

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

CARIBBEAN FLAVORS, INC. d/b/a LA GUIRA RESTAURANT
205 BROADWAY
LAWRENCE, MA 01840
LICENSE # 059400207
HEARD: 02/15/2012

This is an appeal of the action of the Licensing Board of the City of Lawrence (the "Local Board") in revoking the M.G.L. c. 138, §12 all alcohol license of Caribbean Flavors, Inc., d/b/a La Guira (the "Licensee" or "La Guira"). On September 28, 2011, the Local Board held a hearing and voted to revoke the license of La Guira. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, February 15, 2012.

The following documents are in evidence:

Exhibits of the Local Board:

1. Liquor License Renewal Application;
2. Restaurant Layout;
3. 2010 Fire Department Inspection;
4. August 25, 2011 Notice of Hearing;
5. September 29, 2011 Notice of Revocation;
6. Police Incident Report #10007676;
7. Police Incident Report #10007676D; and
8. September 28, 2011 Licensing Board Minutes.

Exhibits of the Licensee:

- A. Entrada Photo;
- B. Photo Inside Premises, Exit Depicted;
- C. Photo Depicting Television (T.V.) and Bar area;
- D. Photo Depicting Lights on Ceiling; and
- E. Photo Depicting Individual inside Premises.

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

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FACTS

The Commission makes the following findings, based on the evidence presented at the hearing:

1. La Guira is the holder of an all alcohol beverages license, issued by the City of Lawrence, located at 205 Broadway, Lawrence, Massachusetts. The capacity is ninety-seven (97) people. Mr. Nunez, the owner of La Guira, has resided in Lawrence for thirteen years. (Exhibit 3, Agreed Upon Facts in Joint Pre-Hearing Memorandum, and Testimony)
2. In the City of Lawrence, on premises licensees have a practice of employing security personnel who check patrons for weapons before they are permitted to enter the premises. Individuals entering clubs are pat-frisked, their bags are searched, and security uses metal detecting wands to detect weapons. (Testimony)
3. On September 5, 2010, Mr. Nunez was at the club. He had at least five (5) security people working that night. One person was stationed at the main door, the second person was stationed at the exit door, the third person was stationed at the back door, the fourth person was stationed on the floor of the club, and the fifth person was moving around the premises. The security officers began work at 6:00 p.m. (Testimony)
4. Mr. Nunez does not have metal detectors, but has one (1) wand used by security at the front door to detect weapons. The policy of La Guira is to only check the men for weapons.
5. Mr. Nunez does not have his security frisk, pat-check, or 'wand' female patrons for weapons. Security searches only their bags. (Testimony)
6. On Sunday evening, September 5, 2010¹ and early Monday morning, September 6, 2010, at approximately midnight, an individual fired gunshots inside La Guira. (Agreed Upon Facts in Joint Pre-Hearing Memorandum, Exhibits 7, 8, and Testimony)
7. As a result of this shooting four (4) individuals received gunshot wounds and two (2) people were killed. (Agreed Upon Facts in Joint Pre-Hearing Memorandum, and Testimony)
8. Mr. Nunez was standing at the door of La Guira when the shootings took place. He saw people running. The security guards at the club jumped on top of him and pulled him behind the bar when the shooting occurred. They did nothing to protect the patrons, identify the shooter, or take control of the premises. (Testimony)
9. Mr. Nunez did not call the police, or instruct his employees to call the police. (Testimony)
10. At 12:05 a.m. on September 6, 2010, Lt. Conway, assigned as the Watch Commander, was monitoring the dispatch area when numerous '911' calls came into the station. These calls reported "someone shot" at La Guira. The police received so many '911' calls regarding the shooting that the overflow calls were bounced to the Lowell Police Department. (Testimony)
11. Lt. Conway immediately dispatched all available police units and officers to La Guira. (Testimony, Exhibits. 8, 4)

¹ The licensing hearing at the Local Board was not scheduled until one (1) year after the incident as there was an ongoing criminal homicide investigation and they did not want to jeopardize that. Lt. Conway waited until permission was given by the District Attorney's Office to proceed with the licensing violations.

