

*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**

**BECKY D., INC. D/B/A SOUTHSIDE ANNIE'S**  
**114 COVE STREET**  
**NEW BEDFORD, MA 02744**  
**LICENSE#: 077800065**  
**HEARD: 05/23/2012**

This is an appeal of the action of the New Bedford Licensing Board (the "Local Board") in suspending the M.G.L. c. 138, §12 all alcoholic beverages license ( the "License") of Becky D., Inc. d/b/a Southside Annie's (the "Licensee" or "Southside Annie's"). On January 23, 2012, the Local Board held a hearing regarding allegations that on August 19, 2011 and October 18, 2011 the licensee permitted illegalities on its premises that resulted in a seven (7) day suspension of its license. The New Bedford Licensing Board found that the licensee had violated 204 CMR 2.50 (2), specifically, permitting an illegality to occur on the licensed premises, as well as New Bedford Licensing Board Regulation number 11, allowing objectionable persons on or about the premises resulting in the sale distribution of narcotics (2 counts). Southside Annie's appealed the Local Board's decision in a timely manner to the Alcoholic Beverages Control Commission (the "Commission" or the "ABCC") and a hearing was held on Wednesday, May 23, 2012.

The following documents are in evidence:

1. CD of Southside Annie's Hearing, January 23, 2012; (1 cd-rom disc)
2. Local Board's Decision dated January 31, 2012; (1 page)
3. Affidavit In Support of Application for Search Warrant dated October 16, 2011; (7 pages)
4. Minutes of Local Board Meeting on January 23, 2012; (5 pages)
5. Local Board Notice dated January 4, 2012 for Hearing on January 23, 2012; (2 pages)
6. DPH State Lab Drug Certificates no. B11-09746 and no. B11-09745 for Joey Mello; (2 pages)
7. Affidavit of Officer Jarrod Garcia dated May 23, 2012; (1 page)
8. Affidavit of Detective Kelly Almeida with Drug Receipt dated May 30, 2012; (2 pages)
9. New Bedford District Court Criminal Docket no. 1133CR006364 - Certified Conviction for Defendant Jose R. Soares; (4 pages)
10. Affidavit of Mr. Ronald Ferreira in Support of Defendant's [Joey Mello] Motion to Suppress Evidence. (2 pages)

There is one (1) audio recording of this hearing, and several witnesses testified.

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## FACTS

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

1. Southside Annie's holds an all alcoholic beverages general-on-premises license, which is operated at 114 Cove Street, New Bedford, Massachusetts. (Testimony)
2. Annette Demers and William Hayter are co-owners of the premises. Ms. Demers is the licensed manager. (Testimony)
3. The New Bedford Police Department received complaints through its TIPS phone line regarding the sale of illegal drugs at Southside Annie's. (Testimony)
4. As a result, the New Bedford Police Department's Organized Crime Intelligence Bureau set up surveillance outside of Southside Annie's. (Testimony)
5. On August 19, 2011, Lieutenant Paul Oliveira set up surveillance in a car parked outside of Southside Annie's. Lt. Oliveira saw an individual, later identified as Ronald Ferreira, standing outside of Southside Annie's on the sidewalk. (Testimony, Exhibit 10)
6. Lt. Oliveira and another individual, both unknown to Mr. Ferreira, pulled the car they were driving alongside the sidewalk where Mr. Ferreira was standing, and asked him where they could buy some drugs. Both individuals were unknown to Mr. Ferreira. (Testimony, Exhibit 10)
7. Mr. Ferreira responded that the Lieutenant should "go see Footsie." Then Lt. Oliveira asked Mr. Ferreira to ask "Footsie" if he would sell cocaine to Lt. Oliveira. Moments later, Mr. Ferreira came outside and said, "Footsie won't sell to you." (Testimony)
8. Thereafter, Lt. Oliveira observed an individual, later identified as Joey Mello, come out of the establishment, look around, and go back inside Southside Annie's. (Testimony)
9. Lt. Oliveira entered Southside Annie's, and saw Joey Mello sitting on a stool at the bar. Lt. Oliveira asked Mr. Mello if he had cocaine on him. Mr. Mello reached into his pocket and retrieved fifteen (15) bags of cocaine. (Testimony)
10. Subsequently, Mr. Mello was arrested and placed in custody. Mr. Mello admitted that "he doesn't have a job at this time, and that he usually goes to South Side Annie's with cocaine on some nights and sells it to make money." (Testimony)
11. Detective Garcia took possession of Mr. Mello's cell phone, which was plugged into an outlet behind the bar. He noticed that there had not been any incoming calls prior to the arrest. (Testimony)
12. Thereafter Mr. Mello consented to a search of his car, where the officers found cocaine. (Testimony)
13. At the time of the arrest, there were between 2 and 5 people in the establishment, the bar was clean, and there was music playing. The music was loud enough that it would have been difficult to have a phone conversation while sitting at the bar. (Testimony)
14. There is a video surveillance system at the premises. (Testimony)
15. In the past, Mr. Hayter has given the New Bedford Police Department footage from the surveillance cameras at the premises to assist them in criminal investigations. (Testimony, Exhibit 4)
16. No members of the New Bedford Police department requested footage from these cameras for information related to Mr. Mello. (Testimony)
17. At the time of the arrest, Detective Garcia did not have a conversation with any of the employees at Southside Annie's, and was unaware of any other police officers having a conversation with any employees at the licensed premises. (Testimony)
18. No police officers observed Mr. Mello sell cocaine inside the licensed premises. (Testimony)
19. No police officers observed Mr. Mello exhibit any unusual behavior inside the licensed premises. (Testimony)

