



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358*

Jean M. Lorizio, Esq.
Chairman

DECISION

**LEVEL 5 RESTAURANT INC. D/B/A LEVEL 5 RESTAURANT
890 STATE STREET
SPRINGFIELD, MA 01109
LICENSE#: 05641-RS-1226
HEARD: 11/10/2021**

This is an appeal from the action of the City of Springfield Licensing Board (the "Local Board" or "Springfield") for suspending the § 12 all alcoholic beverages license of Level 5 Restaurant, Inc. d/b/a Level 5 Restaurant ("Licensee" or "Level 5") located at 890 State Street, Springfield, MA, for five (5) days to be held in abeyance for a period of one (1) year. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a remote hearing was held via Microsoft Teams on Wednesday, November 10, 2021.

The Commission left the record open until the close of business on Friday, November 12, 2021, to allow the Local Board to submit its Rules and Regulations. The Springfield License Commission's Rules and Regulations Manual was received and marked as an exhibit. The record is now closed.

The following documents are in evidence as exhibits:

1. Springfield Police Commissioner Cheryl C. Clapprood's Letter, 2/16/2021
2. Springfield Police Officer Barry D. Delamarter's Report, 2/16/2021;
3. Springfield Police Officer Adam Madera's Report, 1/21/2021;
4. Level 5 Restaurant's 2021 Alcoholic Beverages License;
5. Level 5 Restaurant's Security Plan;
6. Local Board's Decision, 9/9/2021;
7. Floorplan of Licensed Premises;
8. Springfield License Commission Rules and Regulations Manual.

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

FINDINGS OF FACT

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

1. Level 5 Restaurant, Inc. d/b/a Level 5 Restaurant ("Licensee" or "Level 5"), holds an all-alcoholic beverages license and operates a business at 890 State Street, Springfield, Massachusetts. Rasan Jacobs is the Licensee and Manager of Record. (Commission Records)

2. On Thursday, January 21, 2021, at approximately 10:50 p.m., Springfield Police Officers (“Officers”) responded to Level 5 in response to a report of an assault and battery at the licensed premises. (Testimony, Exhibits 1, 2, 3)
3. At approximately 1:20 p.m. on January 21, 2021, Mr. Jacobs went to the home of Mr. Johnny Scott, head chef at the licensed premises. Mr. Scott had been having difficulties with a female co-worker. Mr. Scott presented Mr. Jacobs with an ultimatum to choose between Mr. Scott and his co-worker. Mr. Jacobs chose to retain the female employee and as a result, Mr. Scott resigned. (Testimony)

4. However, Mr. Scott went to Level 5 on the night of January 21, 2021. Mr. Jacobs was also at the licensed premises. (Testimony, Exhibits 2, 3)
5. While at Level 5, Mr. Scott met some friends. (Testimony)
6. At some point, Mr. Scott and Mr. Jacobs spoke. Shortly thereafter, Mr. Scott went into the kitchen to retrieve his personal belongings. (Testimony, Exhibit 2)
7. Mr. Jacobs followed Mr. Scott into the kitchen. Mr. Jacobs got in front of Mr. Scott and told him several times to get out of the kitchen. Mr. Jacobs struck Mr. Scott in the face. Mr. Jacobs went to get Mr. Scott’s friends who went outside with Mr. Scott. (Testimony, Exhibits 1, 2, 3)
8. Mr. Scott called 911 and was subsequently transported to the hospital. (Testimony, Exhibits 1, 2, 3)
9. The Licensee did not call the police. Mr. Jacobs was aware that Mr. Scott was going to call the police. Mr. Jacobs remained at the licensed premises and spoke with Springfield Police when they arrived. Id.
10. The Licensee’s security plan states that video footage will be retained for a period of 30 days. However, approximately 7 days following the incident, the Licensee was unable to retrieve video from inside the licensed premises on the night of the incident. (Testimony, Exhibits 1, 2, 5)
11. On September 8, 2021, the Local Board held a virtual hearing on the Licensee’s alleged violations of 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: No 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 whether present or not, 3 counts, to wit: 1) failure to call the police; 2) allowing/permitting an Assault and Battery on licensed premises; and 3) violation of security plan – failure to provide interior video footage. (Testimony, Exhibit 6)
12. By decision dated September 9, 2021, the Local Board found the Licensee in violation and voted to suspend its license for a period of five (5) days which would be held in abeyance for a period of 1 year. (Exhibit 6)
13. The Licensee timely appealed the Local Board’s decision to the ABCC. (Commission Records)

