



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
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Jean M. Lorizio, Esq.
Chairman

DECISION

**LD HOLDINGS LLC D/B/A BAR 74
76 MERRIMACK STREET
LOWELL, MA 01852
LICENSE#: 03090-RS-0630
HEARD: 7/26/2018 and 9/20/2018**

This is an appeal of the action of the City of Lowell Licensing Commission ("Local Board" or "Lowell") for suspending the § 12 all alcoholic beverages license of LD Holdings LLC d/b/a Bar 74 ("Licensee" or "Bar 74") located at 76 Merrimack Street, Lowell, MA for ten (10) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and hearings were held on Thursday, July 26, 2018, and Thursday, September 20, 2018.

The following documents are in evidence as exhibits:

1. Local Board Regulations;
2. Licensee's Security Plan & Submissions (18 pages) 1/12/2017;
3. Local Board's Decision 5/9/2017;
4. Local Board's Decision 6/13/2017;
5. Local Board's Decision 3/28/2018;
6. Local Board's Decision 5/9/2018;
7. Local Board's Notice of Hearing 4/20/2018 with Lowell Police Department Report; and
8. Lowell Police Department's Victim Witness Statement, 3/24/2018.

City of Lowell Exhibits:

- A. Local Board's Meeting Minutes, 1/12/2017;
- B. Local Board's Meeting Minutes, 3/22/2018;
- C. DVD of Local Board Meeting, 3/22/2018;
- D. Local Board's Notice of Hearing [on 4/12/2018], 3/23/2018;
- E. Local Board's Meeting Minutes, 4/12/2018;

- F. DVD of Local Board Meeting, 4/12/2018;
- G. DVD of Local Board Meeting, 5/3/2018;
- H. Print-out of Text Messages for a period from February 3rd to February 24th ;
- I. ABCC Investigator Michael Teehan's Investigative Report, 2/6/2018;
- J. Bar 74's Change of Manager Application, 4/14/2018;
- K. Local Board's Meeting Minutes, 4/6/2018;
- L. Bar 74's Appeal, 5/14/2018;
- M. Excerpt from Transfer Application of 11/22/2016, Q. 8, Manager Contact David Heeley;
and
- N. Bar 74's Subpoena to Lowell Local Board Chairman, John Descoteaux.

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

FINDINGS OF FACT

The Commission makes the following findings based on the evidence presented at the hearing:

1. LD Holdings LLC d/b/a Bar 74 ("Licensee" or "Bar 74") is the holder of a § 12 all alcoholic beverages license exercised at 76 Merrimack Street, Lowell, Massachusetts. The Licensee has held this license since February of 2017. Lauren DiSalvo is the sole officer/director/stockholder of the corporation. (Testimony, Commission records, Exhibit A)
2. David Heeley was the manager of record when this application was originally granted. (Testimony, Commission records, Exhibit A)

Failure to Appoint Approve License Manager within/for Thirty Days

3. At a Local Board hearing on March 22, 2018, the Licensee was questioned by a member of the Local Board as to the status and whereabouts of David Heeley as the license manager at Bar 74. (Testimony, Exhibit C)
4. Captain Webb of the Lowell Police Department notified the Licensee at the March 22, 2018 hearing that David Heeley resigned as the license manager of record at Bar 74. (Testimony, Exhibits 6, B, C)
5. Ms. Lauren DiSalvo had been unaware of that and was never notified by David Heeley that he resigned as the license manager at Bar 74. (Testimony, Exhibits C, G)
6. Mr. David Heeley testified before the Commission that he stopped working at Bar 74 as the license manager in November of 2017. He testified that he continued to work at Bar 74, but not as the license manager, until March 10, 2018. (Testimony)
7. Mr. Heeley testified that he told the Licensee that he was resigning but that he could not remember the exact date he resigned. (Testimony, Exhibit G)
8. In February of 2018, on eight (8) different dates, (2/3/18; 2/4/18; 2/6/18; 2/7/18; 2/10/18; 2/11/18; 2/23/18; 2/24/18) David Heeley and Lauren DiSalvo sent text messages to each

other regarding Mr. Heeley performing the duties of counting and reconciling cash revenue deposits from the premises, taking inventory of the alcohol, fixing the beer taps, and a meeting with the Lowell Fire Department regarding the fire inspection and certificate at the premises. (Testimony, Exhibit H)

