



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
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DECISION

**THE MIDDLE STREET VILLAGE INC. D/B/A THE VILLAGE SMOKEHOUSE
92-98 MIDDLE STREET
LOWELL, MA 01852
LICENSE#: 063000212
HEARD: 05/30/2017**

This is an appeal under M.G.L. c. 138, § 67, by The Middle Street Village Inc. d/b/a The Village Smokehouse ("Licensee" or "Village Smokehouse") located at 92-98 Middle Street, Lowell, Massachusetts. The Village Smokehouse is appealing the action of the City of Lowell License Commission (the "Local Board" or "Lowell") for suspending its M.G.L. c. 138, § 12 all alcoholic beverages license for two (2) days. The Village Smokehouse timely appealed the Local Board's action to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Tuesday, May 30, 2017.

The following documents are in evidence:

1. Decision of the Local Board, 2/3/17;
2. Letter from the Lowell Police Department to the License Commission, 11/30/16;
3. Letter from the Lowell License Commission to the Licensee, 12/21/16;
4. Lowell Police Department Incident Report, 11/12/16;
5. Lowell Police Department Arrest Report, 11/12/16;
6. Photographs of Iby's face;
7. Local Board Rules and Regulations;
8. Licensee's Report of 11/12/16 incident to the Local Board;
9. Letter to Licensee from the Local Board, 5/17/16;
10. Letter to Licensee from the Local Board, 11/14/16; and
11. Table of Local Board's alcoholic beverage violation findings, 2015-2017.

There is one (1) audio recording of this hearing, and four (4) witnesses testified. The Commission took administrative notice of the Licensee's Commission records. At the close of the hearing, the Commission left the record open until June 9, 2017 for the submission of closing statements as well as for the Local Board's two prior decisions regarding the Licensee and for evidence of penalties issued by the Local Board to other licensees for similar violations. The Commission timely received the closing statements as well as the other documentation, which the Commission has marked as Exhibits 9-11. Accordingly, the record is now closed.

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. The Middle Street Village Inc. d/b/a The Village Smokehouse holds a M.G.L. c. 138, § 12 all alcoholic beverages license exercised at 92-98 Middle Street, Lowell, MA. Alan Kaplan is president, secretary, and director of the corporation, and he is the license manager of record. Timothy Kelleher ("Kelleher") is a director and the treasurer of the corporation. (Commission records)
2. In the evening of Friday, November 11, 2016, Alex Iby ("Iby") arrived at the Village Smokehouse with his girlfriend and others. (Testimony)
3. Iby consumed one beer while on the licensed premises. (Testimony)
4. After midnight, in the early morning of November 12, 2016, Iby and his girlfriend were on the dancefloor of the Village Smokehouse when Iby's girlfriend got into an altercation with other female patrons. (Testimony) The altercation involved pushing and lasted less than a minute. (Testimony)
5. Iby removed his girlfriend from the altercation on the dancefloor and brought her to another area of the licensed premises-- the archway between the two bars. (Testimony)
6. A female bouncer approached Iby and his girlfriend and told them that they needed to leave. (Testimony)
7. Iby and his girlfriend walked towards the exit with Iby following his girlfriend. (Testimony)
8. About twenty to thirty seconds after Iby headed towards the exit, an unidentified person punched Iby in his left eye. (Testimony; Exhibit 6)
9. Iby fell to the floor. (Testimony)
10. When Iby stood up, his eye was blurry, and a male patron, who was unknown to Iby, took him to the bathroom to help him clean blood off of his face. (Testimony)
11. Iby was in the bathroom for a very brief period of time. (Testimony)
12. When Iby exited the bathroom, another man handed Iby an ice pack or a bag of ice. (Testimony) The man was not wearing a Village Smokehouse shirt, and Iby did not know if the man was an employee or a patron. (Testimony)
13. The bar was emptying out and the lights were on inside the licensed premises when Iby exited the bathroom. (Testimony)
14. The Licensee had turned the lights on in the establishment sometime after 1 a.m. (Testimony)
15. Iby does not recall speaking with any other Village Smokehouse employees, except for the instance when the female bouncer asked him to leave. (Testimony)
16. Iby went to the hospital later that morning, and then he went to the police station to report the incident. (Testimony; Exhibit 4)
17. Sometime between 1:10 a.m. and 1:30 a.m. on November 12, 2016, while the lights were on, there was an altercation involving a man (the "Perpetrator") and a woman near the front door of the licensed premises. (Testimony) Another man also may have been involved in the

