

The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Steven Grossman
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

NOTICE OF SUSPENSION

August 14, 2013

CLUB-PASSE-TEMPS OF LOWELL MA.
369-371 MOODY STREET
LOWELL, MA 01852
LICENSE#: 063000085
VIOLATION DATE: 02/06/2013
HEARD: 07/09/2013

After a hearing on July 9, 2013, the Commission finds Club-Passe-Temps of Lowell, MA violated:

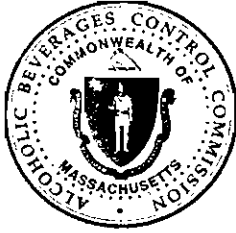
- 1) M.G.L. c. 138 §63A Hindering or Delaying an Investigator of the Commission.

The above-captioned licensee's license is **SUSPENDED INDEFINITELY** effective **forthwith** until further written order of the Commission.

You are advised that you have the right to appeal this decision under M.G.L. c.30A to Superior Court within thirty (30) days upon receipt of this notice.

Kim S. Gainsboro
Chairman

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Jan Kujawski, Investigator
Rose Bailey, Investigator
James Cipoletta, Esq. via fax 781-289-9468
Administration
File



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Club-Passe-Temps of Lowell, MA (the "Licensee" or "Club-Passe-Temps") holds an all-alcoholic beverages club-type license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, July 9, 2013, regarding an alleged violation of:

- 1) M.G.L. c. 138 §63A Hindering or Delaying an Investigator of the Commission;
- 2) M.G.L. c. 138 §15A Change of Officers and Directors in the corporation without authorization;
- 3) M.G.L. c.138 §64 – License issued under this chapter by the Local Licensing Authorities in violation of §16A or any other provision of this chapter

The above-captioned occurred on February 6, 2013 according to Investigator Kujawski's Report.

The following documents are in evidence as exhibits:

1. Investigator Kujawski's Investigative Report dated February 6, 2013;
2. A-K: Annual Reports filed with the Secretary of the Commonwealth from 2002-2012;
3. License Application dated November 29, 1953;
4. License Renewal Application for 1994; and
5. A-C: Annual Reports to the Secretary of the Commonwealth for 2000 – 2012; Bank statements from Sovereign Bank (July, September – October 2012) and Jeanne D'Arc Credit Union (November – December 2012 and January 2013); Minutes of Monthly Club Meetings for 2012 and January – April 2013); Wholesaler Invoices (June 2012 – January 2013).

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

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

FACTS

1. On Wednesday, February 6, 2013, Chief Investigator Mahony with Investigators Bailey, Velez, and Kujawski, investigated the business operation of the Club-Passe-Temps of Lowell, MA. (Exhibit 1, Testimony)
2. Upon entering the establishment, Investigators observed a card game being played with U.S Currency on the table, as well as four electronic video devices. (Exhibit 1, Testimony)
3. Investigators identified themselves to Robert Arcand, vice president of the club and a member of the board of directors, and informed him that they would be conducting an investigation of the licensed premises. (Exhibit 1, Testimony)
4. Investigators observed a room, adjacent to the bar area, that appeared to be an office. (Exhibit 1, Testimony)
5. Investigators asked Mr. Arcand to accompany them into the office area so that he could observe the investigation. (Exhibit 1, Testimony)
6. Mr. Arcand agreed and sat in the office while investigators made observations. (Exhibit 1, Testimony)
7. Investigators observed meters on the wall of the office, which based on their training and experience, investigators know are used to calculate winnings for illegal gambling on electronic video devices. (Exhibit 1, Testimony)
8. Chief Mahony placed \$1 dollar in US Currency into machine number 4, which was located in the bar area. Chief Mahony then registered a bet on the device. (Exhibit 1, Testimony)
9. Investigators in the office observed that the meter labeled number 4 indicated 40 credits. (Exhibit 1, Testimony)
10. The device was then reset to zero (0) credits by pressing a button on the meter labeled number 4. (Exhibit 1, Testimony)
11. A male individual entered the office and identified himself as David Ouellette, club president. (Exhibit 1, Testimony)
12. Investigators identified themselves to Mr. Ouellette and informed him of the investigation. (Exhibit 1, Testimony)
13. Mr. Ouellette stated that investigators must leave the office. (Exhibit 1, Testimony)
14. Chief Mahony explained to Mr. Ouellette that the office area is part of the licensed premises, and also advised him of M.G.L. c. 138 §63 and §63A. Chief Mahony also explained that if Mr. Ouellette demanded that investigators leave the office, then the club would be charged with M.G.L. c. 138 §63A. (Exhibit 1, Testimony)
15. Mr. Ouellette again stated that investigators must leave the office. (Exhibit 1, Testimony)

