

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

November 19, 2012

MODERN SNACK BAR, INC.
347 ALDEN ST.
FALL RIVER, MA 02721
LICENSE#: 038800105
VIO DATE: 02/29/2012
HEARD: 06/05/2012

After a hearing on June 5, 2012, the Commission finds Modern Snack Bar, Inc. in violation of:

- 1) 204 CMR 2.05 (1) - Devices which furnish anything besides merchandise of a quantity and quality commensurate with the price deposited therein are prohibited on licensed premises; and
- 2) M.G.L. c. 140 §177A (1) - Failure to have an automatic amusement device license (1 count).

The Commission suspends the licensee's license for a total of four (4) days to be served. The suspension shall commence on Wednesday, January 2, 2013 and terminate on Saturday, January 5, 2013. The license will be delivered to the Local Licensing Board or its designee on Wednesday, January 3, 2013 at 9:00 A.M. It will be returned to the licensee Sunday, January 6, 2013.

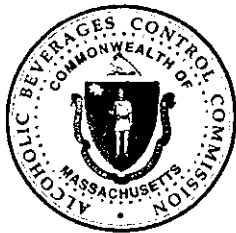
You are advised that pursuant to the provisions of M.G.L. c.138 §23, you may petition the Commission to accept an offer in compromise in lieu of suspension within twenty (20) calendar days following such notice of such suspension. If accepted, you may pay a fine using the enclosed form. All checks must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

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Michael Teehan, Investigator
James W. Clarkin, Esq., via Facsimile
Administration
File



The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
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DECISION

MODERN SNACK BAR, INC.
347 ALDEN ST.
FALL RIVER, MA 02721
LICENSE#: 038800105
VIO DATE: 02/29/2012
HEARD: 06/05/2012

Modern Snack Bar, Inc. (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, June 5, 2012, regarding an alleged violation of:

- 1) 204 CMR 2.05 (1) - Devices which furnish anything besides merchandise of a quantity and quality commensurate with the price deposited therein are prohibited on licensed premises; and
- 2) M.G.L. c. 140 §177A (1) - Failure to have an automatic amusement device license (1 count).

The above captioned occurred on February 29, 2012 according to Investigator Teehan's Investigative Report.

The following documents are in evidence:

1. Investigator Teehan's Investigative Report dated February 29, 2012; and
 2. Copies of Receipts for "Points" and "Phone Minutes".
- A. Memo from Fall River Licensing Board dated March 2, 2012; and
B. Fall River's Corporate Counsel Legal Opinion dated May 14, 2012.

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

FACTS

1. Modern Snack Bar, Inc. holds an all alcohol on-premises license located at 347 Alden Street, Fall River, Massachusetts.
2. On Wednesday, February 29, 2012, at approximately 12:30 p.m., Investigators Kenny and Teehan conducted an investigation of the business operation of Modern Snack Bar, Inc. in order to investigate a complaint filed with the Investigation and Enforcement Division. (Exhibit 1, Testimony)
3. Investigators Kenny and Teehan identified themselves to the owner, later identified as Mr. Joao Camara, and informed him of the complaint being investigated. (Exhibit 1, Testimony)

4. This complaint related to the presence of an illegal device being possessed on the licensed premises. (Exhibit 1, Testimony)
5. Investigators Kenny and Teehan observed one (1) phone card machine, with the name "Lucky Sweepstakes" emblazoned on its sides, in the bar area. (Exhibit 1, Testimony)
6. The Lucky Sweepstakes device had chairs stationed in front of it, so that individuals playing the device could sit while playing. (Exhibit 1, Testimony)
7. Investigator Kenny sat in front of the device and placed one (\$1.00) dollar in U.S. Currency into the device, at which point a register-type piece of paper with printing on it was dispensed from the device. (Exhibits 1,2, Testimony)
8. No merchandise was dispensed from the machine. (Exhibits 1,2, Testimony)
9. The printed receipt indicated, "Good for 15 minutes of phone time" along with one (1) PIN number. (Exhibits 1,2, Testimony)
10. The device's screen indicated that there were four (4) points that had been awarded for placing the one (\$1.00) dollar into the device. (Exhibits 1, 2, Testimony)
11. Mr. Camara told the investigators that once an individual is done playing, they print out a ticket from the device. The ticket is given to the bartender on duty, who places it in an envelope. (Exhibits 1, 2 Testimony)
12. Mr. Camara stated that the vending company, Tele Vending, comes to the licensed premises once or twice a week, and pays off the winnings to the winner from the tickets, contained in the envelopes. (Exhibits 1,2 Testimony)
13. Mr. Camara could not produce a permit for the device. It was not licensed. (Ex. 1, Testimony)
14. At the hearing before the Commission, Mr. Joao Camara, the Licensee testified. He said that the capacity of his premises is 35 patrons, and he usually has the same customers who frequent his premises. All of his customers are from Portugal. (Testimony)
15. The Licensee testified that in December of 2011, Mr. Oren Bouzaglo, the owner of Tele Vending, put the machines in Modern Snack Bar. (Testimony)
16. Mr. Camara and Mr. Bouzaglo evenly divide the proceeds from the machine 50% - 50%. (Testimony)
17. Mr. Camara testified that this machine is for the use of his customers.
18. The customers put money into the machine, and get printed receipts.
19. On the printed receipt are numbers and four (4) points. (Testimony)
20. He testified that the receipts are handed to the bartender and collected behind the bar for an indeterminate period of time. (Testimony)
21. The vendor, Mr. Bouzaglo, comes in once or twice a week, and collects the receipts. (Testimony)
22. The customers then get phone cards and use the cards to call long distance to Portugal and the Azores, as it is far less expensive than using cellular phones. (Testimony)
23. If a customer accumulates five hundred (500) points, the customer gets a certificate to redeem at Modern Snack Bar for food and alcoholic drinks. (Testimony)
24. Mr. Bouzaglo testified that patrons put one (1) dollar into the machine and get a slip of paper issued from machine.
25. No merchandise is dispensed from the machine in exchange for the money inserted into the machine.
26. The vendor testified that once or twice a week he would go to Modern Snack Bar and redeem the slips of paper.
27. Mr. Bouzaglo testified that the customers receive phone cards and points towards gifts certificates at Modern Snack Bar.

