



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

DECISION

**ADOLFO'S RESTAURANT, INC. D/B/A ADOLFO'S RESTAURANT
254 WORTHINGTON ST
SPRINGFIELD, MA 01103
LICENSE#: 1226-00357
HEARD: 4/03/2018**

This is an appeal of the action of the City of Springfield License Commission (the "Local Board" or "Springfield") for suspending the M.G.L. c. 138, § 12 all-alcohol license of Adolfo's Restaurant, Inc. d/b/a Adolfo's Restaurant ("Licensee" or "Adolfo's") located at 254 Worthington Street, Springfield, Massachusetts for 5 days of which 2 days would be served and 3 days would be held in abeyance for 1 year for a violation of M.G.L. c. 138, § 34 – Sale of alcohol to a minor (2 counts). The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Tuesday, April 3, 2018.

The following documents are in evidence:

1. Joint Pre-Hearing Memorandum;
2. Local Board's Notice of Pre-Hearing Conference, 10/25/2016; and
3. Local Board Decision, 4/18/2017.

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

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

FINDINGS OF FACT

1. Adolfo's Restaurant, Inc. d/b/a Adolfo's Restaurant ("Licensee" or "Adolfo's") located at 254 Worthington Street, Springfield, Massachusetts holds an all alcoholic beverages restaurant license under M.G.L. c. 138, §12. (Commission Records)
2. On August 19, 2016, Springfield Police Officers David Ramos and Edwin Irizarry ("Officers") were on patrol in the Worthington Street area when they were flagged down by two staff members of Adolfo's who led officers to an unconscious male (Patron A) on the sidewalk. (Exhibit 2)

3. Police Officers observed Patron A on the sidewalk in front of the licensed premises. The Officers administered first aid. Patron A was later transported by ambulance to Mercy Hospital for further medical treatment. (Exhibit 2)
4. While assisting Patron A, Officers located on his person a Massachusetts Junior Operator's license in another person's name. The person pictured on the Junior Operator's license did not resemble Patron A. (Exhibit 2)
5. Officer Irizarry reported that he was approached by some friends of Patron A, including Patron B, who stated that Patron A was only 19 (actual date of birth 2/2/1997) and had used an older friend's driver's license. (Exhibit 2)
6. Officer Irizarry observed Patron B coming out of the licensed premise. (Testimony)

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); Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972)). 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)." Id.

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. Ch. 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 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 was charged with a violation of M.G.L. c. 138, § 34 – sale or delivery of an alcoholic beverage to a person under twenty-one years of age. (2 counts) 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.

In this matter, the Local Board produced neither eyewitnesses nor direct evidence regarding Patron A’s presence in the licensed premise and neither eyewitnesses nor direct evidence regarding the Licensee selling or delivering an alcoholic beverage to Patron A.

Regarding Patron B, the Local Board only produced direct evidence regarding his being in the licensed premise but did not produce eyewitnesses or direct evidence as to the Licensee selling or delivering an alcoholic beverage to Patron B.

The only witnesses who testified before the Commission were police officers who had no direct knowledge of any of the elements necessary to support a violation of M.G.L. c. 138, § 34. None of the police officers were present inside Adolfo’s, and therefore, could not testify as to what occurred inside the licensed premise. The officers arrived on the scene when Patron A was unconscious on the sidewalk and could not testify as to what transpired prior to that time.

The alleged violations that are the subject of this appeal present the Commission with issues regarding the admissibility of hearsay evidence and the weight accorded hearsay during an appeal from a local board’s enforcement action. 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 have been sustained. Moran v. School Committee of Littleton, 317 Mass. 591, 596-597 (1945) (citations omitted).

The only information about what transpired inside the premises came from the police officers’ recount of verbal statements made to them by Patrons A and B. The way in which the statements were introduced during the hearing before the Commission constitutes hearsay.¹ These hearsay statements conveyed to the police officers contained the following information:

1. Patron A arrived at Adolfo’s around midnight on August 19, 2016 but did not remember showing any identification to enter the premises. Patron A purchased one or two mixed drinks and consumed two shots of tequila purchased for him by his friend.
2. Patron B had been at Adolfo’s on August 19, 2016 and used a fraudulent Maine driver’s license to purchase several alcoholic drinks

However, there was no direct evidence presented at the Commission hearing as to the Licensee selling or serving alcoholic beverages to Patron A and/or Patron B. All of the information presented at the Commission hearing regarding the Licensee selling or serving alcohol to Patrons A & B constitutes hearsay. The Commission was not presented with any corroborating evidence to support a finding based solely on hearsay.

¹ The statements would not be hearsay if the individuals who made the statement(s) appeared before the Commission to testify, but this did not happen.

Therefore, the Commission is persuaded and finds that the Local Board has not proved by legally competent evidence that the Licensee sold or delivered an alcoholic beverage to Patron A and/or Patron B.

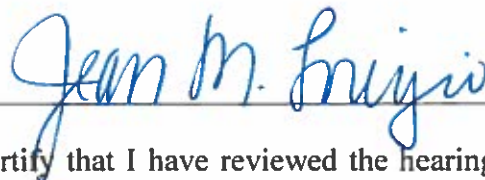
CONCLUSION

The Commission **DISAPPROVES** the action of the Local Board in finding a violation of M.G.L. c. 138, § 34, and for suspending the M.G.L. c. 138, § 12 all-alcohol license of Adolfo's Restaurant, Inc. d/b/a Adolfo's Restaurant.

As such, the Commission remands the matter to the City of Springfield License Commission with the recommendation that it find no violation and that no further action be taken against the Licensee, as any penalty would be discrepant with this Decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



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

Elizabeth A. Lashway, Commissioner



Dated: October 9, 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: Daniel Kelly, Esq. via facsimile 413-733-1245
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