



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
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Chairman

DECISION

**JMRS RESTAURANT INC. D/B/A TAVERN IN THE SQUARE
189 WASHINGTON STREET
SALEM, MA 01970
LICENSE#: 1064-00124
HEARD: 08/31/2017**

This is an appeal under M.G.L. c. 138, § 67, by JMRS Restaurant Inc. d/b/a Tavern in the Square (the "Licensee" or the "Tavern") located at 189 Washington Street, Salem, Massachusetts. The Tavern is appealing the action of the City of Salem License Commission (the "Local Board" or "Salem") for suspending its M.G.L. c. 138, § 12 all alcoholic beverages license for thirty (30) days. The Tavern timely appealed the Local Board's action to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Thursday, August 31, 2017.

The following documents are in evidence:

1. Salem Police Officer Monk's Incident Report, 8/7/2016;
2. Salem Police Sergeant Gaudet's Incident Report, 9/7/2016;
3. Local Board's Decision 3/28/2017;
4. Local Board's Notice of Meeting to be held 3/13/17;
5. Tavern's license for 2017;
6. Essex County Court Public Docket Report for Case# 1677CR-00375;
7. Certification of medical record from Cataldo Ambulance Service;
8. Witness Statement by David Moller;
9. Photograph of officer's injured ear;
10. Thumb drive containing:
 - o Video surveillance of licensed premises;
 - o Video of booking process of Customer¹ at Salem Police Department;
 - o Transcript of Salem Police Officer Jessica Rondinelli's deposition; and
 - o Transcript of Salem Police Officer Eric Gagnon's deposition;
11. CD containing video of booking process of Customer at Salem Police Department;²
12. Local Board's notice regarding closing procedures;
13. Disciplinary notices issued by the Local Board to various licensees;
14. Deposition transcript of Jason L'Abbe;
15. Deposition transcript of Customer, with deposition exhibits; and
16. Incident report of Jason L'Abbe, 8/7/16.

¹ Given the privacy rights of the subject patron, the Commission refers to her herein as "Customer."

² The video was originally submitted as part of Exhibit 10, but when the Commission was unable to open the video after the hearing, Licensee's counsel submitted the video to the Commission on a CD.

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

The Commission took administrative notice of the Licensee's Commission records. At the close of the hearing, the Commission left the record open until September 29, 2017 for the submission of closing statements as well as for the Local Board's two prior decisions regarding the Licensee and for evidence of penalties issued by the Local Board to other licensees for similar violations. By agreement of the parties, each of the parties submitted to the Commission additional documents after the hearing but before September 29, 2017. The Commission timely received the closing statements as well as other documentation, which the Commission has marked as Exhibits 11 to 16. Accordingly, the record is now closed.

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. JMRS Restaurant Inc. d/b/a Tavern in the Square has held a M.G.L. c. 138, § 12 all alcoholic beverages license exercised at 189 Washington Street, Salem, MA since May 2009. (Commission records)
2. On August 6, 2016 into the early morning of August 7, 2016, Customer, then 19 years of age, was a patron of the Tavern. Customer had with her a fraudulent Rhode Island driver's license. (Testimony)
3. Customer arrived at the Tavern between 9:00 p.m. and 9:30 p.m. on August 6, 2016 with a friend, and they sat at a table in the "middle bar" area where they received table service from Tavern employee Jessica Stavropoulos. (Testimony)
4. From Stavropoulos, Customer ordered a Long Island iced tea³ and Red Bull energy drink at about 9:30 p.m., and her friend ordered a margarita. Customer also ordered a side of tater tots, which she shared with her friend. (Testimony; Exhibit 15 at Depo. Exhibit #4)
5. At about 10:30 p.m., Customer ordered from Stavropoulos another Long Island iced tea and Red Bull. Id.
6. At about 11:30 p.m., Customer ordered from Stavropoulos her third Long Island iced tea and Red Bull. Id.
7. Stavropoulos did not observe Customer showing signs of intoxication or acting hostile at the times she served Customer the Long Island iced teas. Id.
8. Customer paid the bill totaling \$48.68 at 11:31 p.m. and then proceeded to the Tavern's bar.⁴ Id.
9. A signed sales slip indicates that at 11:40 p.m.—when Customer was at the bar-- Customer paid a \$10 charge with a \$2 tip for a total of \$12. (Exhibit 15 at Depo. Exhibit #5)

