



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. Gainsboro, Esq.
Chairman

DECISION

THE DO CORPORATION D/B/A WHIPLASH
63 WYMAN STREET
STOUGHTON, MA 02072
LICENSE#: 124400034
HEARD: 09/03/2014 and 02/04/2015

This is an appeal from the action of the Town of Stoughton Board of Selectmen (the "Local Board" or "Stoughton") in suspending the M.G.L. c. 138, §12 all alcoholic beverages license of the Do Corporation d/b/a Whiplash (the "Licensee" or "Whiplash") located at 63 Wyman Street, Stoughton, Massachusetts for thirty (30) days for violations of 205 C.M.R. 2.05(2), M.G.L. c. 265, §13A, and §13D. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and hearings were held on Wednesday, September 3, 2014 and Wednesday, February 4, 2015.

The following documents are in evidence as exhibits:

Local Board's Exhibits:

1. Local Board's Notice of Decision (2 pages);
2. Local Board's Meeting Minutes May 8, 2013 (8 pages);
3. Police Report of Stoughton Police Detective Sergeant Welch (3 pages);
4. Police Report of Stoughton Police Patrolman Farwell (2 pages);
5. Police Report of Stoughton Police Patrolman Baldner (3 pages);
6. Police Report of Stoughton Police Sergeant Bonney (1 page);
7. Police Report of Stoughton Police Patrolman Farwell (1 page);
8. Narrative Report of Stoughton Police Sergeant Bonney (2 pages);
9. Police Report of Stoughton Police Lieutenant McGowan (1 page);
10. Police Report of Stoughton Patrolman Carmichael (2 pages);
11. Google Map Aerial Photograph of Whiplash, 63 Wyman Street Stoughton, MA (1 page);
12. Narrative Report of Stoughton Police Patrolman Farwell (2 pages);
13. Video Disc with recorded footage from the April 14, 2013 incident; and
14. Local Board's Decision on Remand dated September 19, 2013 (4 pages).

Licensee's Exhibits:

- A. Transcript of Hearing held May 8, 2013 at Stoughton Local Board (82 pages);
- B. Binder of Police Dispatch Reports from Stoughton/Dispatch Reports/Log¹;
- C. Stoughton Police Department Incident Report dated September 30, 2012 (2 pages); and
- D. Certificate of Inspection for 350 person occupancy/capacity of Whiplash Club dated November 30, 2011 to December 31, 2012 (1 page).

There is one (1) audio recording of this hearing, and seven (7) witnesses testified.

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

FACTS

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

1. The Do Corporation d/b/a Whiplash operates a bar/nightclub and holds an all-alcoholic beverages license issued pursuant to M.G.L. c. 138, §12. (Commission records, Testimony)
2. Whiplash has entertainment in the form of disc jockeys, live bands, and karaoke. (Testimony, Exhibits 2, A)
3. Daniel Silva is the sole officer, director, shareholder, and owner of the Do Corporation d/b/a Whiplash. Mr. Silva is also the license manager of Whiplash. The license was transferred to the Do Corporation in December 2001. (Commission records, Testimony)
4. Whiplash has a capacity of 350 patrons, and a 1:00 a.m. closing hour. It is open on Friday and Saturday nights only. (Testimony, Exhibits 2, A)
5. All bartenders and bar staff are TIPS certified. (Testimony)
6. The licensed premises includes a small parking lot that holds approximately fifty parking spaces. Patrons routinely park at an MBTA Commuter Rail parking lot across the street. The MBTA parking lot is not part of the licensed premises, nor is it contiguous with it, and Whiplash does not direct patrons to park at the MBTA parking lot. (Testimony, Exhibit 13, A)
7. Upon entry, all patrons are carded and must produce appropriate identification to ensure they are at least twenty-one years of age, and they are all patted down for weapons. All bags are also searched. (Testimony, Exhibits 2, A)

¹ Dispatch calls made by Stoughton Police Department to:

- A. Smokey Bones BBQ and Grille: 01/24/2013 to 4/21/2103 – 25 dispatch calls for building check and premises closing;
- B. Whiplash: 2/24/2013 to 4/21/2013 - 19 dispatch calls for building check, premises closing, motor vehicle accident, shots fired;
- C. The Last Shot: 1/24/2013 to 4/21/2013 – 16 dispatch calls for building check, premises closing;
- D. Alex's of Stoughton: 2/17/2013 to 4/20/2013 – 14 dispatch calls for building check, premises closing, disturbance, motor vehicle accident;
- E. Ten (10) other dispatch calls to Nocera's; Charles Restaurant; and Governor's Pub during same time period.

