

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

Steven Grossman
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

DECISION

SCIOLI CORPORATION DBA SCIOLI'S PIZZA BAR
146 SOUTH MAIN STREET
MILFORD, MA 01757
LICENSE#: 070600035
HEARD: 07/18/2012

This is an appeal of the action of the Town of Milford Licensing Board (the "Local Board") for suspending the M.G.L. c. 138, §12 license of Scioli Corporation dba Scioli's Pizza Bar (the "Licensee" or "Scioli's") located at Milford, MA. 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 18, 2012.

The following documents and physical items are in evidence:

1. Joint Pre-Hearing Memorandum;
2. Decision and Statement of Reasons dated May 2, 2012;
3. Local Board's Notice of Hearing dated March 30, 2012 for hearing to be held April 9, 2012;
4. Local Board's Notice of Hearing dated April 10, 2012 for hearing to be held April 30, 2012;
5. Licensee's All-Alcohol Common Victualler's License;
6. Local Board's General Rules for All §12 licensees;
7. Milford Police Department Incident Report dated March 29, 2012;
8. Milford Police Department Voluntary Statement dated March 29, 2012 for Mr. Tyler Bridges;
9. Milford Police Department Voluntary Statement dated March 29, 2012 for Mr. Sam Guidi;
10. Milford Police Department Voluntary Statement dated March 29, 2012 for Mr. James McLellan;
11. Statement dated March 26, 2012, of Ms. Lisa James-Rapp;
12. Statement of Ms. Stephanie Sturgis;
13. Milford Police Department 2010 Annual §12 Licenses Activity Report;
14. Milford Police Department 2011 Annual §12 Licenses Activity Report;
15. Milford Police Department 2012 Annual First-Quarter §12 Licenses Activity Report;
16. Summary of Pouring Licenses Incidents from Milford Police Department Annual Reports for 2010, 2011, and January - March 2012;
17. Correlation of Pouring Licenses' Incidents Summary List Re: Incident Times;
18. Local Board's Meeting Minutes for April 30, 2012;
19. Four (4) DVDs of Local Board Hearings -
 - i: Scioli Hearing, April 30, 2012;
 - ii: Interview of Tyler Bridges, March 26, 2012;
 - iii: Interview of James McLellan, March 26, 2012; and
 - iv: Scioli Hearing, March 26, 2012.

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20. Two (2) DVDs of Local Board Hearings –
 - i: Scioli Hearing, Call to Milford Police Dispatch, March 24, 2012; and
 - ii: Interview of Stephen Scioli, March 27, 2012;
 21. Photo of Licensee's Location from Town of Milford Property Map;
 22. DVD of Local Board Hearing – Interview of Paul Casasanta, March 28, 2012;
 23. Statement of Mr. Paul Casasanta;
 24. Milford Regional Medical Center Report for Tyler Bridges dated July 17, 2012; and
 25. Local Board's Decision for Blue Moon Saloon, Inc. dated February 6, 1979.
- A. History of Local Board's Decisions for similar licensees;
 - B. Milford Police Department 2009 Annual License Establishments Activity Report; and
 - C. Milford Police Department 2008 Annual License Establishments Activity Report.

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

FACTS

1. Scioli Corporation dba Scioli's Pizza & Bar at 146 South Main St., Milford, MA. It holds an all alcoholic beverages license issued pursuant to M.G.L. c. 137, sec 12.
2. Stephen Scioli, is the president, treasurer and clerk of Scioli Corporation. Suzette Scioli is the license manager.
3. On March 23, 2012, at approximately 10:00 p.m., Mr. Tyler Bridges arrived at Scioli's Pizza Bar with a group of friends. Mr. Scioli was present.
4. Mr. Tyler Bridges was known to the licensee and was often given permission to go into the back area to smoke¹. Mr. Bridges stated that he had been drinking before he arrived at the establishment and was served alcoholic drinks when he arrived. He admitted he was sold or delivered an alcoholic beverage, a mixed drink, by the licensee.
5. Mr. Bridges was observed to walk into a non-public area by a security person on duty, Mr. Paul Casasanta, an employee of the licensee. The parties in this case referred to this security person as "a bouncer."
6. When Mr. Casasanta saw Mr. Bridges walk into the non-public area, Mr. Casasanta approached Mr. Bridges to have him leave that non-public area.
7. There was a verbal exchange between Mr. Bridges and Mr. Casasanta, in which Mr. Bridges refused to leave the non-public area. After some time, Mr. Casasanta acted to remove Mr. Bridges from this non-public area and pushed him to an exit door.
8. When Mr. Bridges was escorted out of this area by Mr. Casasanta, Mr. Bridges fell and hit his head. Mr. Bridges then proceeded to walk outside the premises towards the front door and towards the parking lot area where his vehicle was parked.