³ A Long Island iced tea is a type of alcoholic mixed drink, which contains vodka, gin, rum, and tequila. (Testimony; Exhibit 14) The Tavern serves it in a 14 ounce glass. (Testimony) The former general manager of the Tavern, who testified at the Commission hearing, and the Tavern's bartender, Jason L'Abbe, who was deposed in a separate civil action, testified differently about how much of each type of alcohol a Tavern bartender is supposed to put in a Long Island iced tea. (Testimony; Exhibit 14)

⁴ The bill included Customer's friend's margarita. (Testimony; Exhibit 15 at Depo. Exhibit #4)

10. At 11:42 p.m., Customer was charged for a shot of Patron silver, which was \$10, with a \$2 tip for a total of \$12. Id.
11. At 11:52 p.m., Customer was billed for a sangria, and she paid \$9 for it including the tip. Id.
12. At 12:23 a.m., Customer was billed for a sangria, and she paid \$10 for it including the tip. Id.
13. At approximately 12:30 a.m., Customer became physical with male patrons inside the Tavern, including throwing her beverage on or at one of them. (Testimony; Exhibits 4, 8, 10)
14. Customer promptly exited the premises and started a physical altercation outside the premises with a female. (Testimony; Exhibits 1, 2, 4, 10)
15. The Salem Police Department responded to the scene, and Customer viciously attacked the responding female police officer causing her a serious personal injury. (Testimony; Exhibits 1, 2, 9, 10)
16. Customer, who did not testify at the hearing before the Commission,⁵ testified at her deposition in a separate civil matter that:
 - a. She had not consumed any food on August 6, 2016 until she ate the tater tots at the Tavern that evening;
 - b. She smoked marijuana on August 6, 2016 in the afternoon and in the evening before going to the Tavern, and she approximated that the total she smoked that day was two or three grams;
 - c. On August 6, 2016, before going to the Tavern, she had taken approximately seven prescribed medications for mental health issues;
 - d. She went to the Tavern so frequently that she was no longer carded there;
 - e. On prior occasions, she used her fake identification to enter the Tavern, but on the night of August 6, 2016, she was not carded;
 - f. She would typically consume at the Tavern three to five Long Island iced teas, multiple shots of Patron, and a few beers over the course of two to four hours;
 - g. In August 2016, she was 5'5" and weighed 165 pounds;
 - h. She did not consume any alcoholic beverages on August 6, 2016 before she went to the Tavern; and

⁵ Counsel represented to the Commission that Customer was incarcerated at the time of the hearing before the Commission as a result of her actions in the early morning of August 7, 2016. (Commission File)

- i. While at the Tavern on August 6, 2016, she consumed three Long Island iced teas with Red Bull, two shots of Patron, and one and a half glasses of sangria. She purchased the Long Island iced teas with Red Bull from the waitress and the other drinks at the bar.⁶

(Exhibit 15)

17. On March 13, 2017, the Local Board held a hearing on the alleged violations of 204 CMR 2.05(2) to wit: M.G.L. c. 138, § 34 (sale of alcoholic beverages to a person under 21 years of age) and 204 CMR 2.05(2) to wit: M.G.L. c. 138, § 69 (serving alcoholic beverages to an intoxicated person).
18. By decision March 28, 2017, the Board found the Tavern committed both of the violations and imposed a suspension of 15 days to be served for each violation with the suspensions to be served consecutively, for a total of 30 days.
19. Tavern timely filed an appeal of the Local Board's decision to the ABCC, and the Local Board agreed to stay the suspension during the appeal.
20. With regard to prior disciplinary action related to the liquor license, on December 12, 2012, the ABCC found the Licensee in violation of 204 CMR 2.05(2) to wit: M.G.L. c. 138, § 34C (minor in possession of alcoholic beverages) and suspended the license for three days, all three days held in abeyance for two years provided no further violations of Chapter 138 or Commission regulations occurred.
21. The Local Board's decision in this matter indicates that the Local Board also found two prior violations against the Licensee: (1) in May 2012, a verbal warning about treating an intoxicated person by a bouncer, and (2) in May 2013, a five day suspension, two days served for assault and battery by a Tavern bouncer on a patron.⁷ (Exhibit 3)
22. The Local Board has issued the following penalties against other licensees who the Local Board found in violation of sale to a minor and/or service to intoxicated:
 - a. Licensee A:
 - i. First offense: over-service of a large group of patrons: two-day suspension;
 - ii. Second offense: serving two minors: five-day suspension, two to serve and three days held in abeyance for one year;
 - iii. Third offense: serving a minor: three-day suspension to serve plus three days carried forward from the Second Offense;

