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Chairman

*Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
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DECISION

**M.V.U.S. LLC D/B/A ODYSSEY
300 WORTHINGTON STREET
SPRINGFIELD, MA 01103
LICENSE#: 122600256
HEARD: 01/17/2017**

This is an appeal of the action of the City of Springfield License Commission (the “Local Board” or “Springfield”) for revoking the M.G.L. c. 138 §12 license of M.V.U.S. LLC d/b/a Odyssey (the “Licensee” or “Odyssey”) located at 300 Worthington Street, Springfield, MA. The Licensee timely appealed the Local Board’s decisions to the Alcoholic Beverages Control Commission (the “Commission” or “ABCC”), and a hearing was held on Tuesday, January 17, 2017.

The following documents are in evidence as exhibits:

1. Deposition Transcript of Christian De La Cruz, 6/07/2016;
2. Local Board’s Administrative Record for the Licensee:
 - a. Springfield Police Department’s Special Report, 10/23/2015;
 - b. Local Board’s Decision 11/20/2015;
 - c. Local Board’s Notice of Pre-Hearing Conference, 10/26/2015; and
 - d. Springfield Police Department Incident Report, 10/22/2015.
3. Trial Court Criminal Docket Sheets of P. Bodiford, 10/22/2015;
4. ABCC Decision, 8/16/2011 and Local Board decision dated 9/16/11;
5. Local Board’s Regulations, Policies, and Procedures;
6. Email regarding drug certification;
7. Criminal Docket Sheet of M. Perez, with attached email.

There is one (1) audio recording of this hearing and three (3) witnesses testified.

The Commission took Administrative Notice of the Licensee’s Commission records.

FINDINGS OF FACT

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

1. M.V.U.S. LLC d/b/a Odyssey (“Odyssey”) is the holder of a M.G.L. c. 138, § 12 all alcoholic beverages license located at 300 Worthington Street, Springfield, MA. Mark Ellis is the principal of the Licensee, and Joanne Gagliarducci is the license manager of record. Odyssey received its license on October 15, 2009. (Commission Records, Testimony)
2. The City of Springfield Police Department Narcotics Bureau conducted an undercover investigation involving the illegal distribution of drugs at the Odyssey, from November 2014 until October of 2015. (Testimony, Exhibits 1, 2a, 2d)
3. In November of 2014, Springfield Police Detective Jose Robles, along with Officer Christian De La Cruz¹ were assigned to the Narcotics Bureau in an undercover capacity. Detective Robles has been employed as a police officer for 18 years and has witnessed hundreds of drug transactions. The officers were directed by their supervisor to investigate Odyssey in an undercover capacity for illegal drug dealing. (Testimony, Exhibits 1, 2a, 2d)
4. First Incident: On November 14, 2014 Detective Robles and Officer De La Cruz arrived at Odyssey. The Detectives entered Odyssey and approached “Lola”,² who was the D.J. that evening. The officers asked Lola if they could purchase drugs and gave Lola U.S. currency that had been pre-recorded. Officers observed Lola approach employee P. Bodiford (“Bodiford”) who was working as the bouncer/security staff checking identifications at the door. Lola handed Bodiford the pre-recorded currency and Detectives observed Bodiford hand a small object to Lola. Lola then handed Detective Robles a small bag of cocaine. The cocaine was tagged as evidence pursuant to Springfield Police Department Guidelines.³ (Testimony, Exhibits 1, 2a, 2d)
5. Second Incident: On November 28, 2014, Detective Robles and Officer De La Cruz entered Odyssey with pre-recorded U.S. currency and were approached by Lola, who was speaking to the officers across the bar. Bodiford was standing by the front door and license manger Gagliarducci was working behind the bar. Detective Robles could see the bar and the front door simultaneously from his position. Officers observed Lola approach Bodiford and hand him the pre-recorded currency. Bodiford reached into his pants pocket and then

