



***Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
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Jean M. Lorizio, Esq.
Chairman

DECISION

**970 SOUTH INCORPORATED D/B/A PARTNER'S PUB
970 SOUTH STREET
FITCHBURG, MA 01420
LICENSE#: 0394-00048
VIOLATION DATE: 9/02/2017
HEARD: 04/24/2018**

970 South Incorporated d/b/a Partner's Pub (the "Licensee") holds an alcohol license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, April 24, 2018, regarding an alleged violation of M.G.L. c. 138 § 69 – Sale or Delivery of an Alcoholic Beverage to an Intoxicated Person (1 count), which is alleged to have occurred on September 2, 2017.

The following document is in evidence:

1. Investigator Di Cicco's Investigative Report.

There is one (1) audio recording of this hearing, and four (4) witnesses testified.

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

FINDINGS OF FACT

1. On Saturday, September 2, 2017, Investigators Keefe and Di Cicco ("Investigators") working in an undercover capacity investigated the business operation of 970 South Incorporated d/b/a Partner's Pub to determine the manner in which their business was being conducted. (Exhibit 1; Testimony)
2. At approximately 12:55 a.m., Investigators observed a male individual, Jordan Smith, located to the right of the bar, who appeared to be intoxicated. Id.
3. Smith displayed the following behavioral and physical characteristics: he was unsteady on his feet and had difficulty walking; his knees buckled as he stood and when he attempted to walk; Smith's eyes were glassy, and he spoke in a loud voice which was difficult to understand. Investigator also observed Smith almost fall down to the floor. Id.
4. Investigators continued to observe Smith as he made his way from the far right of the bar to the far left of the bar. Smith was unsteady on his feet, and he swayed from side to side as he walked. His knees often buckled while he walked. Id.
5. At the left side of the bar, Smith sat on a stool next to an unidentified male (the "UMI")

wearing a plaid shirt and shorts. Smith laid his head down on his arms atop the bar. After sitting thus for a few minutes, Smith got up from his seat and talked to other individuals in the bar. Investigators observed that Smith leaned on a chair for support while standing up. Id.

6. At approximately 1:15 a.m., Investigators observed Smith and the UMI standing in line at the service window located on the right side of the bar. Id.
7. Investigators observed that Smith was unsteady on his feet. At times he had his eyes closed with his head down, and sometimes his knees buckled. Id.
8. Smith and the UMI were known to the bartender, Kevin Michaud, and Michaud has denied each of them service at the licensed premises many times in the past. (Testimony) On the night in question, Michaud told the other bartender not to serve Smith or the UMI because they were intoxicated. Id.
9. Last call was at approximately 1:15 a.m. Id.
10. At approximately 1:18 a.m., Investigators observed Michaud place two bottles of beer in front of Smith and the UMI at the service window. Id.
11. The service window is also used as an area where staff place discarded bottles and glasses. (Testimony) Investigator Keefe admitted that it is possible that there were discarded bottles at the service window when Smith and the UMI were standing there. Id.
12. At this time, Investigator Di Cicco stood to the left of Smith and the UMI. Investigator Keefe stood at the middle of the bar with a view of Smith and the UMI, who were approximately 15-20 feet away from him. Smith and the UMI were across the bar facing Investigator Keefe through the service window, and Michaud's back was to Investigator Keefe. Id. It was busy at the time, but there were no permanent structures obstructing Investigator Keefe's view. Id.
13. Investigator Keefe observed Smith and the UMI pick up two bottles of beer from the service window. Id. Investigator Di Cicco also observed Smith and the UMI each in possession of a bottle of beer. Id.
14. Investigators and members of the Fitchburg Police Department made contact with Smith, the UMI, and bartender Michaud. (Exhibit 1; Testimony)
15. Investigators informed Michaud of the violation and that a report would be submitted to the Chief Investigator for review. (Exhibit 1; Testimony)

DISCUSSION

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; see McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

To substantiate a violation of M.G.L. c. 138, § 69, there must be proof of the following elements: (1) that an individual was in or 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. See 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.; 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 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). “[D]isbelief 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, 472 (1981).

To find a violation of M.G.L. c. 138, § 69, evidence must exist 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”). Direct or circumstantial evidence or a combination of the two may be used to prove that an individual is intoxicated. See 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 of 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; see P.J. Liacos, Massachusetts Evidence §4.2, at 118-119; §5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

The Commission must determine whether substantial evidence exists to find that the Licensee, its staff or employees, sold or delivered an alcoholic beverage to an intoxicated person in violation of M.G.L. c. 138, § 69. Here, there is no dispute that Smith was showing signs of intoxication and that the bartenders knew this. The question is whether Michaud served Smith alcoholic beverages after Michaud knew that Smith was intoxicated. The Licensee argues that the two beers that

Michaud placed on the bar were not for Smith and that any beer that Smith had in his possession must have been taken by him from the discarded area. In fact, Investigator Keefe acknowledged that he was not sure who ordered the two beers that Michaud placed in front of Smith and the UMI.

The Commission is not convinced that there is substantial evidence that Michaud served Smith an alcoholic beverage after he was showing signs of intoxication. While the Investigators saw Michaud place a beer bottle in front of Smith and saw Smith in possession of a beer bottle thereafter, doubt exists as to whether the bottle Smith was holding had been served to him or to someone else or had been taken by him from the discarded area. (Testimony) There was evidence that Smith was standing in the area where discarded bottles are placed. *Id.* Investigator Keefe admitted that it is possible that there were discarded bottles at the service window when Smith and the UMI were standing there. *Id.* The Commission is not convinced that there is substantial evidence that Michaud served Smith an alcoholic beverage after Smith was showing signs of intoxication, and consequently, the Commission finds that the Licensee did not violate M.G.L. c. 138 § 69.

CONCLUSION

Based on the evidence, the Commission finds that NO VIOLATION of M.G.L. c. 138 § 69 occurred.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth Lashway, Commissioner



Jean M. Lorizio, Chairman



Dated: August 24, 2018

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.

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cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Joseph Di Cicco, Investigator
Dennis Keefe, Investigator
John M. Dombrowski, Esq. via facsimile 978-840-9032
Administration, File