



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358*

Jean M. Lorizio, Esq.
Chair

DECISION

**LD HOLDINGS, LLC D/B/A BAR 74 LOUNGE & GRILL
76-78 MERRIMACK STREET
LOWELL, MA 01852
LICENSE#: 03090-RS-0630
HEARD: 11/21/2019**

This is an appeal of the action of the City of Lowell License Commission (the "Local Board" or "Lowell") for suspending the § 12 all alcoholic beverages license of LD Holdings LLC d/b/a Bar 74 Lounge and Grill (the "Licensee" or "Bar 74") located at 76-78 Merrimack Street, Lowell, MA for three (3) days with one (1) day to be served and two (2) days held in abeyance for a period of one (1) year. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Thursday, November 21, 2019.

The following documents are in evidence as exhibits:

- A. Lowell Police Report, 6/30/2019;
- B. Lowell Police Superintendent Richardson's Letter to the Local Board, 7/9/2019;
- C. Local Board's Letter to Licensee, 7/16/2019;
- D. DVD video recording of the Local Board hearing, 7/25/2019;
- E. Local Board's decision and statement of reasons, 7/31/2019;
- F. Licensee's Petition on Appeal to the ABCC, 7/31/2019;
- G. Lowell Assistant City Solicitor Gordon's Email 8/9/2019 to Attorney Jacobs concerning the stay of the suspension pending appeal;
- H. Attorney Jacobs' Email 7/8/2019 to Lowell Assistant City Solicitors Gordon and LaGrassa;
- I. Local Board's Alcohol Beverages Regulations for Licensees;
- J. Joint Pre-Hearing Memorandum.

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

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. LD Holdings, LLC d/b/a Bar 74 Lounge and Grill ("Licensee" or "Bar 74") operates a restaurant and bar at 76-78 Merrimack Street, Lowell, Massachusetts. Bar 74 has been in business since February 2017. (Exhibit J).

2. All licensed establishments in Lowell, including Bar 74, have a closing hour of 2:00 a.m. (Testimony).
3. On the evening of June 29th into the early morning of June 30, 2019, three (3) Lowell Police Officers, Officer Danny Perrin, Officer Osama Khudari and Captain James Hodgdon, were assigned to the downtown Lowell foot patrol. (Testimony, Exhibit A).
4. At approximately 2:07 a.m. on June 30, 2019, the above-mentioned Lowell Police Officers were positioned on Merrimack Street at John Street, in close proximity to several licensed establishments, including Bar 74. (Testimony, Id.).
5. The officers observed two (2) females enter Bar 74 at or about 2:07 a.m., turn left when inside and then sit at a table by the front window. Upon approaching Bar 74's entrance, the officers observed approximately a dozen people inside. (Testimony, Id.).
6. The officers observed approximately four (4) to six (6) people cleaning and believed them to be employees of Bar 74. They also observed approximately a dozen people standing at the bar and sitting at tables talking. (Testimony, Id.).
7. They did not observe anyone being served an alcoholic beverage or anyone drinking an alcoholic beverage. There was no music playing and the Disc Jockey ("DJ") was packing up his equipment. (Testimony, Exhibit D).
8. The officers spoke with the head of security, Scott Foreman.
9. The officers then asked to speak with the manager, Abigail Murphy. Captain Hodgdon informed Ms. Murphy that anyone who was not an employee could not be inside the licensed premise given the time. Ms. Murphy clarified that the two (2) females who caught the attention of the officers and were observed entering at 2:07 a.m. were employees of the DJ. (Testimony, Exhibits A & D).
10. Chief Hodgdon assumed the people sitting at the tables and/or standing at the bar were patrons because he did not observe them cleaning or assisting the DJ. (Testimony).
11. The officers observed eleven (11) people exit the establishment. The officers did not speak with any of the people who exited the establishment. (Testimony, Exhibit A).
12. The officers did not enter the premises at any time during this incident. (Testimony, Exhibit D).
13. Officers did not observe any money exchange hands. (Testimony).
14. By letter dated July 9, 2019, Superintendent of Police Raymond Richardson made a written request to the Local Board that enforcement action be taken against Bar 74 for violations that took place on June 30, 2019. The letter cited two (2) violations of the Lowell Alcohol Beverages Regulations: 1) Section 2.01 Hours of Operation and 2) Section 2.02 Patron Entry Hours. (Exhibit B).
15. By letter dated July 16, 2019, Bar 74 was notified of a hearing scheduled on July 25, 2019 to address the complaint filed against Bar 74 by Superintendent Richardson. (Exhibit C).

