



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

J.C. FENWICK'S PUB, INC. DBA TINKUM'S
37 MECHANIC ST.
LEOMINSTER, MA 01453
LICENSE#: 060800024
HEARD: 06/18/2014

This is an appeal of the action of the City of Leominster Licensing Board ("Leominster" or the "Local Board") for suspending the §12 alcohol license of J.C. Fenwick's Pub Inc. dba Tinkums, (the "Licensee" or "Tinkums") located at 37 Mechanic Street, Leominster, MA, for seven (7) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") pursuant to which a hearing was held on Wednesday, June 18, 2014.

The following documents are in evidence as exhibits:

1. City of Leominster's Hearing Notice dated 10/30/2013;
2. City of Leominster's Decision dated 11/19/2013;
3. Leominster Police Department Incident Report no. 13-24762-OF dated 10/7/2013;
4. Transcript of Local Board's Hearing on 11/18/2013;
5. Local Board's Decision dated 3/26/2013;
6. Local Board's Decision dated 9/10/2013;
7. Local Board's License Regulations adopted 9/14/2009;

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

The Commission took Administrative Notice of the Licensee's Commission Records.

FACTS

1. J.C. Fenwick's Pub Inc. dba Tinkum's holds a §12 alcohol license located at 37 Mechanic Street, Leominster, MA. William Plante, Jr. is the owner and prior manager. (Commission Records)
2. The Local Board's Regulations include the following sentencing guidelines:
 - o First offense: warning to seven day suspension.
 - o Second offense: warning to twenty-one day suspension.
 - o Third offense: warning to revocation.
 - o Only offenses which have occurred within the two years preceding the date of the violation shall be used in calculating the number of offenses for purposes of the sentencing guideline.

3366 5062₁

- The sentencing guidelines are only a guide. The Local Board may use its discretion in determining whether the facts surrounding a violation warrant a penalty which is more lenient or severe than that suggested by the guidelines.
 - The sentencing guidelines shall not be construed so as to limit the Local Board's authority to consider alternative dispositions, or further conditions on a license or even alternate penalties (e.g., roll back of operating hours). (Exhibit 7)
3. On March 26, 2013, the Local Board ordered Tinkum's to serve a "three-day suspension, one day to be served and two days to be held in abeyance for one year, at which time the penalty would be dismissed if no further violations occurred." The Local Board also voted to require all of the Licensee's employees to undergo mandatory retraining in alcohol server training. (Ex. 5)
 4. On September 10, 2013, the Local Board found that Tinkum's had allowed patrons to be on the premises after the official closing time and allowed individuals to enter the licensed premises after the official closing time. As a result, the Local Board ordered Tinkum's to serve a five day suspension with three days to be served and two days to be held in abeyance for one year. The Licensee was also required to serve the remaining two days which were held in abeyance from the previous suspension. (Ex. 6)
 5. Therefore, Tinkum's license was suspended for a total of 5 days. The Local Board also voted to roll back the closing hour from 2:00 a.m. to 1:00 a.m. for a period of six months, at which time the Licensee would be called back in for review. (Ex. 6, Testimony)
 6. On October 7, 2013, at approximately 1:04 a.m., Leominster Police Officer Daniel Proietti went to Tinkum's to see if it was closed per the Local Board's decision dated September 10, 2013. He was in uniform. (Ex. 6)
 7. Officer Proietti was aware that J.C. Fenwick's had just completed serving a 5 day suspension and that this was the Licensee's first day open, with a new closing hour of 1:00 a.m. (Ex. 3)
 8. Upon arrival, Officer Proietti approached the glass door entrance and heard music coming from inside the premises. He observed approximately six people inside the establishment, standing in front of the glass door. (Ex.3, Testimony)
 9. Officer Proietti tried to enter the premises; however the door was locked. He knocked on the glass door and a female who was standing near the door just looked at him. (Ex. 3, Testimony)
 10. Officer Proietti knocked again, pointed to the door to open it, and the female opened the door. Immediately upon entering the premises, Officer Proietti heard an individual telling the patrons that it was time to leave. He looked up at the digital clock that was hanging on the wall directly across from the bar, and noted that it was 1:05 a.m. (Ex. 3, Testimony)
 11. Officer Proietti did not observe any alcoholic beverages on the bar or in the general area. (Ex.3, Testimony)
 12. Officer Proietti observed the proposed manager on duty, Albert Bonilla. After they took notice of each other, the music was turned off. As of October 8, 2013, Albert Bonilla is the approved License Manager. (Ex. 3, Commission Records, Testimony)

13. Once inside Tinkum's, Officer Proietti observed a total of 12 people; six people in front of the glass door, four people at or near the DJ table, Mr. Bonilla and a bartender. (Ex. 3, Testimony)
14. Officer Proietti told Mr. Bonilla that he was extremely disappointed that there were still customers inside the premises with music playing after its 1:00 a.m. closing time. Officer Proietti asked Mr. Bonilla if he didn't think a compliance check would be done the day after the five (5) day suspension; Mr. Bonilla stated "I knew you guys would check." (Ex. 3, Testimony)
15. On November 18, 2013, after a hearing, the Local Board ordered that Tinkum's license be suspended for seven days. (Ex. 2, Testimony)
16. Within the preceding 12 months, Tinkum's has had two other license violations. (Exs. 5, 6)

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 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).

