



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

Steven Grossman
Treasurer and Receiver General

DECISION

Kim J. Gainsboro, Esq.
Chairman

75 PURCHASE STREET CORPORATION DBA PETER'S MARKET
75 PURCHASE STREET
MILFORD, MA 01757
LICENSE#: 070600047
HEARD: 12/11/2013

This is an appeal of the action of the Town of Milford Board of Selectmen (the "Local Board" or "Milford") for suspending the M.G.L. c. 138 §15 license of 75 Purchase Street Corporation d/b/a Peter's Market (the "Licensee" or "Peters Market") located at 75 Purchase Street, Milford, MA for thirty (30) days and finding a violation of M.G.L. c. 138, §64. The Licensee timely appealed the Local Board's decisions to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, December 18, 2013. The Licensee admitted to selling an alcoholic beverage to a person under twenty-one years of age in violation of M.G.L. c. 138, §34. As a result, the sole issue on appeal is whether the penalty imposed by the Local Board, i.e. thirty (30) day suspension, was reasonable or, as the Licensee argues, arbitrary and capricious.

The following documents are in evidence as exhibits:

- A. Local Board's Hearing Notice dated 5/7/2013;
- B. Local Board's Hearing Notice dated 5/7/2013;
- C. Local Board's Decision and Statement of Reasons dated 6/18/2013;
- D. Documents Relating to Licensee's Compliance Check of 4/13/2013;
- E. Local Board's Decision and Statement of Reasons dated 3/2/2010; and Local Board's Decision dated 10/19/2010;
- F. Licensee's Case Law References;
- G. ABCC Decisions Referenced by Licensee;
- H. Minutes of the Local Board's Meeting;
- I. DVD Recording of Local Board's Hearing held 6/17/2013;
- J. Local Board's History of its Liquor Disciplinary Proceedings from January 2009 to 7/1/2013;
- K. Letter dated 4/30/2012 from Milford Police Department to Local Board re: Compliance Checks;
- L. Letter dated 9/28/2012 from Milford Police Department to Local Board re: Compliance Checks.

There is one (1) audio recording of this hearing.

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

FACTS

The Commission makes the following findings of fact and rulings of law:

1. 75 Purchase Street Corporation d/b/a Peter's Market is the holder of a M.G.L. c. 138, §15 wine and malt beverages retail package store license located at 75 Purchase Street, Milford, MA. (Commission Records)
2. On Saturday April 13, 2013 from 6:00 p.m. to 10:00 p.m. Milford Police Detective Michael Mastroianni and Detective Carlos Sousa conducted compliance checks of liquor stores located within the Town of Milford, acting under the supervision of the Milford Police Department in accordance with the Town of Milford Alcohol Compliance Check Guidelines. (Exhibits D1, D2, D3, D4, D5, D6, D7, D8)
3. Compliance checks were conducted using a twenty (20) year old undercover operative at 16 licensed establishments in Milford that were open during this operation. (Exhibits D1, D2, D3, D4, D5, D6, D7, D8)
4. The Town of Milford has Compliance Check Guidelines. The compliance checks/stings, as a matter of procedure are published through a press release and in the online news one (1) week before they are conducted. After the checks are completed, each establishment is sent a letter indicating whether they passed or not. (Exhibits D6, D8)
5. During this operation, pursuant to the Town of Milford's Compliance Check Guidelines, the undercover operative did not have a wallet, or currency other than the one twenty dollar bill of U.S. Currency provided by Milford Police Detectives. (Exhibits D1, D2, D3, D4, D5, D6)
6. The undercover operative was instructed to go into each of the sixteen (16) establishments and attempt to purchase a "6 pack" of Budweiser Light beer. If identification was asked for, the undercover operative was instructed to immediately leave the establishment. (Exhibits D1, D2, D3, D4, D5, D6)
7. The Licensee does not dispute that at approximately 7:21 p.m. on April 13, 2013 the twenty (20) year old underage operative, as part of the compliance check, entered Peter's Market and purchased a six-pack of Michelob beer and he was not asked for any identification. On this evening, Mr. Dindup Punel, the clerk on duty at Peter's Market, sold alcohol to the minor. (Joint Pre-Hearing Memorandum, Exhibits C, D1)
8. The Licensee does not challenge that the Milford Police Department conducted this compliance check without adhering to the Compliance Check Guidelines. (Joint Pre-Hearing Memorandum)
9. During this sting, two (2) of the sixteen (16) establishments involved did not request identification from the underage operative before selling him alcoholic beverages, thus committing a violation. Two licensees, Peter's Market, and the Milford Package Store, each failed the compliance check. (Exhibits C, D1, D7, D8)
10. The Milford Package Store, which failed the compliance check on this date, did not receive a penalty. The Local Board voted to issue this licensee a "Letter of Reprimand" or "Warning" as this was its first offense. (Exhibits D1, D8, H, J)

