

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

**JOHNNY G'S INC.
D/B/A JOHNNY G'S
179 LAWRENCE STREET
LAWRENCE, MASSACHUSETTS 01840
LICENSE#: 059400025
HEARING HELD: NOVEMBER 22, 2011**

Johnny G's Inc. d/b/a Johnny G's (the "Licensee") holds a general on premises all alcoholic beverages license issued pursuant to Massachusetts General Laws chapter 138, §12. The Alcoholic Beverages Control Commission ("the Commission") held a hearing on Tuesday, November 22, 2011, regarding an alleged violation of 204 CMR 2.05 (2) - Permitting an illegality on the licensed premises, to wit: M.G.L. c. 138, §69: *Sale or Delivery of Alcoholic Beverages to Intoxicated Persons*.

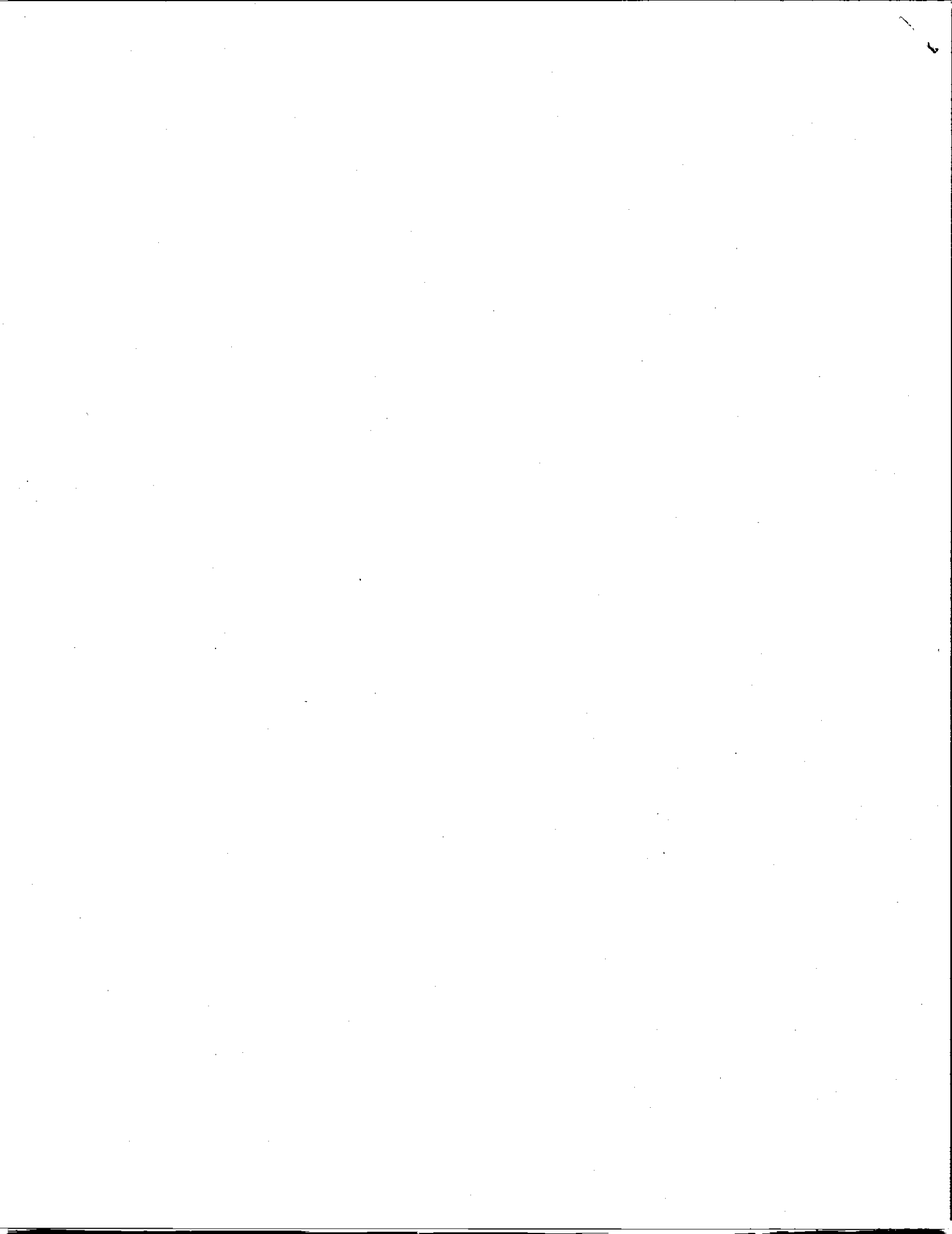
The following documents are in evidence as Exhibits:

Exhibit 1. Alcoholic Beverages Control Commission Investigative Report of Investigator Dennis Keefe dated September 23, 2011.