¹ The legality of an individual smoking inside a licensed premises was not an issue before the Commission in this case.

9. Mr. Bridges then had a conversation with Mr. Stephen Scioli.
10. Mr. Casasanta, then approached Mr. Bridges, knocked him to the ground, unconscious.
11. At that point a melee ensued. Someone kicked Mr. Bridges in the head when he was down on the ground causing him further injury.
12. Mr. Sam Guidi, a friend of Mr. Bridges, came running over to assist him when he was being assaulted.
13. When Mr. Guidi came running, Mr. Casasanta also struck Mr. Guidi one time. As a result, Mr. Guidi was knocked unconscious.
14. Mr. Guidi suffered a concussion, a fractured orbital lobe, and a broken nose.
15. The licensee never contacted police.
16. In fact, a friend of the victim, Mr. Christopher Glen, who was at the scene, was the first person to contact the police.
17. By rule, the Local Board requires licensees to call for police assistance as necessary to fulfill the licensee's obligation to make "all reasonable and diligent efforts" to ensure illegal activities do not occur on the licensed premises.

DISCUSSION

Pursuant to M.G.L. Ch. 138, section 67, "[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. [United Food Corp v. Alcoholic Beverages Control Commission, 375 Mass. 240 (1978).] 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. See, e.g. Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Com'n, 29 Mass. App. Ct. 954, 955 (1990) (rescript). 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 Corp. v. Alcoholic Beverages Control Commission, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

M.G.L. Chapter 138 gives the Commission the authority to grant, revoke and suspend licenses. Chapter 138 was "enacted to serve the public need and... to protect the common good." G.L. Chapter 138, section 23, as amended through St. 1977, c.929, Section 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).

Violation of M.G. L. c 138, §69

M.G.L. c. 138, §69 provides that “[n]o alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person.” Four (4) elements are required to prove that a violation of this statute has occurred: a visibly intoxicated person, was sold or delivered, an alcoholic beverage, on a premises licensed under chapter 138. There was no persuasive evidence that before he was sold or delivered an alcoholic beverage, that Mr. Bridges speech was badly slurred and unintelligible. No witness or other proof was presented that Mr. Bridges was speaking in this manner to the bartender or other agent or employee of the licensee. The Commission is not persuaded that the Licensee violated 204 CMR 2.05 (2), to wit: c. 138 §69-Sale or Delivery of an Alcoholic Beverage to an Intoxicated Person.

In this case, the Commission was not persuaded by the evidence presented at the hearing that Mr. Bridges was visibly intoxicated while inside the licensed premises and that Mr. Bridges was sold or delivered an alcoholic beverage to him inside Scioli’s Restaurant after Mr. Bridges manifested observable signs of intoxication.

Violation of CMR 2.05 (2)

The law is well-settled that ‘under the regulation, [204 C.M.R. 2.05(2)] the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is “bound at his own peril to keep within the condition of his license.” Commonwealth v. Gould, 158 Mass. 499, 507 (1893). Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 186, 190 (1979). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter. Rico’s of the Berkshires, Inc., v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985) (rescript).

The Supreme Judicial court has held that 204 C.M.R. 2.05(2) “describes a preexisting common law duty which licensees owe to their patrons or guests. See Kane v. Fields Corner Grille, Inc., 341 Mass 640, 641-642 (1961). A bar owner, for example, has the duty to protect persons on or about the premises from the dangerous propensities of its patrons, served or unserved. When the bar has served a potentially dangerous patron, the duty may extend beyond the premises. When the bar has not served the patron, however, the duty is based merely on a duty to keep the premises safe, and the duty applies only on or about the premises. Carey v. New Yorker of Worcester, 355 Mass. 450, 452 (1969). See Gustafson v. Mathews, 109 Ill. App. 3d 884 (1982) (bar owner had no duty to prevent intoxicated patron from driving away with his five children in the car); Locklear v. Stinson, 161 Mich. App. 713 (1987) (bar owner not liable when one patron was killed by another patron off the premises).” O’Gorman v. Antonio Rubinaccio & Sons, Inc. 408 Mass. 758, 761 (1990).

In this case, an employee of the licensee committed an assault and battery on a patron both inside and outside the licensed premises. The same employee also committed an assault and battery on a second patron outside the licensed premises, but in a consequential continuation of events that first began inside the licensed premises. The licensee is responsible for illegalities, disturbances, and/or disorders that occur on the licensed premises. The licensee has a duty of care to prevent foreseeable harm to its patrons and others. See Tobin, Id.; Westerback v. Harold F. Leclair Co., 50 Mass App. Ct. 144 (2000); Kane v. Fields Corner Grille, Inc. 341 Mass. 640, 641 (1961); Carey v. New Yorker of Worcester, Inc. 355 Mass. 450, 451 (1969).

