

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. d/b/a MARABU CAFFE
20-22 UNION STREET
LAWRENCE, MA 01840
LICENSE # 059400223
HEARD: 10/11/2011

This is an appeal of the action of the Licensing Board for the City of Lawrence (the "Local Board") in revoking the M.G.L. c. 138, §12 license, all alcohol license of Trempe & Torres, Inc. d/b/a Marabu Caffe (the "Licensee" or "Marabu"). On August 24, 2011, the Local Board held a hearing and voted to revoke the license of Marabu. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "ABCC" or the "Commission") and a hearing was held on Wednesday, October 11, 2011.¹

The following documents are in evidence:

Exhibits of the Licensee:

1. Google Map of Licensee's Location in Lawrence, Massachusetts;
2. Plot Plan;
3. Floor Plan of 20 – 22 Union Street, Lawrence, Massachusetts;
4. Assessor's Map; and
5. Business Card of Security Specialist Johnny Paredes.

¹ At the close of the hearing, the Commission requested to view, as part of the record, the video footage obtained from the Marabu security cameras on this evening. The Commission was notified that the Lawrence Police Department confiscated the hard drive of the security camera as evidence of the shooting that occurred at Marabu that night. The Massachusetts State Police had possession of the hard drive.

The Commission issued a memorandum and order, and kept the record open until March 8, 2012 at 5:00 p.m. for the Local Board to submit the video footage from the evening of the incident. The video footage was submitted by the City of Lawrence; however, it was submitted after the closing date of the Commission's record.

On March 15, 2012, the Commission issued a second memorandum and order stating that it had not received a motion to extend the time for submission from either party. No motion was timely made to re-open the Commission record to submit the video footage as evidence. Therefore the video footage is not evidence in the Commission's case, and was not considered by the Commission in its deliberations regarding this decision.

Exhibits of the Local Board.

- A. Minutes of Hearing before the Local Board, held on August 24, 2011;
- B. Notice of Revocation dated August 24, 2011 Hearing;
- C. Incident Report written by Lawrence Police Officer Hayes, # 11005725 (1 page);
- D. Incident Report written by Lawrence Detective Burke, # 11005725D (4 pages);
- E. Incident Report written by Lawrence Police Officer Vieira, #11005725B (2 pages);
- F. Incident Report written by Lawrence Police Sergeant Fleming, # 11005725E (2 pages);
- G. Incident Report written by Lawrence Police Sergeant Raso, # 11005725A (1 page);
- H. Incident Report written by Lawrence Police Sergeant Fitzpatrick, #11005725C; (5 pages).

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. Marabu holds a common victualler 7 day all alcoholic beverages license, issued by the City of Lawrence, with a 1:00 a.m. closing hour. It has an occupancy rate of 85 persons. (Agreed Upon Facts in Joint Pre-Hearing Memorandum, Testimony)
2. There is a common practice in Lawrence that patrons entering clubs are frisked with a metal detecting wand, and pat-frisked for weapons. Further, all bags are searched for weapons. (Testimony, Exhibit A)
3. Neryda Trempe is the president of Marabu, and has held this position for approximately three (3) years. (Agreed Upon Facts in Joint Pre-Hearing Memorandum)
4. On July 5, 2011, Ms. Neryda Trempe was present at Marabu. At approximately 10:00 p.m., a Lawrence Police Officer stopped by this premises and told her the premises could not have a speaker outside. Ms. Trempe removed the speaker while the officer was present. The officer issued a citation for playing loud music. (Testimony, Exhibit F)
5. Ms. Trempe did not hire, or request, a police detail that evening. (Testimony)
6. Although Ms. Trempe hired Evan Garcia's security company that evening, she had no knowledge about the company's experience, expertise, or training in security procedures.² (Testimony, Exhibit 5)
7. Ms. Trempe had two (2) security persons working that evening. One (1) security person was stationed inside the premises, and one (1) person was stationed at the door. These two (2) security individuals were dressed in black shirts and black pants. They were not wearing badges, and there were no patches on their shirts identifying them as security. (Testimony)
8. Neither Marabu nor the security company had metal detecting wands.³ As such, the security person stationed at the door was not using a metal detecting wand. (Testimony)

² Mr. Garcia did not testify at the hearing.

