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Alcoholic Beverages Control Commission
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Chairman

DECISION

**G & G Restaurant, Inc.
dba Genesio Ristorante & Bar
482 South Main Street
Randolph, MA 02368
License #: 100800059
Heard: February 9, 2011**

This is an appeal of the action of the Randolph Licensing Board (the "Board") in suspending the M.G.L. c. 138, §12 all alcoholic beverages license of G & G Restaurant, Inc. dba Genesio Ristorante & Bar (the "Licensee" or "G&G"). On November 15, 2010, the Local Board held a hearing that resulted in a five (5) day suspension. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on February 9, 2011.

The following exhibits are in evidence by agreement of the parties:

1. Notice of Hearing dated August 2, 2010;
2. Minutes of Hearing from August 2, 2010;
3. DVD of Hearing from August 30, 2010;
4. Notice of Hearing dated October 27, 2010;
5. Police Report from July 23, 2010;
6. Commission Form 43 dated October 6, 2006;
7. Minutes of Hearing dated September 25, 2006;
8. Commission Renewal Application dated November 30, 2006;
9. Commission Renewal Application dated November 26, 2007;
10. Commission Renewal Application dated November 26, 2008;
11. Commission Renewal Application dated November 30, 2009;
12. Local Board Decision dated November 19, 2010;
13. Minutes of Hearing dated November 15, 2010;
14. DVD of Hearing from November 15, 2010;
15. Liquor Policy from the Town of Randolph; and
16. Secretary of State Corporate Record of Licensee.

There is one (1) tape of this hearing.

FACTS

1. G & G Restaurant, Inc. dba Genesio Ristorante & Bar is a Massachusetts Corporation duly organized and existing under the laws of the Commonwealth of Massachusetts with a place of business located at 482 South Street, Randolph, MA. Ex 16
2. On July 23, 2010, there was an altercation in the parking lot of G&G to which the Randolph Police responded. At the parking lot the police officers spoke with an individual under the age of twenty-one (21) who appeared to be intoxicated. This individual reported to the police that he was under twenty-one years old and had been served an alcoholic beverage at G&G. He also reported that the bartender had not requested any identification from him. Ex. 5
3. On August 2, 2010, the Board sent a hearing notice to G&G informing them that a hearing was going to be held regarding their alcoholic beverages license on August 30, 2010. The hearing notice indicated that the Board would be hearing evidence relative to service of an alcoholic beverage to a minor and service of an alcoholic beverage to an intoxicated person. Ex 1
4. The Board held a hearing on these matters on August 30, 2010. Ex 3
5. The Board received written documentation and heard testimony from a Randolph police officer. Michael Grasso, a member of the LLC also testified. The manager of record, Suzette Grasso was present but elected not to testify. Ex 3
6. At the conclusion of the hearing, the Board voted to roll back the hours of the licensee.¹
7. On October 27, 2010, the Board issued a subsequent notice to the Licensee stating that it would hold a hearing on November 15, 2010 on certain violations. Ex 4
8. On November 15, 2010, the Board held a hearing to determine whether:
 - a. G&G violated its license by misrepresenting the identity of G&G's manager on its application for its license and on each application for renewal thereof. G&G identified Suzette E. Grasso as its manager on its initial application and each renewal application.
 - b. G & G violated M.G.L. c. 138 §34 and 204 CMR 2.05 (2) by serving alcohol to a minor on or about July 23, 2010. Ex 7
9. At the November 15, 2010 hearing the Board heard evidence that Suzette E. Grasso has not acted as manager, and that Michael Grasso has, in fact, acted as manager at all times since the initial license was granted. In the application for an alcoholic beverages license Suzette Grasso indicated that she would be at the premises 50 hours a week. Exhibit 6. Mrs. Grasso testified that she is a full time employee at a business other than G&G and works Monday thru Friday 50 hours a week there. She also testified that she is at the premises approximately 10 hours a week. Ex 14
10. At the conclusion of the hearing, the Board found by unanimous vote:

¹ Pursuant to M.G.L. c. 138, § 67, the Licensee attempted to appeal the action of the Board in rolling back its operating hours. Pursuant to M.G.L. c. 138, § 12, ¶ 6, sentence 2, local licensing authorities are permitted to decrease the operating hours of a licensee. Furthermore, it has been adjudicated that the action of a local licensing authority in reducing the hours of operation of a licensee is not a modification of a license, and that a licensee's purported appeal to this Commission of such action by the local licensing authority is without statutory authority and, hence, not permitted. *Casa Loma, Inc. v. Alcoholic Beverages Control Commission*, 377 Mass. 231, 234 (1979); *Profile Lounges, Inc. v. Alcoholic Beverages Control Commission*, 7 Mass. App. Ct 453 (1979). Consequently, this Commission does not have jurisdiction over an appeal of a rollback of hours.