16. Investigators exited the office area. (Exhibit 1, Testimony)
17. Chief Mahony then inquired if Mr. Ouellette was also demanding that investigators leave the entire licensed premises. (Exhibit 1, Testimony)
18. Mr. Ouellette stated that he did demand that investigators leave the club premises. (Exhibit 1, Testimony)
19. Chief Mahony again advised Mr. Ouellette regarding M.G.L. c. 138 §63 and §63A. (Exhibit 1, Testimony)
20. Mr. Ouellette again stated that investigators must leave the premises. (Exhibit 1, Testimony)
21. Chief Mahony advised him of the violation and that a report would be filed for further action. (Exhibit 1, Testimony)
22. Investigators then left the licensed premises. (Exhibit 1, Testimony)
23. Investigator Kujawski reviewed the Secretary of the Commonwealth, Corporation Division website for the officers of Club-Passe-Temps. Listed were: David Ouellette as President; Maurice Soucy as Treasurer, and Dennis Garneau as Clerk. (Exhibit 1, Testimony)
24. Investigator Kujawski then reviewed the Commission files for Club-Passe-Temps which indicates that the licensee has not submitted an application to change officers and directors since December 18, 1963, when the officers and directors were identified as:
 - President – Jean Frechette
 - Vice President – Herve Ducharme
 - Secretary – Raymond Fortin
 - Treasurer – Ralph E. Grady
 - Directors – Mederic Chouinard, Paul Ouellette, and Marcel Dumais. (Exhibit 1, Testimony)
25. On November 24, 1993, the Licensee submitted its required renewal application for calendar year 1994. The submitted renewal application was signed under the penalties of perjury by Maurice Soucy, as an authorized corporate officer. (Exhibit 1, Testimony)
26. Mr. Soucy is not approved by this Commission as a corporate officer, and was not listed as such during the renewal period of 1993 – 1994. (Exhibit 1, Testimony)
27. The annual report filed by the Licensee dated December 30, 1992, lists Mr. Maurice Soucy as the Treasurer of Club-Passe-Temps of Lowell, Massachusetts. (Exhibit 1, Testimony)
28. The Commission left the record open until July 30, 2013 at 5:00 p.m. for the Licensee to submit additional documentation or supplementation on the issue of a change of officers and directors for this license.
29. Counsel for the Licensee submitted a letter to the Commission stating that “The Licensee has contacted the Local Board and has been advised that the City of Lowell does not require the filing of a formal change of officers or directors form, or a hearing on any change. The Local

Board interprets the licensee's obligation as being governed by G.L. c. 138, section 1 and c. 180, section 2." (Commission File)

30. Counsel for the Licensee did not submit any documentation from the Local Board to substantiate that this was, indeed, the formal policy of the Local Board.

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Commn., 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975).

In reviewing the authority of the Commission, the Supreme Judicial Court has held that [t]he powers of the States in dealing with the regulation of the sale of intoxicating liquors are very broad. What they may wholly prohibit, they may permit only on terms and conditions prescribed by the Legislature. Supreme Malt Products Co., Inc., v. Alcoholic Beverages Control Commission, 334 Mass. ----; Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-139; Carter v. Virginia, 321 U.S. 131, 137-143. In dealing with a trade, which, because of its great potential evils, can be wholly prohibited, a wide power is given to the Legislature with respect to the delegation of discretionary powers. Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 619 (1956).

