



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

BONCALDO INC. D/B/A BONCALDO
1381 BOSTON PROVIDENCE TURNPIKE
NORWOOD, MA 02062
LICENSE#: 091400005
HEARD: 05/05/2015

This is an appeal of the action of the Town of Norwood Board of Selectmen (the "Local Board" or "Norwood") for suspending the M.G.L. c. 138, §12 all-alcohol license of Boncaldo Inc. d/b/a BonCaldo ("Licensee" or "BonCaldo") located at 1381 Boston Providence Turnpike, Norwood, Massachusetts, for five (5) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Tuesday, May 5, 2015. The Town stayed the enforcement of the penalty pending the outcome of this appeal.

The following documents are in evidence:

1. Local Board Notice of Hearing, 07/25/2014
2. Joint Pre-Hearing Memorandum with attached Decision of the Local Board, 10/1/14 (the "Decision")
3. Walpole Police Department Motor Vehicle Crash Report, 10/25/2013
4. Walpole Police Department Collision Reconstruction Report, 03/02/2014
5. Norwood Police Department Investigative Report, 04/14/2014
6. Walpole Police Department – Supplemental Reports, 08/29/2014, 09/24/2014, and 10/25/2014
7. MA Driver's License Report for Robert Collins
8. Norwood Hospital Medical Records of Robert Collins, 10/25/2014
9. Death Certificate, 10/26/2013, and Post-Mortem Toxicology Report, 02/17/2014
10. Receipt for Asia Treasures, 10/23/2013
11. BonCaldo Receipt, 10/23/2013
12. Dr. Brian E. Pape's Toxicology Report, 09/30/2014
13. Compact Disc of Photographs from Accident Scene, 10/25/2013
14. Minutes of Local Board's Meeting, 09/30/2014

There is one (1) audio recording of this hearing, and six (6) witnesses testified.

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

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FACTS

1. BonCaldo Inc. d/b/a Bon Caldo is a corporation located at 1381 Boston Providence Turnpike, Norwood, Massachusetts, which holds an all alcoholic beverages restaurant license under M.G.L. c. 138, §12. (Exhibit 2; Commission Files)
2. BonCaldo has operated a restaurant with a small bar for more than ten (10) years, and the instant allegation of a violation of M.G.L. c. 138, §69, was its first alleged violation of Chapter 138. (Exhibit 2; Commission Files)
3. On October 24, 2013, at approximately 7:00 p.m., Robert Collins ("Mr. Collins"), actual date of birth 04/25/1976 (age 37), arrived at Asian Treasures Restaurant located at 399 High Plains Street, Walpole, MA. He was with two other people. (Testimony, Exhibits 2, 4, 10)
4. The Asian Treasures receipt indicates that there were three (3) guests and that eleven (11) alcoholic beverages were purchased, including three (3) Mai Tai cocktails, four (4) Bud Light beers, three (3) Sam Adams Light beers, and one (1) Heineken beer. (Exhibit 10)
5. Mr. Collins and two others split the drinks. However, there was no evidence submitted about the number and particular type of drinks consumed by Mr. Collins. (Testimony; Exhibit 6)
6. Mr. Collins departed Asian Treasures at approximately 9:33 p.m. and arrived at BonCaldo at approximately 9:42 p.m. (Exhibit 4; Testimony)
7. Upon arrival at BonCaldo, Mr. Collins went to the bar area, where bartender Karen Kay was working. (Testimony)
8. Ms. Kay testified that Mr. Collins did not appear intoxicated when he arrived at BonCaldo or at any other time that evening. (Testimony)
9. Ms. Kay knows Mr. Collins. He was a regular customer of BonCaldo who patronized BonCaldo about one (1) to two (2) times a week. (Testimony)
10. When Mr. Collins first arrived at Boncaldo, he ordered a pizza and a glass of pinot grigio wine from Ms. Kay. Mr. Collins paid cash. (Testimony)
11. While at BonCaldo, Mr. Collins met up with several different people that evening, including his twin brother, Ryan Collins, as well as his former girlfriend, Lisa Gaulin. (Exhibit 4; Testimony)
12. On October 24, 2013, at approximately 11:43 p.m., Ryan Collins paid for seven (7) alcoholic beverages. Two (2) of the seven (7) alcoholic beverages were glasses of wine that Mr. Robert Collins had consumed, and the remaining beverages were consumed by Ryan Collins, Ms. Gaulin, and another woman. (Exhibits 5, 11; Testimony)
13. Between 9:42 p.m. and 11:43 p.m., Ms. Kay served Mr. Collins a total of three (3) alcoholic beverages. (Testimony)
14. Mr. Collins remained at BonCaldo until about 1:00 a.m., October 25, 2013. (Testimony; Exhibits 4, 11)
15. There were a total of about ten (10) to twelve (12) people in the bar that evening, and Ms. Kay was the only bartender. (Testimony)

