



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

Jean M. Lorizio, Esq.
Chair

DECISION

**OSBORN TAVERN, LLC D/B/A OSBORN TAVERN
49 MAPLE STREET
DANVERS, MA 01923
LICENSE#: 026400030
HEARD: 4/2/2019**

This is an appeal of the action of the Town of Danvers Licensing Board (the "Local Board" or "Danvers") in suspending the M.G.L. c. 138, § 12 license of Osborn Tavern, LLC d/b/a Osborn Tavern (the "Licensee" or "Osborn Tavern") located at 49 Maple Street, Danvers, MA, for six (6) days, three (3) days to be served and three (3) days held in abeyance for one year. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Tuesday, April 2, 2019.

The following documents are in evidence as exhibits:

1. Local Board's Notice of Hearing dated November 21, 2018 for Hearing to be held December 4, 2018;
2. Danvers Police Department Notice of Violation, Police Reports, and Receipts from November 2, 2018 incident;
3. Danvers Police Department Notice of Violation, Police Reports, and Receipts from November 10, 2018 incident;
4. Danvers Police Report #18014119 (2 pages) dated July 10, 2018 for incident date of July 4, 2018;
5. Town of Danvers Board of Selectmen (Local Licensing Board) Decisions and Notice of Suspensions dated December 21, 2018.

There is one audio recording of this hearing, and six (6) witnesses testified.

FINDINGS OF FACT

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

1. Osborn Tavern LLC, d/b/a Osborn Tavern holds an all alcoholic beverages license issued pursuant to M.G.L. c. 138, §12. The premises is located at 49 Maple Street, Danvers, MA. (Testimony, Exhibits 1, 5)

2. Mr. Joel Hartnett is the principal of the licensee, Osborne Tavern, LLC, and the license manager of the premises. (Testimony)

First Incident: November 2, 2018:

3. On November 2, 2018 at approximately 10:28 p.m. two patrons, a male and female (boyfriend and girlfriend) were inside Osborne Tavern consuming alcoholic beverages. The male and female patrons were arguing with other patrons. (Testimony, Exhibit 2)
4. These other patrons took the arguing male patron outside the premises. The female followed them. The argument continued outside the premises. (Testimony, Exhibit 2)
5. Ms. Kristina Berg, the main bartender at Osborn Tavern who was serving these patrons, called the Danvers Police to report the fight. (Testimony, Exhibit 2)
6. Within minutes, several Danvers Police Officers arrived in marked cruisers. A number of people were standing outside Osborn Tavern and notified the Police Officers that the arguing couple was on School Street, which runs next to Osborn Tavern. (Testimony, Exhibit 2)
7. The Police Officers responded to School Street, located the individuals, and spoke to them. The Officers determined that the female patron was heavily intoxicated. She was emanating an odor of alcohol, her speech was slurred, and she was very unsteady on her feet. She was yelling and screaming at the Officers and was extremely belligerent to them. This female patron was placed in protective custody. (Testimony, Exhibit 2)
8. The Officers determined that the male patron was also visibly intoxicated. The Officers noticed that he also had slurred speech, red glassy eyes, and was emanating an odor of alcohol. The male was arrested on an outstanding warrant. While being placed in custody and into the cruiser, he fell down. (Testimony, Exhibit 2)
9. No Breathalyzer tests, nor field sobriety tests, were performed on the male or female patrons. (Testimony, Exhibit 2)
10. After the incident, Officers spoke to bartender Ms. Berg and obtained the bar receipt for the female and male patrons while at Osborn Tavern. (Testimony Exhibit 2)
11. The bar receipt from Osborn Tavern that night indicates that 6 Coors Light (22 ounce) beers, 3 Bud Light beers BT, 2 Coors Light beers BT, and 1 Michelob Ultra Beer, were purchased by these patrons. The male and female patron each purchased three Coors Light beers. The male and female patron each consumed two beers. Their third beers were poured out. The other beers on the receipt had been consumed by other patrons. (Testimony, Exhibit 2)
12. The male and female patron arrived at Osborn Tavern at 7:00 p.m. on the night of November 2, 2019 and left at 9:19 p.m. Their receipt shows that their bar bill was paid and closed at 9:19 p.m. Bartender Ms. Berg reported to the Police Officers that this

couple had been difficult all evening. Bartender Ms. Berg notified the Police that this male and female patron were not intoxicated when they arrived at Osborn Tavern. (Testimony, Exhibit 2)

