



The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Guinsboro, Esq.
Chairman

DECISION

SQUARE LIQUORS LLC D/B/A WINCHESTER LIQUORS
800 STATE STREET
SPRINGFIELD, MA 01109
LICENSE#: 122600205
HEARD: 10/06/2015

This is an appeal of the action of the City of Springfield Board of License Commissioners (the "Local Board" or "Springfield") for suspending the M.G.L. c. 138, §15 all alcohol license of Square Liquors LLC d/b/a Winchester Liquors ("Licensee" or "Square Liquors") located at 800 State Street, Springfield, Massachusetts, for five (5) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Tuesday, October 6, 2015.

The following documents are in evidence:

1. Decision of the Local Board dated September 29, 2014, with attached reports related to incident that occurred on August 20, 2014;
2. CD of the Local Board's hearing, September 25, 2014;
3. Agenda from Local Board meeting August 2012;
4. Local Board's progressive discipline policy;
5. CD of the Local Board's hearing of August 9, 2012;
6. Copies of numerous suspensions issued by the Local Board.

There is one audio recording of this hearing, and one (1) witness testified.

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

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FINDINGS OF FACT

1. Square Liquors LLC d/b/a Winchester Liquors located at 800 State Street, Springfield, Massachusetts holds an all alcoholic beverages license under M.G.L. c. 138, §15. (Commission File)
2. On August 20, 2014 at approximately 5:00 p.m., a 20 year old Springfield police cadet working in an undercover capacity during a compliance check entered the Licensee's premises and purchased a six pack of beer without being asked for identification. (Exhibit 1)
3. The Local Board charged the Licensee with 204 CMR 2.05(2) Permitting an illegality on the licensed premises to wit: violation of M.G.L. c. 138 §34, sale of alcohol to an under-aged person (one count) and with failure to have the manager of record on the scene (one count). (Exhibit 1)
4. Square Liquors has had the §15 license since October 22, 2013, and this was its first violation. (Commission File)
5. On September 25, 2014, the Local Board held a hearing at which the Local Board discussed, among other things, the fact that the Licensee had had its license for less than a year and that the manager was not present at the time of the sale to the minor. (Exhibit 2)
6. The Licensee's employees are all TIPS certified. (Testimony)
7. The Local Board found that the Licensee violated 204 CMR 2.05(2) to wit: violation of M.G.L. c. 138 §34 (one count), and it voted to suspend the license for a period of five days, one day to be served and four days to be held in abeyance for one year. (Exhibits 1, 2)
8. The Local Board issued its written decision on September 29, 2014 in which it noted that the four days would be held in abeyance until September 25, 2015. (Exhibit 1)
9. The Licensee served the one day suspension, and the four remaining days that were held in abeyance for a year have since lapsed. (Testimony)
10. The City of Springfield has a progressive discipline policy, which took effect on August 9, 2012, which provides in part that for a first offense of a violation of M.G.L. c. 138 §34, a penalty will be imposed of "5 days; days to be served vs. held in suspension at the discretion of the [Local] Board." (Exhibits 3, 4, 5)
11. According to the policy, penalties are increased by five days for each subsequent offense, until the fifth offense, which is a revocation. Suspended days are held in abeyance for one year before being purged. (Exhibit 4)
12. The policy also provides that the Local Board should consider the following factors when determining the number of days to be served vs. held in abeyance: "violation record of the licensee; presence of the manager of record during the violation; number of violations

for the incident date; whether all employees are TIPS-trained; and other factors the Board considers relevant on a case by case basis." (Exhibit 4)

13. Between August 14, 2012 (shortly after the progressive discipline policy took effect) through May 16, 2014 (shortly before the Licensee's violation), there were at least nine violations of M.G.L. c. 138 §34 by licensees in Springfield. All but one of those licensees were issued suspensions of at least five days, with varying numbers of days to be served. The other licensee committed the violation during a concert series, and therefore, the Local Board decided that licensee would serve a one day suspension during the same concert series the following year. (Exhibit 6)

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)). 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. Bd. of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 - 476 (1989)." Dolphino, 29 Mass. App. Ct. at 955.

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. c. 138, §23, as amended through St. 1977, c. 929, §7. "[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).

Here, there is no dispute that the Licensee violated M.G.L. c. 138 §34 by selling beer to a person who was not twenty-one years old. (Testimony) The Licensee argues that the Local Board's

imposition of a five day suspension (one day served) was unreasonably punitive and an unfair penalty given that this was the Licensee's first violation. The Local Board argues that it promulgated its own written progressive discipline policy and that the suspension it issued to the Licensee was consistent with that policy.