¹ Officer Christian De La Cruz did not testify before the Commission due to his military deployment outside of the country making him unavailable. On June 7, 2016, prior to his deployment, Officer De La Cruz was deposed, whereby he testified under oath, and was subject to cross examination by Licensee’s counsel. The transcript of this deposition is in evidence as Exhibit 1. (Testimony, Exhibit 1)

² “Lola” is an alias used by Mr. Luis Ortiz, who is a patron, not an employee. “Lola” volunteered to perform miscellaneous jobs inside Odyssey for the license manager and employees. Lola also volunteered some nights as the D.J. while Odyssey was operating. (Testimony)

³ No drug certifications were introduced in evidence for the five items purchased from Bodiford indicating that they tested positive for cocaine, an illegal Class B narcotic substance. (Testimony, Exhibit 6)

handed Lola a small white item. Lola returned to the officers and gave them a bag of cocaine, which the officers logged as evidence. (Testimony, Exhibits 1, 2a, 2d)

6. Third Incident: On January 6, 2015, Detective Robles returned to Odyssey with pre-recorded currency. Detective Robles purchased cocaine directly from Bodiford. Bodiford gave Detective Robles his cell phone number in case Detective Robles needed to purchase more drugs. This cocaine was tagged as evidence. (Testimony, Exhibits 1, 2a, 2d)
7. Fourth Incident: On October 13, 2015, Officer De La Cruz entered Odyssey in an undercover capacity with pre-recorded currency. Officer De La Cruz spoke to M. Perez ("Perez") who was working behind the bar taking money and serving drinks to customers. Officer De La Cruz asked Perez if he could buy cocaine. Officer De La Cruz gave Perez the pre-recorded currency and observed Perez approach Bodiford and exchange the money for cocaine, which was then handed to Officer De La Cruz. The cocaine was tagged as evidence. (Testimony, Exhibits 1, 2a, 2d)
8. Fifth Incident: On October 21, 2015, Officer De La Cruz entered Odyssey and arranged with J. Camacho ("Camacho") Perez's uncle, to purchase cocaine. Officer De La Cruz observed Camacho walk directly to Bodiford and handed over pre-recorded currency for this undercover purchase on this day. Bodiford reached into his right pants pocket and gave Camacho a small white item in return. Camacho then returned and handed Officer De La Cruz a small glassine bag containing cocaine. The cocaine was tagged as evidence. (Testimony, Exhibits 1, 2a, 2d)
9. On October 21, 2015 Bodiford and Camacho were both arrested outside Odyssey. Camacho and Bodiford were each in possession of the pre-recorded currency from the narcotics transaction of this night, used by Officer De La Cruz. (Testimony, Exhibits 1, 2a, 2d, 7)
10. License manager Joanne Gagliarducci was working and present at Odyssey (11/14/2014; 11/28/2014) during two of the five undercover drug transactions. During one undercover narcotics incident, Officer De La Cruz asked Manager Gagliarducci if he could purchase some cocaine. However, Manager Gagliarducci ignored the officer. (Testimony, Exhibit 2)
11. Odyssey's interior premises is rectangular in its layout and not very large, with a capacity of 84 persons. The whole interior of the premises can be seen from the front door. (Testimony, Commission records)
12. Bodiford was employed at Odyssey providing security as a bouncer. By 2014 he had been working at Odyssey for four years. (Testimony)
13. Bodiford admitted before the Commission that he sold cocaine inside Odyssey while he was working. He further testified that he pleaded guilty to four counts of Distribution of a Class B Substance, cocaine, a violation of M.G.L. c 94C § 32A(a). He was sentenced to a term of two years in the House of Correction, one (1) year to serve, the balance suspended for two (2) years. (Testimony, Exhibit 3)