8. Whiplash utilizes one door for its public entry and exit. Security staff is at this door at all times and outside the door at closing. (Testimony, Exhibits 2, A)
9. A hired police detail is on duty every night that Whiplash is open. (Testimony, Exhibits 2, A)
10. Mr. Silva is present at Whiplash every night that it is open. There are also normally seven security staff working at Whiplash, along with three or four TIPS trained and certified servers working when the club is open. (Testimony, Exhibits 2, A)
11. When Whiplash is filled to capacity there is roughly one security staff member for every fifty patrons. This ratio does not include the hired police detail or the servers. With all floor staff included and police detail included, the ratio is reduced to one staff member per approximately thirty patrons. (Testimony, Exhibits 2, A)
12. Prior to April 14, 2013, in its twelve years operation, Whiplash has never received a prior violation. (Testimony, Commission file)

First Incident – April 14, 2013

13. On the night of April 14, 2014, DJ Power Surge was performing at Whiplash. He had been subcontracted by Whiplash's regular in-house DJ. He had never performed at Whiplash before. (Testimony, Exhibits 2, 6, 8, 13, A)
14. Whiplash was not filled to capacity, approximately 300 people, to watch DJ Power Surge. While the club was not filled to capacity, there were more patrons than usual for a Saturday night. (Testimony, Exhibits 2, 6, 8, 13, A)
15. Around the time of closing, two female patrons were being ejected out of Whiplash by security personnel. The two female patrons had been involved in a fight inside the premises. (Testimony, Exhibits 2, 6, 8, 13, A)
16. Lieutenant John Bonney, a Stoughton police officer, was in the front of Whiplash as part of a staged police presence because of the large crowd at the club and a history of patrons' unruliness as they dispersed into the streets at closing. (Testimony, Exhibits 2, 6, 8, 13, A)
17. Lt. Bonney went inside Whiplash and the DJ was telling patrons over the microphone to leave as it was closing time. There were several hundred people inside the club who were pushing and shoving toward the exit. (Testimony, Exhibits 2, 6, 8, 13, A)
18. One woman in particular, Patron A, was pushing her way through the crowd. Lt. Bonney told her to stop pushing. At that time, Patron A tried to take Lt. Bonney's firearm out of his holster, but she was unsuccessful. Patron A then punched Lt. Bonney in the chest. (Testimony, Exhibits 2, 6, 8, 13, A)
19. Lt. Bonney tried to arrest Patron A but was called away due to incidents taking place outside of the club. (Testimony, Exhibits 2, 6, 8, 13, A)
20. Several small fights subsequently took place outside of the club, and some of the fights occurred in the parking lots (MBTA and Trackside Plaza parking lots) across the street from Whiplash. It is unclear from the evidence whether any fights occurred in the on-premises parking lot. (Testimony, Exhibits 2, 6, 8, 13, A)

Second Incident – April 21, 2013

21. DJ Power Surge returned as the club promoter on the night of April 21, 2013. Whiplash was filled to capacity. (Testimony, Exhibits 2, 4, 7, A)
22. Just after closing at 1:00 a.m., two patrons came running out of the club and informed Stoughton Police officers that a fight had broken out inside the club. (Testimony, Exhibits 2, 4, 7, A)
23. Several fights had indeed broken out inside the club. The detail officer and other police officers who had responded to the scene entered the premises and attempted to stop the fights. (Testimony, Exhibits 2, 4, 7, A)
24. While these fights were being addressed inside the club, several shots were fired outside of the club in the parking lots across the street from Whiplash. It is unclear in which specific parking lots (MBTA and Trackside Plaza parking lots) the shootings occurred. (Testimony, Exhibits 2, 4, 7, A)
25. A shooting victim was found approximately fifty (50) feet from the front door of Whiplash. (Testimony, Exhibits 2, 4, 7, A)
26. Patrons were pushing and shoving while leaving the premises. Some patrons did not want to leave the club, and would not leave, even after shots were fired. (Testimony, Exhibits 2, 4, 7, A)

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) 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. 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.

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).

The Local Board has the burden of producing satisfactory proof that the Licensee committed the violations that occurred on April 14, 2013, and April 21, 2013. The Local Board suspended the license for one month, totaling nine of the Licensee's business days, for violations arising from these two incidents.

All of the violations alleged by the Local Board involve 204 C.M.R. 2.05(2): "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 therefor, whether present or not."