In assessing penalties for violations occurring solely as the result of a "sting," penalties imposed should never be draconian. See Applebee's Northeast, Inc. dba Applebee's Neighborhood Bar & Grill, Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.); Epicure Package Store, Inc. (ABCC decision dated 01/31/2007). The Commission has consistently held that "[t]he policy behind a 'sting' operation should be the education of licensees in the risks associated with selling alcoholic beverages without requesting proof of age." In re: Assinippi Liquors, Inc., Wareham (ABCC decision dated 06/08/2004); Epicure Package Store, Inc. (ABCC decision dated 01/31/2007); Saba Foodmarket, Inc., dba Bradford Shell (ABCC decision dated 05/16/2012). While small suspensions may further that purpose by imposing a consequence for taking a risk, a heavy handed suspension does not. See Assinippi Liquors, supra (Commission held that a twenty day suspension for a compliance check was unreasonable and that it steps over the line of measured education and becomes unreasonably punitive); Saba Foodmarket, supra (Commission held that a revocation of the alcoholic beverages license for a compliance check was unreasonable); 75 Purchase Street Corp. d/b/a Peter's Market, Milford (ABCC decision dated 12/11/13) (30 day suspension for failing a compliance check disapproved by the Commission where local board imposed less severe penalties on other licensees in similar circumstances).

The Commission is persuaded that the Local Board's imposition of a five day suspension with one day to serve was fair and rational in these circumstances. The Local Board was following its written policy of discipline for violations of §34. The policy provides that for a first violation of §34, a licensee will be suspended five days. (Exhibit 4) The Licensee was on notice that the written policy of progressive discipline existed, as the policy predates the Licensee's issuance of its license. (Commission File; Exhibits 3-5) The Local Board's written policy of discipline, "implemented graduated penalties and afforded the warnings of graduated penalties to offenders. . . This system of sanctions is intrinsically rational and fair. It provides standards, warnings, gradualism, and calibration. [The local board] . . . operated within it. The Massachusetts courts have sustained far more draconian punishment. See especially Old Towne Liquor Store v. ABCC, 372 Mass. 152, 154-155 (1977) (affirm ABCC suspension of 45 days for second offense); and Burlington Package Liquors v. ABCC, 7 Mass. App. Ct. 186, 187 (1979) (10-day suspension for sale to minor)." Applebee's Northeast, Inc., supra (affirming Commission's approval of local board's issuance of five day suspension for a second offense of §34). Notably, there is no evidence that the Local Board has treated other licensees differently for the same violation. (Exhibit 6) In fact, the evidence illustrates that between the date the policy took effect and the date of the Licensee's violation, the Local Board consistently imposed at least a five day suspension to other licensees who committed the same violation.¹

In the present case, the Local Board consistently followed its written policy of discipline and determined that although five days was mandated under the policy, it would only impose one of the days to be served. (Exhibits 1, 2, 4) According to the Local Board's policy, the Local Board

¹ The one exception was a licensee who committed the violation during a concert series, and therefore, the Local Board decided that licensee would serve a one day suspension during the same concert series the following year. (Exhibit 6)

considers the following factors in determining the number of days to serve: "violation record of the licensee; presence of the manager of record during the violation; number of violations for the incident date; whether all employees are TIPS-trained; and other factors the Board considers relevant on a case by case basis." (Exhibit 4) Here, the employees were all TIPS trained, but the manager of record was not present at the time of the violation and the Licensee had the license for less than a year at the time of the violation. The Licensee's case is unlike those where a licensee has a long history with a flawless record before its first violation. See Hawthorne By The Sea, Inc., Swampscott (ABCC decision dated 4/23/08) (1 day suspension for failing a compliance check disapproved by the Commission where licensee had been in business for more than sixty years with an unblemished record, and the local board followed no guidelines for discipline). Given that the Licensee was issued its §15 license less than a year before the violation, it was reasonable that the Licensee would be required to serve one of the five days. (Exhibits 2, 4; Commission File)

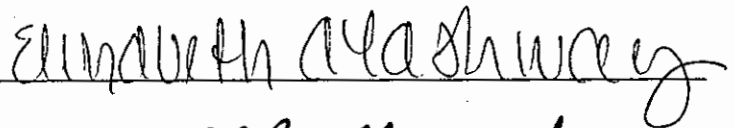
The Commission finds that here, the Licensee's imposed suspension underwent a detailed analysis and thorough scrutiny by the Local Board, which took into consideration the Licensee's brief history. The Commission finds that the imposed suspension was not arbitrary and capricious but rather was a reasonable exercise of the Local Board's lawful discretion and supported by the record.

CONCLUSION

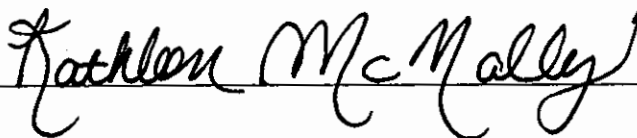
The Alcoholic Beverages Control Commission **APPROVES** the Local Board's suspension of the §15 all alcohol license of Square Liquors LLC d/b/a Winchester Liquors for a period of five days, one day to be served and four days to be held in abeyance for one year.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner



Kathleen McNally, Commissioner



Dated: October 29, 2015

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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Local Licensing Board
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