



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

Steven Grossman
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

NOTICE OF SUSPENSION

June 27, 2014

TWO BROTHERS MARKET II, CORP D/B/A TWO BROTHERS MARKET
415 FERRY STREET
EVERETT, MA 02149
LICENSE#: 038200089
VIOLATION DATE: 12/12/2013
HEARD: 06/17/2014

After a hearing on June 17, 2014, the Commission finds Two Brothers Market II, Corp d/b/a Two Brothers Market in violation of M.G.L. c.138 §23 Transfer of the Privilege of a license without proper approval.

The above-captioned licensee's license is **SUSPENDED INDEFINITELY EFFECTIVE FORTHWITH** until further written order from this Commission.

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

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Caroline Guarino Wilichoski, Investigator
Timothy Hooton, Investigator
Alfred P. Farese, Esq. via facsimile 617-387-7408
Administration
File



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DECISION

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Two Brothers Market II, Corp d/b/a Two Brothers Market (the "Licensee") holds a wines and malt beverages package store alcohol license issued pursuant to M.G.L. c. 138, §15. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, June 17, 2014, regarding an alleged violation of M.G.L. c.138 §23 Transfer of the Privilege of a license without proper approval. The above captioned occurred on December 12, 2013, according to Investigator Wilichoski's Report.

The following documents are in evidence as exhibits:

1. Investigator Wilichoski's Investigative Report dated December 12, 2013;

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

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

FACTS

1. On November 26, 2013, Investigator Guarino-Wilichoski received an application for a Transfer of a §15 License from Two Brothers Market II, Corp to Jacqueline Rosario, sole proprietor.
2. Upon reviewing the application, Investigator Wilichoski observed it contained a Durable Power of Attorney for Ms. Rosario to Edgar Rosario. Investigator Wilichoski noted that throughout the application, Edgar Rosario had signed most of the application documents, purchase and sale agreement, CORI form, as well as the leasehold assignment, for Ms. Rosario.
3. On Thursday, December 12, 2013, Investigators Hooton and Wilichoski conducted an investigation of the business operation of Two Brothers Market II, Corp d/b/a Two Brothers Market to determine the manner in which its business was being conducted.
4. Investigators identified themselves to the clerk on duty, Edgar Rosario.
5. Investigators asked Mr. Rosario if he was related to the proposed licensee, Jacqueline Rosario. He replied that he was Ms. Rosario's nephew.
6. Investigators asked Mr. Rosario who orders the alcoholic beverages from the wholesalers, to which he replied that he did.

7. Investigators observed a glass-fronted refrigerator case filled with bottles of wine and beer for sale. They saw that most of the bottles had a sales sticker with the price and the name of Rosario's Market.
8. Investigators reviewed invoices of alcoholic beverages that were delivered to this establishment. The invoices had the name of NUNU's, 415 Ferry Street, Everett. No corporate name was listed.
9. Investigators asked Mr. Rosario who pays the invoices for the alcoholic beverages, and he replied that Ms. Rosario pays the invoices.
10. Investigators asked Mr. Rosario when a sale of an alcoholic beverage is made, into whose account are the monies deposited? He replied into Ms. Rosario's.
11. Investigators asked Mr. Rosario how long has he been selling alcoholic beverages at this location and he replied for several months.
12. Investigator Wilichoski conducted an administrative review of the Licensee's Commission file which revealed:
13. The applicant, Jacqueline Rosario, first filed an application for a Transfer of Ownership on 12/05/2012 with the Everett Licensing Board (the "Local Board").
14. The transfer of ownership was advertised on 1/18/2013.
15. The Commission received the Transfer of Ownership application on 2/12/2013 and it was assigned to Investigator Capurso.
16. The application was marked "return no action" on 3/20/2013 and returned to the Local Board.
17. The application was re-submitted for reconsideration to the Commission on 11/26/2013 and was assigned to Investigator Wilichoski.
18. According to the Secretary of the Commonwealth, Corporate Division, as of 4/18/2014, the Two Brothers Market II Corp has Daniel Pena listed as president, treasurer, secretary and director.
19. Ms. Robles testified that her former married name was Rosario; however she is no longer married and has reverted to her birth name, Jacqueline Robles.
20. Ms. Robles testified before the Commission that she purchased the liquor store from Mr. Daniel Pena, and that she is currently operating the licensed premises.
21. Ms. Robles testified that she filed an application to transfer the license with the Local Board in Everett, but never received any documentation that the transfer petition had been approved.
22. Mr. Daniel Pena, the approved licensee, did not attend the Commission hearing.
23. Investigator Guarino-Wilichoski testified that a Mr. Pena, the current holder of the license, needs to present to the Commission, a certificate of good standing issued by the Department of Revenue.
24. Investigator Guarino-Wilichoski testified that the application to transfer this license is currently before the Local Board of Everett, and that Ms. Robles needs to file a motion for reconsideration to have the application resubmitted to the Commission.