14. The Local Board charged the Licensee with violations of 204 CMR 2.05(2) Permitting an illegality on the licensed premises to wit: Distribution of a Class B substance (cocaine) on the licensed premises by an employee on November 14, 2014 (2 counts); on November 28, 2014 (2 counts) on January 6, 2015 (1 count) October 13, 2015 (2 counts) and on October 21, 2015 (2 counts).⁴ On November 19, 2015, the Local Board held a hearing, found the Licensee in violation, and revoked Odyssey's M.G.L. c. 138, § 12 license. Odyssey has been closed and not operating since the Local Board issued its decision. (Testimony, Exhibit 2b)
15. The Licensee has the following history of violations:
- August 16, 2011: The ABCC found the Licensee in violation of failure to post a cover charge, sale of alcoholic beverages to an intoxicated patron, and failure to provide printed receipts. The license was suspended for three days. (Exhibit 4)
- September 16, 2011: The Local Board found three violations against the Licensee for violation of 204 CMR 2.05 (2) Permitting an illegality on the licensed premises to wit: patrons smoking in the licensed premises; hindering an investigation; and no manager of record present. The Local Board issued a penalty of a three (3) days suspension, one (1) day to serve/shut down, and the remaining two (2) days held in abeyance for a period of one (1) year, until September 15, 2012. (Exhibit 2)
16. The Rules and Regulations of the City of Springfield Board of License Commissioners Concerning the Sale of Alcoholic Beverages do not contain any provisions regarding progressive discipline. (Exhibit 5)

DISCUSSION

The Local Board has the burden of producing satisfactory proof that the licensee violated 204 CMR 2.05(2) permitting a disorder, disturbance, or illegality on the licensed premises, to wit: M.G.L. c. 94C section 32A(a) Distribution of a Class B Controlled Substance (cocaine) on the licensed premises, and that the penalty imposed by the local board was a reasonable exercise of its lawful discretion.

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).

⁴ The Local Board charged Odyssey on four of the five dates with two (2) counts each night of distribution of narcotics (November 14, 2014; November 28, 2014; October 13, 2015; and October 21, 2015). The evidence before the Commission demonstrated that on these dates the allegations were for one count of a violation of distribution of Class B cocaine on each of the nights, resulting in a total of five counts of the violation. (Testimony, Exhibits 2a, 2b, 2d)

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). 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). There must be substantial evidence that a violation of 204 CMR 2.05(2) has occurred. "Substantial evidence of a violation is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); accord Charlesbank Rest. Inc., v. Alcoholic Beverages Control Comm'n, 12 Mass. App. Ct. 879 (1981).

In the context of an ongoing drug dealing operation operating out of a licensee's establishment, the Commission is not required to make a finding that the licensee *actually knew* that drug dealing was going on in their licensed premises. As the Appeals Court held in New Palm Gardens Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 798 (1981), "[i]t is ... quite possible for a licensee to offend the regulatory scheme without scienter." The obligation of a licensee under the law is clear. A vendor who sells alcohol is "bound at his own peril to keep within the condition of his license." Commonwealth v. Gould, 158 Mass. 499, 507 (1893); Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Comm'n, 7 Mass. App. Ct. 186, 190 (1979).

Furthermore, a licensee "need not have been a participant in the illegal conduct to have violated the regulation." DeMello v. Alcoholic Beverages Control Comm'n, 411 Mass. 1001 (1991) (affirming Commission's affirmation of local board's decision to revoke license because of illegal sales of controlled substances on the licensed premises); see New Palm Gardens, Inc. v. Alcoholic Beverages Control Comm'n, 11 Mass. App. Ct. 785, 796-798 (1981) (licensee "permitted" a violation of law although neither the manager nor the person in charge of the licensed premises was present at the time of the violation); Rum Runners Inc. v. Alcoholic Beverages Control Comm'n, 43 Mass. App. Ct. 248 (1997) (licensee "permitted" a violation where bartender was aware of drug transaction and did not take positive action to stop the violation and prevent its recurrence). In Rum Runners, a patron was a drug dealer who sat next to a second patron at the bar and removed a folded three inch paper square in exchange for \$50.00 while the second patron made eye contact with the bartender. The Appeals Court in Rum Runners, noted that such conduct, "supports attribution of the bartender's knowledge to the licensee." See id. at 250-251. The Appeals Court then affirmed the licensee's suspension. See id.

