

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

Steven Grossman
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

SABA FOODMARKET, INC. DBA BRADFORD SHELL
154 SOUTH MAIN ST.
HAVERHILL, MA 01835
LICENSE# 052000150
HEARD: 05/16/2012

This is an appeal of the action of the Haverhill Licensing Board (the "Local Board") in revoking the M.G.L. c. 138, §15 wine and malt beverages license of Saba Foodmarket, Inc. dba Bradford Shell (the "Licensee" or "Saba"). The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, May 16, 2012. The Licensee argued that the Local Board was arbitrary and capricious in revoking its alcoholic beverages license.

The following documents are in evidence:

1. Minutes of the Haverhill Licensing Board meeting of 02/16/2012 (4 pages);
2. Licensee's Wine and Malt Beverages Package Store License (1 page);
3. Local Board's Notice of Violation dated 09/21/2011(1 page);
4. Detective Spero's Compliance Check Field Report dated 09/21/2011 (1 page);
5. Local Board's Notice of Show Cause Hearing dated 01/13/2012 (1 page);
6. Local Board's Hearing Reminder Letter dated 02/07/2012 (1 page);
7. Show Cause Hearing Administrative Review for Licensee dated 02/15/2012 (1 page);
8. Show Cause Hearing Administrative Review for Academy Plaza Trust dba Academy Liquors (2 pages);
9. Show Cause Hearing Administrative Review for Li's Asian Garden dba Asian Garden (2 pages);
10. Show Cause Hearing Administrative Review for Jiang's Family, Inc. dba China King Super Buffet (2 pages);
11. Show Cause Hearing Administrative Review for 25 Essex Street, LLC dba Essex Street Grille (2 pages);
12. Show Cause Hearing Administrative Review for Adee, Inc. dba Evenfall Restaurant & Grille (2 pages);
13. Show Cause Hearing Administrative Review for Hans Enterprises, Inc. dba Hans Garden (2 pages);
14. Show Cause Hearing Administrative Review for Patel's Liquors, LLC dba Harry's Liquors (2 pages);

15. Show Cause Hearing Administrative Review for Italian American Benevolence Association, Inc. dba Italian American Social Club (2 pages);
16. Show Cause Hearing Administrative Review for Joseph P. Brent dba Joes' Quick Stop (2 pages);
17. Show Cause Hearing Administrative Review for Kaknes Enterprises, Inc. dba K's Citgo-Richdale Store (2 pages);
18. Show Cause Hearing Administrative Review for Bradford Variety & Deli dba Kelly's Restaurant (2 pages);
19. Show Cause Hearing Administrative Review for PJML, Inc. dba [Archie's] Little River Ale House (2 pages);
20. Show Cause Hearing Administrative Review for George's at the Vault, Inc. dba Mal's Place (2 pages);
21. Show Cause Hearing Administrative Review for Mr. Mike's Restaurant & Lounge, Inc. dba Mr. Mike's Restaurant & Lounge (2 pages);
22. Show Cause Hearing Administrative Review for New Lantern Café, Inc. dba New Lantern Café (2 pages);
23. Show Cause Hearing Administrative Review for Shadow Lake Corp. dba One Stop Market (2 pages);
24. Show Cause Hearing Administrative Review for Garcia Espinal dba Pares Liquors (2 pages);
25. Show Cause Hearing Administrative Review for Hakim Sabri dba Red Hen Market (2 pages);
26. Show Cause Hearing Administrative Review for C & W Restaurant, Inc. dba Red Pepper (2 pages);
27. Show Cause Hearing Administrative Review for Russ-Lynn, Inc. dba R.G.'s Pub (2 pages);
28. Show Cause Hearing Administrative Review for K.H.A.M. Dave, Corp. dba Richdale Convenience Store (2 pages);
29. Show Cause Hearing Administrative Review for AMBA Enterprises, Inc. dba Riley's Corner (2 pages);
30. Local Board's Decision dated 02/17/2012 (1 page);
31. Joint Pre-Hearing Memorandum dated 05/14/2012 (5 pages); and
32. Local Board Hearing Decisions for Licensees Charged with Same Violation, c. 138 §34.