- altercation, and other patrons were watching. Id. The doormen tried to separate the parties, and the Perpetrator became violent towards the doormen, punching and flailing. Id.
18. Kelleher witnessed the Perpetrator punch a doorman, and so he summoned a police officer, Officer Hanson, who was across the street, to help. (Testimony)
 19. Officer Hanson and Lieutenant Siopes were standing near the Village Smokehouse when they observed the Perpetrator's actions against the doormen. (Exhibit 5)
 20. The doormen attempted to escort the Perpetrator from the building, but the Perpetrator struggled with them. (Testimony; Exhibit 5)
 21. Officer Hanson and Lieutenant Siopes intervened and arrested the Perpetrator on the street as the Perpetrator continued flailing his arms and body. (Exhibit 5)
 22. There were about 300 patrons at the Village Smokehouse that evening. (Testimony)
 23. There were eight security employees working at the Village Smokehouse that night. (Testimony)
 24. The Licensee had requested police detail for this particular evening, but the detail request was not filled, and the Licensee only learned that it was not filled at about 10:30 p.m. on the evening of November 11, 2016. (Testimony)
 25. After observing the incident with the Perpetrator, Kelleher submitted to the Local Board an Incident Report notifying them that at approximately 1:10 a.m. on November 12, 2016, a woman and the Perpetrator got into an altercation in the vestibule and that when the doormen tried to separate the two people, the Perpetrator threw a punch at the doorman. (Exhibit 8; Testimony) The Local Board received the Incident Report on November 14, 2016. (Exhibit 1)
 26. With regard to the events of November 12, 2016, the Local Board charged the Licensee with violations of Sections 1.16 and 1.20 of the City of Lowell License Regulations. (Exhibit 3)
 27. Section 1.16 of the City of Lowell License Regulations provides in part that, "[t]he Manager shall ensure that there shall be no disorder, . . . misconduct, or any other disturbance permitted on the licensed premises . . ." (Exhibit 7)
 28. Section 1.20 of the City of Lowell License Regulations provides in part that, "[a]ll licensees for the sale and service of alcoholic beverages . . . shall notify the Lowell Police Department immediately, by telephone or otherwise, when any violation of law, disorder, disturbance is taking place, or is about to take place on the licensed premises . . . A notification to the Lowell Police when a violation of law, disorder, disturbance is taking place, or is about to take place shall not have an adverse effect upon the licensee's record, provided that there is no finding of fact of a violation by the licensee. Any person employed by the licensee for the purpose of selling and/or serving alcoholic beverages or any person so engaged without compensation shall notify the Lowell Police in the absence of the manager." (Exhibit 7)
 29. The Local Board held a hearing on the alleged violations on Thursday, January 26, 2017. (Exhibit 1) After consideration of the evidence presented at the hearing, the Local Board found that the Village Smokehouse violated Sections 1.16 and 1.20 of the City of Lowell License Regulations and voted to suspend the Village Smokehouse license for two days. (Exhibit 1)

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).

Adjudicatory findings must be “adequate to enable [a court] to determine (a) whether the order and conclusions were warranted by appropriate subsidiary findings, and (b) whether such subsidiary findings were supported by substantial evidence.” Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm’n, 12 Mass. App. Ct. 879 (1981) (quoting Westborough Dep’t of Pub. Util., 358 Mass. 716, 717-718 (1971)). General findings are insufficient, and if the licensing board does not make sufficient findings, it remains the Commission’s obligation to articulate the findings of fact, which were the basis of the conclusions it drew, and not merely adopt the findings of the board. Charlesbank Rest. Inc., 12 Mass. App. Ct. at 879. “Recitals of testimony do not constitute findings.” Johnson’s Case, 355 Mass. 782 (1968).

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).

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. Ch. 138, § 23. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981). “The Commission has comprehensive powers of supervision over licensees,” Boston Licensing Bd. v. Alcoholic Beverages Control Comm’n, 367 Mass. 788, 795 (1975), 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 Comm’n, 11 Mass. App. Ct. 785, 788 (1981).

The Local Board charged the Licensee with violating Sections 1.16 (failure to ensure that there be no disorder, misconduct, or other disturbance permitted on the licensed premises) and 1.20 (failure to immediately notify the Lowell Police Department that a violation of law, disorder, or disturbance is taking place or is about to take place on the licensed premises) of the City of Lowell License Regulations.

Whether the Licensee Violated Section 1.16

Section 1.16 of the City of Lowell License Regulations parallels the Commission’s regulation 204 CMR 2.05 (2), which the Commission and the courts repeatedly have interpreted.¹ Licensees have an

¹ 204 CMR 2.05 (2) provides that “[n]o licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. The licensee shall be responsible therefor, whether present or not.”

obligation to maintain control over the premises and to comply with Chapter 138 and local regulations. The responsibility of a licensee is to “exercise sufficiently close supervision so that there is compliance with the law on the premises.” Rico’s of the Berkshires, Inc. v. Alcoholic Beverages Control Comm’n, 19 Mass. App. Ct. 1026, 1027 (1985). A licensee who sells alcohol is “bound at his own peril to keep within the condition of his license.” Burlington Package Store, Inc. v. Alcoholic Beverages Control Comm’n, 7 Mass. App. Ct. 186, 190 (1979) (quoting Commonwealth v. Gould, 158 Mass. 499, 507 (1893)). “It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter.” Rico’s of the Berkshires, 19 Mass. App. Ct. at 1027.