The Licensee's obligation under 204 C.M.R. 2.05(2) to maintain control over the premises and to comply with Chapter 138 and local regulations is well-settled. The responsibility of the Licensee is to "exercise sufficiently close supervision so that there is compliance with the law on the premises." Rico's of the Berkshires, Inc. v. Alcoholic Beverages Control Comm'n, 19 Mass. App. Ct. 1026, 1027 (1985) (table). A Licensee who sells alcohol is "bound at his own peril to keep within the condition of his license." Burlington Package Store, Inc. v. Alcoholic Beverages Control Comm'n, 7 Mass. App. Ct. 186, 190 (179); accord Commonwealth v. Gould, 158 Mass. 499, 507 (1893). "It is, thus, quite possible for a Licensee to offend the regulatory scheme without scienter." Rico's of the Berkshires, 19 Mass. App. Ct. at 1027.

The Licensee has a duty of care to prevent only *foreseeable* harm to its patrons and others. Westerback v. Harold F. Leclair, Co., 50 Mass. App. Ct. 144, 145 (2000); Carey v. New Yorker or Worcester, Inc., 355 Mass. 450, 451 (1969); Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 641 (1961). The Supreme Judicial Court has held that 204 C.M.R. 2.05(2),

"describes a preexisting common law duty which licensees owe to their patrons or guests. A bar owner, for example, has the duty to protect persons on or about the premises from the dangerous propensities of its patrons, served or unserved. When the bar has served a potentially dangerous patron, the duty may extend beyond the premises. When the bar has not served the patron, however, the duty is based merely on a duty to keep the premises safe, and the duty applies only on or about the premises." See Gustafson v. Mathews, 109 Ill.App.3d 884, 65 Ill. Dec. 475, 441 N.E.2d 388 (1982) (bar owner had no duty to prevent intoxicated patron from driving away with his five children in the car); Locklear v. Stinson, 161 Mich. App. 713, 411 N.W.2d 834 (1987) (bar owner not liable when one patron was killed by another patron off the premises).

O'Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 758, 761 n.2 (1990) (Citations omitted).

"The duty to protect patrons . . . does not require notice of intoxication, but may be triggered when the conduct of another person puts a tavern owner or its employees on notice that harm is imminent." Christopher v. Father's Huddle Café, 57 Mass. App. Ct. 217, 222-223 (2003). However, a licensee may discharge its duty to protect patrons by taking steps to prevent the harm – such as denying service to a patron who appears intoxicated or who has requested too many drinks, or calling police when a fight occurs or an aggressive patron threatens assault. See, e.g., Greco v. Sumner Tavern Inc., 333 Mass. 144, 145 (1955); Carey, 355 Mass. at 451.

With this framework in mind, each of the twelve alleged violations of 204 C.M.R. 2.05(2), which took place over two nights and a week apart, are discussed in turn.

A. The First Night: April 14, 2013

The Licensee is first charged with six counts of violating 204 C.M.R. 2.05(2), permitting a disorder, disturbance, or illegality on the licensed premises arising from the night of April 14, 2013.

1. Violation of 204 C.M.R. 2.05(2), to wit: "The Licensee operated its establishment so as to allow numerous incidents of assault and battery by patrons on other patrons on the premises, prohibited by M.G.L. c. 265, §13A."

On the night in question two female patrons were ejected from Whiplash for fighting inside the premises. The disturbance then continued outside of the premises in the MBTA parking lot across the street, as all of the patrons were also leaving the club at the same time. The Commission does not find that numerous incidents of assault and battery by patrons on patrons occurred this night inside the premises. However, the Commission does find that at least one incident of assault and battery, patron on patron, occurred inside the premises and that they were then promptly ejected.

This does not end the inquiry into whether a violation of 204 C.M.R. 2.05(2) occurred, however. The Licensee must have been able to foresee this imminent harm occurring on the premises, and the record before the Commission is lacking in any evidence, let alone sufficient evidence, that the Licensee should have foreseen this incident between the two patrons. This is unlike previous cases before the Commission that established foreseeability of a patron on patron assault. See Kane, 341 Mass. at 641 (bartender observed a boisterous patron engage in "words back and forth," "loud talk," and "a lot of commotion" before the patron charged the plaintiff and landed on him); Carey, 355 Mass. at 451 (patron, who was part of a group across the aisle from the plaintiff that was "making a lot of noise," "talking loud," "getting up and jumping around," and then shot the plaintiff); Greco v. Sumner Tavern, Inc., 333 Mass. 144, 145 (1955) (foreseeability where intoxicated patron was boisterous and talking loudly, "antagonizing" other patrons fifteen minutes before assaulting the plaintiff); Trempe & Torres, Inc. d/b/a Marabu Café (ABCC Decision August 21, 2012) (where Lawrence clubs had a practice of pat-frisking for weapons at the door, where licensee did not pat-frisk or engage in usual security practices, it was foreseeable patrons could enter with weapons); Scioli Corp. d/b/a Scioli's Pizza Bar (ABCC Decision September 11, 2012) (foreseeability of imminent harm where "bouncer" working for licensee