16. On July 25, 2019, the Local Board held a public hearing regarding the claimed violations on June 30, 2019. Testimony from Captain Hodgdon, Officer Perrin and Ms. Murphy was offered at the hearing. (Exhibit D).
17. Based on the evidence presented at the hearing, the Local Board found Bar 74 in violation of the Lowell Alcohol Beverages Regulations, Section 2.01 Hours of Operation, and voted to suspend Bar 74's § 12 all alcoholic beverages license for a period of three (3) days, with one (1) day to be served and two (2) days held in abeyance for one (1) year. (Exhibit E).
18. The Local Board did not find a violation of Section 2.02 of their Alcohol Beverages Regulations. (Id.).
19. The Licensee appealed the Local Board's decision to the ABCC on July 31, 2019. (Exhibit F).

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. 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." Dolphino Corp. v. Alcoholic Beverages Control Comm'n, 29 Mass. App. Ct. 954, 955 (1990). 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, 29 Mass. App. Ct. at 955.

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).

"The Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations." Jaman Corp., d/b/a Crossroads (ABCC Decision Nov. 4, 2010). Accordingly here, the Local Board has the burden of producing satisfactory evidence before the Commission that Bar 74 committed a violation of Section 2.01 of the City of Lowell's Alcohol Beverages Regulations.

The evidence presented at the Commission hearing by the Local Board illustrates that around 2:07 am Lowell police officers observed from the front doorway of the licensed premises about four (4) to six (6) people in the establishment cleaning and about a dozen people standing at the bar and sitting at tables talking. (Testimony, Exhibit D). The officers did not observe anyone being served or sold an alcoholic beverage or anyone drinking an alcoholic beverage. (Id.). After speaking with the manager, the officers observed approximately eleven (11) people exit the premises but did not attempt to verify whether they were patrons or employees. (Id.).

While Lowell Police Captain Hodgdon who testified before the Commission was found to be professional and credible, he never entered the licensed premises and did not speak to any of the people he observed leaving the establishment. The Commission does not find that there was

sufficient evidence presented to prove that the people inside Bar 74 after 2:00 A.M. were patrons. In fact, Captain Hodgdon testified at the Commission hearing that he observed the people sitting around tables and standing by the bar and admitted that he did not observe anyone being served an alcoholic beverage nor drinking an alcoholic beverage. Capt. Hodgdon conceded that the establishment was not operating. (*Id.*). Captain Hodgdon merely assumed that the people who exited the establishment were patrons, rather than employees. He acknowledged that Ms. Murphy testified before the Local Board that the people on premise were employees waiting to receive their tips, but he was not convinced as she did not produce pay roll records to substantiate her assertion. (Testimony, Exhibit D). This assumption, without more, does not meet the level of substantial evidence necessary to prove that the Licensee violated Section 2.01 Hours of Operation of the City of Lowell's Alcohol Beverages Regulations.

Accordingly, the Commission disapproves the action of the Local Board in finding that the Licensee committed a violation of Section 2.01 of the City of Lowell's Alcohol Beverages Regulations on June 30, 2019, as alleged by the Local Board.

Furthermore, the Local Board is reminded of the Licensee's right to due process. The Commission suggests Lowell consider reassessing its policy wherein Licensees are not afforded the opportunity to cross-examine adverse witnesses at hearings.


CONCLUSION

Based on the findings above, the Alcoholic Beverages Control Commission ("Commission") **DISAPPROVES** the action of the Local Board in finding the Licensee committed a violation of Section 2.01 of the City of Lowell's Alcohol Beverages Regulations on June 30, 2019.

Therefore, the Commission **DISAPPROVES** the action of the Local Board in ordering a three (3) day suspension. The Commission remands the matter to the Local Commission with the recommendation that no further action be taken against the Licensee as any penalty would be discrepant with the Commission's decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Crystal Matthews, Commissioner 

Jean M. Lorizio, Chairman 

Dated: March 13, 2020

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.

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cc: Travis J. Jacobs, Esq.
Gary D. Gordon, Esq., Assistant City Solicitor
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File