



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

NOTICE OF SUSPENSION

November 4, 2015

NORWOOD CAFÉ INC. OF EVERETT D/B/A ZEKE'S PUB
61 CHELSEA STREET
EVERETT, MA 02149
LICENSE#: 038200027
VIOLATION DATES: 09/03/2013, 9/4/2013, 9/11/2013
HEARD: 10/20/2015

After a hearing on October 20, 2015, the Commission finds Norwood Café Inc. of Everett d/b/a Zeke's Pub violated 204 CMR 2.05 (2): Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 94C Violation of the Controlled Substances Act (1 Count).

Therefore, the Commission **suspends the license for twenty-five (25) days of which ten (10) days will be served and fifteen (15) days will be held in abeyance for a period of two (2) years provided no further violations of Chapter 138 or Commission Regulations occur.** The license will be delivered to the Local Licensing Board or its designee on Wednesday, December 23, 2015 at 9:00 A.M. It will be returned to the Licensee on Saturday, January 2, 2016.

You are advised that pursuant to the provisions of M.G.L. c.138 §23, you may petition the Commission to accept an offer in compromise in lieu of suspension within twenty (20) calendar days following such notice of such suspension. If accepted, you may pay a fine using the enclosed form which must be signed by a Massachusetts Licensed Accountant.

You are advised that you have the right to appeal this decision under M.G.L. c. 30A to Superior Court within thirty (30) days upon receipt of this notice.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro
 Chairman

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Το έγγραφο αυτό είναι σημαντικό και θα πρέπει να μεταφραστούν αμέσως.
这份文件是重要的，应立即进行翻译。

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Caroline Guarino, Investigator
Administration
File



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

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DECISION

NORWOOD CAFÉ INC. OF EVERETT D/B/A ZEKE'S PUB
61 CHELSEA STREET
EVERETT, MA 02149
LICENSE#: 038200027
VIOLATION DATES: 09/03/2013, 9/4/2013, 9/11/2013
HEARD: 10/20/2015

Norwood Café Inc. of Everett d/b/a Zeke's Pub ("Zeke's Pub" or the "Licensee") holds an alcohol license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, October 20, 2015, regarding an alleged violation of 204 CMR 2.05 (2): Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 94C Violation of the Controlled Substances Act (3 Counts).

Prior to the commencement of the hearing, the Licensee stipulated to the facts written in the November 15, 2013 Investigative Report of Investigator Caroline Guarino and to the September 3, 2013 violation alleged in Investigator Guarino's Report. However there were two additional violations alleged to have occurred on September 4th and 11th respectively. The signed stipulation does not include those counts. As a result, the Commission will review the facts of the September 4th and September 11th violations separately and address those counts in the decision.

The following documents are in evidence:

1. Investigator Guarino's Investigative Report dated November 15, 2013;
2. Licensee's Stipulation of Facts;
3. Application and Affidavit in Support of Search Warrant; and
4. Certificate of Drug Analysis regarding September 11, 2013 Incident.

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

There is one (1) audio recording of this hearing.