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

FACTS

We find the following facts:

1. On 06/21/1999, the Local Board issued Saba a wine and malt beverages package store license pursuant to M.G.L. c. 138, §15 which is located at 154 South Main St., Haverhill, MA. (Ex. 2)
2. On 09/21; 9/22; 9/28; and 9/29 of 2011, the Haverhill Police Department conducted compliance checks in the City of Haverhill. (Ex. 4)
3. The Licensee does not dispute that at approximately 6:55 p.m. an underage volunteer working with the Haverhill Police Department purchased a six (6) pack of Bud Light beer, and was not asked for identification at Saba Foodmarket, Inc. dba Bradford Shell. (Ex. 4)

4. As a result of the violation, the Local Board held a hearing on 02/16/ 2012, and determined that Saba sold alcohol to an individual in violation of 2.04 CMR 2.05 (2) to wit M.G.L. c. 138, §34 and consequently revoked Saba's alcoholic beverages license. (Ex. 8)
5. The disciplinary history for Saba is as follows: (Ex. 7)
 - On 06/20/2002, Saba violated M.G.L. c. 138 §34. As a result, on 07/10/2002, the Local Board suspended Saba's license but stayed the imposition of the suspension pending satisfactory completion of a thirty (30) day probationary period which ended August 9, 2002.
 - On 10/25/2007, Saba violated M.G.L. c. 138 §34. As a result, the Local Board suspended its license for two (2) days [11/ 26/2007 and 11/27/2007].
 - On 03/14/2009, Saba violated M.G.L. c. 138 §34. As a result, the Local Board did not impose a disposition (no information listed in the results sections of the history).
 - On 07/15/2010, and 07/22/2010, Saba failed a Commission compliance check in violation of 204 CMR 2.05 (1), to wit: c. 138, §34. As a result, on 10/10/2010, the Commission imposed a nine (9) day license suspension which was served from 02/02/2011 through 02/02/2011.
6. This is Saba's sixth violation for selling alcoholic beverages to a minor (including two (2) prior compliance check failures by the Commission). (Ex. 8)
7. In total, the Haverhill Police Department cited twenty-four (24) alcoholic beverages licensees for failing the compliance checks. (Exs. 8-29) The Local Board held hearings regarding those violations.
8. Of the twenty-three (23) establishments cited, nine (9) had no prior violations¹, four (4) establishments had one (1) prior violation², two (2) establishments had two (2) prior violations³, It

¹ These nine (9) establishments and their corresponding penalties are listed below:

- Li's Asian Garden dba Asian Garden for c. 138 §34 violation on 9/28/2011 received probation one (1) year, which expires 03/15/2013.
- Hakim Sabri dba Red Hen Market for 204 CMR 2.05 (2), to wit: c. 138 §34 on 09/27/2011, the local board withdrew the complaint as the violation occurred under former licensee.
- C & W Restaurant, Inc. dba Red Pepper for 204 CMR 2.05 (2), to wit: c. 138, §34 on 09/29/2011 received probation one (1) year which expires 01/05/2013.
- Mr. Mike's Restaurant & Lounge, Inc. dba Mr. Mike's Restaurant & Lounge for 204 CMR 2.05 (2), to wit: c. 138 §34 on 09/28/2011 received probation one (1) year, which expires 2/16/2013.
- Joseph P. Brent dba Joes' Quick Stop for 204 CMR 2.05 (2), to wit: c. 138, §34 violation on 09/21/2011 received probation one (1) year, which expired 12/08/2012.
- Kaknes Enterprises, Inc. dba K's Citgo-Richdale Store for 204 CMR 2.05 (2), to wit: c. 138 §34 violation on 09/21/2011 received probation one (1) year, which expires 02/16/2013.
- Bradford Variety & Deli dba Kelly's Restaurant for 204 CMR 2.05 (2), to wit: c. 138 §34 violation on 09/21/2011 received probation one (1) year, which expired 12/08/2012.
- Patel's Liquors, LLC dba Harry's Liquors for 204 CMR 2.05 (2), to wit: c. 138 §34 on 09/21/2011 and 204 CMR 2.05 (2), to wit: c. 138 §34 on 9/22/2011 which resulted in restricted hours to sell alcohol – restricted to 8 p.m. from 01/12/2012 to 01/14/2012. In addition, they received probation for one (1) year.
- Jiang's Family, Inc. dba China King Super Buffet for c. 138 §34 violation on 09/29/2011 received probation one (1) year, which expires 01/05/2013.