12. Lawrence Police Officers Mark Panagiotakos, Tomas Caraballo, and Joseph Padellaro, all veteran officers, responded to La Guira for the report of a shooting. They were all in the area and arrived at the premises within minutes. (Testimony, Exhibit 7)
13. When the Officers arrived at La Guira, they observed bedlam. There were several hundred people in the immediate area where the premises is located, and at least one hundred (100) people running out of La Guira. Officer Panagiatakos had difficulty driving his cruiser inside the parking lot to get to the premises. (Testimony)
14. Both Officer Panagiotakos and Officer Caraballo drew their weapons as they got out of their cruisers. The windows of La Guira are tinted, which made it impossible for the officers to see inside. The shooter had not been apprehended or even identified, the scene was chaotic, and they feared for their safety. They were unable to determine the location of the shooter. (Testimony)
15. Officers Panagiotakos and Caraballo attempted to gain access to La Guira, but could not get inside because the doors were locked. They saw a security guard inside and yelled at him to "open the door". (Testimony)
16. When the security guard opened the door for them, people continued to run out of the club as they went inside. (Testimony)
17. Once inside, the scene was chaotic. Everyone was frantic. The officers called Lt. Conway and reported to him that two (2) to three (3) people had been shot, and at least one (1) person was dead. They requested his presence immediately. (Testimony, Exhibit 7)
18. The officers tried to render first aid to two (2) additional people who had also been shot, but quickly realized that they were already dead. Officer Caraballo tried to help the third shooting victim. (Testimony)
19. The officers asked the staff for rags, napkins, or towels to help stop the bleeding. The staff told them that they had nothing the officers could use. The employees did not assist, render aid or cooperate with the police. (Testimony)
20. Within a minute, Officer Padellaro also tried to get inside the club, but the doors were still locked. Although a security guard stood in the lobby looking at Officer Padellaro, he refused to open the door. Officer Padellaro was forced to go in through another door. (Testimony)
21. There was blood and glass everywhere inside La Guira. The place was in shambles. There were approximately twenty (20) people still inside. (Testimony)
22. There were three (3) people shot, all lying on the floor, and all bleeding profusely. Several females, not employees, tended to the victims, performing CPR and using tablecloths and napkins to stop the flow of blood from the wounds.
23. A woman, who appeared to be shot in the back of the head, was in very bad shape, and the paramedics thought she was almost dead. She died later at the hospital. (Testimony)
24. A man, who had been shot in the face, appeared to be dead. Officer Panagiotakos went over to the woman who was caring for this victim, and, in an attempt to keep her calm, told her to stay with the victim and keep talking to him.
25. Soon thereafter, Lt. Conway responded to the scene. Upon arrival he observed hundreds of people, in a state of disorder and confusion, outside of La Guira. He was unable to gain entrance to La Guira because the front door was locked. Paramedics responded to the scene behind Lt. Conway. He began

banging on the doors, but still could not get inside. Ultimately, he radioed the officers inside the premises to open the doors and let him and the paramedics inside. Finally, a security guard working for the licensee opened one of the exit doors and let Lt. Conway and the paramedics inside. (Testimony)