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Commn., 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).

In reviewing the authority of the Commission, the Supreme Judicial Court has held that "[t]he powers of the States in dealing with the regulation of the sale of intoxicating liquors are very broad. What they may wholly prohibit, they may permit only on terms and conditions prescribed by the Legislature." Supreme Malt Products Co., Inc., v. Alcoholic Beverages Control Commission, 334 Mass. ----; Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-139; Carter v. Virginia, 321 U.S. 131, 137-143. In dealing with a trade, which, because of its great potential evils, can be wholly prohibited, a wide power is given to the Legislature with respect to the delegation of discretionary powers. Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 619 (1956).

The SJC further held that “[t]he legislative history of [the Commission’s enabling act], and of M.G.L. (Ter. Ed) Ch. 138, as amended, clearly shows that the powers of the Commission were not intended to be perfunctory or limited.” Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 617 (1956).

A licensee who wishes to transfer its license, or an interest in its alcoholic beverages license, is required to obtain prior written approval from the licensing authorities. This allows the licensing authorities to determine if the transfer is in the public interest, and if the proposed transferee is someone who qualifies to hold a license.

Implicit in the transfer of a license is the surrender of control. A “transfer of a business takes place when the person introduced to it runs the business for his own account.” Griffin's Brant Rock Package Store, Inc. v. Alcoholic Beverages Control Commission, 12 Mass. App. Ct. 768, 771, 429 N.E.2d 62, 65 (1981). The Commission is instructed by the cases of Cleary v. Cardullo's, Inc., 347 Mass. 337, 346-350, 198 N.E.2d 281 (1964) and Number Three Lounge, Inc. v. Alcoholic Beverages Control Comm., 7 Mass. App. Ct. 301, 304-308, 387 N.E.2d 181 (1979). The Licensee, Two Brothers Market II Corporation’s last-disclosed officers, directors, and corporate structure, which were approved by the Commission in October of 2009, listed the following: President: Daniel Pena; Treasurer & Clerk: Daniel Pena; Shareholder: Daniel Pena. Mr. Daniel Pena is listed in the Commission records as the approved license manager.

The licensee did not receive the statutorily required prior approval for Ms. Jacqueline (Rosario) Robles to have any direct or indirect beneficial interest in this license. The Appeals Court held in Number Three Lounge, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 301 (1979), the concept of an ownership interest can vary from an absolute proprietary interest to a mere possessory right.

A licensee must receive prior approval from both the local licensing authority, and the Commission before transferring the privilege of its license, or transferring any type of interest in it. In contravention of the statute, no other individual except for Mr. Daniel Pena, has approved to have control of, and interest in, or benefit from, this licensed business. See Griffin's Brant Rock Package Store, Inc. v. Alcoholic Beverages Control Commission, 12 Mass. App. Ct. 768, 771 (1981).

The Licensee is charged with a violation of M.G.L. c. 138, §23, the transfer of a license without proper approval. The Commission is convinced by satisfactory proof and finds that there was a transfer of a direct or indirect beneficial interest in the license without first obtaining prior written approval from both the Local Board and the Commission, as required by statute. Based on the evidence, the Commission does find a violation of M.G.L. c. 138, §23.

CONCLUSION

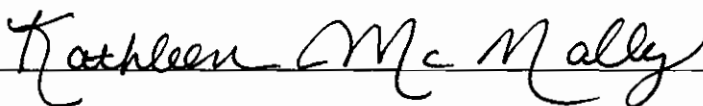
Based on the evidence, the Commission finds the licensee violated M.G.L. c.138 §23 Transfer of the Privilege of a license without proper approval. Therefore, the Commission **INDEFINITELY SUSPENDS** the license of Two Brothers Market II, Corp d/b/a Two Brothers Market **effective forthwith**, until further written order of the Commission.

The Commission will not issue any further order without a written request from the Licensee showing good cause to reconsider this indefinite suspension and a hearing before the Commission that the Licensee attends.

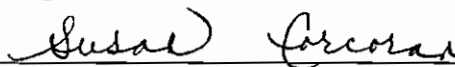
Good cause for the Commission to consider issuing a further written order revising the order of indefinite suspensions will include, but not be limited to, the Licensee filing with both the Commission and the Local Board the appropriate application (including all necessary certificates and documents) to transfer this license, and that appropriate application is granted by the Local Licensing Authorities and approved by the Commission.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Susan Corcoran, Commissioner



Dated: June 27, 2014

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: Local Licensing Board
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