11. On June 17, 2013, the Local Board held a hearing under two separate notices with two separate and unrelated sets of allegations. Both notices were dated May 7, 2013.¹ (Exhibits A, B, C, H)
12. The Licensee has two previous violations which each occurred in 2010. The Licensee's first violation of M.G.L. c. 138, §34, for the sale of alcohol to a minor was not a compliance check. On March 2, 2010, the Local Board imposed the sanction of a one (1) day suspension. (Exhibits E9, H, J)
13. The second violation committed by the Licensee in 2010 was a violation of M.G.L. c. 138, §69, for the sale of alcoholic beverages to an intoxicated individual. On October 19, 2010, the Local Board imposed the penalty of a twelve (12) day suspension. (Exhibits E10, H, J)
14. By its Decision and Statement of Reasons in this matter, dated June 18, 2013, the Local Board found the Licensee violated M.G.L. c. 138, §34 and suspended its license for thirty (30) days. Two (2) of the Local Board members voted to impose a thirty (30) day suspension, and one (1) member voted to impose a fifteen (15) day suspension. (Exhibits C, H)
15. The Local Board's decision stated that this thirty (30) day penalty was imposed due to the Local Board's practice of progressive discipline, as the previous offenses were serious in nature and occurred within a short period of time of each other. (Exhibit C)
16. The Licensee passed two other compliance checks held on April 30, 2012 and September 28, 2012. (Exhibits K, L)
17. The Local Board held hearings and imposed sanctions for license violations in 2009, 2010, 2012, and 2013. (Exhibit J)
18. 2009:
 - a. Contemporary Concepts, Inc. d/b/a Route 85 Mobile, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or "Warning." (Exhibit J)
 - b. Tanglewood Drive, LLC d/b/a The Purchase Street Market, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or "Warning." (Exhibit J)
 - c. CalMol Corporation, d/b/a Fat Boy Bill's Bar & Grille, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or "Warning." (Exhibit J)
 - d. Galway Milford, Inc. d/b/a TD's Pub was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or "Warning." (Exhibit J)
 - e. El Taco, Inc. d/b/a Acapulco's Mexican Family Restaurant, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years

¹ On the alleged violation of M.G.L. c. 138, §69, the Board concluded that there was insufficient evidence to justify taking any action in relation to that purported event. (Exhibits C, H)

- of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or “Warning.” (Exhibit J)
- f. Trushkush Corporation d/b/a Main Street Market, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or “Warning.” (Exhibit J)
 - g. Milford Brew & Que Company, Inc. d/b/a Tennessee’s BBQ & Grill (January 6, 2009) was found to have committed the violation of operating and selling alcoholic beverages after the approved closing hour, and an excessive number of Police calls/responses to the premises – the Local Board imposed a five (5) day suspension. (Exhibit J)
 - h. The Lanai Restaurant, Inc. d/b/a The Pago Pago Restaurant, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, Fourth (4th) offense – the Local Board imposed a nine (9) day suspension, which was upheld upon appeal to the Commission. (Exhibit J)
 - i. Milford Brew & Que Company, Inc. d/b/a Tennessee’s BBQ & Grill, (March 24, 2009) was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, - the Local Board imposed a ten (10) day suspension, as it was a second recent serious violation subsequent to the aforementioned operating after legal closing hour and an excessive number of Police calls/responses to the premises. (Exhibit J)