² These four (4) establishments and their corresponding penalties are listed below:

was the fourth violation for one (1) establishment⁴, and the fifth violation for another establishment.⁵

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- Academy Plaza Trust dba Academy Liquors for violation on 09/27/2011 received probation one (1) year which expired 12/08/2012. The prior history holds violations of: 204 CMR 2.05 (2) on 02/16/1995 which resulted in three (3) day suspension.
 - Adee, Inc. dba Evenfall Restaurant & Grille for c. 138 §34 violation on 9/28/2011 which resulted in restricted hours to sell alcohol – restricted to 10 p.m. from 01/18/2012 to 01/22/12. In addition, they received probation one (1) year, expires 01/05/2013. Their prior history holds [an unspecified] violation in 2009 which resulted in probation two (2) years that expired in August 2011.
 - K.H.A.M. Dave, Corp. dba Richdale Convenience Store for 204 CMR 2.05 (2), to wit: c. 138 §34 received hours to sell alcohol restricted to 8 p.m., two (2) days 12/15/2012 to 12/17/2012. In addition they received probation one (1) year. Their prior history holds violation of 204 CMR 2.05 (2), to wit: c. 138 §69 over serving on 08/11/2010 – no disposition listed.
 - Shadow Lake Corp. dba One Stop Market for 204 CMR 2.05 (2), to wit: c. 138 §34 on 09/21/2011 received hours restricted to sell alcohol, restricted to 8 p.m. from 01/19/2012 to 01/21/2012. In addition they received probation one (1) year. Their prior history holds a violation of 204 CMR 2.05 (2), to wit: c. 138 §34 during unspecified date 2010 at hearing held on 09/28/2010 for which they received a three (3) day suspension with one (1) day to serve, the balance held in abeyance for two (2) years.

³ These two (2) establishments and their corresponding penalties are listed below:

- AMBA Enterprises, Inc. dba Riley's Corner for 204 CMR 2.05 (2), to wit: c. 138 §34 on 09/21/2011 and on 09/22/2011 received hours to sell alcohol restricted to 8 p.m., for three (3) weeks, 02/23/2012 to 03/15/2012. Their prior history holds violation of:
 - In 2005 for sale of drugs on premises – no disposition listed;
 - In 2005 for 204 CMR 2.05 (2), to wit: c. 138 §34 – no disposition listed.
- Garcia Espinal dba Pares Liquors for 204 CMR 2.05 (2), to wit: c. 138 §34 on 09/21/2011 received hours to sell alcohol restricted to 8 p.m. for two (2) weeks, from 02/23/2012 to 03/08/2012. Their prior history holds two (2) violations within two (2) months of 204 CMR 2.05 (2), to wit: c. 138 § 34. Each time the licensee, failed a compliance check and violations were brought to the Commission. The Commission imposed a three (3) day license suspension and subsequently a seven (7) day suspension.

⁴ This establishment and its corresponding penalty is listed below:

- Hans Enterprises, Inc. dba Hans Garden for violation 204 CMR 2.05 (2), to wit: failure to provide adequate crowd control on 01/07/2012. The item was tabled for sixty (60) days, and if no further issues, take no action. Their prior history includes violation of:
 - 204 CMR 2.05 (2), to wit: c. 138 §34 violations on 01/07/2011 but no disposition listed;
 - 204 CMR 4.03 (1A) violation on 01/07/201 but no disposition listed;
 - Incident of Assault & Battery on 07/26/2010 but no disposition listed.

⁵ This establishment and its five (5) violations and corresponding penalties are listed below:

- Russ-Lynn, Inc. dba R.G.'s Pub for 204 CMR 2.05 (2), to wit: c. 138 §34 on 9/28/2011 received hours to sell alcohol restricted to 10 p.m. for 1 day, 1/20/2012. In addition, they received probation one (1) year, which expires 01/05/2013. Their prior history holds violations of:
 - Item for discussion on 11/19/2009 [h.d.] – no disposition listed;
 - Illegal Drug Activity on 01/18/2008 – no disposition listed;
 - 204 CMR 2.05 (2), to wit: c. 138 §69 over serving on 01/18/2008 – no disposition listed;
 - Patrons not contained within area on 08/04/1986 [h.d.] – no disposition listed.