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

FACTS

1. On Friday, September 23, 2011, at approximately 10:17 p.m., Commission Investigators Keefe, Teehan, Bailey, and Chief Investigator Mahony conducted an investigation of the licensed premises to determine the manner in which the business was being conducted.
2. Investigators Keefe and Teehan, after entering the premises, proceeded to the bar area.
3. While at the bar, Investigators Keefe and Teehan observed two male patrons sitting on stools at the bar, slumped over and leaning onto the bar.
4. Investigator Keefe testified that he and Investigator Teehan observed these two men to have slow and uncoordinated movements, and slurred speech.
5. Investigator Keefe testified, he and Investigator Teehan observed the men for a period of approximately 15 to 20 minutes.
6. Investigator Keefe and Teehan both testified that based on their training and experience, each Investigator formed the opinion that each of the two patrons was intoxicated.
7. Investigator Keefe testified that he observed each patron to leave his bar stool and walk around the bar area. He observed each patron swaying from side to side.



8. Investigator Keefe observed one patron, identified as Mr. Daniel Derricks, return to a seat at the bar, and appear to fall asleep on the bar.
9. The second patron, identified as Mr. Wayne Bushaw, was heard stating that he paid for a beer.
10. Patron Bushaw was observed picking up a beer from the bar, and drinking it while standing directly in front of the bartender.
11. Investigators identified themselves to the bartender, who was identified as Cheryl Devine.
12. There were approximately eight (8) patrons inside the premises at this time.
13. While speaking to the bartender, Ms. Devine, Investigators observed the other patron, Mr. Daniel Derricks, who appeared to be in and out of sleep, pick up a beer located three to four feet away, and start drinking it, in clear view of the bartender, Ms. Devine.
14. Ms. Devine, while speaking with the investigators, stated that "They just keep grabbing drinks. I can't control them."
15. Investigators identified both male patrons, who told investigators that they did not have motor vehicles and would be walking home, as they lived in the neighborhood where the establishment is located.
16. Investigators informed Ms. Devine of a violation and left the premises without incident.
17. At the hearing before the Commission, the licensee and his counsel told the Commission that there is an application pending to sell the licensed business.
18. The licensee told the Commission that both of these patrons live in the neighborhood, and reside in a rooming house. The men walk to, and home from, the premises.

DISCUSSION

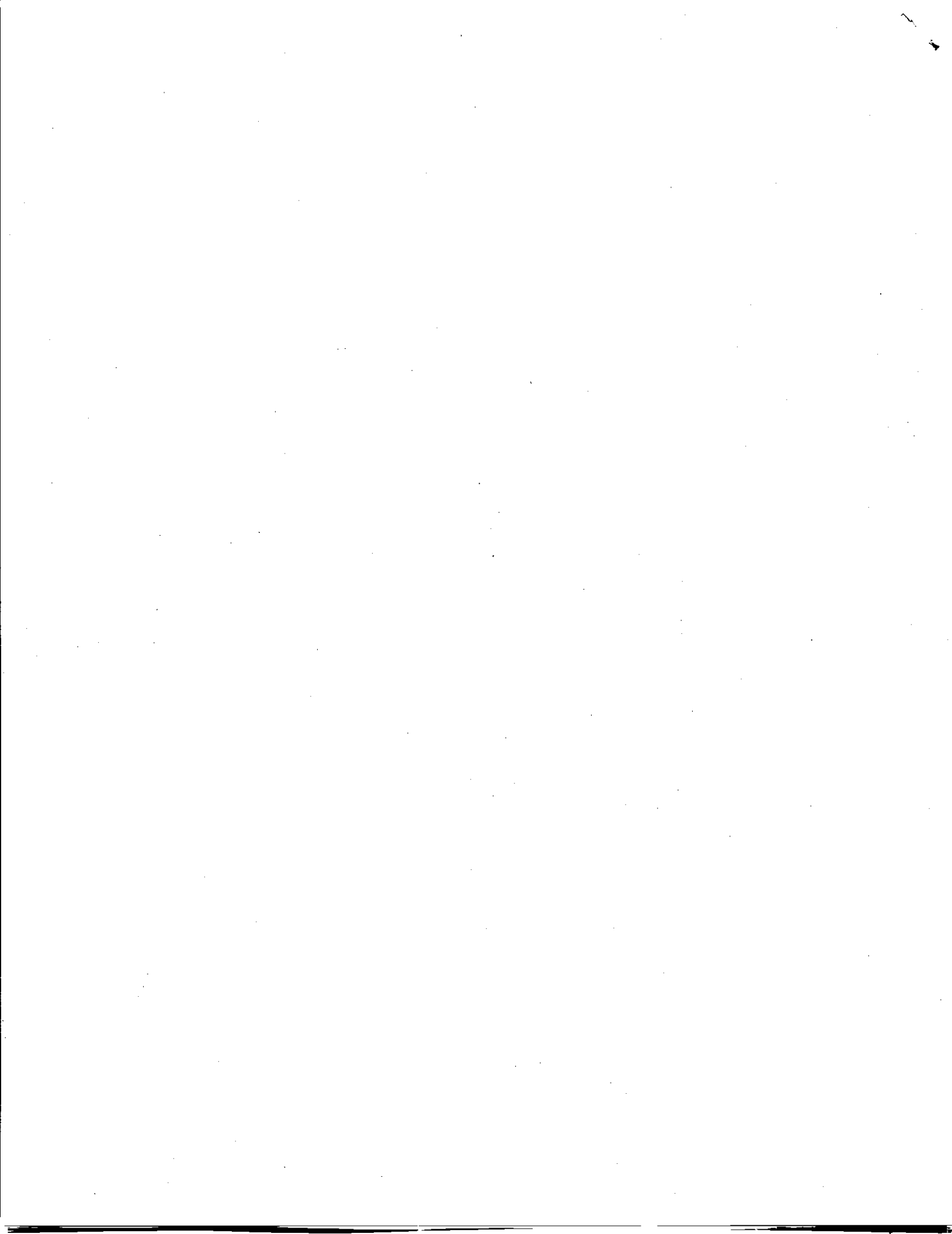
The Commission must determine whether the evidence persuades the Commission that the licensee sold or delivered alcoholic beverages to intoxicated persons in violation of General Laws chapter 138, section 69?