19. 2010:

- a. Mui T. Tran, d/b/a Cedar Street Market, committed three violations during the same evening of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age. One sale/violation was conducted as a compliance check. The licensee was found to have committed two additional sales to minors, on the same evening, which were non-compliance checks. The Local Board imposed a five (5) day suspension, which was upheld on appeal to the Commission.² (Exhibit J)
- b. A & A Fuel, Inc. d/b/a Route 109 Mobile, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, Third (3rd) offense – the Local Board imposed a five (5) day suspension. (Exhibit J)
- c. Contemporary Concepts d/b/a Route 85 Mobile, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, Third (3rd) offense – the Local Board imposed a three (3) day suspension. (Exhibit J)
- d. Tanglewood Drive, LLC d/b/a The Purchase Street Market, was found to have committed a violation of M.G.L. c. 138, § 34 - sale of alcoholic beverages to a person under 21 years of age, Third (3rd) offense – the Local Board imposed a three (3) day suspension. (Exhibit J)
- e. Adonis, Inc. d/b/a Quick Mart, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, Third (3rd) offense – the Local Board imposed a three (3) day suspension. (Exhibit J)
- f. Aida Café, Inc. d/b/a The Tradesman, was found to have committed the violation of allowing improper activities (nude dancing by patrons) – the Local Board imposed a ten (10) day suspension. (Exhibit J)
- g. Aida Café, Inc. d/b/a The Tradesman, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or “Warning.” (Exhibit J)

² This Compliance check was not advertised, therefore that violation was not upheld by the Commission. The Commission upheld the five (5) day suspension due to the other two (2) violations for sales to minors that occurred on the same evening, which were not compliance checks. (Exhibit J)

20. 2012:

- a. Scioli Corporation d/b/a Scioli's Pizza Bar, was found to have committed violations of M.G.L. c. 138, §69 - Service to an Intoxicated Patron; Permitting an Illegality, a violation of 204 CMR 2.05 (2) to wit: Licensee's Employee Assaulting a Patron resulting in serious bodily injury (2 counts); and Licensee's Failure to Call Police, the Local Board imposed a three week suspension.³ (Exhibit J)

21. 2013:

- a. Bapanu Corporation d/b/a Milford Package Store, was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or "Warning." (Exhibit J)
- b. Linchris Hotel Corporation d/b/a Doubletree Hotel Boston/Milford was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or "Warning." (Exhibit J)
- c. TGI Friday's Inc. d/b/a TGI Friday's was found to have committed a violation of M.G.L. c. 138, §34 - sale of alcoholic beverages to a person under 21 years of age, a compliance check, First (1st) offense – the Local Board did not impose a sanction and issued a written reprimand or "Warning." (Exhibit J)

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Connolly v. Alcoholic Beverages Control Commn., 334 Mass. 613, 619 (1956), Opinion of the Justices, 368 Mass. 857, 861 (1975). M.G.L. chapter 138 gives the local board and commission the authority to grant, revoke and suspend licenses. Chapter 138 was "enacted to serve the public need and... to protect the common good." M.G.L. chapter 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. Board 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., 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 Commission, 11 Mass. App. Ct. 785, 788 (1981).

M.G.L. c. 138, §67, provides that "[a]ny person who is aggrieved by the action of the local licensing authorities in modifying, suspending, cancelling, revoking or declaring forfeited their license may appeal therefrom to the Commission If the Commission approves the action of the local licensing authorities it shall issue notice to them to that effect, but if the Commission disapproves of their action it shall issue a decision in writing advising said local authorities of the reasons why it does not approve (said action) and shall then remand the matter to the said local authorities for further action."