⁶ Because of Customer's inconsistent and contradictory testimony about it, the Commission discredits Customer's deposition testimony concerning whether she believes that she was showing signs of intoxication on August 6, 2016. At first, she testified that she was becoming sociable, relaxed, and talkative after consuming the Long Island iced teas, that she was "heavily intoxicated and incoherent" after drinking the shots of Patron, and that she was "more intoxicated, a little more incoherent, kind of going in and out" after consuming the sangrias. However, on cross-examination, Customer testified that "incoherent" to her means "not being able to walk fast or straight, and just slurred speech, I guess," but that she was not sure one way or another whether she was exhibiting any of those symptoms at any time at the Tavern on August 6, 2016. (Exhibit 15 at pp. 105, 107-109, 217)

⁷ Information about those violations is not in the Commission's File, and the Local Board did not submit such documentation in the present case. Consequently, the Commission does not know what the charges were that the Local Board found Licensee violated.

- b. Licensee B:
 - i. First offense: serving a minor: one-day suspension;
 - c. Licensee C:
 - i. First offense: serving a minor and permitting a disturbance (physical altercation): warning; and
 - ii. Second offense for sale to a minor: three-day suspension, one day to serve and two days held in abeyance.⁸
- (Exhibit 13)

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. 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). 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.

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). “The Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations.” Jaman Corp., d/b/a Crossroads (ABCC Decision Nov. 4, 2010). Adjudicatory findings must be “adequate to enable [a court] to determine (a) whether the order and conclusions were warranted by appropriate subsidiary findings, and (b) whether such subsidiary findings were supported by substantial evidence.” Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm’n, 12 Mass. App. Ct. 879 (1981) (quoting Town of Westborough v. Dep’t of Pub. Util., 358 Mass. 716, 717-718 (1971)).

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975). Both the Local Board and the Commission have the authority to grant, revoke, and suspend licenses. “The Commission has comprehensive powers of supervision over licensees,” Boston Licensing Bd. v. Alcoholic Beverages Control Comm’n, 367 Mass. 788, 795 (1975), 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).

The Local Board has the burden of producing satisfactory proof that the Licensee violated 204 CMR 2.05(2) to wit: M.G.L. c. 138, §§ 34, 69 and that the penalty imposed by the Local Board was a reasonable exercise of its lawful discretion.

⁸ On the same day it issued that decision, the Local Board also issued two other decisions to Licensee C related to two separate instances of sales of narcotics. Licensee C received a six-month suspension for the first of those two violations and a revocation for the second.

I. Sale, Delivery, or Furnishing Alcoholic Beverages to Persons Under Twenty-One Years of Age, M.G.L. c. 138, § 34

The Licensee was charged with a violation of 204 CMR 2.05(2) to wit: M.G.L. c. 138, § 34 – sale or delivery of an alcoholic beverage to a person under twenty-one years of age. General Laws Chapter 138, § 34 provides, in 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.” M.G.L. c. 138, § 34. The Appeals Court has stated that “the purpose of the statute [is] to protect the welfare of children from the danger of alcohol.” Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 133-134 (1996); accord Fran’s Lunch, Inc. v. Alcoholic Beverages Control Comm’n, 45 Mass. App. Ct. 663, 664 (1998).

The Licensee admits that it violated M.G.L. c. 138, § 34 but disputes the penalty as excessive. The Commission finds by substantial evidence that the Licensee sold and delivered alcoholic beverages to Customer who was younger than age 21 and upholds the Local Board’s finding of a violation of M.G.L. c. 138, § 34. The assessment of the penalty is discussed below.

II. Service of Alcoholic Beverages to an Intoxicated Person, M.G.L. c. 138, § 69

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).

In order to prove this violation, the Local Board must show: (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. 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 with regard to one licensee where acquaintance described patron who later had accident as appearing to feel “pretty good” while at that licensed premise). 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). The Local Board may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two. See Vickowski, 422 Mass. at 611 (direct evidence of obvious intoxication not required). “[S]ome quantum of direct evidence that the patron was exhibiting outward signs of intoxication is unnecessary; circumstantial proof alone can suffice if it is sufficiently robust.” Rivera, 77 Mass. App. Ct. at 21. “[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 (where patron had been served six or more White Russians); see O’Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64, 65 (1981) (inference of obvious intoxication could be drawn where patron consumed at least fifteen beers and six martinis). “When evidence of excessive consumption is lacking, as matter of common sense and experience, the inference may not be drawn.” Vickowski, 422 Mass. at 611; see Kirby, 34 Mass. App. Ct. at 632 (consumption of eight beers insufficient to support inference of obvious intoxication); Makynen, 39 Mass. App. Ct. at 312 (same, as to consumption of five to six cans of beer). “Evidence 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.

