



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

DIAMANTE RESTAURANT, INC. D/B/A DIAMANTE RESTAURANT
206 LAWRENCE STREET
LAWRENCE, MA 01810
LICENSE#: 059400178
HEARD: 07/11/2012

This is an appeal of the action of the Licensing Board for the City of Lawrence (the "Local Board") in suspending the M.G.L. c. 138, §12 all alcoholic beverages license of Diamante Restaurant, Inc. d/b/a Diamante Restaurant (the "Licensee" or "Diamante"). On April 11, 2012, the Local Board held a hearing and found that the licensee had violated the provisions of its license, M.G.L. chapter 138, and 204 CMR 2.05, section 2, that resulted in the license being suspended for a period of seven (7) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, July 11, 2012.

The following documents are in evidence as Exhibits:

1. Local Board's (Lawrence) Pre-Hearing Memorandum dated July 10, 2012;
2. Lawrence Police Department Incident Report # 12001438 dated February 27, 2012;
3. Local Board Notice of Hearing dated March 30, 2012 for Hearing on April 11, 2011;
4. Local Board Meeting Agenda for April 11, 2012;
5. Local Board Meeting Minutes for April 11, 2012 meeting;
6. Local Board Notice of Suspension dated April 12, 2011;
7. Local Board Notice of Hearing dated May 23, 2007 for Hearing on June 13, 2007; Lawrence Police Department Incident Report # 10007676 dated May 14, 2007; and Disposition of Verbal Warning Issued for violation on May 14, 2007.

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

FACTS

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

1. Diamante Restaurant, Inc. d/b/a Diamante Restaurant ("the licensee"), located at 206 Lawrence Street, Lawrence, MA, is the holder of a restaurant, all-alcoholic beverages license issued by the City of Lawrence. (Exhibit 1)

2. On Sunday evening, February 26, 2012, and the early morning of Monday, February 27, 2012, two couples were at Diamante celebrating the birthday of Ms. Katherine Vieira. Mr. Miguel Gonzalez, Mr. Miguel Brea, and Ms. Johanny Gomez, were celebrating with Ms. Vieira. (Exhibit 2, Testimony)
3. While inside Diamante, another patron Mr. David Hernandez, who was not with the two couples, was very intoxicated and causing problems inside the club. Mr. Hernandez was knocking bottles over and bothering other patrons. Mr. Hernandez grabbed the buttocks of Ms. Gomez and started insulting her. Mr. Hernandez then pushed both Ms. Gomez and Ms. Vieira, causing Ms. Vieira to fall on the floor and hurt her ankle. (Exhibit 2, Testimony)
4. Mr. Miguel Gonzalez, while inside Diamante, then struck Mr. Hernandez on the head with a glass beer bottle. Mr. Miguel Brea brought an aluminum baseball bat inside the premises of Diamante and was swinging the bat at Mr. Hernandez, trying to strike him. (Exhibit 2, Testimony)
5. Police Officers from the City of Lawrence responded at approximately 12:50 a.m. to Diamante after receiving a '911' call for the report of a large fight. Upon arrival they observed Mr. Miguel Brea and Mr. Miguel Gonzalez running towards Park Street. Miguel Brea was carrying an aluminum baseball bat, and as he rounded the corner toward Bunker Hill Street, he threw the bat to the ground. Both men were trying to get into a gray Toyota 4 Runner motor vehicle. (Exhibit 2, Testimony)
6. At the same time, Officers observed Mr. David Hernandez stagger out of Diamante. He was not wearing a shirt and blood was pouring from a wound on the top of his head. Mr. Hernandez was being followed by a security guard from Diamante, Mr. Joel Figueroa. Mr. Figueroa told the Officers that Mr. Hernandez needed an ambulance. Mr. Hernandez was with his cousin, Mr. Geraldo Perez. (Exhibit 2, Testimony)
7. Officers observed that Mr. Miguel Gonzalez was wearing an orange shirt that was blood-stained and torn. Mr. Hernandez, Mr. Perez, and Mr. Figueroa each identified Mr. Gonzalez as the individual who struck Mr. Hernandez on the head with a glass beer bottle. (Exhibit 2, Testimony)
8. Mr. Hernandez, Mr. Figueroa, and Mr. Perez each identified Mr. Miguel Brea as the man who brought the aluminum baseball bat inside Diamante, and was swinging the bat trying to hit Mr. Hernandez. (Exhibit 2, Testimony)
9. Mr. Brea and Mr. Gonzalez were both arrested. The baseball bat was seized as evidence, as well as the torn, blood-stained orange shirt worn by Mr. Gonzalez. After Mr. Brea and Mr. Gonzalez were arrested, Mr. Hernandez was put into an ambulance to be treated for his injuries. (Exhibit 2, Testimony)
10. At this time, Ms. Katherine Vieira and Ms. Johanny Gomez approached the officers, and identified Mr. Hernandez, as the man who had grabbed the buttocks of Ms. Gomez, and had pushed both women. The Officers noticed that Ms. Katherine Vieira was very intoxicated. The women told the Officers that they were patrons in the club that evening with their boyfriends, Mr. Brea and Mr. Gonzalez, who had just been arrested. (Exhibit 2, Testimony)