26. When he entered the premises, Lt. Conway observed the worst carnage he has witnessed in his twenty-five (25) years of experience as a police officer.² He served in the armed forces prior to becoming a police officer, and he had never seen anything as bad as this. (Testimony)
27. The responding officers were "visibly shaken" by the scene at La Guira. It appeared as if someone had thrown a hand grenade inside the premises as there was broken glass, blood, and bodies on the floor. (Testimony)
28. Another man had been shot in the chest and was in a very bad condition. The responders were not sure if he was going to survive.³ (Testimony)
29. After triaging the victims, the paramedics and Lt. Conway and Officer Panagiotakos began loading them into the ambulances. There were still hundreds of people outside taking pictures with cellphones. Officer Panagiotakos had to push people out of the way to get the victims into the ambulances. (Testimony)
30. The crowd was so large that police officers from Methuen, Andover, and North Andover were called to assist with the crowd control and traffic. (Exhibits 3, 8, and Testimony)
31. From La Guira, Lt. Conway went to the hospital and discovered that there were two (2) additional victims. The first victim, a female employee, had been shot twice in the upper legs. The second victim, a female patron, was cut after falling on the broken glass and sustained additional injuries from being trampled while inside La Guira. Both of these victims went to the hospital themselves. (Testimony)
32. Subsequently, Lt. Conway investigated the '911' calls, and determined that none of the calls were placed from a land line. All of the '911' calls were placed by cellphones. Thereafter, Lawrence Police Officer Gene Scanlon investigated and cross-referenced all of the '911' calls received, and determined that there were no '911' calls placed from La Guira, the licensee, or any employees of the licensee. (Testimony)
33. Although La Guira has a capacity of ninety-seven (97) persons, it was grossly overcrowded on this evening. There were hundreds of people outside the premises when Lt. Conway arrived, which was within minutes of receiving the "911" calls.
34. Neither the licensee, nor the employees were helpful to the police or the paramedics. Mr. Nunez did not even make his presence known to Lt. Conway until sometime later that night. Mr. Nunez was discovered inside La Guira when Lt. Conway sent officers to the office in the back to make sure that the videotape evidence of the incident was not tampered with. (Testimony)

² Lt. Conway has worked as a Lieutenant for the Lawrence Police Department since May 1, 2004. Since May of 2003, he has been the liaison for the Lawrence Police Department and the Local Board. He is responsible for investigating incidents and violations in Lawrence under M.G.L. chapter 138.

³ At the time of the hearing, he was still in the hospital and on life support.

35. Moreover, Officer Caraballo subsequently viewed the videotape⁴ and it appeared as if there were a lot of people inside La Guira. He believed that there were more than ninety-seven (97) people inside La Guira. (Testimony)

DISCUSSION

Pursuant to M.G.L. Ch. 138, section 67, “[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. [United Food Corp v. Alcoholic Beverages Control Commission, 375 Mass. 240 (1978).] 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. See, e.g. Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Com’n, 29 Mass. App. Ct. 954, 955 (1990) (rescript). 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 Corp. v. Alcoholic Beverages Control Commission, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

M.G.L. Chapter 138 gives the local board and commission the authority to grant, revoke and suspend licenses. Chapter 138 was “enacted to serve the public need and... to protect the common good.” G.L. Chapter 138, section 23, as amended through St. 1977, c.929, Section 7. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given ‘comprehensive powers of supervision over licensees,’ Connolly v. Alcoholic Beverages Control Comm., 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 788 (1981).

The law is well-settled that ‘under the regulation, [204 C.M.R. 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. 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 Commission, 7 Mass. App. Ct. 186, 190 (1979). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter. Rico’s of the Berkshires, Inc., v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985) (rescript).

In Lawrence there is a practice among on-premises licensees to hire security personnel to search individuals before they enter the club. Here, Mr. Nunez hired security personnel to pat frisk and “wand” the men for weapons. These individuals also searched bags and purses for weapons. Mr. Nunez admitted that he does not have the security personnel search the women. In these circumstances, a female patron bringing a weapon into a club is foreseeable. The licensee is responsible for illegalities, disturbances, and/or disorders that occur on the licensed premises. The licensee has a duty of care to prevent foreseeable harm to its patrons and others. See Tobin, Id.; Westerback v. Harold F. Leclair Co., 50 Mass App. Ct. 144 (2000); Kane v. Fields Corner Grille, Inc. 341 Mass. 640, 641(1961); Carey v. New Yorker of Worcester, Inc. 355 Mass. 450, 451 (1969). The Commission finds La Guira’s failure to search female patrons sub-standard and insufficient to meet its compliance obligation “to exercise sufficiently close supervision so that there is compliance with the law on the premises.” This failure resulted in two fatalities, as well as other life threatening injuries.