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. 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 Appeal 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 Com’n, 29 Mass. App. Ct. 954, 955 (1990) (rescript). 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 Corp. v. Alcoholic Beverages Control Commission, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

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, as amended through St. 1977, c. 929, § 7. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Board 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., 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 Commission, 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, section 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, sections 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, 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).

Level 5 Restaurant, Inc. was charged with violating 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: No 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 whether present or not, 3 counts, to wit: 1) failure to call the police; 2) allowing/permitting an Assault and Battery on licensed premises; and 3) violation of security plan – failure to provide interior video footage.

The Licensee testified that he did, in fact, punch his former employee while in the kitchen at the licensed premises and admittedly did not call the police. However, the Licensee argued he

punched the man in self-defense. In addition, the Licensee testified that he did not call the police because he knew the former employee was going to call and stressed the fact that he waited for and spoke with police when they arrived. Finally, it was argued the Licensee did not intentionally violate the security plan. The Commission is not persuaded by these arguments and is struck by the fact that the Licensee and Manager of Record, himself, committed the assault and battery on the licensed premises.

The Commission finds the Licensee violated 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: ~~No 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 whether present or not, 3 counts, to wit: 1) failure to call the police; 2) allowing/permitting an Assault and Battery on licensed premises; and 3) violation of security plan – failure to provide interior video footage.

The Commission further finds the Local Board's imposition of a 5-day suspension, to be held in abeyance for 1 year, to be a reasonable exercise of its discretion.

CONCLUSION

The Alcoholic Beverages Control Commission ("Commission") **APPROVES** the action of the City of Springfield in finding a violation of 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: No 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 whether present or not, 3 counts, to wit: 1) failure to call the police; 2) allowing/permitting an Assault and Battery on licensed premises; and 3) violation of security plan – failure to provide interior video footage.

The Commission further **APPROVES** the action of the Local Board in suspending the license of Level 5 Restaurant, Inc. d/b/a Level 5 Restaurant for 5-days to be held in abeyance for 1-year.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

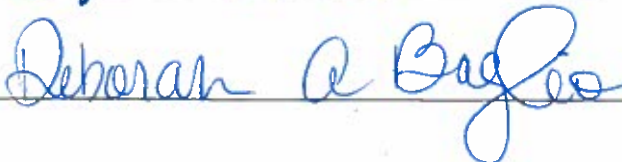
Jean M. Lorizio, Chairman



Crystal Matthews, Commissioner



Deborah Baglio, Commissioner



Dated: December 19, 2022

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.

This document is important and should be translated immediately.
Este documento es importante y debe ser traducido inmediatamente.
Este documento é importante e deve ser traduzido imediatamente.
Ce document est important et devrait être traduit immédiatement.
Questo documento è importante e dovrebbe essere tradotto
immediatamente.

Το έγγραφο αυτό είναι σημαντικό και θα πρέπει να μεταφραστούν
αμέσως.

这份文件是重要的，应立即进行翻译。

यह दस्तावेज़ महत्वपूर्ण है और इसका तुरंत अनुवाद किया जाना चाहिए

Dokiman sa a enpòtan epi li ta dwe tradwi touswit

'Đây là tài liệu quan trọng và cần được dịch ngay'

ឯកសារនេះសំខាន់ណាស់ ហើយត្រូវបកប្រែជាបន្ទាន់។

2021-000106-ad-enf

cc: Daniel D. Kelly, Jr., Esq.
Alesia H. Days, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File