FACTS

5. In August 2013, the Everett Police Department Special Criminal Investigations Unit (UNIT) and the Massachusetts State Police (MSP) conducted an investigation of illegal distribution of narcotics in the City of Everett. The UNIT received information that Richard Kjersgard (Kjersgard) and his partner Richard Dangelo Jr. (Deangelo) were selling cocaine at Zeke's Pub. (Ex. 1, Testimony)
6. Detective Paul Strong of the Everett Police Department conducted numerous surveillances and observed Elena Guiry f/k/a Elena Zannino and Dave Zannino, both of whom have ownership interests in the Licensee corporation, speaking to Kjersgard outside of Zeke's Pub. There was no evidence presented regarding the contents of these communications. (Ex. 1, Testimony)
7. On Tuesday, September 3, 2013 at approximately 8:00 p.m., Trooper Lawrence Richardson (UC) of the MSP, working in an undercover capacity, entered the licensed premises and spoke with an individual named "Roy." (Ex. 1, Testimony)
8. During the conversation with Roy, the UC asked Roy if he could give him some "PERKS" (prescription medication Percocet). (Ex. 1, Testimony)
9. Roy told the UC he would give him some Vicodin in exchange for a few beers and Roy instructed the UC to follow him into the bathroom where Roy gave the UC two small yellow pills marked with the letters TEVA on one side and the numbers 3926 on the other (believed to be Diazepam). (Ex. 1, Testimony)
10. Shortly thereafter, the UC, Roy, and Kjersgard were standing in front of the establishment, when an individual identified as "Joey" (Joel Dacova) arrived and was introduced to the UC. (Ex. 1, Testimony)
11. Joey and Kjersgard were in conversation and Roy told the UC that they were discussing cocaine. (Ex. 1, Testimony)
12. The UC asked Roy if he could get some cocaine, and Roy asked how much he wanted. The UC responded that he wanted a forty dollar bag. This conversation took place outside of the licensed premises. (Ex. 1, Testimony)
13. Roy told the UC to wait and walked inside Zeke's Pub. A short time later, Roy led the UC back inside the licensed premises and told the UC that it would cost fifty dollars (\$50) and might take some time because Joey did not have anything. (Ex. 1, Testimony)
14. The UC agreed and then observed Kjersgard and Joey walk out the back door and back into the establishment a few minutes later. Joey proceeded to walk out the front door and stood until Roy motioned the UC to follow him outside. (Ex. 1, Testimony)
15. Outside of the licensed premises, the UC engaged Joey in conversation, exchanging U.S. currency (\$60.00 official buy funds receiving \$10.00 in change) for a clear knotted plastic package of white powdery substance. (Ex. 1, Testimony)
16. Joey provided the UC with a cell number for future purchases. (Ex. 1, Testimony)
17. The UC gave Detective Hall of the Everett Police Department the clear knotted plastic package of white powdery substance. Based on Detective Hall's training and experience as a narcotics

investigator, as well as the color, texture, nature of packaging, he believed the item contained cocaine. (Ex. 1, Testimony)

18. Joey told the UC it was okay to ingest the illegal narcotics in the bathroom and that it was common knowledge and everyone knows what is going on. Kjersgard was flashing a roll of money and was making comments: "you know how I got this." Elena Guiry, the licensed manager who was working as a bartender at the time, was present during this conversation. Ms. Guiry was friendly with Joey, Kjersgard, and Roy. (Ex. 1, Testimony)
19. On Wednesday, September 4, 2013 the UC entered Zeke's Pub. While sitting at the bar the UC called Joey, who agreed to sell the UC a fifty dollar (\$50) bag of cocaine. (Ex. 1, Testimony)
20. Thereafter, Kjersgard entered the premises and spoke with other patrons. Joey called the UC and asked if he was still waiting, to which the UC replied yes. Joey stated that he would be back to the bar shortly. (Ex. 1, Testimony)
21. Thereafter, the UC was standing in front of and outside of the licensed premises and observed Joey arrive. Joey spoke with the UC and assured him that he was going to take care of him. (Ex. 1, Testimony)
22. Joey approached Kjersgard in the rear bar area and together they walked out the back door of the premises. (Ex. 1, Testimony)
23. Joey approached the UC in front of the licensed premises and handed him a clear knotted plastic bag containing a white powdery substance. The UC handed Joey fifty dollars (\$50) in official buy funds. (Ex. 1, Testimony)
24. The UC left the establishment, met with investigators from the Everett Police Department, and handed the "package" to Detective Hall. Based on Detective Hall's training and experience as a narcotics investigator, as well as the color, texture, and nature of the packaging, he believed that the item contained cocaine. There was no drug certification for this item, and it was not field tested. (Ex. 1, Testimony)
25. The UC reported that a male bartender, later identified as an owner of the licensed premises, was engaged in conversation with Joey and Kjersgard inside and outside Zeke's Pub. There was no evidence presented regarding the contents of these conversations. (Ex. 1, Testimony)
26. Joey also had a conversation with the UC at the counter of the bar while the male owner was walking around. Joey told the UC that it was okay to do cocaine in the bathroom. There was no evidence presented regarding the specific location of the owner during this conversation, or whether or not he overheard this conversation. (Ex. 1, Testimony)
27. On Wednesday, September 11, 2013 at approximately 8:30 p.m., the UC again entered Zeke's Pub. Upon entering the licensed premises, the UC made contact with Kjersgard and inquired if Joey was around. Kjersgard asked what the UC was looking for, to which the UC responded two bags of cocaine. (Ex. 1, Testimony)
28. Kjersgard told the UC that he would take care of him, and that he should wait out front. He said that he was going to the bathroom to put packages of cocaine into a cigarette box and would bring the cigarette box back to him. (Ex. 1, Testimony)
29. This conversation took place inside the licensed premises, however there was no evidence presented that there were any witnesses that overheard this conversation. (Ex. 1, Testimony)