16. Joseph BonCaldo, the president of BonCaldo, was at BonCaldo that evening. Mr. BonCaldo also knew Mr. Collins as a regular customer, who patronized BonCaldo about one (1) to two (2) times a week. (Testimony)
17. Mr. Bon Caldo spoke with Mr. Collins that evening three (3) to (4) times for about three (3) to five (5) minutes each time. Mr. BonCaldo observed Mr. Collins walk by him at least one (1) time that evening. Mr. BonCaldo did not believe that Mr. Collins showed any signs of intoxication that night. (Testimony)
18. In all the times Mr. Collins visited BonCaldo, neither Ms. Kay nor Mr. BonCaldo ever saw Mr. Collins intoxicated. (Testimony)
19. At approximately 1:00 a.m. Mr. Collins left the premises within minutes of the people he was with leaving the bar. (Testimony)
20. Mr. Collins got into a single car accident at 1:13 a.m. (Exhibit 4)
21. There was a lag of approximately fifteen (15) minutes from when Mr. Collins left Bon Caldo to the time of the accident (approximately 1.2 miles away). (Testimony; Exhibit 5)
22. Mr. Collins was transported to Norwood Hospital and was pronounced dead at approximately 2:18 a.m. (Exhibits 3, 4, 8)
23. Mr. Collins's blood alcohol concentration ("BAC") at 2:10 a.m. was 0.28%, and his vitreous alcohol concentration result was .32%. Tests for other drugs came back negative. (Testimony; Exhibits 9, 12)
24. An average, social, occasional drinker (someone who drinks about two (2) drinks one (1) or two (2) times a week) would usually show signs of intoxication at .15% BAC. (Testimony)
25. About 98% of people who are heavy drinkers would show visible and obvious signs of intoxication at .25% BAC. Visible and obvious signs of intoxication include changes in appearance, behavior, and demeanor, which could include signs such as: glassy and bloodshot eyes, red face, slurred speech, acting overly gregarious, acting out of character, decreased coordination, and changes in relating to other people. (Testimony)
26. Brian E. Pape, Ph.D., a toxicologist with over twenty-five (25) years of experience in the field, who testified for the Town of Norwood, concluded that he was more than 95% certain that Mr. Collins showed visible and obvious signs of intoxication at or prior to Mr. Collins's last service of alcohol at BonCaldo. (Testimony; Exhibit 12)
27. However, there was no evidence of the number of drinks it customarily would take for Mr. Collins, who was about 5'10" tall and weighed approximately 190 pounds, to exhibit signs of intoxication. Likewise, there was no evidence as to what signs of intoxication Mr. Collins would customarily exhibit when he would become intoxicated.
28. In addition to the paucity of information regarding how many drinks Mr. Collins had that night, Ryan Collins told the police officer that it did not appear to him that his brother, Mr. Robert Collins, was intoxicated that night.¹ (Testimony; Exhibit 4)

¹ Ryan Collins appeared intoxicated to Sergeant Martin McDonough on the night of the accident—Ryan Collins had glassy eyes and slurred speech, and his breath smelled of alcohol. (Testimony)

29. Likewise, Robert Goldberg, who was one of the people with Mr. Collins at Asian Treasures and at BonCaldo, informed the police officer that he separated from Mr. Collins at BonCaldo but that when he did see him, it did not appear as though Mr. Collins was intoxicated. (Testimony; Exhibit 4)

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. Board 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 service to an intoxicated person in violation of M.G.L. c. 138, §69. “No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person.” M.G.L. c. 138, §69. “[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated.” Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). “The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication.” Id. at 610; accord McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

In order to prove this violation, the Local Board must prove: (1) that an individual was intoxicated on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the

intoxicated individual. Vickowski, 422 Mass. at 609. "The imposition of liability on a commercial establishment for the service of alcohol to an intoxicated person . . . , often has turned, in large part, on evidence of obvious intoxication at the time a patron was served." Id. at 610; see Cimino, 385 Mass. at 325, 328 (patron was "totally drunk"; "loud and vulgar"); Gottlin v. Graves, 40 Mass. App. Ct. 155, 158 (1996) (acquaintance testified patron who had accident displayed obvious intoxication one hour and twenty minutes before leaving bar); Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121 (1994) (sufficient evidence for jury where acquaintance described patron who later had accident as appearing to feel "pretty good"). Contrast Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (commercial establishment could not be liable when there was no evidence of obvious intoxication while patron was at bar); Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (affirming summary judgment for defendant in absence of any evidence of obvious intoxication); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816-817 (1979) (directed verdict in favor of commercial establishment affirmed when there was no evidence that patron was served alcohol after he began exhibiting obvious signs of intoxication).