13. There were no witnesses who were present inside Osborn Tavern during this incident, who appeared and testified before the Commission.¹ (Commission records, Testimony)

Second Incident: November 10, 2018:

14. On November 10, 2018 at 2:53 a.m. Danvers Police Officer John Melto was on duty performing routine night shift patrol in a marked cruiser. His attention was drawn to a motor vehicle parked in the corner of the municipal parking lot located approximately 50 feet behind Osborn Tavern. The engine of this motor vehicle was running, and the head lights were illuminated. (Testimony, Exhibit 3)
15. Officer Melto observed a male individual sleeping inside the motor vehicle in the driver's seat which was in a reclined position. The Officer observed vomit on the ground next to the driver's side door of the motor vehicle. (Testimony, Exhibit 3)
16. The Officer ran the license plate listing of the motor vehicle and then banged on the driver's window for approximately one minute before the male occupant woke up. (Testimony, Exhibit 3)
17. The male was the only occupant of the motor vehicle. When the male woke up, he was disoriented. The officer observed this occupant's eyes to be bloodshot and glassy. Instead of opening the car window, the male occupant opened the car door. The officer immediately detected a strong odor of alcohol coming from the male occupant. (Testimony, Exhibit 3)
18. The male occupant stated that he had been at Osborn Tavern earlier and had consumed two beers. The man, upon exiting his motor vehicle, stumbled and almost fell. The Officer formed the opinion that this male was intoxicated and under the influence of alcohol. (Testimony, Exhibit 3)
19. The Officer placed the male in protective custody and determined that he was too intoxicated to perform a field sobriety test. (Testimony, Exhibit 3)
20. During booking at the police station, this male was unsteady on his feet, had slurred speech, and bloodshot glassy eyes. At 3:30 a.m. the male took a Breathalyzer test and the machine registered a .147 reading. (Testimony, Exhibit 3)
21. The male admitted again that he had been drinking earlier at Osborn Tavern. He reported that he had consumed four beers, and four "jello shots" throughout the night. (Testimony, Exhibit 3)

¹ Neither bartender Kristina Berg, nor the couple, the male and female patrons, appeared at the Commission hearing. (Commission records, Testimony)

22. Another Danvers Police Officer went to Osborn Tavern the next day and determined the identity of the male occupant. This male individual was identified as a regular patron of Osborn Tavern and is known to Mr. Hartnett, the license manager and principal of the licensee. (Testimony, Exhibit 3)
23. This male patron arrived at Osborne Tavern at approximately 5:00 p.m. with five co-workers. Each co-worker took turns buying rounds of drinks for one another. His credit card receipt demonstrated that he opened his bar bill at 5:22 p.m. He paid \$35.85 and closed the bill at 6:24 p.m. (Testimony, Exhibit 3)
24. The last round of drinks was purchased by this group between approximately 9:30 p.m. and 10:00 p.m. The patron and his co-workers left Osborn Tavern between 10:00 p.m. and 10:30 p.m. (Testimony, Exhibit 3)
25. The group hung around outside Osborne Tavern for a short period of time. A co-worker walked the male patron to his motor vehicle in the rear municipal parking lot. He knew he could not drive himself home, so he intentionally fell asleep in his car. (Testimony, Exhibit 3)
26. None of the individuals who were patrons inside Osborn Tavern testified at the Commission hearing. (Commission records, Testimony)
27. The Local Board held a hearing and found that Osborne Tavern committed the violation of Sale or Delivery to Intoxicated Persons, a violation of MGL c. 138 § 69 on both November 2, 2018, and November 10, 2018.² The Local Board voted to suspend the license for six (6) days, with three (3) days to be served, and three (3) days held in abeyance for one year, for these violations. (Exhibit 5)

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 revoke licenses. Their powers were authorized “to serve the public need and . . . to protect the common good.” M.G.L. c. 138, § 23. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Bd.