30. The UC went outside and waited for Kjersgard in front of the licensed premises. Minutes later Kjersgard walked outside and handed a cigarette box to the UC. (Ex. 1, Testimony)
31. The UC examined the cigarette box and observed two clear knotted plastic packages that contained a white powdery substance, and he handed Kjersgard one hundred dollars (\$100) in official buy funds. (Ex. 1, Testimony)
32. Thereafter, the UC left the licensed premises, met with investigators from the Everett Police Department, and handed the "packages" to Detective Hall. (Ex. 1, Testimony)
33. Based on Detective Hall's training and experience as a narcotics investigator, as well as the color, texture, and nature of packaging, the item given to Detective Hall by the UC was believed to contain cocaine. Thereafter, the item was sent to the state drug lab and was confirmed to contain cocaine. (Exs. 1, 3, 4, Testimony)
34. On September 20, 2013, Detective Strong spoke with Steve Zannino and notified him of the Everett Police Department's investigation. Mr. Zannino said he spoke to Kjersgard about what was going on in the bar, but did nothing about it. (Ex. 1, Testimony)

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm'n., 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975). The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in M.G.L. c. 138.

M.G.L. c. 138 gives the Commission the authority to grant, revoke and suspend licenses. Chapter 138 was "enacted ... 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. of Registration in Medicine, 383 Mass. 299, 317 (1981) (emphasis supplied). The Commission is given "comprehensive powers of supervision over licensees." Connolly, 334 Mass. at 617. The Commission's decision must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n., 401 Mass. 526, 528 (1988). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Id. Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc., v. Comm'r of Ins., 420 Mass 707, 710 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

204 CMR 2.05(2) provides that "[n]o licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. The licensee shall be responsible therefore, whether present or not." The law is well-settled that "under the regulation, [204 CMR 2.05(2)] the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises." Rico's of the Berkshires, Inc. v. Alcoholic Beverages Control Comm'n., 19 Mass. App. Ct. 1026, 1027 (1985). A vendor who sells alcohol is "bound at his own peril to keep within the condition of his license." Commonwealth v. Gould, 158 Mass. 499, 507 (1893); Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Comm'n., 11 Mass. App. Ct. 785, 788 (1981). In determining a licensee's liability, the Commission is

not restricted in only finding that the licensee actually knew that drug dealing was going on in their licensed premises. As the Appeals Court held in New Palm Gardens Inc. v. Alcoholic Beverages Control Comm'n, 11 Mass. App. Ct. 785, 798 (1981), "[i]t is ... quite possible for a licensee to offend the regulatory scheme without scienter."