The Commission considers various factors, such as the licensee’s security plan and the conduct of its employees, in deciding whether a licensee has permitted an illegality to occur on its premises. The Licensee is responsible for the actions and inactions of Mr. Casasanta, who is considered an agent of the licensee. Mr. Casasanta’s behavior was reprehensible and most probably criminal in nature. The licensee

argued that it could not have foreseen what was going to happen. However, the Mr. Casasanta aka "the bouncer" had already beaten Mr. Bridges inside the licensed premises and subsequently got agitated when Mr. Bridges was speaking with the principal of the licensee outside. The Licensee should have at the very least separated the individuals, but the Licensee took no action to stop Mr. Casasanta from continuing to assault Mr. Bridges. In Christopher v. Father's Huddle Cafe 57 Mass. App. Ct. 217 (2003), the court held that the tavern operator has "...a duty of reasonable care to prevent foreseeable harm to its patrons". Id. at 222. In Christopher, there was a melee that originally started in the tavern but progressed into the outside of the establishment, which ultimately resulted in a death. The Christopher Court held that the duty of care extends to all reasonably foreseeable harm including harm that happens in distances from the premises. Id.

The Court further emphasized in its decision "**calling the police when an aggressive person threatens assault**" would discharge the duty of the licensee, Id. at 223 (emphasis supplied). If the Licensee had called the police, his obligations would have been fulfilled. However, testimony was heard that on several occasions not only did the licensee not call the police, but when the patron was calling, Mr. Scioli, the principal of the Licensee, was in the background asking him not to contact them.

The Commission has long held that the licensee has the duty of care to protect the public. See JLMP Enterprises Inc. v. Tabu Ultra Lounge and Nightclub (August 2009) (melee in parking lot where Commission upheld the town's suspension holding that the licensee failed to act in compliance of the duty of care and prevent foreseeable harm); Raysa Poppi, Inc. d/b/a/ Willy Topps (March 2009) (where Commission upheld the town's suspension due to the licensee not reporting the incidents of assault taking place inside the establishment to the police); Guzzman, Inc. d/b/a/ Raffi's Place (January, 2010) (Commission upheld the town's suspension due to illegal activity taking place on the premises).

It was clear from the testimony of the witnesses that both victims incurred significant injuries on the night in question at the hands of Mr. Casasanta. It was also clear that Mr. Bridges, who had been injured by Mr. Casasanta and was attempting to speak with Mr. Scioli about it, was followed by Mr. Casasanta, who continued to assault him. It is concerning that the licensee did not call the police or emergency personnel at the time the victims were being assaulted, particularly since it was obvious that both individuals had suffered serious injuries.

The Commission finds Scioli's failure "to exercise sufficiently close supervision so that there is compliance with the law on the premises." See Id. This failure resulted in serious injury to two (2) individuals. Scioli's did not employ proper procedures to protect its patrons. These factors taken together resulted in the unsafe operation of this premises. Furthermore, the employees jeopardized the safety of the patrons. The Commission finds this action to be an aggravating circumstance to the violation since the licensee, and its employees and agents did nothing to protect the patrons safety.

CONCLUSION

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding the violation of M.G.L. c. 138, section 69 was committed by the Licensee.

The Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding the violation was committed by the Licensee of permitting an illegality to occur on the licensed premises.

The Local Board's statement of reasons does not articulate a separate suspension for each of the two (2) offenses found by them at their locally conducted hearing. The Commission today finds only one (1) violation. But this one violation is a serious offense that resulted in serious injuries to more than one (1) patron of the Licensee being inflicted by the Licensee's security person. For this single violation alone, given the aggravating circumstances of the incident, the Commission **APPROVES** the action of the Local Board in **SUSPENDING** the License of Scioli Corporation dba Scioli's Pizza Bar for three (3) weeks. This penalty is a reasonable exercise of the Local Board's lawful discretion for this single serious violation.

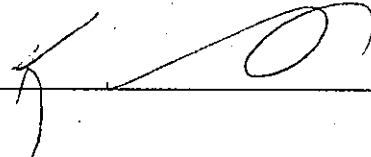
ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner



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

Kim S. Gainsboro, Chairman



Dated: September 11, 2012

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: Louis A. Cassis, Esq. via Facsimile
Gerald M. Moody, Esq. via Facsimile
Frederick G. Mahony, Chief Investigator
Administration
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