



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

TREMPE & TORRES INC. DBA MARABU CAFFE
20-22 UNION STREET
LAWRENCE, MA 01840
LICENSE#: 059400223

This is an appeal of the action of the Lawrence Licensing Board (the "Local Board") in suspending the M.G.L. c. 138, §12 all alcoholic beverages license of Trempe & Torres, Inc. dba Marabu Caffe (the "Licensee" or "Marabu"). On June 8, 2011, the Local Board held a hearing that resulted in a five (5) day suspension. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on September 21, 2011.

The following exhibits are in evidence by agreement of the parties:

1. Map from Assessor.
- A. Lawrence Licensing Board Decision dated June 9, 2011.

There is one (1) tape of this hearing. Several witnesses testified.

FACTS

1. The City of Lawrence issued Marabu a seven (7) day common victualer and all-alcoholic beverages license at 20-22 Union Street. Testimony
2. Nereyda Trempe is the president of Marabu. Testimony
3. This licensee has been in existence for approximately three (3) years. Testimony
4. On May 9, 2011 at approximately 1:15 a.m., Sergeant Michael Simard from the Lawrence Police Department was working a private detail at Malaya's Night Club, a licensed premises in proximity to Marabu. Testimony
5. After the club emptied, Sgt. Simard proceeded to disperse the crowd gathering on Newbury Street and Methuen Street. Testimony
6. Sgt. Simard testified that he observed three (3) males later identified as Rosalito Tejada (age 19), Joel Rodriguez (age 23) and Alexander Rodriguez (age 20) standing in the street talking to four (4) females inside a black Nissan. Testimony
7. The three (3) males were blocking the westbound traffic which then caused a standstill in traffic in both directions. Testimony
8. Sgt. Simard headed towards the individuals and asked that they keep walking in an effort to keep traffic moving. Testimony
9. Sgt. Simard testified that he asked the males several times to keep moving and leave the area or they would be arrested. They refused. Testimony

10. Sgt. Simard called for back-up after the individuals refused to comply with his request. Testimony
11. Sgt. Simard continued to speak with the individuals and Alexander Rodriguez approached Sgt. Simard and was very combative. At this point there were approximately 300-400 individuals in the street watching the exchange. Testimony
12. Soon thereafter, Sgt. Simard heard the sirens from approaching police officers. The crowd began dispersing. Testimony
13. Thereafter, Sgt. Simard arrested Alexander Rodriguez, Joel Rodriguez and Rosalito Tejada.
14. Rosalito Tejada was so combative and resistant to arrest that he was tasered. Testimony
15. A fourth individual Senny Arias (age 31) was arrested after he interjected himself into the communications between Sgt. Simard and the other three (3) individuals who were blocking traffic. Testimony
16. Sgt. Simard testified that all of their breaths smelled like alcoholic beverages. Testimony
17. Sgt. Simard testified that Alexander Rodriguez admitted to being inside Marabu with his brother Joel Rodriguez. Testimony
18. Sgt. Simard also testified that when he questioned Alexander Rodriguez about being inside the Marabu as a minor, that Alexander changed his statement and said he was not inside the Marabu, but met his brother, Joel Rodriguez, outside the premises and drank somewhere else. Testimony
19. However, Sgt. Simard also questioned Joel Rodriguez about Alexander drinking inside the Marabu that evening. Sgt. Simard told Joel after he was booked, that Alexander stated he was drinking inside Marabu even though he is under age, and that he had "used a VIP pass to get in and didn't have to show an ID. Sgt. Simard asked Joel if that was true and Joel Rodriguez responded, "Yes, that is how he got in, I showed my ID, I'm twenty-three (23)." Testimony
20. During Senny Arias' booking, he admitted to being at Marabu with the other three (3) males. Testimony
21. During Rosalito Tejada's booking he admitted to drinking inside Marabu. Testimony
22. On June 8, 2011, after notice to the licensee, the Board held a hearing regarding the above facts and found that the licensee violated the provisions of M.G.L. c. 138, and 204 CMR 2.05, §2. Testimony
23. As a result of the Board's finding, it suspended the alcoholic beverages license for a period of five (5) days. Testimony
24. The licensee disputed the Board's finding and alleged that there was insufficient evidence presented to the board to support the board's finding, and the licensee appealed the board's action to the Commission. Testimony

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. 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 Appeals 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 Comm'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 Comm'n, 29 Mass.App.Ct. 954, 955 (1990)(rescript). General Laws chapter 138, §34 provides, in part, that "[w]hoever makes a sale or delivery of any

alcoholic beverage or alcohol to any person under twenty-one (21) years of age, either for his own use or for the use of his parent or any other person, ... shall be punished." The Appeals Court has stated that "the purpose of the statute [is] to protect the welfare of children from the danger of alcohol, see Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 133-134 (1996)." Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass.App.Ct. 663, 664 (1998). This public policy of the Commonwealth prohibiting the sale or delivery of alcoholic beverages to persons under the age of twenty-one (21) years old (commonly referred to as "minors" for the purpose of the Liquor Control Act) has been characterized as "strongly paternalistic." Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 136, (1996); In Re: Alan C. Dinh dba Juliano's Beer & Wine, Quincy (Commission Decision April 8, 2005.)

In August, 2000, M.G.L. c. 138, §34 was amended to further provide that "whoever furnishes any such beverage or alcohol for a person under twenty-one (21) years of age shall be punished." At the time this statute was amended, the word "furnish" was expressly defined to mean, in part pertinent here, to "allow a person under twenty-one (21) years of age except for the children and grandchildren of the person being charged to possess alcoholic beverages on premises or property owned or controlled by the person charged." Commonwealth v. Kneram, 63 Mass.App.Ct. 371 (2005). The Appeals Court held that "it appears clear that the intent in passing this legislation was to hold persons criminally responsible for furnishing those under twenty-one with alcohol."