attacked a patron; when the victim spoke with the licensee about the attack, the licensee did not call the police or emergency personnel and requested that the patron not call police either; the bouncer, who was still on the premises, then attacked the victim again).

On the other hand, the Licensee did everything it reasonably could to prevent any kind of patron on patron assault, all factors which the Commission has found in the past to be controlling. The Licensee ensured that the club was not overcrowded. Diamante Restaurant, Inc. d/b/a Diamante Restaurant (ABCC Decision September 7, 2012); Restaurante Bar Caballo Blanco (ABCC Decision October 15, 2008). There was no evidence of an issue of intoxication of any patrons (including the patrons involved in the fight) or service to minors. *Id.* A police detail was hired, and there were roughly eleven staff members for the 300 or so patrons. Diamante Restaurant, Inc. d/b/a Diamante Restaurant (ABCC Decision September 7, 2012); Restaurante Bar Caballo Blanco (ABCC Decision October 15, 2008). All patrons were pat-frisked at the door. Diamante Restaurant, Inc. d/b/a Diamante Restaurant (ABCC Decision September 7, 2012). There was no evidence of a history of patrons who had prior incidents or who were known to carry illegal weapons. Restaurante Bar Caballo Blanco (ABCC Decision October 15, 2008). Also, there was no indication that the patrons' conduct in the minutes and hours leading up to the assault should have alerted the Licensee to the possibility of an imminent fight. Kane, 341 Mass. at 641; Carey, 355 Mass. at 451; Greco, 333 Mass. at 145.

This is more akin to prior Commission decisions wherein no violation for a patron on patron assault was found. See RJA Corp. d/b/a Jo Angelo's Café (ABCC Decision March 5, 2014) (no violation where a patron was not intoxicated, entered a bathroom, and was attacked by another patron unprovoked where the incident lasted for sixty seconds, there was no prior indication that an assault was about to ensue, and there was no known provocation); Rypan, Inc. d/b/a The Shooters Café (ABCC Decision December 19, 2012) (no violation where patrons were arguing in the bathroom, the victim left the bathroom and was immediately stabbed because the entire incident lasted thirty seconds, security personnel immediately responded and escorted the assailant off the premises, and there was no prior indication that an altercation was about to ensue); Trois, Inc. d/b/a The Hide-A-Way (ABCC Decision August 17, 2007) (no violation where patron was struck by another patron when the altercation was over within a minute, neither of the patrons were intoxicated, and the establishment was not overcrowded).

Here, the Licensee could not have foreseen the assault and, therefore, could not have prevented it. The duty to protect patrons may be triggered when the conduct of another person puts a licensee or its employees on notice that harm is imminent. There was no conduct here that put the Licensee on notice of imminent harm that it could have prevented. The Licensee had been in business for twelve years with no violations of this kind.

To the extent that the Local Board charged this violation for conduct that occurred outside the premises, in the MBTA and other parking lots across the street from Whiplash, there was no violation of 204 C.M.R. 2.05(2), to wit: assault and battery by patrons on other patrons on the licensed premises, prohibited by M.G.L. c. 265, §13A. See North Street Market Place, LLC, d/b/a Jae's Spice (ABCC Decision September 29, 2010) (204 C.M.R. 2.05(2) only applies to disturbances, disorder, or illegalities occurring in or on licensed premises, and not "around" the licensed premises).

2. Violation of 204 C.M.R. 2.05(2), to wit: "The Licensee operated its establishment so as to allow numerous incidents of assault and battery upon a public employee [police officers] on the premises, prohibited by M.G.L. c. 265, §13D."

When Lt. Bonney entered the licensed premises on April 14, 2013, he observed one woman, Patron A, pushing her way through the crowd to exit the premises. He told her to stop pushing. At that time, Patron A tried to take Lt. Bonney's firearm out of his holster, but she was unsuccessful. Patron A then punched Lt. Bonney in the chest.