⁴ At the time of the hearing, the Massachusetts State Police were in possession of the videotape; therefore, the Commission was unable to view it.

Mr. Nunez admitted that he did not call 911 or ask any of his employees to call 911. When the gun shots were fired, the security staff shielded Mr. Nunez, but did nothing to protect the patrons. The Supreme Judicial court has held that 204 C.M.R. 2.05(2) "describes a preexisting common law duty which licensees owe to their patrons or guests. See Kane v. Fields Corner Grille, Inc., 341 Mass 640, 641-642 (1961). A bar owner, for example, has the duty to protect persons on or about the premises from the dangerous propensities of its patrons, served or unserved. When the bar has served a potentially dangerous patron, the duty may extend beyond the premises. When the bar has not served the patron, however, the duty is based merely on a duty to keep the premises safe, and the duty applies only on or about the premises. Carey v. New Yorker of Worcester, 355 Mass. 450, 452 (1969). See Gustafson v. Mathews, 109 Ill. App. 3d 884 (1982) (bar owner had no duty to prevent intoxicated patron from driving away with his five children in the car); Locklear v. Stinson, 161 Mich. App. 713 (1987) (bar owner not liable when one patron was killed by another patron off the premises)." O'Gorman v. Antonio Rubiniaccio & Sons, Inc. 408 Mass. 758, 761 (1990). There were three individuals, two of whom were dead, bleeding on the floor in his establishment, and Mr. Nunez never offered assistance or even identified himself as the owner to the police officers. In fact, it wasn't until Officer Caraballo went in search of the videotape and stumbled upon Mr. Nunez in the back office that the police even knew Mr. Nunez was there or was the owner.

Moreover, Mr. Nunez and his staff kept the doors to the premises locked. When each of the officers and the paramedics attempted to gain access to the victims inside La Guira, the doors to the premises were locked. The La Guira security guards were inside the doorways watching the police officers trying to get inside, and yet, the security guards still would not unlock the doors. This conduct would be disconcerting if it just happened once, but in this case, it happened on at least three occasions. In fact, Lt. Conway standing with the paramedics was banging on the doors and still could not get inside. He was forced to call one of his officers who were inside La Guira to open the door. The fact that the licensee's employees and security personnel would not unlock the doors to allow the police and the paramedics to respond and render aid for a shooting with multiple victims and fatalities is at best reprehensible, if not unconscionable. The Commission finds such inaction by the licensee to be a callous indifference to these events and to the licensee's obligations.

In addition, the premises was overcrowded. This made it extremely difficult for the officers to respond to the shooting. It also required police from three (3) neighboring towns to assist with crowd and traffic control directly after the incident.

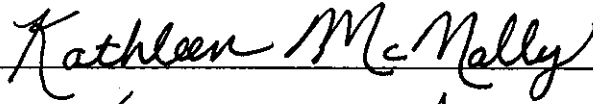
The Commission finds the actions of the licensee in failing to call '911' to report the shooting, locking the doors to the police and paramedics, tinting the windows making it impossible to see inside the premises, and the overcrowding, to be aggravating factors that persuades the Commission that there was a complete abdication of the duties and responsibilities of the licensee.

CONCLUSION

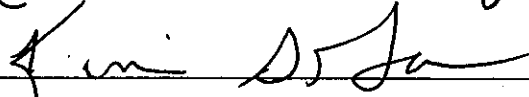
The Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding the violation was committed by the Licensee. The Commission approves the action of the Local Board in **REVOKING** the License of Carribean Flavors, Inc. d/b/a La Guira Restaurant. The penalty is a reasonable exercise of the Local Board's lawful discretion.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Kim S. Gainsboro, Chairman



Dated: August 14, 2012

You have the right to appeal this decision to the Superior Court under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

cc: Mark D. Johnson, Esq.
Charles D. Boddy, Jr., Esq.
Licensing Board for the City of Lawrence
Frederick G. Mahony, Chief Investigator
Administration
File