20. Prior to the arrest, no one conducted surveillance of Mr. Mello inside the licensed premises. (Testimony)
21. Moreover, no one testified that Mr. Mello's behavior inside Southside Annie's had been suspicious or should have raised anyone's curiosity. (Testimony)
22. There was also no evidence that Mr. Mello was a known drug dealer to the community at large in New Bedford. (Testimony)
23. Over the next several months, the New Bedford Police Department continued their investigation into illegal narcotic activity in New Bedford. During the investigation, two (2) informants told the New Bedford Police Department that Jose Roberto Soares was selling cocaine out of his home and out of South Side Annie's. (Testimony, Exhibit 3)
24. Specifically, a first-time confidential informant told Detective Bielski that Mr. Soares was illegally selling cocaine from Southside Annie's Bar located at 114 Cove Street in New Bedford, Massachusetts. A second confidential informant also told Lt. Oliveira that Mr. Soares was illegally selling drugs. (Testimony, Exhibit 3)
25. As a result, Detective Evan Bielski began investigating Jose Roberto Soares. (Testimony, Exhibit 3)
26. One of the confidential informants told Lt. Oliveira that Mr. Soares gave specific instructions regarding buying narcotics from him at Southside Annie's. (Testimony)
27. Mr. Soares instructed the confidential informant to go into Southside Annie's and have at least one drink so it would not be obvious to the employees that a drug sale was taking place. (Testimony)
28. During this investigation Detective Bielski conducted periodic surveillance of Mr. Soares. (Testimony, Exhibit 3)
29. On several occasions Detective Bielski observed Mr. Soares outside of Southside Annie's bar smoking cigarettes or talking on his cell phone. After finishing the cigarette or his conversation, he would re-enter the bar. (Testimony, Exhibit 3)
30. On October 18, 2011, Detective Bielski and other New Bedford Police Officers went to Southside Annie's to observe Mr. Soares. (Testimony)
31. While at the establishment, investigators observed Mr. Soares leave the bar to smoke a cigarette, and talk on his cell phone on several occasions, and then re-enter the establishment. (Testimony)
32. The City of New Bedford has imposed a smoking ban in its licensed premises. As a result, patrons who wish to smoke must do so outside of any licensed premises. (Testimony)
33. After Mr. Soares re-entered Southside Annie's, members of the New Bedford Police Department entered the premises and arrested Mr. Soares pursuant to an arrest warrant. Mr. Soares had fourteen (14) bags of cocaine, and an [unspecified] amount of United States currency in his possession. (Testimony, Exhibit 9)
34. No members of the New Bedford Police Department ever conducted surveillance of Mr. Soares while he was inside Southside Annie's. (Testimony, Exhibit 3)
35. There was no evidence that any sale of narcotics took place inside Southside Annie's. (Testimony, Exhibit 3)
36. There was no evidence that either Mr. Mello or Mr. Soares were known drug dealers. (Testimony, Exhibit 3)

#### 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. 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 Appeals 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 Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations and that the penalty imposed by the Local Board was a reasonable exercise of its lawful discretion. 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, 710 (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).