9. Essex Street, LLC dba Essex Street Grille also failed Haverhill's compliance check on September 2, 2011. This was Essex Street's eleventh violation. It was their third compliance check failure. As a penalty, the Local Board restricted the sale of alcoholic beverages to 10 p.m. for four (4) days from 01/18/2012 to 01/22/2012. In addition, they were placed on probation for one (1) year. The Commission notes that since there was no appeal from this rollback of hours, the Commission did not then and also does not now address the legality of this action by the Local Board.
10. Essex Street's prior history consists of the following violations:
- In 2006, Essex Street had two (2) violations:
 - They sold alcoholic beverages after hours and received a three (3) day suspension from 03/19/2007 to 03/22/2007.
 - On 12/26/2006, they had a minor in possession of an alcoholic beverage and received a four (4) day suspension from 05/16/2007 to 05/19/2007.
 - In 2007, Essex Street had two (2) violations:
 - On two (2) different dates they were overcrowded. They received no disposition on the second charge and a two (2) day suspension due to non-appearance on the second violation.
 - In 2008, Essex Street had two (2) violations:
 - On 11/23/2008, they were in violation of serving after hours and the Local Board restricted their hours to sell alcohol to 9 p.m. and;
 - On 12/23/2008, they were again in violation of serving after hours and the Local Board imposed a two (2) day suspension.
 - In 2009, Essex Street had four (4) violations:
 - In early 2009, they served after hours and the Local Board imposed a two (2) day suspension;
 - In 2009, the Commission found the licensee in violation of serving a minor. The Commission imposed a six (6) day suspension.
 - On 07/18/2009, the Commission found the licensee in violation of failing to post its certificate of inspections and refilling liquor bottles. The Commission modified the license by restricting the hours of sale until 10 p.m. for twenty-seven (27) days.
 - Thereafter in 2009, the licensee was found in violation by the Commission serving a minor. The Commission imposed a nine (9) day license suspension, with six (6) days to serve, and the balance held in abeyance.
11. PJML, Inc. dba [Archie's] Little River Ale House also failed Haverhill's compliance check on 09/02/2011. This was PJML's seventh violation. As a penalty, the Local Board placed the licensee on probation for one (1) year.
12. PJML's prior history consists of the following violations:
- In 2007, PJML were charged with one (1) violation:

- On 12/15/07, PJML over served an individual. The Local Board required police details on Friday and Saturday nights for two (2) months.
 - In 2009, PJML had three (3) violations:
 - On 11/26/2009, PJML were charged with a disturbance. There is no disposition listed.
 - On 12/05/2009 PJML were charged with a disturbance. There is no disposition listed.
 - On 04/18/2009 PJML were charged with disorderly conduct. There is no disposition listed.
 - In 2011, PJML had two (2) violations:
 - On 11/19/2011 PJML failed to report a disturbance to the police, and failure to provide adequate safety to patrons. The Local Board dismissed the violations.
 - On 11/20/2011 PJML failed to report a disturbance to the police, and failed to provide adequate safety to patrons. The Local Board restricted their hours to sell alcohol to 10 p.m., for two (2) days.
13. George's at the Vault, Inc. dba Mal's Place failed to provide adequate crowd control on 02/24/2012 and was found over serving alcoholic beverages on 03/03/2012. This was George's eleventh (11th) violation. As a penalty, the Local Board required a mandatory closing time of two (2) hours early Friday and Saturday for one (1) month, held in abeyance for six (6) months.
14. George's prior history consists of the following violations:
- In 2009, George's had three (3) violations:
 - On 09/26/2009, Georges over served alcoholic beverages, had improper crowd control, and used their entertainment/liquor license improperly. For all three (3) violations, the Local Board imposed a two (2) day suspension of entertainment license with suspension continued for a six (6) month period.
 - In 2011, George's had five (5) violations:
 - On 05/08/2011 they were charged with disorderly conduct. The Local Board required them to close early at 12 p.m. [sic] for two (2) months and limit occupancy to one hundred (100) persons on Thursday, Friday, and Saturday.
 - On 03/19/2011, they were charged with a disturbance. There is no disposition listed.
 - On 03/26/2011, they were charged with disorderly conduct. There is no disposition listed.
 - On 04/09/2011, they were charged with an indecent assault & battery on a person fourteen (14) or over. There is no disposition listed.
 - On 04/16/2011, they were charged with a disturbance. There is no disposition listed.
 - Incident and Disorderly Conduct on 04/30/2011 – There is no disposition listed.
15. New Lantern Café, Inc. dba New Lantern Café failed to provide adequate crowd control on 03/03/2012. As a penalty, the Local Board imposed a mandatory early closing time of 11 p.m. (since this was a violation during their probationary period) from 04/18/2012 to 04/21/2012.
16. New Lantern's prior history consists of the following violations:

