



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

Jean M. Lorizio, Esq.
Chairman

DECISION

AHPP LLC D/B/A MAIN STREET LIQUORS
391 MAIN STREET
TEWKSBURY, MA 01876
LICENSE#: 00061-PK-1270
HEARD: 9/29/2022

This is an appeal of the action of the Town of Tewksbury Board of Selectmen ("Local Board" or "Tewksbury") in suspending the M.G.L. c. 138, § 15 annual all alcoholic beverages retail package store license of AHPP LLC d/b/a Main Street Liquors ("Licensee" or "Main Street Liquors") located at 391 Main Street, Tewksbury, Massachusetts for ten (10) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission ("Commission" or "ABCC"), and a remote hearing via Microsoft Teams was held on Thursday, September 29, 2022.

The following documents are in evidence as exhibits:

1. March 24, 2022, Notice from Tewksbury Police Department to Licensees of Upcoming Compliance Checks;
2. April 7, 2022, Police Department Report;
3. April 13, 2022, Police Department Report;
4. April 21, 2022, Police Department Report;
5. June 8, 2022, Notice of Hearing before Select Board;
6. June 30, 2022, Local Board's Decision;
7. November 9, 1998, Tewksbury Board of Selectmen Penalty Guidelines for Licensee Violations;
8. Minutes of Local Board's Hearing, 6/28/2022.

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

FINDINGS OF FACT

The Commission makes the following findings based on the evidence presented at the hearing and stipulated facts agreed to by the parties:

1. AHPP LLC d/b/a Main Street Liquors ("Licensee" or "Main Street Liquors") holds a retail package store all alcoholic beverages license and operates at 391 Main Street, Tewksbury, Massachusetts. (Commission Records)

2. The Tewksbury Police Department sent a notice dated March 24, 2022, to the Licensee notifying them of upcoming compliance checks at all liquor establishments. (Exhibit 1)
3. On Thursday, April 7, 2022, Detective Sergeant Donovan and Detective Lieutenant Farnum ("Detectives") of the Tewksbury Police conducted compliance checks at licensed establishments in Tewksbury. (Exhibit 2)
4. At approximately 6:00 p.m. on April 7, 2022, a nineteen-year-old male operative working with Detectives entered Main Street Liquors and purchased a 6-pack of Sam Adams beer. The underage male was not asked for identification. Id.
5. On Wednesday, April 13, 2022, Detective Sergeant Donovan and Detective Lieutenant Farnum ("Detectives") conducted compliance checks at six licensed establishments in Tewksbury, including Main Street Liquors. Main Street Liquors passed the compliance check on this occasion. (Exhibit 3)
6. On Thursday, April 21, 2022, Detective Sergeant Donovan and Detective Lieutenant Farnum ("Detectives") conducted compliance checks at seven licensed establishments in Tewksbury, including Main Street Liquors. (Exhibit 4)
7. At approximately 5:45 p.m. on April 21, 2022, an eighteen-year-old male operative working with Detectives entered Main Street Liquors and purchased a 6-pack of Bud Light beer. The underage individual was not asked for identification. Id.
8. On Tuesday, June 28, 2022, the Local Board conducted a violation hearing regarding both the April 7 and April 21, 2022, compliance checks. (Exhibits 5, 8)
9. At the June 28, 2022, hearing, the Licensee was found in violation of M.G.L. c. 138, § 34 as a result of both the April 7 and April 21, 2022, compliance checks. (Exhibit 6)
10. For the violation on April 7, 2022, the Local Board voted to suspend Main St. Liquors' license for one (1) day to serve and two (2) days held in abeyance for a period of twelve (12) months. (Exhibits 6, 8)
11. For the violation on April 21, 2022, the Local Board voted to suspend the license for seven (7) days. The Local Board classified the April 21, 2022, incident as a "second offense" and ordered the imposition of the two (2) days held in in abeyance from the "first violation" on April 7, 2022. For both compliance check violations, the license was suspended for a total of 10 days to serve. Id.
12. The Local Board issued a decision dated June 30, 2022, finding the licensee in violation of sale and/or delivery of alcoholic beverages to a person under twenty-one years of age and ordered that the ten-day suspension for both violations begin on July 28, 2022. (Exhibit 6)
13. The Local Board's Guidelines for penalties dated November 9, 1988, state that the penalty range for a first offense is a warning to a seven-day suspension and the penalty range for a second offense is a seven-day to fourteen-day suspension. (Exhibit 7)
14. The Licensee timely appealed the Local Board's decision to the ABCC. (Commission Records)

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.

Pursuant to M.G.L. c. 138, § 34, the sale of alcohol to minors is prohibited, and imposes both criminal and civil sanctions. M.G.L. c. 138, § 34 provides: Whoever makes a sale or delivery of any alcoholic beverages or alcohol to any person under twenty-one (21) years of age, either for his own use or for the use of his parent or any other person...or whoever furnishes any such beverage or alcohol for a person under twenty-one (21) years of age shall be punished by a fine of not more than two thousand (2,000) dollars or by imprisonment for not more than one (1) year or both. To enforce the provisions of M.G.L. c. 138, § 34, both the Commission and Local Boards commonly perform compliance checks, also known as “stings”, at licensed establishments.