11. Ms. Vieira and Ms. Gomez went to the Lawrence police station and gave written statements. Mr. Hernandez was to be prosecuted for Indecent Assault and Battery, and two (2) counts of Assault and Battery. (Exhibit 2, Testimony)
12. Lawrence Police Officer Mark Panagiotakos responded to Diamante and when he tried to enter Diamante, the doors were locked and the grates were closed. The door was opened for the Officer and upon entering he observed blood and broken bottles on the floor. The staff was cleaning up. There was no crime scene to secure as the area was being cleaned up and had been altered. (Exhibit 2, Testimony)
13. Lieutenant Shawn Conway testified at the Commission hearing. He made a recommendation to the Local Board that a fourteen (14) day suspension be issued against Diamante. The Local Board suspended Diamante's license for seven (7) days. (Exhibit 5, Testimony)
14. At the hearing before the Commission, the Licensee did not dispute the facts.
15. Prior to April 11, 2012, the licensee was subject to a verbal warning, issued on May 17, 2007 after a disciplinary hearing held by the Local Board, for purchasing alcohol from other than a distributor. (Exhibit 7)

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).

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, 735 N.E. 2d 1256 (2000); Kane v. Fields Corner Grille, Inc. 341 Mass. 640, 641, 171 N. E. 2d 287 (1961); Carey v. New Yorker of Worcester, Inc. 355 Mass. 450, 451, 245 N.E. 2d 420 (1969).

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 Rubinaccio & Sons, Inc. 408 Mass. 758, 761 (1990).

It is undisputed that a disturbance occurred inside the premises on the night in question. One patron, who was inside the establishment, was hit in the head with a bottle by another patron. There is also no dispute that a patron brought an aluminum bat inside the premises that evening, and was swinging it at the same patron, attempting to strike him. Officers observed David Hernandez stagger out of the premises and blood was pouring from a wound on the top of his head. Joel Figueroa, a security guard from Diamante, told the officers that Mr. Hernandez was injured to the extent that he needed an ambulance to transport him to the hospital for medical treatment. The security guard for the licensee, Mr. Figueroa, also admitted that the bat did not belong to the licensee, and that another patron brought it into the premises. The licensee admitted that these facts occurred inside the premises on the night in question. The issue of a disturbance occurring inside the premises is obviously one that is not of dispute.

The Commission, in deciding illegalities on the premises will consider various factors, such as the licensee's security plans and whether the licensee permitted the premises to exceed its legal capacity. The Commission is aware that in the City of Lawrence, there is a practice that some on-premises licensees have security personnel who check patrons for weapons before entering the premises. It is a common practice in Lawrence that people entering clubs are pat-frisked, and metal detecting wands are used to detect for weapons. Patrons' bags are searched and checked for weapons. See, e.g., In Re: [Trempe & Torres, d/b/a Marabu Café (City of Lawrence) ABCC Decision dated August 14, 2012; Caribbean Flavors, d/b/a La Guira (City of Lawrence) ABCC Decision dated August 21, 2012].

In this case, Diamante hired security personnel, yet there was no evidence that proper security procedures were not being followed. There was no evidence that Diamante and its security personnel were checking patrons for weapons, or that bags were being searched and checked, or that metal detectors and wands were being used. There was no evidence that the security personnel at this premises were properly trained, and it leads the Commission to conclude that these premises were being operated in an unsafe manner, such that a patron could carry into this premises a baseball bat and wield it without any

apparent challenge, delay, or interference by the licensee or its employees or agents, including the security personnel on duty.

Furthermore, the Commission finds that the employees of the licensee interfered with, and impeded the efforts and responsibilities of the Lawrence Police Officers who responded to the premises. The Commission has grave concerns about employees interfering with and contaminating a crime scene by removing evidence before police arrive.

The licensee does not dispute that these events occurred. However, the Licensee argues that the penalty that was issued was too severe. The Licensee argues that it should not have received a penalty of seven (7) days, but rather a lesser sanction of four (4) days. Although it is the second violation, the licensee did not receive any suspension of time for the previous violation. The Commission finds that there were two (2) very serious incidents which occurred inside the premises: first, a patron on patron attack with a bottle and second, a patron attempting to attack another patron with a metal baseball bat. These incidents resulted in injury to the victim who was badly bleeding from a head wound and required immediate medical attention. Furthermore, an aluminum baseball bat was brought inside the premises. No excuse, explanation, or justification was offered by the licensee as to how a baseball bat can get carried into the premises at this hour of the night without any action by the licensee. The Commission finds that there is no credible excuse, explanation, or justification available to the licensee as to how and why a baseball bat was allowed to be carried into the premises. The licensee failed to comply with its legal obligations.

The Commission, after a hearing, finds that there was sufficient evidence presented that the Licensee committed a violation of M.G.L. chapter 138, and 204 CMR 2.05, section 2, and allowed a disturbance inside the premises. Based on the severity and nature of the incidents that occurred, the extent of the injuries to the patrons, compounded with the crime scene being cleaned up before officers could respond, the Commission finds that a seven (7) day suspension is warranted, at the least.

CONCLUSION

Based on the evidence at the hearing, 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 suspending the license of Diamante Restaurant, Inc. d/b/a Diamante Restaurant for seven (7) days. The penalty is a reasonable, if not generous, exercise of the Local Board's lawful discretion.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner *Kathleen McNally*

Susan Corcoran, Commissioner *Susan Corcoran*

Dated: September 7, 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: Charles Boddy, Esq. [Attorney for the local board]
Carl Donaldson, Esq. [Attorney for the licensee]
Licensing Board for the City of Lawrence
Frederick G. Mahony, Chief Investigator
Administration
File