Both the Local Board and the Commission have the authority to grant, revoke and suspend licenses. Their powers were authorized "to serve the public need and... to protect the common good." M.G.L. c. 138, §23, as amended through St. 1977, c.929, §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).

These "comprehensive powers" are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, §64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§ 23, 64.

The Commission's decision must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 528 (1988). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc., v. Comm'r of Ins., 420 Mass 707, 710 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

The Licensee is charged with violating 204 C.M.R. 2.05(2) permitting an illegality on the premises, to wit: City of Leominster Regulations 1.04, §A, "The hours of operation shall be restricted to those set by the Licensing Authority and stated on the face of the license. No patrons shall be on the premises before the official opening hours or after the official closing hours. Last call is a minimum of 30 minutes prior to closing time. Customers must be up and out once the closing hour of the licensed premises has been reached. No drinks shall be consumed after closing hours." Licenses may be modified for failure to comply with G. L. c. 138. Colonial Tavern Colonial Tavern, Inc. v. Boston Licensing Bd., 384 Mass. 372 (1981). In this case, the Local Board decreased Tinkum's hours for violating sections 1.03 and 1.04 of the City of Leominster's Regulations by allowing individuals to enter the premises after the closing hour and be inside the premises after the closing hour.

The [local] board may set the closing hours for individual establishments within statutory limits. See Casa Loma, Inc. v. Alcoholic Beverages Control Comm'n, 377 Mass. 231, 234 (1979); Boston Licensing Bd. v. Alcoholic Beverages Control Comm'n, 367 Mass. 788, 794 (1975). Sales ... must be permitted, except on certain days (see G. L. c. 138, § 33), **between 11 a.m. and 11 p.m.** (Emphasis supplied) Casa Loma, Inc. v. Alcoholic Beverages Control Com., 377 Mass. 231 (1979). The Supreme Judicial Court has concluded that the hours of a licensee during the periods from 8 a.m. to 11 a.m. and from 11 p.m. to the statutorily mandated closing time (2 a.m. as to restaurants) are a matter solely of local control..., subject only to judicial review of a local authority's failure to give a proper hearing. Thus the hours from 11 a.m. to 11 p.m. are not subject to local discretion but mandatory hours of operation. Colonial Tavern Colonial Tavern, Inc. v. Boston Licensing Bd., 384 Mass. 372 (1981); Casa Loma, Inc. v. Alcoholic Beverages Control Com., 377 Mass. 231 (1979).

M.G.L. c. 138, §12 further provides, "that any such licensee or his manager shall not be prohibited from being on the licensed premises at any time; provided, further, that the employees, contractors or subcontractors shall not be prohibited from being upon such premises at any time for the purpose of cleaning, ... opening or closing the business in an orderly manner. Leominster's Regulations 1.04, §A in pertinent part clearly states that, " No patrons shall be on the premises before the official opening hours or after the official closing hours...Customers must be up and out once the closing hour of the licensed premises has been reached. In this case, there is no question that patrons were in the licensed premises after the required closing time of 1:00 a.m. The door was locked and the patrons were standing inside the premises. The music was still playing.

Although there were no alcoholic beverages on the bar or in the possession of any of the patrons, the patrons were asked to leave after Officer Proietti entered. There was no evidence that these individuals were Tinkum's employees or that they were cleaning the premises. Furthermore, Tinkum's had just had their license reinstated that day, after it had been suspended for allowing individuals in the licensed premises after its closing time. This was the very reason Tinkum's hours were rolled back from 2:00 a.m. to 1:00 a.m.

Leominster's Regulations include sentencing guidelines that permit anything from a warning to a seven day suspension for a first violation. This was Tinkum's third violation in less than twelve months. As such, the penalty the Local Board imposed was reasonable.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the City of Leominster Licensing Board in suspending the M.G.L. c. 138 §12 license of J.C. Fenwick's Pub Inc. dba Tinkums for seven (7) days.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

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

Susan Corcoran, Commissioner _____

Dated: August 13, 2014

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: Christian W. Lund, Esq. via email
Brian Riley, Esq. via email
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration
File