The SJC further held that "[t]he legislative history of [the Commission's enabling act], and of M.G.L. (Ter. Ed) Ch. 138, as amended, clearly shows that the powers of the Commission were not intended to be perfunctory or limited. Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 617 (1956).

M.G.L. c.138 §63A – Hindering or Delaying an Investigator of the Commission:

M.G.L. Chapter 138, Section 63A states in pertinent part: "Any person who hinders or delays any authorized investigator of the commission ... in the performance of his duties, or who ... locks out any such investigator, ... from any place which such investigator, ... is authorized to inspect, shall be punished."

The Commission is extremely concerned with evidence presented to the Commission regarding the conduct of Mr. David Ouellette, license manager and club president. While Commission Investigators were performing their jobs and conducting an inspection of a licensed premises, and after they identified themselves to Mr. Ouellette and informed him of the investigation being conducted, Mr. Ouellette then hindered and delayed Commission Investigators by demanding more than once that they must leave the office of the licensed premises.

Even after Chief Investigator Mahony explained to Mr. Ouellette, that the office area is part of the licensed premises and Chief Investigator Mahony specifically advised Mr. Ouellette regarding M.G.L. c. 138 §63 and §63A and specifically explaining that if Mr. Ouellette demanded that investigators leave the office, then the club would be charged with M.G.L. c. 138 §63A, Mr. Ouellette persisted in his misconduct. Mr. Ouellette was unrelenting in his demand that investigators must leave the office. So, the Investigators disengaged from, rather than escalate, this situation created by Mr. Ouellette's obstreperous conduct and exited the office area of the licensed premises.

Chief Investigator Mahony further inquired of Mr. Ouellette if he was also demanding that Commission investigators leave the entire licensed premises. Mr. Ouellette stated that he did demand that investigators leave the club premises completely. Chief Investigator Mahony again advised Mr. Ouellette regarding M.G.L. c. 138 §63 and §63A. Mr. Ouellette's obstreperous conduct continued unabated and he again stated that investigators must leave the premises. Chief Investigator Mahony advised him of a violation.

The Commission cannot and does not condone hindering and/or delaying Commission investigators, nor does it condone a lack of cooperation and interference by the Licensee with the Investigators while in the performance of their duties in their official capacity, under any circumstances, and in any condition. The Commission notes that conduct such as that described in the hearing before the Commission can be prosecuted criminally pursuant to M.G.L. c. 138, §63A. The Commission finds the Licensee violated M.G.L. c. 138, §63A.

M.G.L. c. 138, §15A- Failure to disclose all persons who have a direct or indirect beneficial or financial interest in said license, to wit: Failure to notify licensing authorities of a change of officers and directors:

M.G.L. c. 138, §15A requires that a licensee or applicant for an alcoholic beverages license disclose all individuals who have a direct or indirect beneficial interest in the license. The Appeals Court held in Number Three Lounge, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 301 (1979), the concept of a "direct or indirect beneficial interest" in a license can range from an ownership interest to an absolute proprietary interest to a mere possessory right and includes the right of control. The officers and directors of a corporation are the control group of that corporation.

However, M.G.L. c. 138, §1 provides, in pertinent part, in the definition of the term "club" that "[s]uch club shall file with the local licensing authorities and the commission annually within three months after January first in each year a list of the names and residences of its officers, together with the amount of salary or compensation received by each employee engaged in the handling or selling of alcoholic beverages." The Commission is called upon to read two provisions of the Liquor Control Act harmoniously.

