



Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
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Jean M. Lorizio, Esq.
Chairman

DECISION

BOB MARTIN'S BAR, INC. D/B/A SOUTH GARDNER HOTEL
8-12 EAST BROADWAY
GARDNER, MA 01440
LICENSE#: 0436-00008
HEARD: 2/21/2019

This is an appeal of the action of the City of Gardner Licensing Board (the "Local Board" or "Gardner") for suspending the § 12 all-alcohol license of Bob Martin's Bar, Inc. d/b/a South Gardner Hotel ("Licensee" or "South Gardner Hotel") located at 8-12 East Broadway, Gardner, Massachusetts. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Thursday, February 21, 2019.

The following documents are in evidence:

1. City of Gardner Law Department's Letter withdrawing the Local Board's Opposition to the Licensee's Appeal, 2/20/2019;
2. Licensee's Notice of Appeal, 11/15/2018;
3. Local Board's Decision imposing a 2-Day Suspension, 11/16/2018;
4. Local Board's Decision imposing a 3-Day Suspension, 11/16/2018; and
5. Licensee's Pre-Hearing Memorandum.

There is one (1) audio recording of this hearing, and one (1) witness testified. The Commission took administrative notice of Licensee's Commission record.

FINDINGS OF FACT

1. Bob Martin's Bar, Inc. d/b/a South Gardner Hotel ("Licensee" or "South Gardner Hotel") holds a § 12 all alcoholic beverages innholder's license. The Licensee is located at 8-12 East Broadway, Gardner, Massachusetts. (Commission records, Exhibits 1, 3, 4)
2. On September 13, 2018 the Local Board received notification of a violation from the Gardner Police Department. The Gardner Police requested a violation hearing be held because they were notified pursuant to M.G.L. c. 90, § 24-J, a "§ 24-J Last Drink Report" supplied by the District Court, that on September 3, 2018 an individual was charged with Operating a Motor Vehicle Under the Influence of Alcohol. The driver who was charged

stated to the Court that the last drink was served at the licensed premise, South Gardner Hotel. Based on the “§ 24-J Last Drink Report,” the Gardner Police requested a violation hearing be held for this allegation charging the Licensee with violating 204 CMR 2.05(2) permitting an illegality of the licensed premises, to wit, Chapter 138, § 69. (Exhibit 3)

3. On November 13, 2018, the Local Board held a hearing on these allegations and voted to suspend the South Gardner Hotel’s license for three (3) days.¹ (Exhibit 3)
4. On November 2, 2018 the Local Board received notification of an alleged violation from the Gardner Police Department. The Gardner Police were notified pursuant to a M.G.L. c. 90, § 24-J, a “§ 24-J Last Drink Report,” that on October 21, 2018, an individual was charged with Operating a Motor Vehicle Under the Influence of Alcohol. The driver stated to the Court that the last drink was served by the Licensee, South Gardner Hotel. Based on the “§ 24-J Last Drink Report” the Gardner Police requested a violation hearing be held for this allegation charging the Licensee with violating 204 CMR 2.05(2) permitting an illegality of the licensed premises, to wit, Chapter 138, § 69. (Exhibit 4)
5. On November 13, 2018, the Local Board held a hearing on these allegations and voted to suspend the South Gardner Hotel’s license for two (2) days.² (Exhibit 4)
6. The Applicant timely appealed to the Commission the Local Board’s decision, which had found that the Licensee committed a violation of 204 CMR 2.05(2) permitting an illegality of the licensed premises, to wit, chapter 138, § 69 on September 3, 2018 and also a violation of 204 CMR 2.05(2) permitting an illegality of the licensed premises, to wit, chapter 138, § 69 on October 21, 2018. (Exhibit 2)
7. Immediately prior to the Commission hearing, the City of Gardner Assistant City Solicitor submitted a letter on behalf of the Local Board withdrawing its opposition to the Licensee’s appeal. (Exhibit 1)
8. The Licensee appeared at the Commission hearing. (Commission records, Exhibit 1)
9. No representative from the Local Board of the City of Gardner appeared at the Commission hearing. (Commission records)

¹ The Licensee did NOT serve the three (3) day suspension. (Commission records)

² The Licensee has served this two (2) day suspension. (Commission records)

DISCUSSION

Pursuant to M.G.L. c. 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). 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.

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). “The Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations.” Jaman Corp., d/b/a Crossroads (ABCC Decision Nov. 4, 2010).

The Local Board has the burden of producing satisfactory proof before the Commission that the Licensee committed these two allegations of violations of 204 CMR 2.05 (2) to wit: M.G.L. c. 138, § 69 on the dates of September 3, 2018, and October 21, 2018.

The Local Board has both the burden of proof and the burden of production regarding these charges. The Local Board of the City of Gardner submitted a written letter that the Local Board was withdrawing its opposition to the Licensee’s appeal. (Exhibit 1) No representatives from the City of Gardner Local Board appeared at the Commission hearing. The Commission finds that there was no evidence presented that the Licensee committed these violations. As a result, the Commission makes a finding of No Violation of 204 CMR 2.05(2) permitting an illegality of the licensed premises, to wit, chapter 138, § 69 committed by the Licensee on September 3, 2018, as alleged by the Local Board. The Commission also makes a finding of No Violation of 204 CMR 2.05(2) permitting an illegality of the licensed premises, to wit, chapter 138, § 69 committed by the Licensee on October 21, 2018, as alleged by the Local Board.

CONCLUSION

Based on the findings and rulings above, the Alcoholic Beverages Control Commission (“Commission”) **DISAPPROVES** the action of the Local Board in finding the Licensee committed a violation of 204 CMR 2.05(2) permitting an illegality of the licensed premises, to wit: chapter 138, § 69 on September 3, 2018.

Based on the findings and rulings above, the Alcoholic Beverages Control Commission (“Commission”) **DISAPPROVES** the action of the Local Board in finding the Licensee committed a violation of 204 CMR 2.05(2) permitting an illegality of the licensed premises, to wit: chapter 138, § 69 on October 21, 2018.

Therefore, the Commission **DISAPPROVES** the action of the Local Board in ordering a five (5) day³ suspension. The Commission remands the matter to the Local Board with the recommendation that no further action be taken against the Licensee as any penalty would be discrepant with the Commission's decision.

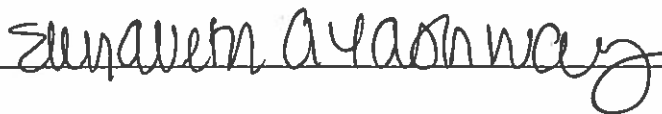
ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



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

Elizabeth A. Lashway, Commissioner



Dated: April 5, 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: Jerold G. Paquette, Esq.
Priya Gandbhir, Esq.
Frederick G. Mahony, Chief Investigator
Local Licensing Board
Administration, File

³ The five (5) day suspension is the combination of the three (3) day suspension, combined with the two (2) day suspension. The Licensee has served the two (2) day suspension. See supra, Footnote 2. (Commission records)