



*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**

**T & S LIQUORS, INC.**  
**104 LANCASTER STREET**  
**LEOMINSTER, MA 01453**  
**LICENSE#: 060800060**  
**HEARD: 11/28/2012**

This is an appeal of the action of the Leominster Licensing Board (the "Local Board") in suspending the M.G.L. c. 138, §15 license of T & S Liquors, Inc. (the "Licensee" or "T & S") located at 104 Lancaster Street, Leominster, MA for three (3) days<sup>1</sup>. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, November 28, 2012.

The following documents are in evidence:

1. Telegram & Gazette Article Published March 16, 2012, "Leominster Liquor License Checks on Tap";
2. Local Board License Regulations Adopted September 14, 2009;
3. Leominster Police Department Notice of Violation Compliance Check dated April 30, 2012;
4. Leominster Police Department Incident Report for Violation on April 27, 2012;
5. Photocopy of Underage's Massachusetts Driver's License;
6. Local Board's Notice of Hearing dated May 17, 2012 for hearing to be held on June 11, 2012, with Minutes of the Local Board's Hearing held June 11, 2012;
7. Photograph of Underage Operative; and
8. Local Board's Decision dated June 13, 2012.

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

FACTS

1. T & S Liquors, Inc. is a Massachusetts Corporation doing business at 104 Lancaster Street, Leominster, Massachusetts. (Testimony, Exhibit 9)

<sup>1</sup> The three (3) day suspension was to be served on July 19 – July 21, 2012; however, the suspension was stayed pending the result of this appeal. (Exhibit 9)

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2. T & S is a family-run package store that has been in continuous operation at its current location for over thirty (30) years.
3. During its operation, it has been owned, managed, and primarily staffed by Robert Kirouac, his wife, Gay Kirouac, and his brother-in-law, Lance Hazard (collectively "Owners"). (Exhibit 9)
4. All employees have received "TIPS" training in identifying underage customers. (Testimony, Exhibit 9)
5. The Leominster License Commission adopted License Regulations for alcoholic beverages licensees on September 14, 2009. (Exhibit 2)
6. Section 2 Scope and Statutory Basis for Promulgation of Rules states,
  - a. The statutory basis for the promulgation of these rules is set forth within the applicable section of G.L. c. 138. Each reference to a statute shall include any amendment thereto.
  - b. These rules are supplementary to any statutory requirements and to the rules of the Alcoholic Beverages Control Commission. (Exhibit 2)
7. The Leominster License Regulation includes in section 1.20 written Compliance Check Guidelines to be used when conducting underage drinking compliance checks on licensed premises. These guidelines state:
  - a. The underage person taking part in the compliance check should reasonably look their age. Efforts to make them appear older should be avoided.
  - b. A photo of the underage person should be taken and attached to the information requested in item (d).
  - c. The underage person should not carry any money with them other than that given by the law enforcement officer supervising them.
  - d. The underage person shall sign a release form prior to starting participation in this program.
  - e. Unless circumstances warrant, the underage person shall be given a B.A.C. test at the beginning and at the conclusion of the investigation. They should be informed of this prior to beginning the investigation.
  - f. The underage person shall enter the licensed premises under observation by a law enforcement officer.
  - g. The underage person shall attempt to purchase an alcoholic beverage. They should attempt to purchase the same thing at each location.
  - h. At no time shall the underage person attempt to misrepresent their age.
  - i. If asked for identification, the underage person should provide their true license.
  - j. If served at any on-premises establishment, the underage person shall remain on the licensed premises for a period of time instructed by the law enforcement officer. They should then exit the licensed premises, leaving the alcoholic beverage. If served at an off-premises establishment, the underage person shall carry the alcoholic beverage out to the law enforcement officer.
  - k. At no time, under any circumstances, shall the underage person consume any alcoholic beverage.
  - l. The safety and welfare of all underage participants will be of the utmost importance to the law enforcement personnel. Underage persons shall not be exposed to any unusual, unnecessary, or unreasonable risk.