² The Local Board also voted to impose a one (1) day suspension which had been held in abeyance from a prior violation found by the Local Board, which was not the subject matter of this appeal. Due to this violation, which is the subject matter of this appeal, the Local Board voted for Osborn Tavern to serve the one (1) day license suspension in January of 2019. (Exhibits 4, 5)

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 is charged with two incidents (November 2, 2018 and November 10, 2018) of service to an intoxicated person in violation of M.G.L. c. 138, § 69. “No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person.” M.G.L. c. 138, § 69. “[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated.” Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). “The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication.” *Id.* at 610; accord McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

In order to prove this violation, the following must be shown: (1) that an individual was intoxicated on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. See Vickowski, 422 Mass. at 609. “The imposition of liability on a commercial establishment for the service of alcohol to an intoxicated person ..., often has turned, in large part, on evidence of obvious intoxication at the time a patron was served.” *Id.*; see Cimino, 385 Mass. at 325, 328 (patron was “totally drunk”; “loud and vulgar”); Gottlin v. Graves, 40 Mass. App. Ct. 155, 158 (1996) (acquaintance testified patron who had accident displayed obvious intoxication one hour and twenty minutes before leaving bar); Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121 (1994) (sufficient evidence for jury where acquaintance described patron who later had accident as appearing to feel “pretty good”). Contrast Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (commercial establishment could not be liable when there was no evidence of obvious intoxication while patron was at bar); Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (affirming summary judgment for defendant in absence of any evidence of obvious intoxication); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816-817 (1979) (directed verdict in favor of commercial establishment affirmed when

there was no evidence that patron was served alcohol after he began exhibiting obvious signs of intoxication).

I. November 2, 2018 Incident:

The Local Board produced evidence in this matter that the two individuals (the couple/girlfriend-boyfriend) were inside Osborn Tavern. They produced evidence that the individuals were served alcoholic beverages by a licensee employee, while inside Osborn Tavern. This evidence was produced by the Local Board through the testimony of Danvers Police Officers and corroborated by a receipt from Osborn Tavern for alcoholic beverages purchased by these individuals on the night of this incident. However, the Local Board did not produce any direct evidence or percipient witnesses regarding the events that transpired while this couple was inside the licensed premises. There was no one who testified before the Commission who was actually present inside Osborn Tavern during this time.

The Commission was not presented with any direct evidence regarding a necessary element of the violation of service of alcoholic beverages to an intoxicated person – that the patron was exhibiting visible signs of intoxication prior to being served alcoholic beverages by the Licensee's employee. The Local Board presented the testimony of the Danvers Police Officers, whom the Commission found to be very professional and credible witnesses. However, some of the testimony presented by the Local Board, although very credible, was hearsay.³ The Local Board produced the testimony of the Danvers Police regarding what happened that night inside Osborn Tavern, based on conversations that they had with bartender Ms. Berg, who did not appear and testify before the Commission. However, based on the testimony of the Officers produced by the Local Board as to what bartender Ms. Berg reported to them, this still would not have provided the necessary evidence of the requisite element of visible intoxication prior to or during the service of alcoholic beverages while inside Osborn Tavern.

The bar receipt was also produced by the Local Board, corroborating other evidence that alcoholic beverages were purchased by these two patrons while inside the premises. The Commission heard testimony that this couple each consumed two 22-ounce beers, and that they (the couple) had been difficult all evening. They were arguing inside and outside the premises, and as a result, Osborn Tavern bartender Ms. Berg called the Danvers Police. There was no evidence presented to the Commission regarding any visible signs of obvious intoxication of either patron prior to or during the service of alcoholic beverages while they were inside Osborn Tavern. Bartender Ms. Berg reported to the Officers that this couple was not intoxicated upon their arrival at Osborn Tavern.