A licensee has a duty of care to prevent only foreseeable harm to its patrons and others. The Do Corp. d/b/a Whiplash (ABCC Decision July 1, 2015). The inquiry here is whether there was any conduct by the Licensee’s patrons on November 12, 2016 that put the Licensee on notice of imminent harm that the Licensee could have prevented. See Rypan, Inc. d/b/a The Shooters Café (ABCC Decision December 19, 2012). There were at least four instances of pushing, shoving, and/or punching in the early morning hours of November 12th—when women pushed each other on the dancefloor, when a person punched lby in the face as he was walking towards the exit, when a woman and the Perpetrator and possibly another male fought near the doorway of the premises, and when the Perpetrator resisted intervention by the doormen, flailing and punching at least one of them. (Testimony) The Perpetrator also resisted assistance from the police officers, who arrested the Perpetrator on the street as the Perpetrator continued flailing his arms and body. (Testimony; Exhibit 5)

This is unlike previous cases that established foreseeability of a patron on patron assault. See Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 641 (1961) (bartender observed a boisterous patron engage in “words back and forth,” “loud talk,” and “a lot of commotion” before the patron charged the plaintiff and landed on him); Carey v. New Yorker or Worcester, Inc., 355 Mass. 450, 451 (1969) (patron, who was part of a group across the aisle from the plaintiff that was “making a lot of noise,” “talking loud,” “getting up and jumping around,” and then shot the plaintiff); Greco v. Sumner Tavern, Inc., 333 Mass. 144, 145 (1955) (foreseeability where intoxicated patron was boisterous and talking loudly, “antagonizing” other patrons fifteen minutes before assaulting the plaintiff); Trempe & Torres, Inc. d/b/a Marabu Café (ABCC Decision August 21, 2012) (where Lawrence clubs had a practice of pat-frisking for weapons at the door, where licensee did not pat-frisk or engage in usual security practices, it was foreseeable patrons could enter with weapons); Scioli Corp. d/b/a Scioli’s Pizza Bar (ABCC Decision September 11, 2012) (foreseeability of imminent harm where “bouncer” working for licensee attacked a patron; when the victim spoke with the licensee about the attack, the licensee did not call the police or emergency personnel and requested that the patron not call police either; the bouncer, who was still on the premises, then attacked the victim again).

The Licensee here did everything it reasonably could to prevent any kind of patron on patron assault, all factors which the Commission has found in the past to be controlling. See Juan M. Vargas d/b/a Restaurante Bar Caballo Blanco (ABCC Decision October 15, 2008) (providing that prior knowledge can be established by “prior history of violence by patrons, overcrowding, intoxicated patrons, [or] prior knowledge of patrons in possession of illegal weapons.”) There is no evidence that the club was overcrowded. There was no evidence of an issue of intoxication of any patrons (including the patrons involved in the altercations) or service to minors. The Licensee had requested a police detail that evening, and there were roughly eight staff members for the three hundred or so patrons. (Testimony) There was no evidence of a history of patrons who had prior incidents. Also, there was no evidence that the patrons’ conduct in the minutes and hours leading up to the altercations should have alerted the

Licensee to the possibility of an imminent fight. See Kane, 341 Mass. at 641; Carey, 355 Mass. at 451; Greco, 333 Mass. at 145.

The altercations here are more akin to prior Commission decisions wherein no violation for a patron on patron assault was found. See RJA Corp. d/b/a Jo Angelo's Café (ABCC Decision March 5, 2014) (no violation where a patron was not intoxicated, entered a bathroom, and was attacked by another patron unprovoked where the incident lasted for sixty seconds, there was no prior indication that an assault was about to ensue, and there was no known provocation); Rypan, Inc. d/b/a The Shooters Café (ABCC Decision December 19, 2012) (no violation where patrons were arguing in the bathroom, the victim left the bathroom and was immediately stabbed because the entire incident lasted thirty seconds, security personnel immediately responded and escorted the assailant off the premises, and there was no prior indication that an altercation was about to ensue); Trois, Inc. d/b/a The Hide-A-Way (ABCC Decision August 17, 2007) (no violation where patron was struck by another patron when the altercation was over within a minute, neither of the patrons were intoxicated, and the establishment was not overcrowded).