Without sufficient evidence, the Commission must resist the temptation to reason backwards to find that a person was manifestly intoxicated before being involved in or causing a horrific accident. In Royal Dynasty, Inc. v. ABCC, Suffolk Superior Court C.A. No. 03-1411 (Billings, J.) (December 9, 2003), the Superior Court reversed the Commission decision which found a violation of M.G.L. c. 138, § 69. The Superior Court described the facts in that case as “a horrific fatal accident, the extraordinarily reckless behavior by two recently-departed Royal Dynasty patrons that caused it, the failed PBT [portable breathalyzer test] and field sobriety tests at the scene, and the evident absence of another source of alcohol for either man.” Royal Dynasty, at 10. The Superior Court acknowledged that with those facts, “it is tempting to reason backward to the conclusion that they [the allegedly intoxicated patrons] must have been visibly intoxicated when served.” Id. However, the elements necessary to prove a violation of M.G.L. c. 138, § 69 require the presence of a visibly intoxicated person in or on a licensed premise, followed by a sale or delivery of an alcoholic beverage to that visibly intoxicated person.

Here, the evidence is clear that Customer ordered and was served three Long Island iced teas from her waitress at a table. However, there was no testimony at the Commission hearing with regard to Customer’s purchases or consumption of alcoholic beverages at the bar. Likewise, there was no testimony at the Commission hearing concerning whether Customer was showing discernible signs of intoxication while she was at the bar. In review of the documentary evidence, the Commission is faced with the question as to how much weight to afford the deposition testimony, in particular, Customer’s, which the Local Board submitted, with the Licensee’s assent, as an exhibit after the Commission hearing.⁹ The Supreme Judicial Court took up a similar issue in Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526 (1988). In that case, the Supreme Judicial Court examined whether it was appropriate for the local board, and then the ABCC on appeal, to rely upon the criminal

⁹ The parties submitted the deposition transcripts of: Officer Eric Gagnon who testified about Customer’s booking process on August 7, 2016 (Ex. 10); Officer Jessica Rondinelli who testified about the incident outside the Tavern on August 7, 2016 (Ex. 10); Jason L’Abbe who was a Tavern employee on August 6, 2016 (Ex. 14); and Customer (Ex. 15). The depositions were taken in a different civil action about the events involving Customer inside and outside the Tavern on the evening on August 6, 2016 to the early morning of August 7, 2016.

trial testimony of a minor who testified that she had been served alcoholic beverages at the subject licensees' establishments. Embers of Salisbury, Inc., 401 Mass. 526 (1988). The Embers of Salisbury Court noted that it was for the ABCC "to weigh the credibility of witnesses and to resolve factual disputes. 'A court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'" Id. at 529 (quoting School Comm. Of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978)). The Embers of Salisbury Court also noted that the transcript from the criminal trial—which was given under oath and subject to cross-examination-- was available to both parties; certain particulars of the minor's testimony was corroborated by the testimony of the licensees and of police officers; and the parties could have subpoenaed the minor to testify at the hearing. Id. at 530-531. Consequently, the Supreme Judicial Court affirmed the ABCC's finding of a violation of sale to a minor.¹⁰ Id. at 531.

The Commission is persuaded that the particulars of Customer's deposition testimony about the number and type of cocktails that she testified she ordered, purchased, and consumed on the premises, as summarized in paragraph 16 in the Facts Section above, is consistent with the sales slips marked as Exhibit 5 to her deposition. (Exhibit 15; Exhibit 15 at Depo. Exhibit #4) The sales slips evidence that Customer purchased four drinks at the bar: one shot of Patron, two glasses of Sangria, and another item for which she paid \$12 (\$10, plus a \$2 tip, which was the same she paid for the shot of Patron). Customer testified at her deposition that she purchased at the bar two shots of Patron and two glasses of Sangria, which is consistent with the sales receipts. (Exhibit 15; Exhibit 15 at Depo. Exhibit #5) There was no evidence to the contrary. For those reasons, the Commission relies on Customer's deposition testimony in finding that after consuming the three Long Island iced teas with Red Bull, Customer went to the bar and purchased and consumed two shots of Patron and two sangrias.¹¹ See id.