The case of Rum Runners, Inc. v. Alcoholic Beverages Control Commission, 43 Mass.App.Ct. 248, further expounds on the licensee's responsibility under 204 CMR 2.05 (2), which in pertinent part, provides "the licensee shall be responsible therefore whether present or not." In Rum Runners, a patron was a drug seller who sat next to a second patron at the bar and removed a folded 3-inch paper square in exchange for \$50.00 while he (drug seller) made eye contact with the bartender. The Appeals Court, in citing Pennsylvania Liquor Control Bd. v. Leggens, 117 Pa. Comm. 107, 111 (1988), held that such conduct "supports attribution of the bartender's knowledge to the licensee." Rum Runners, Inc., 43 Mass. App. Ct. at 251. Even where there was no evidence of the manager or bartender's whereabouts during the drug transaction, knowledge of drug activity still may be imparted to the licensee where "the Commission could infer knowledge from the drug paraphernalia found by the raiding squad (scales, snorting tube)." See Rico's of the Berkshires, 19 Mass. App. Ct. at 1027.

In prior decisions where the Commission found a licensee had permitted an illegality on the licensed premises, i.e. illegal narcotic sales, there was evidence that some nexus between the drug transactions and the licensed premises existed. See id. Once there is evidence of illegal drug transactions on the licensed premises with such activities of the patron involved in the illegalities introduced, the licensee must rebut this with credible evidence that they exercised sufficiently close supervision so that there is compliance with the law on the licensed premises. Commonwealth v. Gould, 158 Mass. App. Ct. at 507. "[M]ere 'passivity or abstinence from preventative action' may support finding that [a] licensee permitted an illegality." Rum Runners, Inc., 43 Mass. App. Ct. at 251 quoting Harrington v. Smarr, 844 S.W. 2d 16, 19 (Mo. Ct. App. 1992). By stipulating to the violation, the Licensee admitted that it permitted the sales of illegal narcotics on the licensed premises on September 3, 2013. (Exhibit 2) Accordingly, the Commission finds a violation occurred on September 3, 2013.

The facts from September 4 & 11, 2013, however, demand a different outcome. 204 C.M.R. 2.05(2) requires the illegality permitted to "take place *in or on the licensed premises*." 204 C.M.R. 2.05(2) (emphasis added); accord Vasta, Inc., Winchendon (ABCC Decision Oct. 3, 2014); North Street Market Place LLC, Pittsfield (ABCC Decision Nov. 8, 2010). The events that took place on September 4 and 11 did not take place "in or on the licensed premises" -- each transaction took place outside of the licensed premises.¹

Because the Licensee did not stipulate to the violations alleged on September 4 or 11, 2013, the investigator bore the responsibility of proving all elements of 204 C.M.R. 2.05(2). The investigator has failed to do so on these two counts. Accordingly, the Commission finds no violations on September 4 & 11, 2013.

¹ Moreover, there is no evidence that the substance recovered on September 4, 2013, was in fact the illegal drug cocaine. The substance was not field-tested, nor was it accompanied by a drug certificate. All that was introduced was testimony that the substance looked like cocaine. See Vasta, Inc., Winchendon (ABCC Decision Oct. 3, 2014) ("The Local Board must demonstrate that the pills recovered actually contain oxycodone in this matter before the Commission, and the charge must be proven by satisfactory proof pursuant to M.G.L. c. 138, 64"; "it would be a rare case in which a witness's statement that a particular substance looked like a controlled substance would alone be sufficient to support a conviction").

CONCLUSION AND DISPOSITION

Based on the evidence, including the Licensee's stipulation to the facts and violation, the Commission finds the Licensee violated 204 CMR 2.05 (2): Permitting an Illegality on the Licensed Premises, to wit: M.G.L. c. 94C Violation of the Controlled Substances Act (1 Count).

Therefore, the Commission **suspends the license for twenty-five (25) days of which ten (10) days will be served and fifteen (15) days will be held in abeyance for a period of two (2) years provided no further violations of Chapter 138 or Commission Regulations occur.**

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Elizabeth A. Lashway, Commissioner _____

Dated: November 4, 2015

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