



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

FEDERAL STREET, CORP. D/B/A LIDO CAFÉ
106-12 FEDERAL STREET
LYNN, MASSACHUSETTS 01905
LICENSE#: 063800030
HEARD: 07/22/2015

This is an appeal of the action of the City of Lynn Licensing Board (the "Local Board" or "Lynn") for suspending the M.G.L. c. 138, §12 all-alcohol license of Federal Street, Corp. d/b/a Lido Café ("Licensee" or "Lido Café") located at 106-12 Federal Street, Lynn, Massachusetts, for seven (7) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Wednesday, July 22, 2015.

The following documents are in evidence:

1. Alcoholic beverages license for Lido Café;
2. Rules and Regulations of the City of Lynn Licensing Board;
3. Police report, March 29, 2015;
4. Decision of the Local Board, May 20, 2015; and
5. Federal Street Corporation's additional submissions.

On September 28, 2015, by agreement of the parties, Lido Café submitted information it obtained from Lynn about Lynn licensees' violations of the alcoholic beverages control laws and regulations between the period of November 28, 2006 to the present. (Exhibit 5)

There is one (1) audio recording of the July 22, 2015 hearing, and three (3) witnesses testified: the owner/ license manager of Lido Café, a police officer who was not present at the time of the incident, and a member of the Local Board.

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

FINDINGS OF FACT

1. Federal Street, Corp. d/b/a Lido Café, located at 106-12 Federal Street, Lynn, Massachusetts, holds an all alcoholic beverages restaurant license under M.G.L. c. 138, §12. James Irving is the owner and license manager. (Commission Files)
2. Lido Café's license requires that the premises be open no later than 1:00 a.m. (Exhibit 1; Testimony)
3. On March 29, 2015, after 1:00 a.m., Lynn Police Officers Daley and Gasca observed approximately fifteen individuals standing outside of Lido Café. (Exhibit 3; Testimony)
4. Once the officers entered Lido Café at about 1:03 a.m., they observed a patron exit the restroom and then exit the premises. (Exhibit 3; Testimony)
5. Mr. Irving was not on the premises at the time, but at the hearing before the Commission, he conceded that the patron who exited the bathroom was on the premises after 1:00 a.m. (Testimony)
6. In the almost twelve years that the current owner of Lido Café has had the §12 license, Lido Café has not had any other license violations. (Commission Files)
7. The Local Board held a hearing on May 19, 2015 at which it voted to suspend Lido Café's all alcoholic beverages license for a period of seven days, three days to be served and four days to be held in abeyance for one year. (Exhibit 4)
8. On its own initiative, the Licensee thereafter rolled back its closing time to 12:00 a.m., although the license still allows for a 1:00 a.m. closing time. (Testimony)
9. There were fourteen after-hour violations in Lynn from November 28, 2006 to September 28, 2015.¹ Of the fourteen violations, there were five suspensions (including Lido Café), seven letters of warning,² and two violations accepted for the file with no sanction. Further review of the five suspensions illustrates that all of the licensees other than the Lido Café, had a history of past violations. (Exhibit 5)

¹ At the conclusion of the Commission's July 22, 2015 hearing, the parties agreed to keep the record open so that they could submit information about penalties issued by Lynn for similar violations. On September 28, 2015, counsel for the Licensee submitted to the Commission information it obtained from Lynn relative to Lynn licensees' violations from November 28, 2006 to September 28, 2015 and particularly concerning violations of the after-hours regulations. (Exhibit 5)

² Police reports indicate that some of the after-hour violations that resulted in warnings had far worse facts than in the present case. (Exhibit 5) For example,

- 4/27/14 police report: at 1:25 a.m., several people were sitting around a table eating, and someone was singing karaoke—warning issued;
- 2/21/12 police report: at 1:18 a.m., two patrons and two employees were in the back bar, and an employee served a beer after hours—warning issued;
- 2/15/12 police report: at approximately 1:03 a.m., several customers were drinking alcoholic beverages, the bartender poured a mixed drink, several alcoholic beverages were observed on the bar and tables, and a person was still playing the guitar—warning issued.

DISCUSSION

Pursuant to M.G.L. Ch. 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. Bd. of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 – 476 (1989).” Dolphino, 29 Mass. App. Ct. at 955.

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. c. 138, §23, as amended through St. 1977, c. 929, §7. “[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 is given “comprehensive powers of supervision over licensees,” Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 617 (1956), 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).

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. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§23, 64.

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 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

The Licensee is charged with violating the terms of the license (1:00 a.m. closing time) and the Local Board’s Rules and Regulations concerning management and control of the premises. On May 19, 2015, after a hearing, the Local Board voted to suspend the Licensee’s license for a period of seven days, three to be served and four to be held in abeyance for one year. (Exhibit 4; Testimony)

A local board may set the closing hours for individual establishments within statutory limits. See Casa Loma, Inc. v. Alcoholic Beverages Control Comm’n, 377 Mass. 231, 234 (1979); Boston Licensing Bd. v. Alcoholic Beverages Control Comm’n, 367 Mass. 788, 794 (1975). There is no dispute that here it was within the Local Board’s discretion to set the closing time of the licensed

premises to 1:00 a.m. See Casa Loma, Inc., 377 Mass. at 232-235; Colonial Tavern, Inc. v. Boston Licensing Bd., 384 Mass. 372, 375-376 (1981); Exhibit 1.³ Consequently, the Licensee's patrons are not permitted to be on the premises after the 1:00 a.m. closing hour.⁴ (Exhibit 1) In this case, the Licensee concedes that on March 29, 2015, a patron exited the premises a few minutes after 1:00 a.m.—just after he exited the bathroom. (Testimony; Exhibit 3) Therefore, a violation occurred.⁵