The legality of using an underage operative to conduct compliance checks was established in Fran’s Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass. App. Ct. 663 (1998). The Appeals Court held that “[a]bsent entrapment or other abuses violative of fundamental fairness, government involvement in criminal activity for purpose of investigating possible violations of law is permissible, even if technical violations of law occur.” Id at 664. The Appeals Court further held that where a “sting operation was conducted in accordance with published guidelines designed to ensure that such operations were conducted fairly, the commission could properly rely on this evidence.” Id at 665.

The parties have stipulated to agreed-upon facts that result in two violations of M.G.L. c. 138, § 34 on April 7 and April 21, 2022. The Licensee argues that the sanctions imposed by the Local

Board for the April 7 and April 21, 2022, compliance check violations are excessive. The Local Board has Guidelines for Penalties, issued November 9, 1988, which outline graduated penalties including the option of issuing a warning for a first offense. Specifically, the Local Board's Guidelines for Penalties authorizes a warning to a seven-day suspension for a first offense and a seven to fourteen-day suspension for a second offense.

In reviewing the Local Board's Guidelines for Penalties, the Commission is guided by a discussion of progressive sanctions in Applebee's Northeast, Inc. dba Applebee's Neighborhood Bar & Grill v. Massachusetts Alcoholic Beverages Control Commission and The Licensing Board of the Town of Weymouth, Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.); ("Applebee's"). In Applebee's, the Licensee challenged a five (5) day suspension as too severe. The Court laid out the criteria that the Town of Weymouth used for its calibration of penalties:

(i) the number of prior offenses; (ii) the degree of inspection (of customers) exhibited by the licensee; (iii) the severity and type of offense; (iv) the efforts to identify purchasers of alcohol, if any; (v) the appearance of the purchaser receiving the illegal sale; (vi) the quality of evidence of the violation, i.e. clear violation versus questionable one; and (vii) the general reputation of the licensee. Id. at 7.

In reviewing the appropriateness of the penalty the Court found, "that for several reasons, the resulting sanction does not fall outside the boundaries of rationality." In considering the Town's imposed sanctions, the Court found that the Town's well-developed disciplinary system helped to avoid "abrupt or draconian punishment." Instead, the system "implemented graduated penalties and afforded the warnings of graduated penalties to offenders." Id. at 6.

Here, the Commission recognizes that the Local Board instituted progressive penalties and that while it may not render the same sanctions within the Local Board's range for first and second violations of compliance checks, the Commission finds that the Local Board's Guidelines for Penalties avoid abrupt and draconian punishment and are rational as well as fair. The Local Board's suspending the license for one day to serve and two days held in abeyance for twelve months for the April 7, 2022, compliance check violation is within the range for first offenses in the Local Board's Guidelines for Penalties and therefore the Commission finds the penalty is within the Local Board's discretion.

However, the Local Board erred in treating the April 21, 2022, compliance check "violation" as a "second offense" when the Local Board had not found the Licensee in violation of an offense prior to April 21, 2022.

The Local Board's hearing for both compliance checks was conducted on June 28, 2022, and its Decision concerning both the April 7 and April 21, 2022 compliance checks issued on June 30, 2022. In Commonwealth v. Hernandez, the Massachusetts Appeals Court ruled that a Defendant could not be convicted of a second offense operating under the influence charge because, "the controlling fact is that at the time of his commission of offense, he had not yet been convicted of earlier charges." Commonwealth v. Hernandez, 60 Mass. App. Ct. 416, 417 (2004).

As such, the Local Board further erred in imposing a seven-day suspension as well as concluding that the "two days in abeyance for a period of twelve months" should be imposed. The April 21, 2022, compliance check occurred prior to the Local Board's issuing a decision concerning the

April 7, 2022 compliance check violation. The Local Board's decision to treat the April 21, 2022, compliance check as a "second offense" cannot stand.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission ("Commission") **APPROVES** the action of the Tewksbury Board of Selectmen ("Local Board") in finding that Main Street Liquors committed a violation of M.G.L. c. 138, § 34 on April 7, 2022.

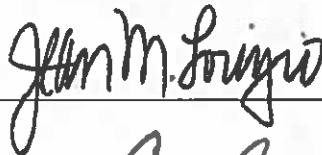
The Alcoholic Beverages Control Commission ("Commission") also **APPROVES** the action of the Tewksbury Board of Selectmen in suspending the alcoholic beverages licenses of Main Street Liquors for a period of one (1) day to serve and two (2) days held in abeyance for the violation which occurred on April 7, 2022.

Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding Main Street Liquors committed a violation of M.G.L. c. 138, § 34 on April 21, 2022.

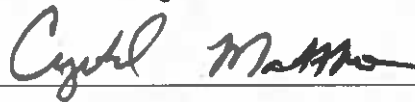
However, the Commission **DISAPPROVES** the action of the Local Board in suspending the license for seven (7) days for the violation which occurred on April 21, 2022 and remands the matter to the Local Board with the recommendation that the Local Board schedule, provide notice of and conduct a hearing concerning the April 21, 2022 compliance check.¹ If the Licensee is found in violation, the penalty should be considered for that of a first offense. Imposing a penalty based on a second offense or imposing the two-day suspension held in abeyance as a result of the April 7, 2022, compliance check would be discrepant with the law and this decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Crystal Matthews, Commissioner



Deborah Baglio, Commissioner



Dated: January 24, 2025

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.

¹ The Commission notes that the Local Board's Notice of Show Cause Hearing dated June 8, 2022, did not include notice that the Local Board's compliance check conducted on April 21, 2022, would be a subject of the hearing.

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Administration, File