The evidence further reveals that Customer ordered the three Long Island iced teas with Red Bull between approximately 9:30 p.m. and 11:30 p.m. from a waitress while seated at a table. (Testimony) The person who served those three drinks testified that Customer was not showing signs of intoxication when she served Customer any of the three drinks. (Testimony) Customer then proceeded to the bar and between approximately 11:40 p.m. and 12:25 a.m. ordered the two shots of Patron and two glasses

¹⁰ The Embers of Salisbury, Inc., decision is consistent with the line of cases providing that a decision of a board that rests entirely upon hearsay evidence cannot be sustained, but decisions based upon hearsay evidence that are supported and corroborated by competent legal evidence may be sustained. See Moran v. School Committee of Littleton, 317 Mass. 591, 596-597 (1945) (citations omitted); Braintree Brew House LLC d/b/a The Brew House (ABCC Decision March 27, 2013) (violation of § 69 disapproved where all of the evidence presented to the Commission constituted hearsay; all of the witnesses who testified had either arrived at the scene after the patron was outside the premises or were with the patron at the hospital); Vannak Kann d/b/a The Crown (ABCC Decision August 9, 2016) (disapproving local board's finding of a violation of § 69 where all of the information regarding patron's behavior and consumption of alcoholic beverages while inside of the licensed premises constituted hearsay).

¹¹ The Commission also notes that Customer made statements at a lawful deposition that were against her own penal interest, which would allow her recorded testimony to be admitted as an exception to the rule against hearsay. See Mass. Guide to Evidence, SJC Advisory Committee on Mass. Evidence Law, 2017 ed., Art. 8, Sec. 804 (b)(1), (3) (providing that where declarant is unavailable as witness, prior recorded testimony and statements against interest may be admitted). Customer was unavailable to testify at the Commission hearing because she was incarcerated at that time. The writ of habeas corpus is not available in administrative proceedings. See M.G.L. c. 248, § 2.

of Sangria. (Exhibit 15 at Depo. Exhibit #5) Customer then became aggressive with male patrons at the bar around 12:30 a.m., and shortly thereafter, she left the premises after throwing her beverage—her last glass of sangria – on or at a male patron. (Testimony; Exhibit 10)

As there was no testimony at the Commission hearing about Customer's purchase of alcoholic beverages at the bar, there was no live testimony about whether she was showing signs of intoxication at the time of service of alcoholic beverages at the bar.¹² However, "[a] patron's consumption of a large quantity of alcohol is a circumstance that, in itself, can support the necessary inference." Hang Tai Enterprises, LLC d/b/a Hang Tai Too (ABCC Decision August 14, 2013) (citing Vickowski, 422 Mass. at 611). The Commission is convinced that the "service [to Customer] of [the] large number of strong alcoholic drinks was sufficient to put [the Tavern] on notice that it was serving a [patron] who could potentially endanger others." Cimino, 385 Mass. at 328 (where patron had been served six or more White Russians); Hang Tai Enterprises, LLC d/b/a Hang Tai Too (ABCC Decision August 14, 2013) (liability found where female patron and male patron were each served four to five alcoholic beverages, including a scorpion bowl, at the table; then at the bar female patron was served a 16 ounce scorpion bowl, a kamikaze mixed drink in a shot glass, and at least one beer; and at the bar male patron was served a zombie mixed drink in a 12 ounce glass, a kamikaze mixed drink in a shot glass, and an undetermined number of beers). Customer consumed three Long Island iced teas, each with a Red Bull energy drink,¹³ within two hours, and then, over the course of the next forty minutes, consumed two shots of Patron and a glass of sangria. (Testimony; Exhibit 15; Exhibit 15 at Depo. Exhibit #5) She had consumed six alcoholic beverages over the course of less than three hours when she ordered her seventh alcoholic beverage. (Exhibit 15 at Depo. Exhibit #5) The number and type of alcoholic beverages combined with the period of time over which Customer consumed them supports the inference that Customer was showing signs of intoxication at the time of service of her last glass of sangria. That information alone supports the necessary inference.¹⁴ The Tavern knew or should have known before serving Customer her last glass of sangria that that Customer was intoxicated.

III. Appropriateness of Sanctions Imposed by Local Board

The Licensee further argues that the penalty of a fifteen-day suspension for each of the two violations to be served consecutively is excessive. Therefore, the Commission must review whether the sanction imposed by the Local Board for these violations was reasonable. "The burden is on the licensee to prove the penalty imposed should not be approved." Metrowest Tropical Foods, Inc. (ABCC Decision Sept. 20, 2006). The Local Board does not have a progressive discipline policy. Thus, the Commission must consider, in the absence of these regulations, the totality of the evidence, including but not limited to the prior violation history of the Licensee, the egregiousness of the violation(s), and the penalties imposed against other licensees by the Local Board for comparable violations.