General Laws chapter 138, section 69 provides that "No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person". The Massachusetts Appeals Court held that "The statutory language applicable to licensees focuses only on sales and deliveries." A.C. Cruise Line, Inc. v. Alcoholic Beverages Control Commission, 560 N.E.2d 145, 29 Mass. App. Ct. 319, 324, (1990) citing Tiki Hut Lounge, Inc. v. Alcoholic Beverages Control Commission, 398 Mass. 1001, 1002 (1986). "We do not imply language in a statute if the Legislature has not provided it." A.C. Cruise Line, Inc. v. Alcoholic Beverages Control Commission, 560 N.E.2d 145, 29 Mass. App. Ct. 319, 324, (1990) citing New England Power Co. v. Selectman of Amesbury, 389 Mass 69, 74 -75 (1983).

To prove a violation of M.G.L. chapter 138, section 69 there must be proof of four elements:

1. In or on a licensed premises;
2. a visibly intoxicated person;
3. was sold or delivered;
4. an alcoholic beverage.

In this case we have proof that two individuals were inside a licensed premises. Both of these individuals were observed to show visible, generally recognized signs of intoxication. It was undisputed that these men, Mr. Bushaw and Mr. Derricks, each came into possession of an



alcoholic beverage. While the evidence showed that these two individuals came into possession of an alcoholic beverage, the evidence did not show that the bartender, or any other employee of the licensee, sold or delivered alcoholic beverages to these visibly intoxicated persons. The evidence did not show that the bartender, or any other employee of the licensee, sold or delivered the alcoholic beverage to an intermediary, who then made a delivery to these intoxicated persons. The evidence showed that these two intoxicated persons merely themselves obtained possession of an alcoholic beverage. This is insufficient to prove the element of a sale or delivery.

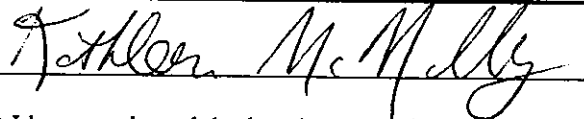
Based on the evidence presented at the hearing, the Commission finds that there was not sufficient evidence to prove a violation of M.G.L. chapter 138, section 69.

CONCLUSION

The Commission, after a hearing, finds that there was not sufficient evidence presented at the hearing that the Licensee committed a violation of M G L c. 138, section 69.

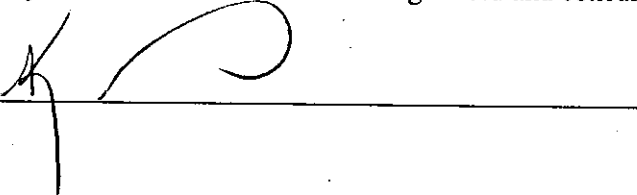
ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



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

Kim Gainsboro, Chairman



Dated: February 14, 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: Attorney Robert F. Kelley
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Dennis Keefe, Investigator
Michael Teehan, Investigator
✓ Administration
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