- m. The underage person will not wear, exhibit, or carry any law enforcement identification or falsely represent themselves as an employee of the law enforcement unit while participating in this program. They shall not under any circumstances carry a weapon.
  - n. The law enforcement personnel should only enter the premises to observe on an as-needed basis when circumstances warrant.
  - o. Notice to licensees of alleged violations will be given upon conclusion of the compliance check. Official notification of date, time, and place of hearing. (Exhibit 2)
8. On March 16, 2012, the City of Leominster published a written notice in the Worcester Telegram that the Leominster Police Department, in cooperation with the Leominster Community Action Team, would be conducting compliance checks on “bars and restaurants.” (Exhibit 1)
  9. Specifically, the notice states:
 

Leominster liquor license checks on tap

Leominster- The Police Department, in collaboration with the LUK Leominster Community Action Teams, will conduct compliance checks on establishments in the city that hold liquor licenses.

The checks, which involve **sending undercover underage patrons into bars and restaurants to order drinks**, will take place in the upcoming months. (emphasis supplied) The dates are not announced in advance.

Businesses that serve the minors are then called before the License Commission for hearings in which actions such as license suspension may be taken. (Exhibit 1)
  10. On the evening of April 27, 2012, members of the Leominster Police Department, in conjunction with the Leominster Community Action Team (LCAT) conducted compliance checks for off-premises (M.G.L. c. 138, §15) alcoholic beverages licensees. (Exhibit 4)
  11. Officer Richard Woodward and Officer Oswaldo Ramos, both Leominster Police Officers supervised the compliance checks that evening. (Testimony, Exhibit 4)
  12. The officers, using two (2) underage operatives, as well as individuals from the LCAT, divided the compliance checks between them. (Testimony, Exhibit 4)
  13. Prior to the commencement of the compliance checks, pursuant to Leominster’s compliance check guidelines, Officer Woodward made a photocopy of Anthony Sisoian’s license, turned his pockets inside out, and administered a blood alcohol test to insure that Mr. Sisoian had not consumed any alcohol. (Testimony)
  14. Officer Woodward reviewed the guidelines with Mr. Sisoian and instructed him to go into the licensed premises, and attempt to purchase alcohol.
  15. Officer Woodward further instructed Mr. Sisoian to produce his own Massachusetts license if he was asked for proof of age. (Testimony)
  16. Mr. Sisoian never signed a release as required by the guidelines prior to starting participation in this program. (Testimony)
  17. Officer Woodward went to T & S with underage operative, Mr. Sisoian and LCAT member Mr. Digregorio. (Testimony, Exhibit 4)

18. Officer Woodward watched Mr. Sisoian enter the licensed premises.
19. He confirmed that Mr. Sisoian had his own valid Massachusetts Driver's license, with a date of birth of March 9, 1993. Mr. Sisoian was nineteen (19) years old. (Testimony, Exhibit 4)
20. Mr. Sisoian entered T & S at 5:22 p. m. while talking on his cell phone. He went to the cooler, picked up a six (6) pack of Bud Light and brought it to the counter. He was still talking on his cell phone. (Testimony, Exhibit 4)
21. Mr. Kirouac, one of the owners, was behind the counter. (Testimony, Exhibit 4)
22. Mr. Kirouac asked Mr. Sisoian for identification. (Testimony, Exhibit 4)
23. Mr. Sisoian, still on his cell phone, handed Mr. Kirouac his Massachusetts Driver's license which pictured him vertically.<sup>2</sup> (Testimony, Exhibit 4) This driver's license specifies "under 21 until 03-09-2014."
24. Mr. Kirouac questioned Mr. Sisoian as to why he possessed a vertical identification if he was over twenty-one (21) years. He said to Mr. Sisoian, "Your ID looks weird." (Testimony)
25. Mr. Sisoian, still on the cell phone, nodded his head in acknowledgement of Mr. Kirouac statements, but never spoke with him. (Testimony)
26. Mr. Kirouac sold Mr. Sisoian the six (6) pack of Bud Light beer. (Testimony, Exhibit 4)
27. Mr. Sisoian exited T & S at 5:25 p. m., and informed members of the team that he was able to purchase alcoholic beverages. (Testimony, Exhibit 4)
28. The entire time Mr. Sisoian was in T & S, he was talking on his cell phone. (Testimony)
29. After the compliance checks, Officers Woodward and Ramos, tested Mr. Sisoian's blood alcohol levels again. The test showed no alcohol in Mr. Sisoian's blood. (Testimony, Exhibit 4)

### 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 Leominster, 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).