The Appeals Court has noted that General Laws c. 138, §34, is a patchwork of several related, but distinct, provisions. At issue in this appeal is the so-called "furnishing" provision, which the Legislature inserted deep into the existing text in 2000 as the result of an emergency act known as the Social Host Act. ... G. L. c. 138, § 34, inserted by St. 2000, c. 175. This portion of §34 was enacted in response to public outcry over a series of drunk driving incidents that occurred after parties at private homes.

At hearing before the Commission, Sgt. Simard testified that Rosalito Tejada, a minor, admitted to drinking alcoholic beverages inside Marabu. Sgt. Simard testified that he could smell alcoholic beverages on Rosalito Tejada's breath and that he was very combative. Sgt. Simard further testified that Joel Rodriguez agreed that Alexander Rodriguez had been drinking inside Marabu and had gained entrance to Marabu without showing valid identification by showing a "VIP" card.

Marabu argues that these statements are hearsay and should not be admitted into evidence or considered by the Commission as evidence. For the reasons stated herein, the Commission rules that these statements are admissible and may be relied upon for the truth of the matters stated therein. The Commission finds that these statements, while hearsay, are inherently reliable. See Commonwealth v. Durling, 407 Mass. 108 (1990). Sgt. Simard testified before the Commission and was cross-examined. Sgt. Simard's testimony has substantial indications of reliability. Sgt. Simard's testimony contained detailed factual recitations of observations made personally by Sgt. Simard, not general statements or conclusions. The Commission finds that the admissions by the underage nineteen (19) year old to consuming alcoholic beverages that night are both admissible and credible because they are statements against penal interest. M.G.L. c. 138, §34C ("[w]hoever, being under twenty-one (21) years of age and not accompanied by a parent or legal guardian, knowingly possesses ... any alcohol or alcoholic beverages, shall be punished."); See Commonwealth v. Dew, 443 Mass. 620 (2005).

Moreover, no evidence was offered by Marabu to suggest that these admissions by the nineteen (19) year old were unreliable. Marabu presented no evidence that it was unable to exercise its right to

subpoena the nineteen (19) year old and compel his attendance to testify before the Commission. Embers of Salisbury, Inc. v. Alcoholic Beverages Control Com'n, 401 Mass. 526, 531 (1988)(Marabu was "entitled to a subpoena, if necessary, to compel [both Sgt. Simard's and the underage person's] attendance and testimony. G.L. c. 30A, § 12(3) and (5) (1986 ed.). [Marabu] chose not to call [witnesses] and rested on the ... testimony of other witnesses on the issue of the nineteen (19) year old, Rosalito Tejada, possessing alcoholic beverages in Marabu. The right to confront and cross-examine adverse witnesses is not self-executing. Having failed to invoke their right to call [the under-aged person] as a witness, they cannot be heard to complain of the consequences. Cf. School Comm. of Brockton v. Massachusetts Comm'n Against Discrimination, 3

77 Mass. 392, 402-403 (1979) (no unfairness where witness failed to appear at administrative proceeding, where aggrieved party failed to pursue right to enforce subpoena compelling attendance and testimony)."

The Local Board provided the licensee with notice of the hearing and specified that the licensee had allegedly violated M.G.L. c. 138 and ABCC regulation. While the Local Board quoted a portion of that statute, there is no evidence that the Local Board issued or the licensee requested any specific particulars on which of the many provisions of §34 the licensee is alleged to have violated. The Commission finds that the notice of hearing provide by the Local Board coupled with the hearing process before the Local Board and the Joint Prehearing Memorandum filed by the Local provided Marabu with adequate notice of the issues in order for Marabu to obtain a reasonable opportunity to prepare and present evidence and argument in defense to the issues. See Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission (No. 1), 374 Mass. 547 (1978). The Commission also finds that Marabu has made no showing that its substantial rights have been prejudiced. Id.

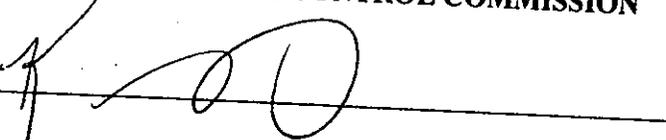
The Commission's discussion must therefore determine whether the Local Board presented credible evidence that persuades the Commission that Marabu committed or permitted the illegality of alcoholic beverages being furnished to a person under twenty-one (21) years of age in violation of the plain language of §34. Based on the testimony of Sergeant Simard, the police report of Sgt. Simard that contained the statements against penal interest made by the nineteen (19) year old that he was drinking alcoholic beverages in Marabu, the Commission approves the action of the Local Board in finding that Marabu violated M.G.L. c. 138, and the regulation cited. The Commission is further persuaded that the five (5) day suspension ordered by the Local Board was a reasonable exercise of its lawful discretion.

CONCLUSION

Based on the evidence and testimony at the hearing, the Commission APPROVES the action of the Local Board in finding that Trempe & Torres, Inc. dba Marabu Caffè violated the provisions of M.G.L. c. 138 and 204 CMR 2.05, §2. The Commission also APPROVES the action of the Local Board in suspending the license for five (5) days as the Commission is further persuaded that this five (5) day suspension is a reasonable exercise of the Local Board's lawful discretion.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Susan Corcoran, Commissioner



Dated: October 27, 2011

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: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration
Counsel for Licensee
File