¹² See supra note 5.

¹³ While there is no prohibition against serving alcoholic beverages along with beverages containing caffeine, note that the Commission banned alcoholic beverages that contain caffeine following a ruling by the U.S. Food and Drug Administration that alcoholic drinks that contain added caffeine are unsafe and pose a public health risk. See ABCC Advisory, Nov. 19, 2010; 204 CMR 2.19.

¹⁴ Customer also testified at her deposition that before going to the Tavern she had not eaten all day, she smoked marijuana twice that day, and she had taken seven different prescribed medications for her mental health issues that day. (Exhibit 15)

The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in M.G.L. c. 138. Chapter 138 was “enacted ... to serve the public need and ... to protect the common good.” M.G.L. c. 138, § 23. “[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 Licensee has had three prior violations, two of which were found by the Local Board in 2012 and 2013. Neither of those violations appears to have been for sale to a minor or service to an intoxicated person. However, the Commission found that the Licensee violated § 34C (possession by a minor) in December 2012 and suspended the license for three days, with all three days held in abeyance for two years provided no further violations of Chapter 138 or Commission regulations occurred. (Commission File; Exhibit 3)

The penalties that the Local Board has imposed on similarly situated licensees for sales to a minor have ranged from a warning for a first offense to a three-day suspension for a third offense (with three additional days to be served that were carried forward from a prior offense). The Local Board only presented the Commission with one other instance of a violation by a Salem licensee of service to an intoxicated. In that case, it was the licensee’s first offense but there was over-service to a “large group” of patrons. There, the Local Board imposed a two-day suspension. (Exhibit 13)

In the instant case, this was the Licensee’s fourth violation but its second violation for sale to a minor and first offense for service to an intoxicated patron. (Commission File; Exhibit 3) The Local Board argues that it imposed the fifteen-day penalty for sale to a minor due to the “Tavern’s persistent and habitual admission of persons under the age of twenty-one (21) without regard for the welfare of the community or its statutory obligations as a licensee.” (Local Board’s Closing Statement, at 2) However, the only violation before the Local Board was the instant one—one count of service to a minor--, and the Tavern’s only other violation for sale to a minor was four years prior to the instant violation. (Commission File; Exhibit 3) Similarly, the Local Board justifies the fifteen-day suspension for sale to an intoxicated on “Tavern’s wanton disregard for the safety of its patrons and for the public as well as the magnitude of the resulting consequences.” (Local Board’s Closing Statement, at 5) The Local Board appears to have reasoned backwards from Customer’s egregious behavior once she left the Tavern, in particular, the injury Customer inflicted on a responding police officer. This was the Tavern’s first offense for sale to an intoxicated patron. The Commission finds that based on the Licensee’s prior history, the length of time the Licensee has had its license (since May 2009), the evidence of sanctions imposed upon other licensees for similar violations, and the lack of Local Board rules regarding progressive discipline, the Local Board’s imposition of fifteen-day suspensions for each of the two violations to be served consecutively was too harsh a penalty and inconsistent with the penalties assessed against similarly situated Salem licensees. Instead, the Commission recommends that the Local Board impose sanctions that are more consistent with similarly situated licensees: approximately three days for sale to a minor and approximately four days for service to an intoxicated patron.

CONCLUSION

Based on the evidence and testimony at the hearing, the Commission **APPROVES** the action of the City of Salem Licensing Board in finding that JMRS Restaurant Inc. d/b/a Tavern in the Square violated 204 CMR 2.05(2) to wit: M.G.L. c. 138, § 34 and 204 CMR 2.05(2) to wit: M.G.L. c. 138, § 69.

However, the Commission **DISAPPROVES** the action of the City of Salem Licensing Board in suspending the Licensee's M.G.L. c. 138, § 12 license for thirty (30) days. The Commission finds that based on the aforementioned analysis, the penalty of fifteen days for each of the two violations is too severe. The Commission remands the matter to the Local Board with the recommendation that the Local Board impose a sanction against the Licensee that is more consistent with penalties imposed against similarly situated licensees: approximately three days for sale to a minor and approximately four days an intoxicated patron.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner 

I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Jean M. Lorizio, Chairman 

Dated: December 19, 2017

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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