The Commission does not find numerous instances of assault and battery on a police officer occurred. The Commission does find that one incident of assault and battery upon a police officer occurred inside the premises. However, for the reasons stated in A(1), *supra*, the Licensee did not permit this illegality to occur on the licensed premises.

3. Violation of 204 C.M.R. 2.05(2), to wit: "The Licensee operated its establishment so as to create and/or maintain a public nuisance on the premises."

Although the events of the evening on April 14, 2013, at Whiplash were extremely chaotic as demonstrated by the evidence, particularly the testimony and the video (Exhibit 13), and required multiple police officers from neighboring cities and towns to respond to Whiplash, the Commission did not hear any direct evidence from residents or property owners that the Licensee created and/or maintained a public nuisance. The Commission reviewed Police Chief Paul Shastany's remarks during the Local Board hearing, (Exhibit A) which is uncorroborated hearsay. See Gallagher v. Dir. of Div. of Employment & Training, 64 Mass. App. Ct. 1102 (2005) (Commission "do[es] not consider unsupported and uncorroborated hearsay to be 'substantial evidence'"); accord Guzman, Inc. d/b/a Raffi's Place (ABCC Decision March 19, 2010). The Commission finds that no direct evidence exists of this allegation, therefore Commission finds the Licensee committed no violation regarding permitting an illegality, to wit: creating or maintaining a public nuisance.

4. Violation of 204 C.M.R. 2.05(2), to wit: "The Licensee permit[ted] the establishment to be overcrowded without sufficient security or control, leading directly to violent disturbances and threats to public peace and order."

The Commission heard allegations that Whiplash was overcrowded on April 14, 2013. The police reports and testimony indicated that there were hundreds of patrons, approximately 300, inside the club on this evening. The Certificate of Inspection and Occupancy for this premises legally allows a capacity of 350 patrons. Therefore, the Commission finds no violation of overcrowding was committed by the Licensee, as the Occupancy certificate allows for 350 patrons and the evidence demonstrates there were no more than 300 patrons inside the club.

5. Violation of 204 C.M.R. 2.05(2), to wit: "Permitting any disorder, disturbance or illegality of any kind in or on the licensed premises"

Based on the evidence as set forth in A(1)-(4), *supra*, and the Commission's findings of no violations, the Commission finds that the Licensee did not commit this violation.

6. Violation of 204 C.M.R. 2.05(2), to wit: "Failure to maintain adequate police detail for function, Stoughton Board of Selectmen Alcoholic Beverages Regulations, Section 209-28"

Section 209-28 of the Stoughton Board of Selectmen Alcoholic Beverages Regulations states: "Any function conducted by the licensee on the licensed premises must be covered by a uniformed off-duty police detail to be assigned at the discretion of the Chief of Police. The expense of said detail shall be the responsibility of the licensee. The police detail shall remain on the licensed premises until the function is closed."

The Commission finds that the Licensee did not commit this violation, as the evidence demonstrates that the Licensee had retained a police detail who was working inside the premises on the evening of April 14, 2013.

B. The Second Night: April 21, 2013

The Licensee is charged with six additional counts of violating 204 C.M.R. 2.05(2), permitting a disorder, disturbance, or illegality on the licensed premises, arising from the night of April 21, 2013.

1. Violation of 204 C.M.R. 2.05(2), to wit: "The Licensee operated its establishments so as to allow numerous incidents of assault and battery by patrons on other patrons on the premises, prohibited by M.G.L. c. 265, §13A."

The Licensee is charged with permitting a disturbance in the form of numerous incidents of assault and battery by patrons on other patrons on the evening of April 21, 2013. On this evening the club was at its total capacity of 350 patrons. The regular D.J. of Whiplash had again subcontracted for another promoter, D.J. Power Surge, to work on this evening. This promoter, DJ Power Surge, was unfamiliar to the Licensee. Although not overcrowded on the evening of April 21, 2013, there were a greater number of patrons than Whiplash usually has on a Saturday night. This was a larger crowd than the week before on April 14, 2013. Police officers were notified that there were 350 patrons inside the premises this evening.

Just after 1:00 a.m. Officer Farwell saw two male patrons running out of the club. The patrons told the police officers that a fight broke out inside the club. Officer Farwell and other police officers entered the club. Once inside, Officer Farwell observed the Detail Officer dealing with an altercation. Police Officers arrested a male patron inside the club at that time. Officer Farwell next observed several other fights inside the club, some of which were fights between patrons near the stage which is located at the back of the club.