Pursuant to M.G.L. c. 138, §34, the sale of alcohol to minors is prohibited, and imposes both criminal and civil sanctions. M.G.L. c. 138, §34 provides: Whoever makes a sale or delivery of

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<sup>2</sup> A vertical picture typically denotes that it was issued at a time when the holder was not yet twenty-one (21) years old. A license holder is not required to update the vertical photograph when achieving their twenty-first birthday.

any alcoholic beverages 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...or whoever furnishes any such beverage or alcohol for a person under twenty-one (21) years of age shall be punished by a fine of not more than two thousand (2,000) dollars or by imprisonment for not more than one (1) year or both. To enforce the provisions of M.G.L. c. 138, §34, both the Commission and the Local Boards commonly perform compliance checks on licensed establishments.

The legality of using an underage operative to conduct compliance checks was decided in Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass. App. Ct. 663 (1998). The Appeals Court held that "[a]bsent entrapment or other abuses violative of fundamental fairness, government involvement in criminal activity for purpose of investigating possible violations of law is permissible, even if technical violations of law occur." Id at 664. The Appeals Court further held that where a "sting operation was conducted in accordance with published guidelines designed to insure that such operations were conducted fairly, the commission could properly rely on this evidence." Id at 665.

Consequently, "conducting compliance checks in strict compliance to the written guidelines is essential to the validity of the checks. Local authorities' failure to follow the guidelines ...for compliance checks undermines the legitimacy and integrity of the compliance checks throughout the state and fails to adequately preserve their fairness." Fay, et al v. Jenkins et al, Middlesex Superior Court C.A. No. 2007002652-F (Muse. J.) See also Fran's Lunch, Inc., 45 Mass. App. Ct. at 655; 700 NE 2d 846 (1998) (sting operation conducted by A.B.C.C. was constitutional where strict procedure for fair control check was observed); BBRG Massachusetts, Inc. dba. Papa Razzi (A.B.C.C. decision May 21, 2007); Assinippi Liquors, Inc. (A.B.C.C. decision April 7, 2004); Epicure Package Store, Inc. (A.B.C.C. decision January 31, 2007).

The Local Board has adopted its own guidelines to be used when compliance checks are conducted. Guideline d. requires the underage person to sign a release form prior to starting participation in this program. Mr. Sisoian never signed the required release.

Both Courts and the Commission rely on local licensing boards to follow stringent and identical procedures to uphold the validity of compliance checks. Fay v. Jenkins, Suffolk Superior Court, C.A. No. 2007-02652-F, Memorandum of Decision And Order (Muse, J.) "Conducting compliance checks in strict conformance to the written guidelines is essential to the validity of the checks. Local authorities' failure to follow the guidelines ... undermines the legitimacy and integrity of the compliance checks throughout the state and fails to adequately preserve their fairness." Id. citing Fran's Lunch, supra. Leominster did not follow its own guidelines, thereby resulting in an invalid sting.

Moreover, the Local Board's guidelines have no provisions for giving notice to licensees that compliance checks are going to be conducted. Although the city published a notice in the newspaper that a sting was going to occur, this notice was defective. The notice specifically said that the compliance checks were going to be conducted by "sending undercover underage patrons into bars and restaurants to order drinks" i.e, into M.G.L. c. 138, §12 on-premises licensees. However, this compliance check was in fact conducted on a M.G.L. c. 138, §15 off-premises licensee. We find this publication did not furnish the licensee with a sufficiently

definite warning so that people of common intelligence would know that the Leominster Police Department intended to conduct compliance checks on M.G.L. c.138, §15 licensees. See Aristocratic Restaurant v. Alcoholic Beverages Control Commission, 374 Mass. 547, 552 (1978); Fay, et al v. Jenkins et al, supra.

