

RE: North Street Market Place, LLC
D/B/A: Jae's Spice
Premises: 297 North Street
City/Town: Pittsfield, MA 01201
License #: 097400170
Heard: September 29, 2010

DECISION

This is an appeal of the action of the Pittsfield Licensing Board (the "Board") in suspending the M.G.L. c. 138, § 12 all alcoholic beverages license of North Street Market Place, LLC d/b/a Jae's Spice ("Jae's Spice" or the "Licensee") for three (3) days. On August 30, 2010, the PLB held a hearing to determine if the Licensee was in violation of 204 C.M.R. 2.05 (2) for permitting a disturbance, disorder, or illegality of any kind to the place in or on the licensed premises. The hearing was in relation to an incident that occurred on July 11, 2010.

The Board found that Jae's Spice violated the Alcoholic Beverages Control Commission ("ABCC" or the "Commission") regulation 204 C.M.R. 2.05 (2) for permitting a disturbance, disorder, or illegality of any kind to the place in or around the licensed premises. As a result of these violations, the Board ordered that Jae's Spice all alcoholic beverages license be suspended for a period of three (3) days and that said suspension be served from 12:01 a.m. on September 22, 2010 through midnight on September 24, 2010.

Jae's Spice appealed the Board's decisions to the ABCC and a hearing was held on September 29, 2010. During the hearing Captain Robert Czerwinski, Officer Michael Silver, Jae Chung, Karen Victorin, Akeem Victorin, and Amanda Marcisz testified.

The following documents are in evidence:

1. Photograph Looking Down Melville Street Towards Jae's Spice.
2. Recording of 911 Call Made From Jae's Spice by Bartender Jesse Suphan.
3. Recording of Police Call Log Containing Three (3) Calls Made by Amanda Marcisz.
4. DVD of Pittsfield Licensing Board's Hearing.

5. Aerial Photograph of Jae's Spice and Surrounding Neighborhood.
6. Pittsfield Fire Department Report of Captain Robert Czerwinski, Incident No. 10-3780; and
7. Pittsfield Police Report of Officer Michael J. Silver, Incident No. 10-2743.

There is one tape of this hearing.

FACTS

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

1. The Licensee holds and all alcohol M.G.L. c. 138, §12 license at 273-97 North St. Testimony.
2. On Sunday July 11, 2010 Karen Victorin, an employee of Jae's Spice, held an 18th birthday party for her son Akeem, on the second floor in a banquet hall of the licensed premises. Testimony
3. Ms. Victorin and eight adults chaperoned the party, which was attended by a large number of individuals between the ages of 15 and 20. Ms. Victorin along with other chaperones searched all of the attendees and their belongings for alcoholic beverages when they entered the premises. Testimony
4. Ms. Victorin told the attendees prior to entering the party that they could not come in and out of the licensed premises. They were told that if they left the party, they could not return. Testimony
5. Although there was food served at the party, there was no alcohol sold, served, or located on the second floor banquet hall. Moreover, the invitation stated that no alcohol was going to be served or permitted on the premises. Testimony
6. The party began around 8:45 p.m. At approximately 9:44 p.m. Jesse Suphan, an employee of Jae's Spice, called 911 to ask for assistance with a 15 year old girl ("Jane Doe") who was vomiting in the first floor bathroom. Testimony
7. When Ms. Victorin learned that Jane Doe was vomiting, she announced that the party was over and told everyone to leave. Testimony
8. In response to the 911 call, Captain Robert Czerwinski of the Pittsfield Fire Department along with other firefighters arrived at the premises and went to the bathroom to assist the teenager. Testimony

9. Captain Czerwinski formed the opinion that that Jane Doe was intoxicated. Neither Jane Doe nor her friends stated that she was served or consumed any alcohol at the party. Testimony
10. The firemen assisted Jane Doe until emergency medical technicians arrived and transported her to the hospital. Testimony
11. The Board did not provide the Trip sheet from the emergency medical technicians or medical records for Jane Doe. Testimony
12. As they left the premises, Captain Czerwinski called the Pittsfield Police Department to report a large congregation of teenagers and what appeared to be underage drinking occurring in the parking garage located across the street from Jae's. The Columbus Avenue/Summer Street parking garage is owned by the City of Pittsfield. Testimony, Ex.
13. At approximately 10:00 p.m. Officer Silver arrived at the garage and observed several partially and fully consumed bottles of alcoholic beverages throughout the parking deck. Testimony
14. Officer Silver noticed a young man standing in the corner of the garage who began to vomit as they approached. The police spoke with 18-year-old Justin, who confirmed he was vomiting due to the consumption of alcohol. Testimony
15. Justin admitted to Officer Silver that he had been drinking alcohol throughout the evening and had attended Akeem's party at Jae's Spice. Justin did not state that he had been served or consumed any alcoholic beverages at the party. Justin's parents were called and he was released to his mother. No charges have been filed against him. Testimony

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 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 Com'n, 29 Mass.App.Ct. 954, 955 (1990)(rescript).

The Board's decision states "that the Licensee violated Commission Regulation 204 C.M.R. 2.05 (2) by permitting a disturbance, disorder, or illegality of any kind to take place in or

around (sic) the licensed premises.” This is a misstatement and incorrect application of the Regulation. The Board incorrectly broadened the scope of the Regulation to include disturbances, disorders, or illegalities that occur **around** the licensed premises.

The correct language of 204 C.M.R. 2.05 (2) prohibits a licensee from permitting a disturbance, disorder, or illegality of any kind to take place **in or on** the licensed premises (emphasis supplied). Here, the Board did not present any evidence that a disturbance, disorder or illegality took place at all much less in or on the licensed premises. Moreover, the Board agreed that the licensee was not serving alcohol to underage individuals or permitting underage individuals to consume alcohol or possess alcohol

Although Ms. Victorin and the licensee may have exercised poor judgment in having a party this size open to anyone who wanted to attend, there is insufficient evidence to conclude that the Licensee permitted a disturbance, disorder, or illegality of any kind to take place in or on the licensed premises. Testimony from multiple sources shows that there were no alcoholic beverages served and/or located at the party. Disturbances and underage drinking might have occurred across the street from the premises; however, the Licensee is not liable for that behavior on these facts, which do not show any activity that emanated in, or on the licensed premises.

CONCLUSION

The Pittsfield Licensing Board failed to prove its charges that: Jae’s Spice violated Commission Regulation 204 C.M.R. 2.05 (2) by permitting a disturbance, disorder, or illegality of any kind in or on the licensed premises. The Commission therefore **DISAPPROVES** the action of the Pittsfield Licensing Board in finding that the licensee violated the regulation. As a result, the Commission need not reach the question of whether the Commission approves or disapproves the action of the Board in suspending Licensee’s license for three (3) days since any suspension would be aberrant to the Commission’s finding that no violation was committed by the licensee.

The Commission remands the matter to the Board with the recommendation that no further action be taken by the Board against the licensee as a result of this incident.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman, _____

Susan Corcoran, Commissioner _____

Dated in Boston, Massachusetts this 8th day of November 2010.

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 days of receipt of this decision.

cc: Local Licensing Board
 File