- a. Sale to a Minor: that G&G made a sale of an alcoholic beverage to a person under twenty-one (21) years of age, that being Dean Doucette, age Twenty (20), on July 23, 2010 and that the sale of the alcoholic beverages were for his use. Further, Mr. Doucette consumed such alcoholic beverages on the premises of G&G on that date. The Board found that there was satisfactory proof that G&G had violated and permitted the violation of the license and a law of the Commonwealth of Massachusetts, by serving and selling alcoholic beverages to a person under twenty-one (21) years of age.
11. The Board issued a written reprimand to G&G for this violation.
 - a. False statements in license application and renewal application: that the licensee made false statements in its license application and in its renewal applications regarding the identity of the manager of G&G. G&G's application for a license represents that the manager of G&G's would be Suzette Grasso. The application attaches a Clerk's Certificate of Vote representing that Suzette Grasso had been appointed Manager of the Corporation. That document was signed by Suzette Grasso and indicated that she would be on the premises 50+ hours per week. G&G's application attached a Commission Form A Licensee Personal information Sheet. That document was signed under the pains and penalties of perjury. G&G submitted no such document containing the personal information of Mr. Grasso. From the date G&G commenced business as a licensed establishment, Suzette Grasso was not the "manager" of G&G's as that term is understood by the Local Board. She did not work as the manager of G&G. Michael Grasso acted as the manager at all times. Mrs. Grasso worked not more than sixteen (16) hours per week, and was not generally present at the premises during peak times for business and peak times for alcohol-related problems. Exs 12,13
12. Thereafter, the Board issued a written decision dated November 19, 2010 that the Licensee (1) made a sale or delivery to a person under the age of twenty-one (21) years old and issued a letter of warning and (2) made false statements in its license application and subsequent renewals and suspended the Licensee's all alcohol restaurant license for a period of five (5) days. Ex 12
13. The Board, on behalf of the town, has adopted a progressive discipline policy for alcoholic beverages licensee violations. The policy sets forth the following penalty: If a licensed establishment shall be found by the Local Board to be in violation of the General Laws of the Commonwealth, or a rule or regulation of the Local Board, the following are the guidelines for imposition of penalties:
 - a. First Offense: Written Reprimand
 - b. Second Offense: Three (3) to five (5) consecutive days suspension.
 - c. Third Offense: Seven (7) to ten (10) consecutive days suspension.
 - d. Fourth Offense: Thirty (30) consecutive days suspension.
 - e. Fifth Offense: Show cause hearing to revoke. Ex 15

The Local Board reserves the right to increase the penalty if the offense is of an extremely grievous nature and reserves the right to reduce the penalty when mitigating circumstances are present. These guidelines shall take effect on January 1, 1999 (Amended on December 20, 1999 and effective at 12:00 a.m. on December 21, 1999). All liquor establishments will start with a record of no pre-existing violations for the purpose of applying this new policy. For the purpose of counting offenses for application of the above penalty guideline, a violation will be removed from an

establishment's record after thirty-six (36) months have expired from the date of the violation. Ex 15

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 Comm’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 Comm’n, 29 Mass.App.Ct. 954, 955 (1990)(rescript).

Incident on July 23, 2010 Service to a Minor

A licensee violates G.L. c. 138, §34² by delivering or selling alcoholic beverages to an individual under twenty-one (21) years of age on its premises. The board found that G&G sold or delivered an alcoholic beverage to a person under twenty-one years of age on its premises. The Board issued a written reprimand for this violation. A written reprimand is not considered an action of a local Board appealable under G.L. c. 138, §67. Therefore, this Commission does not have jurisdiction over this matter and cannot address this reprimand.³

False Statements in an application

204 CMR 2.01 (6) states that “[e]very application for a license or permit by a corporation shall state the full names and home addresses of the...manager or other principal representative of the corporation. It shall be signed by some officer duly authorized by a vote of its board of

² G.L. c. 138, §34 provides, in pertinent part, that “[w]hoever makes a sale or delivery of any alcoholic beverage or alcohol to any person under 21 years of age, either for his own use or for the use of his parent or any other person ... shall be punished.”