³ Ms. Trempe had ordered the metal detecting wands; however, they were delivered to her the day after this incident

9. Ms. Trempe instructed the security personnel to pat down only the men⁴, to check the women's purses, to check identification at the door, and to make sure the premises did not exceed capacity. (Testimony)
10. As a preliminary matter, Ms. Trempe's instructions were lacking because the women were not checked for weapons. Further compounding the problem was that the security personnel did not even follow Ms. Trempe's limited procedures. The male patrons were not pat-frisked, and the female patrons' bags were not searched. (Testimony, Exhibit A)
11. The security personnel were not properly trained. (Testimony, Exhibit A)
12. At the time of the shooting, Ms. Trempe was inside the premises. She was in the back of the bar cashing people out. At approximately 12:45 a.m. there was an announcement for "last call" and the D.J. put on the last song. Then, Ms. Trempe heard a "pop". She observed the security person assigned to the inside of Marabu checking around the interior of the premises. The men's room door was closed and the security person pushed it open and found the shooting victim inside the men's room. (Testimony)
13. Ms. Trempe went outside to the patio and twice called "911" for police assistance, because they did not come after her first call. (Testimony)
14. Subsequently several patrons carried the victim to a private car.⁵ (Testimony)
15. At approximately 1:00 a.m., Lawrence Police Sergeant Daniel Fleming was dispatched to the Marabu in response to a report of shots being fired. (Testimony)
16. Sergeant Fleming was assigned as the patrol Sergeant that evening, and has been a police officer for fifteen (15) years. When he arrived at the premises, the scene was chaotic. (Testimony)
17. Sergeant Fleming observed approximately one hundred and fifty (150) to two hundred (200) people outside of the premises. It was a mob scene. The parking lot was filled with people, and cars attempting to leave. (Testimony, Exhibit F)
18. Sergeant Fleming observed a car leave the parking lot at a high rate of speed, and he ordered the car to stop. He observed the shooting victim, covered in blood, inside the vehicle. The driver of the car yelled at Sergeant Fleming. It was a very volatile situation. (Testimony, Exhibit F)
19. The paramedics arrived on scene. The victim was removed from the motor vehicle and the paramedics began treating him. (Testimony)
20. Sergeant Fleming, surrounded by a mob of people, called for back-up officers to assist and secure the scene. He was concerned for his own safety as he tried to keep the crowd at bay. It was an emotionally charged scene with many people yelling. He attempted to assist the paramedics who were treating the victim. (Testimony, Exhibit F)
21. Sergeant Fleming spoke to Mr. Jose Rosario, the driver of the motor vehicle. He was attempting to drive the victim to the hospital. (Testimony, Exhibit F)

⁴ Initially Ms. Trempe testified that she instructed the security personnel to pat down all entering patrons, she later testified that she only instructed them to pat down the men. As such, we credit the latter testimony.

⁵ As of the Commission hearing date, the shooter had not been identified.

22. Sergeant Fleming learned that the victim had been shot inside the premises, while in the men's bathroom. Mr. Rosario told Sergeant Fleming that he owned the nightclub (Marabu). (Testimony, Exhibit F)
23. When Sergeant Fleming went inside the premises he saw the employees cleaning up the club. Sergeant Fleming instructed them to stop cleaning. He saw blood in the bathroom, and thereafter attempted to secure the bathroom which was where the shooting occurred and a crime scene. (Testimony)
24. The employees ignored Sergeant Fleming's instructions and continued cleaning, potentially destroying evidence of the shooting. Marabu's employees were not helpful or cooperative. (Testimony)
25. Officer Vieira⁶, among other officers, immediately headed to the Marabu. He was assigned to the midnight shift, uniformed patrol duty, in a marked cruiser. He was leaving roll call at 1:00 a.m. when he heard Sergeant Fleming's call requesting additional assistance. Sergeant Fleming sounded very distressed. (Testimony, Exhibit E)
26. Officer Vieira arrived at the Marabu at approximately 1:07 a.m., where he observed total chaos. He observed in excess of two hundred (200) patrons outside the premises, with motor vehicle traffic not moving in the parking lot, and many people running back and forth. (Testimony, Exhibit E)
27. Officer Vieira tried to determine which police officer, of the many in the area, most urgently needed assistance. He entered the club and tried to gain control of the premises. (Testimony)
28. As soon as he entered the premises, Officer Vieira was told that there was a shooting in the men's bathroom. He went directly to the men's bathroom, saw blood in one of the stalls, and observed one shell casing. (Testimony, Exhibit E)
29. He observed several employees at the scene, some of whom were cleaning. He observed at least six (6) to eight (8) employees standing pat. None of them offered assistance. He observed the two (2) security persons standing by, and one (1) person, who was later identified as a patron, in a wheelchair. (Testimony)
30. Patrons and employees were interfering with the crime scene and impeding the investigation. Bystanders attempted to remove potential evidence from the crime scene. Employees were tampering with blood evidence when they began to clean up the crime scene. (Testimony, Exhibit E)
31. Officer Vieira called for other officers to respond to the scene. Approximately fifteen (15) police officers, including officers from previous shifts, arrived at the premises. (Testimony, Exhibit E)
32. Officer Vieira tried to assist the EMTs and paramedics in rendering medical aid to the victim. Speaking in both Spanish and English, he instructed the employees several times to stop removing glasses and other items since the premises was now a crime scene. The employees