9. On February 2, 2018, ABCC Investigators conducted a license premise inspection at Bar 74. Investigator Michael Teehan testified at a June 5, 2018 ABCC hearing on this matter and submitted a report in evidence that during the inspection Mr. David Heeley identified himself to ABCC Investigators as the license manager of record for Bar 74. (Commission records, Testimony, Exhibit I)
10. On April 16, 2018, Ms. DiSalvo submitted an application to the Local Board for Mr. Paul Palladino to become the License Manager at Bar 74. Mr. Palladino was approved by the Local Board and the ABCC. (Testimony, Commission records, Exhibits 6, F, G, J)

Failure to Display Alcohol License:

11. On or about March 6, 2018, the alcohol license of Bar 74 was not physically displayed on the wall, as is required. The Licensee was issued a violation notice.¹ (Testimony, Exhibits 6, 7, D, E, F)
12. The alcohol license was usually displayed in a frame on the wall inside the premises at a height of approximately nine feet. (Testimony)
13. When Ms. DiSalvo was notified that the license was not displayed on the wall, she went to Bar 74 and observed that the license was not in its typical location hanging on the wall. (Testimony)
14. Ms. DiSalvo and Bar 74's employees searched for the alcohol license and found it wrapped inside of a coat on top of the refrigerator.² (Testimony)

¹ The violation resulted when Lowell Police Detective Borodawka, after being instructed by his supervisor to specifically check to see if Bar 74's license was displayed on the wall, visited Bar 74 on March 6, 2018 and noticed that it was not present. Detective Borodawka testified before the Local Board on April 12, 2018 that he had never previously been instructed to observe whether an alcohol license was displayed on the wall inside a licensed premise. (Exhibits 7, E, F)

² Ms. DiSalvo testified that she had no idea who put the license there, or how it was placed there. As soon as the license was located, it was placed back in its usual position in a frame on the wall. (Testimony)

15. On May 3, 2018, the Local Board found the Licensee in violation of Rule 1.13³ (failure to display license) and Rule 1.15⁴ (failure to have a license manager or obtain one within thirty days of an unexpected termination) and suspended Bar 74's license for ten (10) days.⁵ (Testimony, Exhibits 6, G)
16. The Local Board Rules are silent regarding a specific disposition or suspension time periods for any violations. (Exhibit 1)
17. The Local Board Rules are silent regarding progressive discipline. (Exhibit 1)

DISCUSSION

Pursuant to M.G.L. Chapter 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) citing United Food Corp v. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978). 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.

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm’n, 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).

³ Local Board Rule 1.13 DISPLAY OF LICENSES AND PERMITS: “All licenses and permits issued by the License Commission shall be displayed on the licensed premises in a conspicuous place to which the public has access and from where the public can read.” (Exhibit 1)

⁴ Local Board Rule 1.15 MANAGER: “No corporation shall be approved for a license unless the corporation, by affirmative vote of a majority of its Board of Directors and duly affirmed by the Clerk of the Corporation, has appointed a Manager who has been vested with full authority and control of the premises and the business to be licensed. The Manager shall have total responsibility for the proper operation of the licensed premises, whether present or not. No appointment of a Manager shall be effective unless and until approved by the Lowell License Commission and Alcoholic Beverages Control Commission. . . . *Whenever an employee leaves his or her employment as Manger, it is incumbent upon the corporate directors to take action to present a suitable candidate as a replacement either in anticipation of the current Manager’s departure or within thirty days after an unexpected termination.* Massachusetts law requires that a corporate liquor license retain a manager for the day-to-day business on the licensed premises. Failure to do so shall be cause for the local licensing authority to suspend the liquor license.” (Exhibit 1) (Italics supplied.)

⁵ The Local Board did not specify or designate a specific time period of suspension for either violation. The Local Board also did not specify whether this penalty/disposition was to run concurrently for the two violations. (Exhibits 6, G)

The Commission is given “comprehensive powers of supervision over licensees.” Connolly, 334 Mass. at 617. M.G.L. c. 138 gives the Commission the authority to grant, revoke and suspend licenses. 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.

The Local Board has the burden of producing satisfactory proof that the Licensee violated Local Board Rules 1.13 and 1.15, and that the penalty imposed by the Local Board was a reasonable exercise of its lawful discretion.

Failure to Appoint an Approved License Manager

M.G.L. c. 138 § 26 states, in part, that the licensee must appoint a manager who shall have, “full authority and control of the premises, described in the license of such corporation, and of the conduct of all business therein relative to alcoholic beverages as the licensee itself could in any way have and exercise if it were a natural person resident in the commonwealth.” M.G.L. c. 138 § 26.

