female ordered, paid for, and was delivered a bottle of Budweiser Light beer for Detective Jusino. The minor was not asked to present any identification. License Manager Prost was sitting at the bar during the sale and service to the minor. (Testimony, Exhibit 1)
15. Sixth Incident: On Thursday March 17, 2016 at approximately 10:00 p.m., the same minor female ordered and was served three shots of an alcoholic beverage "vegas bombs" by the bartender. The bartender did not request an identification prior to service. License manager Prost was sitting at the bar during this transaction. (Testimony, Exhibit 1)
16. On March 22, 2016 Detective Dion went to Hunter's Pub to conduct a license premise inspection. At this time he observed a beer pong game set up on a pool table inside the premises. (Testimony, Exhibit 1)
17. During this inspection Detective Dion also observed two bottles of alcohol, a bottle of 99 Bananas Liqueur to be encrusted with a sticky substance, and a bottle of Cointreau liqueur covered in dust and dirt. (Testimony, Exhibit 1)
18. The Local Board charged the Licensee with numerous violations, and on April 21, 2016, the Local Board held a hearing, found the Licensee in violation, and imposed a 34 day suspension for violations of:³ (Testimony, Exhibits 2, 3, 6, 8,9)

³ The Licensee was also charged with a violation of 204 CMR 2.05 (2), which provides that "[n]o licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to the place in or on the licensed premises. The licensee shall be responsible therefore, whether present or not." However, the Local Board found no violation of this charge. (Exhibits 2, 3)

- a) Count One: Violation of M.G.L. c. 138, §34: Sale or Delivery or furnishing alcoholic beverages to persons under twenty-one years of age (six (6) counts). The Licensee received a thirty (30) day suspension (5 days suspension per incident/violation which totals 30 day suspension). (Testimony, Exhibits 2, 3, 6, 8, 9)
- b) Count Two: Violation of 204 CMR 204 2.05: Licensed Premises (8): “[a]ll premises covered by a license or storage permit shall be kept in a clean and sanitary condition at all times.” The Licensee received a one (1) day suspension for dirty bottles and unsanitary conditions on its premises, to run concurrently with Count One. (Testimony, Exhibits 2, 3, 6, 8, 9)
- c) Count Three: Violation of Chicopee Rules and Regulations – 1.08 Environs of Licensed Premises: “It shall be the obligation of licensees to ensure that a high degree of supervision is exercised over the conduct of the licensed establishment at all times.” The Licensee was found in violation for the beer pong game and received a three (3) day suspension to run concurrently with Count One. (Testimony, Exhibits 2, 3, 6, 8, 9)

19. The Licensee has the following history of violations:

- o 2011: The Local Board found four violations against the Licensee on February 18, 2011 regarding hours of operation. The Local Board imposed the penalty of a one (1) day suspension held in abeyance for six months. (Exhibit 7)
- o 2012: The Local Board found the Licensee in violation on December 20, 2012 of MGL c. 140, §183A regarding concerts, dances, exhibitions and public shows. The Licensee received a warning placed in its file. (Exhibit 7)
- o 2014: The Local Board found the Licensee in violation of nine counts on October 16, 2014. Resulting in various penalties ranging from no action, warning placed in file, and one (1) day suspension. (Exhibit 7)

20. None of the Licensee’s prior violations were violations of M.G.L. c.138, §34 - sale or delivery of alcoholic beverages to a minor. (Exhibit 7)

21. Rule 1.14 Disciplinary Guidelines for the Local Board of Chicopee state:

- a) Licensees in violation of the applicable laws of the Commonwealth, regulations of the Alcohol Beverages Control Commission and/or these regulations may be subject to the following guideline range of discipline:
 - o First Offense: warning to seven (7) day suspension.
 - o Second Offense: warning to thirty (30) day suspension.
 - o Third Offense: warning to revocation/cancellation.
- b) Only offenses which have occurred within the two years preceding the date of violation shall be used in calculating the number of offenses for purposes of the sentencing guidelines.
- c) The disciplinary guidelines are only a guide. The Chicopee License Commission may use its discretion in determining whether the facts surrounding a violation warrant a penalty which is more lenient or severe than that suggested by guidelines.