Where the holder of a "club"-type section 12 license complies with its statutory duty created in M.G.L. c. 138, §1 and timely files an annual report with both the local licensing authorities and the Commission, the Commission concludes that a duplicative process of a formal application for a change of officer and directors is not required. Therefore, in the situation where a "club"-type license holder timely files its M.G.L. c. 138, section 1 annual reports and files annual corporate reports with the Secretary of State that are consistent with the section 1 annual reports, an application under General Laws chapter 138, chapter 15A for the change of officers and directors is not statutorily required. The Commission, to date, has no regulation in existence that requires this application. In this case, however, there is no evidence that this club licensee did not file timely its reports. Therefore, given the state of the evidence, the Commission is not persuaded that the Licensee violated M.G.L. c. 138, §15A.

This conclusion does not relieve any holder of a club-type license from filing, and receiving approval from both licensing authorities, a formal application under M.G.L. c. 138, §15A to change any directors or officers of the licensee when such changes occur during the term of the license. The Commission reads the obligation to file an annual report under M.G.L. c. 138, §1 as an exception to the general rule of obtaining prior approval for any change of corporate directors or officers only when the club licensee's terms of office correspond with the term of the license, viz., the calendar year, M.G.L. c. 138, §23. Changes during the year must still be approved through the normal application process pursuant to M.G.L. c. 138, §15A subject to approval by the Local Board and the Commission.

M.G.L. c. 138, §64 M.G.L. c. 138 §64 – License issued under this chapter by the Local Licensing Authorities in violation of §16A or any other provision of this chapter:

The alleged violation of M.G.L. c. 138, §64 is based on an investigative review that went back 21 years. The alleged violation was based on the premise that the signatory on the application for renewal has not been the subject of a formal application under M.G.L. c. 138, §15A to change the directors and officers of the corporation that held this club-type license. There was no evidence presented that during this time period the Licensee failed to file timely M.G.L. c.138, §1 annual reports or failed to file timely annual corporate reports with the Secretary of State that were not consistent with the M.G.L. c. 138, §1 annual reports. Therefore, in light of the above, the Commission is not persuaded that the Licensee violated M.G.L. c. 138, §64 M.G.L. c.138 §64.

CONCLUSION

Based on the above, the Commission finds the licensee did not violate:

- 1) M.G.L. c. 138 §15A Change of Officers and Directors in the corporation without authorization;
- 2) M.G.L. c.138 §64 – License issued under this chapter by the Local Licensing Authorities in violation of §16A or any other provision of this chapter.

Based on the evidence, the Commission finds the licensee violated:

- 3) M.G.L. c. 138 §63A Hindering or Delaying an Investigator of the Commission.

The Commission finds the unrelenting misconduct of Mr. Ouellette to be an aggravating circumstance given his dual responsibility as president and license manager.

Therefore, the Commission **INDEFINITELY SUSPENDS** the license of Club-Passe-Temps of Lowell, MA **effective forthwith**, until further written order of the Commission.

The Commission will not issue any further order without a written request from the Licensee showing good cause to reconsider this indefinite suspension and a hearing before the Commission that the Licensee attends.

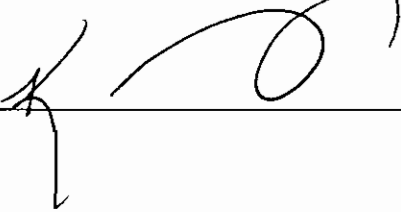
Good cause for the Commission to consider issuing a further written order revising the order of indefinite suspensions will include, but not be limited to, the Licensee filing with both the Commission and the Local Board the appropriate applications for a change in the current officers and directors of the Club-Passe-Temps of Lowell, MA so that David Oullette is no longer a director or officer of the Licensee and that appropriate application is granted by the Local Licensing Authorities and approved by the Commission for the license manager to be changed to an individual other than Mr. David Ouellette.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner 

Susan Corcoran, Commissioner 

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

Kim Gainsboro, Chairman, 

DATE: August 14, 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: James Cipoletta, Esq. via fax 781-289-9468
- Local Licensing Board
- Frederick G. Mahony, Chief Investigator
- Jan Kujawski, Investigator
- Rose Bailey, Investigator
- Administration
- File