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). The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in G.L. c. 138. The Commission has comprehensive powers of supervision over licensees and has statutory authority (G. L. c. 138, § 64) to revoke or suspend a license for violation of a regulation. Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission, 374 Mass. 547 (1978).

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.

The SJC held that “[t]he legislative history of [the Commission’s enabling act], and of 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).

The commission has comprehensive powers of supervision over licensees. Connolly v. Alcoholic Beverages Control Commn. 334 Mass. 613, 617 (1956). The Commission may make regulations for “clarifying, carrying out, enforcing and preventing violation of” statutory provisions for the “method of carrying on the business of any licensee,” and “for the proper and orderly conduct of the licensed business.” G. L. c. 138, § 24, as appearing in St. 1971, c. 478. The Commission has exercised this authority through the promulgation of regulations that are codified at chapter 204 of the Code of Massachusetts Regulations. Licenses are also revocable for violation of “any regulation adopted by the commission or *local licensing authority*” (emphasis supplied), and local licensing authorities may make “reasonable requirements” with respect to “the conduct of business by any licensee.: G. L. c. 138, § 23, quoted in part in fn. 1, supra. 367 Mass. 788, 1975 Mass. LEXIS 900, Boston Licensing Board v. Alcoholic Beverages Control Commission, 367 Mass. 788 (1975)

Furnishing Anything besides Merchandise of a Quantity and Quality Commensurate with the Price Deposited Therein

A Commission regulation promulgated at 204 CMR 2.05(1) provides in pertinent part, that “any ... devices which furnish anything besides merchandise of a quantity and quality commensurate with the price deposited therein are prohibited on licensed premises.” Investigator Kenny put one (1) dollar in U.S. Currency into the device and received a piece of paper in return that furnished fifteen (15) minutes of telephone time. The Commission is not persuaded that this piece of paper constitutes “merchandise” within the meaning of the Commission’s regulation, given the usual and ordinary meaning of the word “merchandise.” In addition, how this piece of paper could be converted into fifteen minutes of telephone time is not clear to the Commission.¹ Thus the Commission is not persuaded that this piece of paper is merchandise of a “quantity and quality commensurate” with the dollar that was deposited.

¹ Moreover, the cost of this telephone time is not consistent with the Commission’s common knowledge and life experience.

Further, in addition to the piece of paper that could be converted into telephone time by some undisclosed method, Investigator Kenny also received "points" that could be redeemed for food and alcohol at the premises. The Commission finds that this action of providing points to be redeemed for food, alcohol, and phone time at an indeterminate time, are something besides "merchandise of a quantity and quality commensurate with the price deposited therein." This machine was banned by this regulation from being possessed inside a licensed premises. The Licensee violated 204 CMR 2.05(1).

Failure to License the Automatic Amusement Devices

204 CMR 2.05(2) provides in pertinent part that, "No 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 therefor, whether present or not. M.G.L. c. 140, § 177A (2), provides in pertinent part, "The term "automatic amusement device" as used in this section shall be construed as meaning any mechanism whereby, upon the deposit therein of a coin or token, any apparatus is released or set in motion or put in a position where it may be set in motion for the purpose of playing any game involving, in whole or in part, the skill of the player, including, but not exclusively, such devices as are commonly known as pinball machines including free play pinball machines, but not including slot machines as defined in chapter 23K." Investigator Kenny sat in front of the device titled "Lucky Sweepstakes" inside the licensed premises and placed one (1) dollar in U.S. Currency into the device to play the machine. After Investigator Kenny inserted money and played the Lucky Sweepstakes game, it dispensed a register-type paper with printing. This is clearly an automatic amusement device, which must be licensed pursuant to M.G.L. c. 140, § 177A (2). The device was not licensed, which constitutes a violation of M.G.L. c. 140 § 177A.

The Commission notes that even if this device were licensed, it is banned by Commission regulations from being possessed inside a licensed premises. Thus, the Commission anticipates that the local licensing authorities under M.G.L. c. 138 would never license a machine or other device that is banned from being possessed inside a licensed premises.

CONCLUSION

Based on the evidence, the Commission finds the licensee violated:

- 1) 204 CMR 2.05 (1) - Devices which furnish anything besides merchandise of a quantity and quality commensurate with the price deposited therein are prohibited on licensed premises; and
- 2) M.G.L. c. 140 §177A (1) - Failure to have an automatic amusement devices license (1 count).

Therefore, the Commission **suspends the license for seven (7) days of which four (4) days will be served and three (3) days will be held in abeyance for a period of two (2) years provided no further violations of Chapter 138 or Commission Regulations occur.**

In addition, the Commission imposes a condition on this license that, the licensee must not possess in or on the licensed premises any automatic amusement device including, but not limited to, telephone card machines and video poker machines.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner *Kathleen McNally*

I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Kim S. Gainsboro, Chairman *Kim S. Gainsboro*

Susan Corcoran, Commissioner *Susan Corcoran*

Dated: November 19, 2012

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
Frederick G. Mahony, Chief Investigator
Michael Teehan, Investigator
Mark Kenney, Investigator
James W. Clarkin, Esq., via Facsimile
Administration
File