Although the Officers testified that this couple was visibly intoxicated when they were placed in police custody, Massachusetts' case law supporting a finding of a violation for M.G.L. c. 138, § 69, sale or delivery of alcoholic beverages to intoxicated persons, requires evidence that the patron was exhibiting visible signs of intoxication in an open and obvious manner *prior to or while being served* an alcoholic beverage by the Licensee or its employee. The evidence must demonstrate that the patron's state of intoxication was so open and obvious that the licensee or its employees knew or should have known of this condition of intoxication *prior to or during* the sale or service

³ Hearsay evidence is admissible during Commission proceedings. The Commission determines the weight accorded hearsay evidence during its proceedings. See Embers of Salisbury v. Alcoholic Beverages Control Comm'n, 401 Mass 526 (1988).

of alcohol while inside the premises. Evidence of apparent intoxication, at some point later in time does not, by itself, suffice to show the patron's intoxication was evidence at the time the last drink was served. Douillard v. LMR, Inc., 433 Mass. 162, 165, (2001).

The Local Board produced a plethora of evidence of this couple's intoxicated state after the couple left Osborn Tavern that evening. This, however, does not sustain the burden of the Local Board in this matter. The Local Board must produce some evidence that "the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink." Rivera v. Club Caravan, 77 Mass. App. Ct. 17, 20 (2010); see Vickowski, 422 Mass. at 610.

As a result of the lack of required evidence presented to make a finding of a violation of M.G.L. c. 138, § 69, the Commission does not find that Osborn Tavern committed this violation on November 2, 2018.

II. November 10, 2018 Incident:

The Commission finds the evidence regarding proof of this second violation somewhat analogous to the aforementioned incident of November 2, 2018. The Commission, similarly, in this matter, was not presented with any evidence regarding visible signs of intoxication by the patron prior to or during the sale or service of alcoholic beverages while inside Osborn Tavern. The Commission heard evidence that this male individual was a patron at Osborn Tavern on this evening, that he was served by an employee and consumed alcoholic beverages, while inside the premises. The Commission was also presented with evidence of this individual's intoxication hours subsequent to him having departed from the premises. In the present case, no direct evidence was offered to prove the patron's intoxication at the time of purchase or service of alcoholic beverages. That the patron later exhibited signs of intoxication hours after he left Osborn Tavern alone is not sufficient to show that he was intoxicated when he was last served alcohol inside Osborn Tavern. See Soucy v. Eugene M. Connors Post 193, Inc., 79 Mass. App. Ct. 1109, *2 (2011) (memorandum and order pursuant to Rule 1:28); Douillard, 433 Mass. at 167-168.

The Commission was presented again with evidence of the intoxication of this patron after he left Osborn Tavern. At 2:53 a.m., the Officer discovered the male occupant sleeping in his motor vehicle and formed the opinion that he was under the influence of alcohol. The evidence presented to the Commission indicates that this patron left the premises at the latest time of approximately 10:30 p.m. and his bar bill receipt demonstrates that he paid his bill at 6:24 p.m. The Commission was not presented with any direct evidence as to any obvious condition of intoxication of this patron while inside Osborn Tavern.

The Commission finds, based on the evidence presented, that a necessary element required to prove a violation of MGL c 138, § 69, has not been produced by the Local Board – that this patron was exhibiting open and obvious signs of visible intoxication prior to or while being sold or served alcoholic beverages inside Osborn Tavern.

Therefore, as the Local Board has not sustained its burden of proof in this matter, the Commission finds that Osborn Tavern did not commit a violation M.G.L. c. 138, § 69 on November 10, 2018.

CONCLUSION

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding a violation of M.G.L. c. 138, § 69 as alleged on November 2, 2018, and in finding a violation of M.G.L. c. 138, § 69 as alleged on November 10, 2018. The Commission also disapproves any penalty resulting therefrom, as any penalty would be discrepant with the decision of the Commission.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Jean M. Lorizio, Chairman,



Dated: August 29, 2019

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: David DeLuca, Esq.
James Cote, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
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