⁶ Officer Vieira has worked for the Lawrence Police Department since 1999, and has been a Detective in this Department for eight (8) years. Prior to holding these positions, he was employed as an Emergency Medical Technician. He is also a veteran who served in the Marine Corps. (Testimony)

- ignored him and continued to remove items from the premises. (Testimony, Exhibit E)
33. This is the licensee's third violation of Massachusetts General Laws chapter 138 and/or Commission Regulations. (Testimony, Exhibit A)
 34. Prior to July 5, 2011, the Local Board held two (2) disciplinary hearings involving Marabu for separate violations. After each hearing, the Local Board found Marabu had committed the violation. (Exhibit A, Agreed Upon Facts in Joint Pre-Hearing Memorandum)
 35. Marabu failed to comply with a stop work order issued by the Lawrence Inspectional Services Department on May 9, 2011. As a result, the Local Board suspended its license for a period of five (5) days. The Licensee timely appealed this decision to the ABCC, which after a hearing upheld the Local Board's findings and penalty. This matter is currently pending before the Superior Court. (Exhibit A, Agreed Upon Facts in Joint Pre-Hearing Memorandum)
 36. The Licensee was charged with a second violation, selling an alcoholic beverage to a minor. After a hearing, the Local Board suspended Marabu's license for a period of five (5) days for this violation. The Licensee appealed this decision to the ABCC, which after a hearing, upheld the Local Board's decision and penalty. The matter is also currently pending before the Superior Court. (Exhibit A, Agreed Upon Facts in Joint Pre-Hearing Memorandum)

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. Ch. 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." M.G.L. Ch. 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 Commission considers various factors, such as the licensee's security plan, the conduct of its employees, and whether the licensee permitted the premises to exceed its legal capacity, in deciding whether a licensee has permitted an illegality to occur on its premises. There is a practice in the City of Lawrence, among on-premises licensees to hire security personnel to search individuals for weapons before they enter clubs. Specifically, patrons entering clubs are pat-frisked, and "wanded" with metal detecting wands to check for weapons. Additionally, patrons' bags are searched for weapons. 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). Although, Marabu hired security personnel, it did not employ proper procedures to protect its patrons. Marabu's security personnel admitted that they did not search the bags or the individuals who entered the club for weapons. In these circumstances, it was foreseeable that individual(s) could bring weapons into Marabu. The Commission finds Marabu's failure to search 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." See Id. This failure resulted in this shooting.

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).

Marabu is responsible for the actions and inactions of the security personnel hired to be the agents of the licensee that evening. On the evening in question, Marabu's security personnel did not check entering patrons for weapons and did not search the bags of entering patrons. Marabu security personnel did not use metal detectors or metal detecting wands. These factors taken together resulted in the unsafe operation of this premises. Furthermore, Marabu's employees interfered with, and impeded the efforts and responsibilities of the Lawrence Police Officers who responded to a life threatening shooting at the premises. The employees jeopardized the police investigation and subsequent criminal prosecution by tainting the crime scene when they destroyed evidence, even after being ordered repeatedly by the Police to not do so. The Commission finds this action to be an aggravating circumstance to the violation since the licensee, and its employees and agents, stood by and did nothing to stop or control the patrons jeopardizing the police investigation, or to prevent the employees tampering with the scene of the crime inside the licensed premises.

CONCLUSION

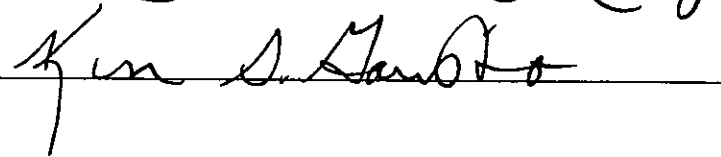
The Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding the violation was committed by the Licensee. The Commission approves the action of the Local Board in **REVOKING** the License of Marabu. The penalty is a reasonable exercise of the Local Board's lawful discretion.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Kim S. Gainsboro, Chairman



Dated: August 21, 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: John Russell, Esq.
Charles Boddy, Esq.
Frederick G. Mahony, Chief Investigator
Administration
File