Moreover, the Code of Massachusetts Regulations clearly and directly requires a licensee to exercise and maintain control over a licensed premises. 204 CMR 2.05(2). Said code provision provides:

"[n]o licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. *The licensee shall be responsible therefor, whether present or not.*" (Emphasis supplied).

Attribution of responsibility for employee behavior to alcoholic beverages licensees has been consistently upheld. C.F., Rum Runners v. ABCC, 43 Mass. App. Ct. 248 (1997), Rico of the Berkshires v. Alcoholic Beverages Control Comm'n, 19 Mass. App. Ct. 1026 (1985). Where there is evidence of a drug trade taking place on a licensed premises and where a licensee later disavows knowledge thereof, it is clear that the Commission can infer that "a manager who wanted to see would have seen." Rico of the Berkshires, 19 Mass. App. Ct. at 1027.

The Local Board found the Licensee responsible for violations of 204 CMR 2.05(2), permitting any disorder, disturbance, or illegality on the premises. To prove a case of permitting an illegality under the facts of this case, the Local Board need *only* introduce evidence of activities that, taken together, demonstrate that the licensee "permitted a disorder, disturbance or illegality of any kind to take place in or on the licensed premises." In the instant case, the Local Board contends that the licensee violated 204 CMR 2.05(2) by employees distributing a Class B drug (cocaine) inside the licensed premises.

The Commission heard evidence from Detective Robles and reviewed the transcript of Officer De La Cruz who participated in the drug transactions with employees of Odyssey. Detective Robles testified that he has been a police officer for 18 years and has witnessed hundreds of drug transactions. The evidence demonstrated that it was not just one employee who participated in the drug transactions. Two employees and at least two patrons were involved in the drug dealing operation.

Bodiford testified and admitted before the Commission that he sold cocaine inside Odyssey while working as an employee. Mr. Bodiford further testified that he pleaded guilty to distributing cocaine and received a criminal sentence with a period of incarceration. License manager Gagliarducci testified that she had no knowledge that employees were selling narcotics inside Odyssey, although she was present on two of the incident dates. Bodiford testified that manager Gagliarducci had no knowledge that he or anyone else was involved in selling drugs inside the premises.

The Commission has consistently held that violations involving the license manager, corporate officers, and employees of the licensee are the responsibility of the licensee. See In Re English Social Club (ABCC decision dated August 17, 2007) (where non-profit corporate officers and license manager were permitting gambling on the licensed premises, Commission upheld Local Board violation); In Re: Trasmontano, Inc. d/b/a Whisper's Pub (ABCC decision dated June 6, 1989) (Commission upheld Local Board's revocation where stockholders, and corporate officers were involved in illegal drug activity at the licensed premises); In Re: The Embers of Salisbury Beach, Inc. d/b/a Kon Tiki (ABCC decision dated August 18, 1994) (Commission imposed a 14 (fourteen) day suspension where employees of the licensee were involved in illegal drug activity inside the license premises).

Although the Commission finds Bodiford's testimony credible, his testimony does nothing to relieve the licensee's responsibility for these violations. The Commission is convinced that the license manager knew or should have known that employees were selling drugs inside the premises. These drug sales inside the licensed premises involving not just one but two employees, and two patrons, lasted for approximately one year. Every time an undercover officer sought to purchase drugs inside Odyssey from Bodiford, they succeeded. Another employee and two patrons participated in and helped to facilitate the drug sales. These sales were not concealed in any

manner and instead occurred out in the open inside Odyssey during business hours. Furthermore, the interior of Odyssey is not very large, and the entire premises can be observed while standing at the front door. The Commission therefore finds that the Licensee permitted these violations and knew or should have known that the sale of narcotics was taking place on the licensed premises.