In determining the licensee’s liability, the Commission is not restricted in only finding that the licensee actually knew that drug dealing was going on in their licensed premises. As the Appeals Court held in New Palm Gardens Inc. v. Alcoholic Beverages Control Commission, Mass.App. 785, 798 (1981), “[i]t is ... quite possible for a licensee to offend the regulatory scheme without scienter.” The licensee is bound “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. 507 (1893). The case of Rum Runners Inc. v. Alcoholic Beverages Control Commission, 43 Mass.App.Ct. 248, further expounds on the licensee’s responsibility under 204 CMR 2.05 (2), which in pertinent part, provides “the licensee shall be responsible therefore whether present or not.” In Rum Runners, a patron was a drug seller who sat next to a second patron at the bar and removed a folded 3”inch paper square in exchange for \$50.00 while he (drug seller) made eye contact with the bartender. The Appeals Court in Rum Runners, supra at 251, in citing Pennsylvania Liquor Control Bd. v. Leggens, 117 Pa. Commw. 107, 111 (1988), held that such conduct “supports attribution of the bartender’s knowledge to the licensee.” Even where there was no evidence of the manager or bartender’s whereabouts during the drug transaction, knowledge of drug activity still may be imparted to the licensee where “the Commission could infer knowledge from the drug paraphernalia found by the raiding squad (scales, snorting tube). See Rico of the Berkshires v. Alcoholic Beverages Control Commission, 19 Mass.App.Ct. 1026 (1985).

To prove a case of permitting an illegality of this type, i.e. illegal narcotic sales, a Local Board can introduce evidence of activities that, taken together, ought to raise suspicion by any licensee, for instance, the time a patron arrives at the service bar inside the licensed premises, eye contact or discussions with other patrons, the time either party enters a bathroom, hallway or other secluded area, whether the patron is followed into any secluded area by any other patrons, whether a patron consumes any beverages delivered, the time a patron spends consuming beverages before departing, and any physical manifestation of drug intoxication or nervousness. Such evidence may also include consistent behavioral or transactional patterns with the same patrons. In Re: 63 Page Boulevard, Inc. d/b/a the Cornerstone, Springfield (ABCC decision October, 2005). In the Commission decision of In Re: Moonshine Pub, Inc. v. Fall River Licensing Board, (ABCC decision March 9, 2005), the Commission held that evidence of illegal narcotics or drug paraphernalia inside the licensed premises creates a permissible inference resulting in the conclusion that management should have known illegalities in the form of drug violations were occurring (plastic baggies underneath the bar). In this case, there is no connection between the licensed premises and the drug transactions. There was no evidence that any drug transaction ever took place inside the licensed premises. Moreover, this case is unlike the Cornerstone, where the confidential informant (“C.I.”) would wait in the car while the purported patron would go inside, purchase the drugs in the bathroom, return to the motor vehicle, and deliver the drugs to the C.I. In the present case, there was no evidence of drug paraphernalia or illegal narcotics inside the premises, or that management was involved in selling the illegal narcotics. In Re: 63 Page Boulevard, Inc. dba the Cornerstone, Springfield (ABCC decision October, 2005).

In prior decisions where the Commission has found that a licensee had permitted an illegality on the licensed premises, i.e. illegal narcotic sales, the Local Board had produced evidence that there existed some nexus between the drug transactions and the licensed premises. See Id. Once the local board had introduced such evidence of illegal drug transactions on the licensed premises with such activities of the patron involved in the illegalities, the licensee must rebut this with credible evidence that they exercised sufficiently close supervision so that there is compliance with the law on the licensed premises. Commonwealth v. Gould, 158 Mass. App. Ct. 507, 33 N.E. 2d 656 (1893). “[M]ere ‘passivity or abstinence from preventative action’ may support finding that [a] licensee permitted an illegality.” Rum Runners Inc. v. Alcoholic Beverages Control Commission, 43 Mass.App.Ct. 248, 682 N.E.2d 897 (1997) quoting Harrington v. Smarr, 844 S.W. 2d 16, 19 (Mo. Ct. App. 1992). In this matter of Southside Annie’s, the Local Board did not submit such evidence of a nexus between the illegal drug transactions and the licensee.

#### Permitting an Illegality on the Premises: Incident on August 19, 2011

On August 19, 2011, Mr. Mello was arrested at Southside Annie’s after he confessed to being in possession of cocaine. There is no allegation that Mr. Mello was selling drugs inside the licensed premises. Furthermore, the police did not produce any evidence about any of Mr. Mello’s activities while he was inside the licensed premises. While it is true that several indicators of sales of illegal narcotics include persons who receive a large number of phone calls, persons who are visited at the premises by an unusually large number of people at frequent intervals, or persons who appear to be making exchanges of small packages or payment of money, no such evidence existed in this case. See Id.