The Local Board must produce some evidence that "the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink." Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 20 (2010); see Vickowski, 422 Mass. at 610 ("The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication"). "The [Local Board] may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two." Vickowski, 422 Mass. at 611 (direct evidence of obvious intoxication not required). "[S]ervice [to a patron] of a large number of strong alcoholic drinks [would be] sufficient to put [a licensee] on notice that it was serving a [patron] who could potentially endanger others." Cimino, 385 Mass. at 328. It is proper to infer from evidence a patron's excessive consumption of alcohol, "on the basis of common sense and experience, that [a] patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee." Vickowski, 422 Mass. at 611; accord P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

However, "[e]vidence of apparent intoxication, or of elevated blood alcohol levels, at some later point in time does not, by itself, suffice to show that the patron's intoxication was evident at the time the last drink was served." Douillard v. LMR, Inc., 433 Mass. 162, 165 (2001). Yet, such evidence may be used to bolster other evidence concerning a patron's condition at the time alcohol was served. Id. at 166. Likewise, expert opinion about an average drinker's response to alcohol is not sufficient by itself to demonstrate whether a particular drinker showed signs of intoxication, but such expert testimony "may . . . be sufficient when conjoined with other direct evidence of the patron's customary reactions to alcohol consumption." Soucy v. Eugene M. Connors Post 193, Inc., 79 Mass. App. Ct. 1109, *2 (2011) (memorandum and order pursuant to Rule 1:28); see Douillard, 433 Mass. at 167-168 (finding sufficient evidence to permit inference of visible intoxication at time final drink was served where patron and his friend confirmed patron usually showed signs of intoxication after consuming seven drinks, expert opined that patron likely had nine drinks, and expert opined that one usually shows signs of intoxication at a blood alcohol level lower than patron's was). In Soucy, there was direct evidence of the number of drinks that the patron consumed as well as expert opinion about the patron's blood alcohol levels at the bars, "levels at which average persons would have shown signs of intoxication." Soucy, 79 Mass. App. Ct. at *1. Despite such evidence and expert opinion, there was no evidence of the number of drinks it customarily would take for the patron to become intoxicated. Id. at *2. Consequently, the Soucy Court determined that "a fact finder could not conclude . . . that [the patron] passed his normal point of intoxication and thus likely appeared intoxicated while at the [bars]." Id.

In this matter, there was no evidence as to the number of drinks Mr. Collins consumed before he arrived at BonCaldo. (Exhibit 10; Testimony) While at BonCaldo, Mr. Collins consumed three (3) glasses of wine between the hours of 9:42 p.m. and 11:43 p.m. (Testimony; Exhibit 11) There was no evidence that Mr. Collins consumed any other alcoholic beverages at BonCaldo. (Testimony) There was no evidence

that Mr. Collins exhibited signs of intoxication at BonCaldo on the night in question. (Testimony; Exhibit 4) In fact, there was direct evidence that Mr. Collins did not exhibit signs of intoxication at BonCaldo that night. (Testimony; Exhibit 4) Mr. BonCaldo and Ms. Kay, who were the only witnesses at the hearing who saw Mr. Collins before the accident on October 24th, never witnessed Mr. Collins intoxicated on any occasion. (Testimony) There was no evidence as to how many alcoholic beverages Mr. Collins, in particular, customarily would need to consume to exhibit signs of intoxication. Dr. Pape testified that about 98% of people who are heavy drinkers would show visible and obvious signs of intoxication at a BAC lower than Mr. Collins's was. (Testimony) Dr. Pape concluded that he was more than 95% certain that Mr. Collins showed visible and obvious signs of intoxication at or prior to Mr. Collins's last service of alcohol at BonCaldo. (Testimony; Exhibit 12)

However, the facts reveal that there was no evidence that Mr. Collins "was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink." Rivera, 77 Mass. App. Ct. at 20. There was no evidence that BonCaldo served Mr. Collins a "large number of strong alcoholic drinks . . . sufficient to put [BonCaldo] on notice that it was serving a [patron] who could potentially endanger others [or himself]." Cimino, 385 Mass. at 328. To the contrary, the evidence presented was that Mr. Collins only consumed three (3) glasses of wine at BonCaldo. (Testimony) Proof of Mr. Collins's high blood alcohol content after the accident was not, by itself, sufficient to show that Mr. Collins was intoxicated when BonCaldo last served him. See Soucy, 79 Mass. App. Ct. at *2; Douillard, 433 Mass. at 167-168. Moreover, as in Soucy, Dr. Pape's expert opinion, without evidence as to the number of alcoholic drinks it would customarily take Mr. Collins to exhibit signs of intoxication, is not sufficient by itself to permit the inference that Mr. Collins was visibly intoxicated when BonCaldo served him. See Id. Dr. Pape even testified that he could only be 95% certain that Mr. Collins showed visible and obvious signs of intoxication at or prior to Mr. Collins's last service of alcohol at BonCaldo. For the aforementioned reasons, the Commission concludes that there is insufficient evidence to prove that BonCaldo violated M.G.L. c. 138, §69.

CONCLUSION

Therefore, the Commission **DISAPPROVES** the action of the Local Board in finding Boncaldo Inc. d/b/a BonCaldo in violation of M.G.L. c. 138, §69. The Commission also **DISAPPROVES** the action of the Local Board in suspending the license for five (5) days for said violation that is disapproved. 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 Elizabeth A. Lashway

Kathleen McNally, Commissioner Kathleen McNally

Dated: July 1, 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.

cc: Louis A. Cassis, Esq. via facsimile 617-472-9028
David DeLuca, Esq. via facsimile 617-479-6469
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration
File