As noted above, the Licensee does not challenge the Local Board's finding that a violation occurred. Therefore, the Commission must review whether the penalty imposed by the Local Board for this violation was reasonable. In assessing penalties for violations occurring solely as the result of a "sting," penalties imposed should never be draconian. See Applebee's Northeast, Inc. dba Applebee's

³ The Commission found no violation for the service of alcohol to an intoxicated patron, however, it upheld the violation of permitting an illegality, employee assaulting patron resulting in serious bodily injury (2 counts) and upheld the penalty of a three (3) week suspension. (Exhibit J)

Neighborhood Bar & Grill, Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.). See Epicure Package Store, Inc. (ABCC decision dated 01/31/2007). The Commission has consistently held that [t]he policy behind a “sting” operation should be the education of licensees in the risks associated with selling alcoholic beverages without requesting proof of age. In re: Assinippi Liquors, Inc., Wareham (ABCC decision dated 06/08/2004); Epicure Package Store, supra. (ABCC decision dated 01/31/2007); See Saba Foodmarket, Inc., dba Bradford Shell (ABCC decision dated 05/16/2012).

While small suspensions may further that purpose by imposing a consequence for taking a risk, a heavy handed suspension does not. See Assinippi Liquors, supra. (ABCC decision dated 06/08/2004 where Commission held that a twenty (20) day suspension of the alcoholic beverages license for a compliance check was unreasonable. The Commission found that a suspension of that length steps over the line of measured education and becomes unreasonably punitive.) See Saba Foodmarket, supra. (ABCC decision dated 05/16/2012 where the Commission held that a revocation of the alcoholic beverages license for a compliance check was unreasonable.)

In 2007 and again in 2012, the Commission faced the same issue as in this case, regarding a license revoked as a result of a failed compliance check. Epicure Package Store, supra., Saba Foodmarket, supra. In both instances, the Commission held that the penalty of revocation or cancellation of a license for a violation occurring solely as the result of a “sting” is draconian and unfair. Id.

In reviewing the evidence in this matter, the Commission finds that the Local Board issued less severe sanctions to other licensees when they committed a third (3rd) violation of failing a compliance check, with penalties of three (3) or five (5) day suspensions. The Local Board also imposed less severe sanctions on licensees with prior lengthy suspensions for serious violations, when the subsequent violation was the failure of a compliance check. The Tradesman, a licensee, received a ten (10) day suspension for failure to properly manage the premises on January 5, 2010, and on January 13, 2010 subsequent to and close in time to the previous violation, failed a compliance check, (first offense) and the Local Board imposed the sanction of a “Warning.”

As such, the Commission is persuaded and finds that the penalty of a thirty (30) day suspension imposed by the Local Board in this matter is not consistent with the sanctions imposed on other licensees for committing the same violation of failing a compliance check. The Commission has consistently and historically held that Compliance Checks are educational tools and thus, the penalty should not be draconian, punitive, or unfair, but rather a sanction resulting in the measured education of the licensee about the risks of selling alcoholic beverages to persons younger than the statutorily required age of twenty-one (21) years. The Local Board imposed significantly less severe sanctions on licensees that committed compliance check violations which were found to be a third (3rd) offense. Although this was the licensee’s second violation of M.G.L. c. 138, §34, it was the licensee’s first violation for the failure of a compliance check. Therefore, the Commission finds this penalty to be unreasonable.

CONCLUSION

Based on the evidence and rulings above, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in suspending the M.G.L. c. 138 §15 wines & malt beverages license of 75 Purchase Street Corporation d/b/a Peter’s Market for thirty (30) days and remands the matter to the Local Board with the recommendation that the license be suspended for a period of five (5) days.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner *Kathleen McNally*

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

Susan Corcoran, Commissioner *Susan Corcoran*

Dated: May 30, 2014

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: Karen D. Simão, Esq. via fax 617-946-4624
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File