The Licensing Commission of Lowell pursuant to c. 138 § 23 has promulgated Local Board Rule 1.15 consistent with c. 138 § 26. The Local Board Rule 1.15 regarding the license manager of record further states, in part:

Whenever an employee leaves his or her employment as Manager, it is incumbent upon the upon the corporate directors to take action to present a suitable candidate as a replacement either in anticipation of the current Manager’s departure or within thirty days after an unexpected termination.

(Exhibit 1) (*Italics supplied*).

The Commission, after reviewing the evidence submitted does not find that the Local Board has met its burden of proof regarding this violation. The Commission finds that the evidence supports the fact that Mr. Heeley was employed as the license manager of record through March of 2018. The Commission also finds that the testimony of Mr. David Heeley is not reliable. Mr. Heeley testified inconsistently numerous times before the Local Board and this Commission.⁶

On February 2, 2018, ABCC Investigators conducted a license premise inspection at Bar 74. On this date, Mr. David Heeley identified himself to ABCC Investigators as the license manager of record at Bar 74.⁷ (Commission records, Exhibit I) Likewise, the text messages submitted by Ms. DiSalvo from February of 2018 for eight different dates between herself and Mr. Heeley,

⁶ The inconsistencies related to the number of times he worked at Bar 74 after November of 2017; the duties/jobs he performed at Bar 74 after he resigned in November of 2017 until March of 2018; the individual he notified at Bar 74 regarding his resignation as license manager; and with whom he corresponded in the text messages marked as Exhibit H. (Testimony; Exhibits G, H)

⁷ Mr. Heeley testified before the Commission that he never told ABCC Investigators that he was the license manager at Bar 74 but only that he was the “former manager.” (Testimony, Commission records, Exhibit I) The Commission finds Heeley’s testimony not credible.

discussing duties this Commission recognizes to be those of a license manager, support the position that Mr. Heeley was the license of manager of record in February of 2018. (Exhibit H)

The evidence in the record supports the Licensee's position that this was an unexpected departure/resignation by Bar 74's approved manager of record. The Commission finds Ms. DiSalvo's testimony credible that she was first notified that Mr. Heeley was no longer employed as the license manager at Bar 74 during the March 22, 2018 Local Board hearing. (Exhibit C) Less than one month later, on April 16, 2018, the Licensee submitted an application to the Local Board for Mr. Paul Palladino to become the license manager. (Exhibits F, J) Mr. Palladino was approved by the Local Board and the ABCC. (Commission records, Exhibits G)

The Commission finds that the time period from when the Licensee first received notice that the manager of record resigned on March 22, 2018 to April 16, 2018 when the Licensee submitted the application for the new license manager, is twenty-six (26) days. This time period is less than the thirty (30) days required by the Local Board pursuant to Local Board Rule 1.15.

The Commission finds that Bar 74 did not commit a violation of Local Board Rule 1.15.

Failure to Display Alcohol License

Local Board Rule 1.13 states: "All licenses and permits issued by the License Commission shall be displayed on the licensed premises in a conspicuous place to which the public has access and from where the public can read." (Exhibit 1)

Ms. DiSalvo admitted that the alcohol license was not displayed on the wall in its usual position. (Testimony) After searching the premises, the license was located wrapped inside a coat on top of the refrigerator. Id. Ms. DiSalvo testified that she had no idea who put it there, or how it was placed there. Id. As soon as the license was located, it was placed back in its usual position in a frame on the wall. Id.

The Commission finds that the license was not displayed on the wall, which is a violation of Rule 1.13. However, in reviewing the evidence in the record, the Commission is persuaded that the Licensee did not intentionally commit this violation and that the Licensee was unaware that its license was not displayed on the wall. The circumstances surrounding the license's removal from the wall and the discovery of the license wrapped in a coat on top of a refrigerator are puzzling. Given these facts and that there were no safety issues involved, the Commission recommends a warning for a violation of Rule 1.13.

CONCLUSION AND DISPOSITION

The Commission **DISAPPROVES** the action of the License Commission for the City of Lowell in finding that the Licensee committed the violation of Local Board Rules and Regulation 1.15;

The Commission **APPROVES** the action of the License Commission for the City of Lowell in finding that the Licensee committed a violation of failure to properly display its alcohol license in violation of Local Board Rules and Regulation 1.13; and

The Commission **DISAPPROVES** the action of the License Commission for the City of Lowell in suspending the license of LD Holdings, LLC d/b/a Bar 74 for ten (10) days. The Commission remands this matter to the Local Board and recommends the Local Board issue the penalty of a WARNING for a violation of Rule 1.13, failure to properly display its alcohol license.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: February 4, 2019

You have the right to appeal the decision disapproving of the non-renewal and the denial of transfer 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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