The ABCC guidelines state that, “[n]otification that a compliance check will be taking place will be made in the media prior to the start date.” In Re: Epicure Package Store, Inc., Foxborough (ABCC Decision dated March 28, 2007).<sup>3</sup> In the Epicure case, the Commission ruled that there is no legal defect or unfairness when a licensee receives actual notice that a compliance check will be conducted. The Commission has recently addressed issues arising out of the failure to give this notification.

In In Re: BBRG Massachusetts Restaurants Inc. dba Papa Razzi, Burlington (ABCC Decision dated May 21, 2007) the Commission found that “[t]he failure to notify in the media ...jeopardizes the entire compliance check.” In Papa Razzi, the Commission found this failure alone made the conduct of the “sting” operation unfair and resulted in the Commission disapproving the action of the local licensing authority. This decision of the Commission was reviewed and affirmed. Fay, et al v. Jenkins et al, Middlesex Superior Court C.A. No. 2007002652-F (Muse. J.)

While in this case there is evidence that the local police department placed a notification in the media prior to the start date, that notice was specific and limited by its own terms to §12 on-premises license holders. Such a notice limited to §12 license holders is not notice to §15 license holders. There was no evidence presented that the licensee was provided with any actual written notice prior to the start date that a “sting” or “compliance check” would be conducted. See In Re: Hinoelia Rivera dba El Coqui Liquor, Worcester (ABCC Decision dated December 28, 2007). This case involving T & S is similar to the Papa Razzi case and the El Coqui case in which the “[t]he failure to notify in the media, the first guideline of the ABCC, jeopardizes the entire compliance check.”<sup>4</sup>

The Commission finds that even a single violation of written sting guidelines undermines the fairness of the operation, jeopardizes the entire sting, and results in the Commission finding that the compliance check is not valid. The Commission finds that in order for there to be validity to

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<sup>3</sup> The notice issued by the ABCC investigators is general and perhaps, to the inattentive, innocuous. The ABCC notification of a “sting” merely states that the ABCC Investigators “will be conducting minimum age purchase law compliance checks throughout 2007.” *Massachusetts Beverage Business*, September 2007 ed., page 445.

<sup>4</sup> The Commission notes that in this case, the underage operative did not leave when asked for identification. Instead the underage operative produced an identification and responded to that request,. This conduct is contrary to the ABCC’s guidelines which mandate that an underage operative leave the licensed premises when asked for any identification. Since this case is decided on other issues, the Commission need not, and does not, reach this issue of the conflict(s) between the ABCC guidelines and the local guidelines and leaves this issue for decision on another day.

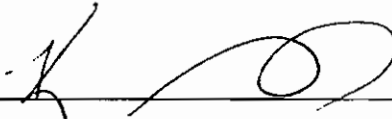
the compliance checks, there must be conformity to the guidelines promulgated by the Local Board. The city of Leominster is expected to adhere to its own Guidelines. The Commission finds that this sting is invalid, and disapproves the action(s) of the city of Leominster and the Local Board.

CONCLUSION

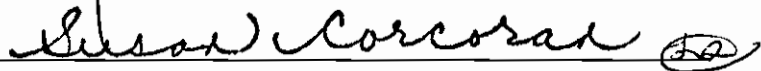
The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding the violation was committed by the Licensee. The Commission remands the matter to the Local Board with a recommendation that no further action be taken against this licensee as any penalty or sanction would be discrepant with the Commission's decision disapproving the violation finding. The Commission thus does not reach the question whether to approve the action of the Local Board in **SUSPENDING** the license of T & S Liquors, Inc. for three (3) days.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kim S. Gainsboro, Chairman



Susan Corcoran, Commissioner



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

Kathleen McNally, Commissioner



Dated: January 9, 2013

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: Matthew Kirouac, Esq. via Facsimile 617-367-8307  
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Frederick G. Mahony, Chief Investigator  
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File