- d) The sentencing guidelines shall not be construed so as to limit the Chicopee License Commission to consider alternative dispositions, or further conditions on a license or even alternate penalties (e.g. roll back of operating hours). (Exhibit 9)

DISCUSSION

Pursuant to M.G.L. Chapter 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. 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 (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 Licensee was found in violation of six (6) counts of M.G.L. Chapter 138, § 34, sale to a minor. Massachusetts General Laws, Chapter 138, § 34, provides in part, “Whoever makes a sale or delivery of any alcoholic beverage or alcohol to any person under twenty-one (21) years of age . . . shall be punished by a fine of not more than two thousand dollars (\$2000) or by imprisonment for not more than one (1) year or both.” The legality of the use of a minor to conduct underage stings was decided in Fran’s Lunch, Inc. v. Alcoholic Beverages Control Comm’n, 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 Alcoholic Beverages Control 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. The Court's rationale was that the purchase of alcoholic beverages by the under-age person was made for use in ferreting out violators of intoxicating liquor laws, and therefore promoted rather than hindered the purposes of the statute.

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 decision dated June 8, 2004). Compliance checks are a tool that should be used to educate licensees.

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.

The Commission has previously decided the question of the legality of sting operations conducted by local licensing authorities. In the case of In Re: Cape Cod Grogroery, Inc., (ABCC decision dated December 13, 1985) the Commission found that the use of under-age sting operations was not contrary to the public policy of the Commonwealth so long as the sting operations were conducted fairly.

In the present case, Mr. Prost, the license manager, admitted that some of the violations of sale to minors occurred. However, he contested the second incident of sale to a minor (March 15, 2016 at 10:15 p.m.) arguing that the violation is invalid as the underage operative did not follow the compliance check guidelines. The guidelines instructed the minor when asked for an identification, to say that they did not have one, and to leave the establishment. (Exhibit 1) The Licensee argues that the underage operative and the undercover officer did not leave after being asked for an identification and the minor responding to the bartender that she did not have one.

"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 v. Jenkins, Middlesex Superior Court C.A. No. 2007002652-F (Muse. J.) See also Fran's Lunch, Inc., 45 Mass. App. Ct. at 655(1998) (sting operation conducted by ABCC was constitutional where strict procedure for fair control check was observed); BBRG Massachusetts, Inc. d.b.a. Papa Razzi (ABCC decision dated May 21, 2007); Assinippi Liquors, Inc. (ABCC decision dated April 7, 2004); Epicure Package Store, Inc. (ABCC decision dated January 31, 2007).

Accordingly, the Commission finds no violation for this "Second" incident (March 15, 2016 at 10:15 p.m.) as the compliance check guidelines were not strictly adhered to and followed. However, based on the foregoing, the Commission does find that the Licensee committed five (5) violations of M.G.L. Chapter 138, §34, sale to a minor, during the other five incidents reported.

The Licensee further argues that the penalty is excessive. Therefore, the Commission must review whether the sanctions imposed by the Local Board for these violations were reasonable. In reviewing the Local Board Rules, the Commission is guided by a discussion of progressive sanctions which is developed and found in two cases: Applebee's Northeast, Inc. d/b/a Applebee's Neighborhood Bar & Grill ("Applebee's"), Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.); and Alcoholic Beverage Control Commission vs. the Licensing Board of the Town of Weymouth. In Applebee's, the Licensee challenged a five (5) day suspension as too severe. The Court laid out the criteria that the Town of Weymouth used for its calibration of penalties. "These included: (i) the number of prior offenses; (ii) the degree of inspection (of customers) exhibited by the licensee; (iii) the severity and type of offense; (iv) the efforts to identify purchasers of alcohol, if any; (v) the appearance of the purchaser receiving the illegal sale; (vi) the quality of evidence of the violation, i.e. clear violation versus questionable one; and (vii) the general reputation of the licensee." Id. at 7.

In reviewing the appropriateness of the penalty, the Court found, "that for several reasons, the resulting sanction does not fall outside the boundaries of rationality." In reviewing the Town's imposed sanctions the Court found that the Town's well-developed disciplinary system helped to avoid "abrupt or draconian punishment." Instead, the system "implemented graduated penalties and afforded the warnings of graduated penalties to offenders." Id. at 6.

Upon Commission review of the Rules and Regulations promulgated by the Local Board of Chicopee, the penalties for liquor violations are as follows: First offense: warning to seven (7) day suspension. Second Offense: warning to thirty (30) day suspension. Third Offense: warning to revocation/cancellation. In addition, the Local Board rules ~~do~~ state that these penalties are only a guide, and that the Local Board may use its discretion regarding the factors surrounding the violation. (Exhibit 9) The Commission finds that a suspension/closure for thirty days (in total) for six (6) violations for sales to a minor equates to a five (5) day suspension for each violation of sale to a minor. The Commission does not find this penalty to be unreasonable as it is in compliance with the Rules and Regulations which the Chicopee Local Board promulgated. As the Commission finds that the Licensee committed five (5) violations of sales to minors, the Commission finds the penalty of five days per violation for a total of twenty-five (25) days to be within the sanctions promulgated by the Local Board and thus, are not unreasonable.