In fact, no evidence was produced that any individuals ever met with Mr. Mello inside the licensed premises. Detective Garcia testified that while the police were conducting surveillance of Mr. Mello, they never saw anyone meet with him. Moreover, his phone log history on the day of his arrest at Southside Annie’s illustrated that he had no incoming phone calls while inside Southside Annie’s during that day. As no evidence was produced that an illegality occurred on the licensed premises, other than the individual, unobservable misconduct of possession of narcotics by a single person, the Commission finds that the licensee did not permit an illegality to occur on the licensed premises. See In Re: Guzman Inc., d/b/a Raffi’s Place, (ABCC decision 2010).

#### Permitting an Illegality on the Premises: Incident on October 18, 2011

Thereafter, the New Bedford police Department received information regarding an individual named Jose Soares selling cocaine from Southside Annie’s Bar. As a result, Detective Evan Bielski began investigating Mr. Soares. Mr. Soares gave individuals wishing to purchase narcotics from him at Southside Annie’s specific instructions Mr. Soares instructed these individuals to go into Southside Annie’s and have at least one drink so it would not be obvious to the employees that a drug sale was taking place.

During this investigation Detective Bielski conducted periodic surveillance of Mr. Soares. On several occasions Detective Bielski observed Mr. Soares outside of Southside Annie’s bar smoking cigarettes or talking on his cell phone. The City of New Bedford has imposed a smoking ban in licensed premises. As a result, patrons who wish to smoke must do so outside of any licensed premises. After finishing the cigarette or his conversation, Mr. Soares would re-enter the bar.

On October 18, 2011, Detective Bielski and other New Bedford Police Officers went to Southside Annie’s to observe Mr. Soares. While at the establishment, the investigators observed Mr. Soares leave the bar to smoke a cigarette, talk on his cell phone on several occasions, and then re-enter the establishment. After Mr. Soares re-entered Southside Annie’s, members of the New Bedford Police

Department entered the premises and arrested Mr. Soares pursuant to an arrest warrant. Mr. Soares had fourteen (14) bags of cocaine, and an [unspecified] amount of U.S. currency in his possession.

No members of the New Bedford Police Department ever conducted surveillance of Mr. Soares while he was inside Southside Annie's. There was no evidence that any narcotics sale took place inside Southside Annie's. There was no evidence that either Mr. Mello or Mr. Soares were known drug dealers. There was no evidence presented that any employees of Southside Annie's knew, or should have known that these individuals were drug dealers.

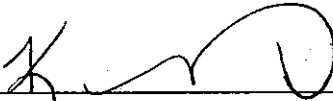
As such, the licensee had no reason to suspect that Mr. Soares was dealing drugs. Therefore, insufficient evidence was presented to persuade the Commission as to how this licensee permitted the alleged illegality on the premises, or how this licensee could detect and prevent this behavior. Any other conclusion would make it a *per se* violation, and make it impossible for a bar owner to detect or prevent. Cornerstone, supra.

#### CONCLUSION AND DISPOSITION

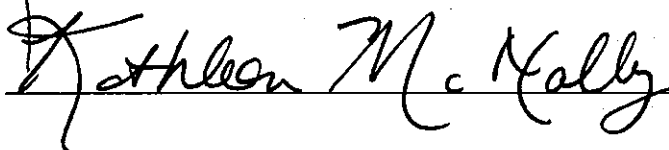
Based on the evidence and rulings above, the Alcoholic Beverages Control Commission DISAPPROVES the action of the New Bedford Licensing Board in finding the licensee committed any violations. The Commission remands the matter to the New Bedford Licensing Board with the recommendation that no modification, suspension, revocation, or cancellation of the license be ordered by the Board. The Commission found it unnecessary to determine the reasonableness of the penalty imposed by the Board since our disapproval would render any sanction by the Board discrepant with our decision.

#### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kim S. Gainsboro, Chairman



Kathleen McNally, Commissioner



Dated: August 22, 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: Emile E. Morad, Esq. [Attorney for the licensee]  
John E. Flor, Esq. [Attorney for local board]  
New Bedford Licensing Board  
Frederick G. Mahony, Chief Investigator  
Administration  
File