- In 1992, New Lantern committed one (1) violation:
 - The violation occurred on 08/03/1992, but is not specified. There is no disposition listed.
- In 1995, New Lantern committed one (1) violation:
 - On 12/28/1995, New Lantern served a minor. There is no disposition listed.
- In 1996, New Lantern committed one (1) violation:
 - On 02/26/1996, New Lantern served a minor. The Local Board imposed a three (3) day suspension.
- In 1999, New Lantern committed one (1) violation:
 - On 11/17/1999 New Lantern over served alcoholic beverages to an individual. There is no disposition listed.
- In 2007, New Lantern committed three (3) violations:
 - On 09/27/2007, they were charged with disorderly conduct. There is no disposition listed.
 - On 09/28/2007 there was an assault & battery. There is no disposition listed.
 - On 10/28/2007 there was disorderly conduct. There is no disposition listed.
- In 2008, New Lantern committed three (3) violations:
 - On 03/21/2008 and 03/22/2008 New Lantern was charged with an assault & battery with a deadly weapon. There is no disposition listed.
 - On 04/1/2008, New Lantern failed to comply with ordinance 40 §21 and failed to empty out bar. There is no disposition listed.
- In 2009, New Lantern committed one (1) violation:
 - On 11/15/2009, an individual was placed in protective custody. There is no disposition listed.
- In 2011, New Lantern had one (1) violation:
 - On 09/28/2011 they failed Haverhill's compliance check. The Local Board imposed a one (1) year probationary period, held in abeyance for one (1) year provided no further violations occur.
- On 02/17/2012, the Local Board provided the Licensee with written notice and a statement of reasons for its revocation of the license pursuant to M.G.L. c. 138, §23. (Ex. 8)
- The Local Board found that the Licensee posed a threat to the public safety and that the public need would be met by other liquor stores in the immediate area, so that no inconvenience or direct impact on the public is (sic) felt, in the event of closing/reduction of this Licensee's hours. (Ex. 8)

DISCUSSION

Pursuant to M.G.L. c. 138, §67, "[a]ny person who is aggrieved by the action of the local licensing authorities in modifying, suspending, cancelling, revoking or declaring forfeited their license, may appeal therefrom to the Commission within five (5) days following notice of such action or

following the expiration of said period, upon petition in writing, setting forth all the material facts in the case. The Commission shall hold a hearing upon each such appeal, requiring due notice to be given to all interested parties. If the Commission approves the action of the local licensing authorities it shall issue notice to them to that effect, but if the Commission disapproves of their action it shall issue a decision in writing advising said local authorities of the reasons why it does not approve M.G.L. c. 138 §67, and shall then remand the matter to the said local authorities for further action.”

Therefore, the Commission must review the issue of the penalty imposed by the Local Board for this violation. In assessing penalties for violations occurring solely as the result of a “sting,” penalties imposed should never be draconian. See *Epicure Package Store, Inc.* (ABCC decision dated 01/31/2007). The Commission has consistently held that [t]he policy behind a “sting” operation should be the education of licensees in the risks associated with selling alcoholic beverages without requesting proof of age. In re: *Assinippi Liquors, Inc.*, Wareham (ABCC decision dated 06/08/2004), *Epicure Package Store, Inc.* (ABCC decision dated 01/31/2007). While small suspensions may further that purpose by imposing a consequence for taking a risk, a heavy handed suspension does not. See *Assinippi Liquors, Inc.*, Wareham (ABCC decision dated 06/08/2004 where Commission held that a twenty (20) day suspension of the alcoholic beverages license for a compliance check was unreasonable. The Commission found that a suspension of that length steps over the line of measured education and becomes unreasonably punitive.).

In 2007, the Commission faced the same issue regarding a license revoked as a result of a failed compliance check. *Epicure Package Store, Inc., Foxboro* (ABCC Decision dated 03/28/2007). In that case, the Commission held that the penalty of revocation or cancellation of a license for a violation occurring solely as the result of a “sting” is draconian and unfair. *Id.* As such, the Commission finds that the penalty imposed by the Local Board is unreasonable.

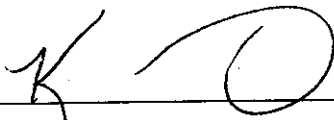
CONCLUSION AND DISPOSITION

Based on the evidence and rulings above, the Commission DISAPPROVES the action of the Local Board in revoking the license and remands the matter to the Local Board with the recommendation that the license be suspended for a period of twenty (20) days with ten (10) days to serve and the balance held in abeyance for three (3) years.⁶

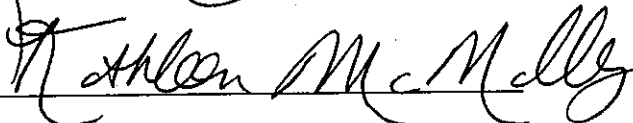
⁶ Haverhill has no written progressive discipline policy. Given the result in this decision, we need not decide whether the penalty itself was arbitrary and capricious in comparison to the other licensees penalized that night.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Kathleen McNally, Commissioner



Dated: June 27, 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: David J. Doneski, Esq. [Attorney for the local board]
Patricia Lang Farnsworth, Esq. [Attorney for the licensee]
Frederick G. Mahony, Chief Investigator
Administration
File