With regard to the Local Board's finding that the Licensee violated 204 CMR 2.05(8), the Licensee did not dispute that liquor bottles at the premises were not clean. The license manager testified that he has many alcoholic beverage bottles at the bar, and he asks the bartenders to routinely clean them. With regard to the Local Board's finding that the Licensee violated Chicopee's Rules and Regulations 1.08, the license manager asserted that he had a water pong (not beer) game on top of the pool table. The Licensee's arguments are not persuasive and the Commission finds the Licensee committed these two violations and holds that the sanctions imposed (one day and three day suspensions) to be reasonable and in compliance with the rules promulgated by the Local Board of Chicopee.

Lastly, the Commission is extremely concerned that some of the violations in question involved the license manager, who is also the owner of the License. Mr. Prost, the license manager, was present at the bar for five of the violations for sales to minors. For two of the violations, license manager Prost instructed the bartender to make the sale to the minor, once after being asked whether to request an identification, and again when the bartender told Prost that the minor was

not in possession of an identification, Prost instructed the bartender to serve the minor alcohol. The license manager is the individual who is responsible for the control and management of the licensed premises. The Commission has consistently held that violations involving the license manager, corporate officers, and employees of the licensee are the responsibility of the licensee. See In Re English Social Club (ABCC decision dated August 17, 2007) (Where non-profit corporate officers and license manager were permitting gambling on the licensed premises, Commission upheld Local Board violation); In Re: Trasmontano, Inc. d/b/a Whisper's Pub (ABCC decision dated June 6, 1989) (Commission upheld Local Board's revocation where stockholders, and corporate officers were involved in illegal drug activity at the licensed premises.) In Re: The Embers of Salisbury Beach, Inc. d/b/a Kon Tiki (ABCC decision dated August 18, 1994) (Commission imposed a 14 (fourteen) day suspension where employees of the licensee were involved in illegal drug activity inside the license premises). Accordingly, the Commission strongly recommends that the Local Board require the Licensee to file an application to change its license manager so that a more responsible individual manages the License.

CONCLUSION AND DISPOSITION

The Commission **DISAPPROVES** the action of the City of Chicopee License Commission in finding that on Tuesday March 15, 2016 at 10:15 p.m. (second incident) the Christopher Prost d/b/a P.G. Hunter's Pub committed a violation of sale to a minor M.G.L. c. 138, § 34.

The Commission **APPROVES** the action of the Local Board in finding that on March 15, 2016 and March 17, 2016, the Licensee committed five (5) violations of sale to a minor M.G.L. c. 138, § 34. The Commission determined that the penalty imposed by the Local Board in suspending the alcoholic beverages license of Hunter's Pub for thirty (30) days for the six separate incidents, equated to a five (5) day suspension for each incident. With a finding of five violations of § 34, the Commission therefore finds that a twenty-five (25) day suspension is appropriate.

The Commission finds that the Licensee committed the violation of ABCC Regulation 204 CMR 204 – 2.05, and the Commission **APPROVES** the action of the Local Board in suspending the Licensee for one (1) day, to run concurrently with the twenty-five day suspension.

The Commission finds that the Licensee committed the violation of Chicopee regulation 1.08(a) and the Commission **APPROVES** the action of the Local Board in suspending the Licensee for three (3) days, to run concurrently with the twenty-five (25) day suspension. The Commission finds this penalty to be a reasonable exercise of the Local Board's lawful discretion.

The Commission remands the matter to the Local Board with the recommendation that the Licensee serve the twenty-five (25) day suspension, and the one (1) day and three (3) day suspensions to run concurrently with the twenty-five day suspension. The Commission also strongly recommends that the Local Board require the Licensee to file an application to change its license manager so that a more responsible individual manages the License.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner

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Elizabeth Lashway, Commissioner

Handwritten signature of Elizabeth Lashway in blue ink, written over a horizontal line.

Dated: January 27, 2017

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: Thomas Rooke, Esq. via facsimile 413-731-1302
Christopher Prost
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File