The Commission finds that several incidents of assault and battery by patrons on other patrons occurred on the premises on the night of April 21, 2013. The Licensee could not have foreseen imminent harm to its patrons. Just as with April 14, 2013, the premises, while at capacity was not over capacity; there is no evidence that anyone was intoxicated; no patrons appeared to raise concerns for security personnel earlier in the evening; the police Detail Officer and numerous staff members were present; and routine security protocol was followed. To the extent that the Local Board charged this violation for the conduct that occurred outside and in the parking lots across the street from Whiplash, there was no violation of 204 C.M.R. 2.05(2), to wit: assault and battery by patrons on other patrons on the licensed premises, prohibited by M.G.L. c. 265, §13A.

See North Street Market Place, LLC d/b/a Jae's Spice (ABCC Decision September 29, 2010) (204 C.M.R. 2.05(2) only applies to disturbances, disorder, or illegalities occurring in or on licensed premises, and not "around" the licensed premises).

2. Violation of 204 C.M.R. 2.05(2), to wit: "The Licensee operated its establishment so as to allow numerous incidents of assault and battery upon a public employee [police officers] on the premises, prohibited by G.L. c. 265, §13D."

The Commission was not presented with any direct evidence that an assault and battery on a police officer occurred on the night of April 21, 2013. Therefore, the Commission finds that the Licensee did not commit this violation on April 21, 2013.

3. Violation of 204 C.M.R. 2.05(2), to wit: "The Licensee operated its establishment so as to create and /or maintain a public nuisance on the premises."

To reiterate the aforementioned analysis regarding the same allegation for the incident which occurred on April 14, 2013, the Commission did not hear any direct evidence that the Licensee created and/or maintained a public nuisance. The Commission finds that as no direct evidence of this allegation was presented, the Licensee committed no violation on April 21, 2014 regarding permitting an illegality, to wit: creating or maintaining a public nuisance.

4. Violation of 204 C.M.R. 2.05(2), to wit: "The Licensee permit[ed] the establishment to be overcrowded without sufficient security or control, leading directly to violent disturbances and threats to public peace and order."

The Commission heard allegations that Whiplash was overcrowded on the evening of April 21, 2013. There were 350 patrons inside the club on this evening. However, the Certificate of Inspection and Occupancy for this premises legally allows a capacity of 350 patrons. Therefore, the Commission finds no violation of overcrowding was committed by the Licensee on April 21, 2013, as the Licensee's Occupancy certificate allows for 350 patrons.

5. Violation of 204 C.M.R. 2.05(2), to wit: "Permitting any disorder, disturbance or illegality in or on the licensed premises"

Based on the evidence as set forth in B(1)-(4), *supra*, and the Commission's findings of no violations, the Commission finds that the Licensee did not commit this violation.

6. Violation of 204 C.M.R. 2.05(2), to wit: "Failure to maintain adequate police detail for function, Board of Selectmen Alcoholic Beverages Regulations, Section 209-28."

The Licensee is charged with not retaining a police detail on the evening of April 21, 2013. The Commission finds that the Licensee did not commit this violation, as the Commission heard evidence that two police detail officers were working inside the premises on this evening. Therefore, the Commission finds no violation of this charge was committed by the Licensee on April 21, 2013.

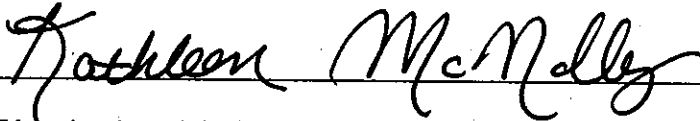
CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding that the Do Corporation d/b/a Whiplash committed any violations of 204 C.M.R. 2.05(2). The Commission remands the matter to the Local Board with the recommendation that no modification, suspension, revocation, or cancellation of this license be ordered by the Local Board.

The Commission found it unnecessary to determine the reasonableness of the penalty imposed by the Local Board since its disapproval would render any sanction by the Local Board discrepant with the Commission's decision.

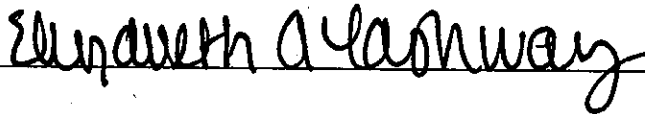
ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



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

Elizabeth Lashway, Commissioner



Dated: July 1, 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.

cc: Nicole Oribhabor, Esq. via facsimile 617-507-6331
Rudolph Miller, Esq. via facsimile 617-507-6331
Brian Riley, Esq. via facsimile 617-654-1735
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