The Licensee further argues that the penalty of revocation is excessive. Therefore, the Commission must review whether the sanction of revocation 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 Springfield Local Board rules do not address progressive discipline. 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, punishments meted out for similarly situated licensees, and the egregiousness of the violation(s) in making this determination.

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).

The Commission is given “comprehensive powers of supervision over licensees.” Connolly, 334 Mass. at 617. M.G.L. c. 138 gives the Commission the authority to grant, revoke and suspend licenses. 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) (emphasis supplied).

The Commission was presented with no evidence regarding other licensees charged with similar violations, and was presented with no evidence regarding what sanctions the Local Board imposed upon other licensees for these or similar narcotics violations. In reviewing the prior history of Odyssey, the Commission does not find that Odyssey possesses a lengthy history of prior violations. Furthermore, the Licensee’s history does not contain any prior sanctions for illegal narcotics violations.

Odyssey was granted its license in November of 2009 and has a history of two prior violations, one before the Local Board, and one before the Commission, neither of which are narcotic violations. The Commission finds that the Rules and Regulations of the Local Board do not address progressive discipline. Furthermore, the Commission was not presented with any evidence of similar violations committed by other licensees in Springfield, nor any sanctions imposed by the Local Board for similar infractions.

The Commission finds that these violations were committed by the Licensee, and they are extremely egregious in nature. The Commission finds that based on the Licensee’s prior history of two violations, the length of time the Licensee has been in operation, the lack of evidence of sanctions imposed upon other licensees for similar violations, and the lack of Local Board rules regarding progressive discipline, the Commission disapproves the Local Board’s revocation of the M.G.L. c. 138, § 12 license of M.V.U.S. LLC d/b/a Odyssey.

The Commission finds that the Licensee has been closed since November of 2015, which is a period of approximately eighteen (18) months. The Commission finds this period of closure to be an appropriate sanction for these violations. In addition, the Commission strongly recommends that the Local Board require the Licensee to file an application to change its license manager, so that a more responsible manager is installed to operate the licensed business.

CONCLUSION AND DISPOSITION

The Commission **APPROVES** the action of the Local Board of Springfield in finding that the Licensee committed the violations of 204 CMR 2.05(2) Permitting an illegality on the licensed premises to wit: Distribution of a Class B substance (cocaine) on the licensed premises by an employee on November 14, 2014 (1 count); on November 28, 2014 (1 count); on January 6, 2015 (1 count); October 13, 2015 (1 count); and on October 21, 2015 (1 count) resulting in a finding of five (5 counts) violations in total.


The Commission **DISAPPROVES** the action of the Local Board of Springfield in finding that the Licensee committed an additional four counts of the violations of 204 CMR 2.05(2) Permitting an illegality on the licensed premises to wit: Distribution of a Class B substance (cocaine) on the licensed premises by an employee on the licensed premises by an employee on November 14, 2014 (1 counts); on November 28, 2014 (1 count); October 13, 2015 (1 count); and on October 21, 2015 (1 count).⁵

The Commission **DISAPPROVES** the action of the Local Board in revoking Odyssey's license. The Commission finds that based on the aforementioned analysis, the penalty of revocation is too severe. The Commission remands this matter to the Local Board with the recommendation that the Local Board impose the sanction against the Licensee for its period of closure, since November of 2015. The Commission finds that closure of the premises for a period of approximately of 18 months to be an appropriate sanction for this Licensee.

Furthermore, the Commission strongly recommends that the Local Board require the Licensee to file an application to change its license manager, so that a more responsible manager is installed to operate the licensed premises.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Elizabeth Lashway, Commissioner



Dated: May 2, 2017

⁵ See Footnote number 5.

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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