³ Yet, if this Commission had jurisdiction, the Commission would be challenged to approve the action of the local board given the facts in evidence and the applicable law. Tiki Hut Lounge, Inc. v. Alcoholic Beverages Control Comm’n 398 Mass. 1001 (1986)(rescript)(possession of alcoholic beverages by underage person insufficient to prove sale or delivery under M.G.L. c. 138, § 34 when “[t]here simply is no language in c. 138, § 34, that reasonably may be construed as imposing a duty on a licensee to exercise reasonable care to assure that no alcoholic beverage will find its way into the hands of a person below the legal drinking age. The statutory language applicable to licensees focuses only on sales and deliveries. Therefore, since there was neither a finding nor evidence that [licensee] sold or delivered an alcoholic beverage to a person below the legal drinking age,” the decision of licensing authority could not be approved.)

directors or other similar board. A copy of such vote certified by the clerk or secretary of the corporation, together with a copy of the certificate of its organization, shall accompany the application. A copy of the vote appointing its manager or other principal representative shall also accompany the application.”

204 CMR 2.01 (8) states that “[a]ll applications shall be made under the pains and penalties of perjury and any false statement contained in any application shall be a cause or ground for refusing to grant the license or permit or for suspending, canceling or revoking a license or permit already granted.

G&G represented in its license application that Mrs. Grasso would be on the premises for 50 hours per week and in each subsequent license renewal that Mrs. Grasso was the license manager. By Mrs. Grasso’s own testimony before this Commission, she is a nursing supervisor Monday through Friday and works fifty hours at another place of employment. Mrs. Grasso admitted that she spends approximately 15 hours only at the premises. Mrs. Grasso admitted that she executed the license application and subsequent renewals and that she does not work at the premises for as many hours as she indicated on the license application.

The Appeals Court has held that the licensee is required to have an authorized manager satisfactory to the licensing authority. G.L. c. 138, § 26. In this case with G&G, the licensee essentially concedes that it did not have the authorized manager in the premises as represented to the local board for the time [in issue]. The statute does not contain any scienter requirement. In any event, the licensee did nothing for years to bring the matter to the commission's attention and proceeded during that interval to serve liquor without a proper manager. That conduct is prohibited by the statute. Howard Johnson Company v. Alcoholic Beverages Control Commission, 24 Mass.App.Ct. 487 (1987). G&G essentially conceded it did not have the authorized manager at the time in issue. This conduct violates § 26. Moreover, where, as here, the licensee did nothing for years to bring the matter to the attention of the Local Board and proceeded to serve alcoholic beverages without the authorized manager, it made false statements in its application and continued the false statement with each renewal application that represented the authorized manager to be in charge of the licensed business.

CONCLUSION AND DISPOSITION

Based on this evidence, the Commission approves the action of the Randolph Licensing Board in finding that G & G violated 204 CMR 2.01 (6) and (8) when it represented in its application that Suzette Grasso was the license manager. However, the Commission disapproves of the penalty that the Board imposed.

The town has a progressive discipline policy that has been adopted by the Board. The Board’s suspension of G&G’s license professed to be progressive discipline based upon prior violations. Although the Board’s progressive discipline policy is reasonable, the application of the policy to the facts at hand are unreasonable.

In the present case, the prior violation was the service to a minor allegation and the false statement allegations were the subsequent violation. The Licensee received a written reprimand for the prior violation on the same night that it received a five (5) day suspension of its license for the subsequent violation. As such, the Board treated each violation for dispositional purposes as separate and unique, despite the fact that the penalty for each occurred on the same night.

In order to have a second violation, there must be a first violation. Here there was no final disposition on the prior violation to render the subsequent offense appropriate under the progressive discipline policy. In order for a prior violation to trigger progressive discipline under a progressive discipline policy, that prior violation must have been finally disposed. Further, the Board's progressive discipline policy does not authorize any suspension of any length for a first offense on facts such as these, that is, without any specified aggravating circumstances. Thus, the Board has legislated away its discretion and is bound by that policy. See Restaurant Consultant's Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 167 (1987).

Therefore the Commission disapproves the action of the Randolph Licensing Board in suspending G & G's license as originally stated and remands the matter to the Board with the recommendation that the Licensee be issued a written reprimand consistent with its progressive discipline policy.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Robert H. Cronin, Commissioner _____

Dated: April 5, 2011

You have the right to appeal this decision to the Superior Court 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
Robert D. Hillman, Esq. via Facsimile 617-951-2323
Frederick Mahony, Chief Investigator
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