While a violation occurred, the Commission disagrees with the Local Board's imposition of a seven day suspension, three days to be served. (Exhibit 4) This was the Licensee's first violation in almost twelve years. (Commission Files) On March 29, 2015, the Licensee's last patron exited the premises when the officers arrived at 1:03 a.m., just three minutes after closing time. (Exhibit 3) That patron had been in the bathroom. No patrons were seen with alcoholic beverages inside the premises after the 1:00 a.m. closing time. See *id.* Moreover, following the Local Board hearing, the Licensee self-imposed an earlier closing time in an effort to avoid future violations. (Testimony)

While the Local Board's Rules and Regulations include progressive discipline guidelines that suggest a seven to ten day suspension for a first violation of Local Board and/or Commission Rules and Regulations, "[t]he Local Board reserves the right to impose lighter or more severe discipline based on the history of the establishment . . . and other information, this includes written warnings." (Exhibit 2, p. 14) Information from the parties relative to Lynn licensees' violations from November 28, 2006 to September 28, 2015 reveals that there were fourteen after-hour violations in Lynn during that time period. (Exhibit 5) Of the fourteen, there were five suspensions (including Lido Café) and seven letters of warning, and two violations were accepted for the file with no sanction. *Id.* Of the fourteen violations, there were five suspensions (including Lido Café), seven letters of warning, and two violations accepted for the file with no

³ Sales must be permitted, except on certain days (see G. L. c. 138, § 33), between 11 a.m. and 11 p.m. Casa Loma, Inc., 377 Mass. at 233. The Supreme Judicial Court has concluded that "the hours of a licensee during the periods from 8 a.m. to 11 a.m. and from 11 p.m. to the statutorily mandated closing time (2 a.m. as to restaurants) are a matter solely of local control, subject only to judicial review of a local authority's failure to give a proper hearing." *Id.* at 234.

⁴ Under certain circumstances, employees may be on the licensed premises after closing hours. See M.G.L. c. 138, §12 (providing "that any such licensee or his manager shall not be prohibited from being on the licensed premises at any time; provided, further, that the employees, contractors or subcontractors shall not be prohibited from being upon such premises at any time for the purpose of cleaning, . . . opening or closing the business in an orderly manner"). Consequently, there is no issue with the fact that in the present case certain of the Licensee's employees were on the premises after hours in order to clean and close the premises.

⁵ The police report indicates that at 1:03 a.m. other patrons were exiting the premises as the police officers entered the premises. (Exhibit 3) However, at the hearing, the Local Board did not produce any percipient witnesses or direct evidence to corroborate the observations recited in the police report. In fact, the Licensee denies that any patron other than the person exiting the bathroom was on the premises after 1:00 a.m. (Testimony) The Commission will not rely on such hearsay statements in the police report that are contradicted by the evidence in this case. See Merisme, 27 Mass. App. Ct. at 475-476 (finding that board's decision was a denial of plaintiff's substantial justice where board relied entirely on hearsay statement in police report; "[t]his also is not a case where the hearsay evidence relied on was sufficiently corroborated by other evidence, . . . or a case where the evidence was within an exception to the hearsay rule and therefore competent to support the board's decision, . . . or a case where the hearsay evidence was uncontradicted on the record."); Murphy v. Superintendent, Mass. Corr. Inst., Cedar Junction, 396 Mass. 830, 834 (1986) (determining that sometimes "hearsay standing alone in support of a conclusion may not be substantial evidence, especially when it is contradicted by more reliable evidence. . . . On the other hand, hearsay evidence, especially if . . . it is uncontradicted on the record, may well be sufficiently reliable to support a conclusion.").

sanction. Id. Further review of the five suspensions illustrates that all of the licensees, other than the Lido Café, had a history of past violations. Id. Notably, the Local Board issued more warning letters for after-hours violations than it did suspensions. Id. Police reports submitted by Lido Café in the September 28, 2015 submission indicate that some of the after-hour violations that resulted in warnings had far worse facts than in the present case.⁶ Id.

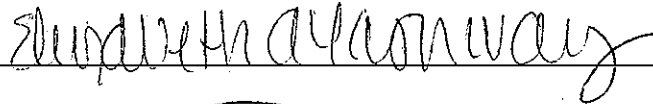
For the reasons cited above, including in recognition of the Licensee's clean history of no prior violations, the fact that the Licensee violated the terms of its license only because a patron had been using the bathroom, and given that the Local Board has more regularly imposed warnings to licensees who violate the after-hours regulation, the Commission finds that the penalty imposed by the Local Board was unwarranted and unsupported by the record.

CONCLUSION

The Alcoholic Beverages Control Commission **DISAPPROVES** the penalty imposed by the Local Board. The appeal from the decision of the City of Lynn Licensing Board to suspend the license of Federal Street, Corp. d/b/a Lido Café for seven (7) days is hereby **remanded back to the Local Board with the recommendation that it issue Lido Café a warning letter.**

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner



Kim S. Gainsboro, Chairman



Dated: October 19, 2015

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.

⁶ For example,

- 4/27/14 police report: at 1:25 a.m., several people were sitting around a table eating, and someone was singing karaoke—warning issued;
- 2/21/12 police report: at 1:18 a.m., two patrons and two employees were in the back bar, and an employee served a beer after hours—warning issued;
- 2/15/12 police report: at approximately 1:03 a.m., several customers were drinking alcoholic beverages, the bartender poured a mixed drink, several alcoholic beverages were observed on the bar and tables, and a person was still playing the guitar—warning issued.

(Exhibit 5)

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