Here, with regard to the events Iby witnessed and/or experienced, the pushing on the dancefloor among the women lasted less than a minute. (Testimony) There is no evidence as to what prompted the dancefloor incident or that it was foreseeable. After a female bouncer told Iby and his girlfriend that they needed to leave, only about twenty to thirty seconds passed before someone punched Iby in the face. Id. The action of the female bouncer in ejecting Iby and his girlfriend from the licensed premises in an apparent attempt to prevent a further altercation with the other women was appropriate. The Commission finds that the Licensee cannot be held liable for the punch Iby experienced because the Licensee's employees had no time to reasonably prevent the punch. See Acunha Restaurant Corp. d/b/a Plaza Mexico (August 30, 2016) (no violation where stabbing occurred two minutes after an altercation and only seconds after the knife became visible, because the Licensee's employees had no time to reasonably prevent the stabbing); Trois, Inc. d/b/a The Hide-A-Way (June 27, 2007) (no violation where patron impulsively struck another patron and the altercation was over within a minute). Moreover, Iby himself was not involved in the shoving among the women on the dancefloor, and therefore, it was not foreseeable that someone would punch him as he walked toward the exit of the premises.

There is no evidence that there was any correlation between the dancefloor incident or the Iby incident to the altercation(s) involving the Perpetrator. However, the evidence is that the altercations occurred generally around the same time -- after 12:00 a.m. on November 12th. When Iby exited the bathroom and when the altercation involving the Perpetrator occurred, the lights were on inside the licensed premises. The Licensee turned on the lights after 1:00 a.m. Other than these facts, the precise timing and sequence of the punch of Iby relative to the Perpetrator's events is not entirely clear. There is no evidence to suggest that the Perpetrator's behavior was foreseeable or that the Licensee could have or should have acted sooner to prevent the Perpetrator's actions. The Licensee's doormen acted swiftly upon witnessing the altercation between the woman and the Perpetrator in the vestibule. There is no evidence to suggest that any of the Licensee's employees witnessed Iby being punched or that they learned of the punch that evening. There is also no evidence to show who punched Iby. Additionally, Iby was not involved in the altercation by the vestibule involving the woman and the Perpetrator. Therefore, the punch to Iby could not have served to warn the Licensee that any other altercation was imminent, if indeed the punch to Iby occurred before the Perpetrator's actions in and near the front vestibule.

The Commission finds that there is no evidence of a violation of Section 1.16 of the City of Lowell License Regulations because there is no evidence of conduct by the Licensee's patrons on November 12, 2016 that put the Licensee on notice of imminent harm that the Licensee could have prevented.

Whether the Licensee Violated Section 1.20

Section 1.20 of the City of Lowell License Regulations requires licensees to "notify the Lowell Police Department immediately, by telephone or otherwise, when any violation of law, disorder, [or] disturbance is taking place, or is about to take place on the licensed premises." (Exhibit 7) Here, Kelleher summoned Officer Hanson and Lieutenant Siopes of the Lowell Police Department as soon as he saw the doormen struggling with the Perpetrator. (Testimony; Exhibit 5) There is no question that the Licensee's actions were immediate with regard to the altercation involving the Perpetrator.

The issue here is whether the Licensee complied with Section 1.20 with regard to the altercation on the dancefloor and the punch to Iby. As explained above, there is no evidence as to the precise timing of the altercations or the sequence of the punch of Iby relative to the Perpetrator's events. However, all of the altercations occurred after 12:00 a.m. on November 12, 2016 and likely occurred around 1:00 a.m. As soon as Kelleher witnessed the altercation with the Perpetrator, he immediately sought police assistance. Given the lack of evidence as to the precise timing and sequence of events, the Commission cannot find that the Licensee failed to notify the Lowell Police Department as soon as it learned that a disturbance was taking place on the licensed premises.

CONCLUSION

Based on the evidence and testimony at the hearing, the Commission **DISAPPROVES** the action of the City of Lowell Licensing Board in finding that The Middle Street Village Inc. d/b/a The Village Smokehouse violated Sections 1.16 (failure to ensure that there be no disorder, misconduct, or other disturbance permitted on the licensed premises) and 1.20 (failure to immediately notify the Lowell Police Department that a violation of law, disorder, or disturbance is taking place or is about to take place on the licensed premises) of the City of Lowell License Regulations. Therefore, the Commission **DISAPPROVES** the action of the City of Lowell Licensing Board in suspending the Licensee's M.G.L. c. 138, § 12 license for two (2) days. The Commission remands the matter to the Local Board with the recommendation that no further action be taken against the Licensee, as any penalty would be discrepant with this decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner 

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

Kathleen McNally, Commissioner 

Dated: September 5, 2017

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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