

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

**HONG KONG EASTERN PEARL ENTERPRISE INC. D/B/A EASTERN PEARL
2275 PROVIDENCE HIGHWAY
WALPOLE, MA 02081
LICENSE#: 1314-00040
HEARD: 08/29/2017**

This is an appeal of the action of the Town of Walpole Board of Selectmen (the "Local Board" or "Walpole") for revoking the M.G.L. c. 138, § 12 all alcoholic beverages license of Hong Kong Eastern Pearl Enterprise Inc. d/b/a Eastern Pearl ("Licensee" or "Eastern Pearl") located at 2275 Providence Highway, Walpole, Massachusetts. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Tuesday, August 29, 2017.

The following documents are in evidence as exhibits:

1. Local Board Notice of Hearing Letter with Signed Mail Receipt, 2/9/16;
2. Local Board's Decision [7-day suspension], 3/3/16, with Licensee's Stipulation to Violations which occurred 12/25/2015 and 1/15/2016;
3. Local Board Notice of Hearing [2/28/17] Letter with police report [vio. date 1/12/17];
 - a) Atty. Wei Jia Notice of Appearance and Request for Continuance, 2/18/17;
 - b) Local Board's Notice of Rescheduled [3/14/17] Hearing, 2/22/17;
 - c) Email from Atty. Wei Jia's Office Requesting Continuance, 3/13/17 with handwritten, "Allowed, Johnson Smith" received 3/16/17;
 - d) Local Board's Notice of Rescheduled [3/21/17] Hearing (due to weather) 3/15/17;
 - e) Local Board's Notice of Rescheduled [4/11/17] Hearing (due to attorney being out of country), via hand delivery, 3/21/17;
 - f) Local Board's Notice of Rescheduled [4/11/17] Hearing sent certified mail, 3/22/17 for alleged violations on 1/12/17 and 2/23/17 – underage service, and 1/29/17 – service of alcohol to intoxicated;
 - g) Walpole Police Department, Chief Carmichael's Letter to Local Board, 2/9/17 regarding Licensee's prior violations;
 - h) Local Board's Notice of Rescheduled [4/25/17] Hearing, 4/13/17.
4. Local Board's Decision, via hand delivery and certified mail 4/26/17;
5. Local Board Notice of Hearing on 5/23/17 Letter with police report of incident on 4/15/17 and criminal court papers for docket number 1757CR000651, including criminal

- dockets, criminal complaint, and tender of plea/admission in criminal court;
6. Local Board's Decision sent certified mail, 6/9/17;
 7. Local Board's Administrative Penalties for Violations of Sales to Alcoholic Beverages to persons under age 21;
 8. Massachusetts Driver's License of Underage Operative; and
 9. Walpole Police Department's Directive on Compliance Checks signed by Detective Songin and the Underage Operative.

There is one (1) audio recording of this hearing, and eight (8) witnesses testified.

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

FINDINGS OF FACT

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

1. Hong Kong Eastern Pearl Enterprise Inc. d/b/a Eastern Pearl ("Licensee" or "Eastern Pearl") located at 2275 Providence Highway, Walpole, Massachusetts, holds a § 12 all alcoholic beverages license. (Commission records, Testimony)
2. The Licensee has held the alcoholic beverages license since July 2, 2014. (Commission records)

April 15, 2017 Violation

3. On April 15, 2017, a man ("male driver") was arrested by the Walpole Police Department for operating a motor vehicle while under the influence of alcohol. (Testimony, Exhibit 5)
4. The male driver had failed the field sobriety test. (Testimony, Exhibit 5)
5. On April 21, 2017, in Wrentham District Court, the male driver admitted to sufficient facts for the crime of operating under the influence of alcohol in violation of M.G.L. c. 90, §24(1)(a)(1), that occurred on April 15, 2017. (Testimony, Exhibit 5)
6. During his proceedings of admission to sufficient facts to the crime of operating a motor vehicle under the influence of alcohol, the male driver admitted to the Court that on the date of the incident he had consumed his last alcoholic beverage at the Eastern Pearl. (Testimony, Exhibit 5)
7. The Local Board found that the Licensee violated 204 CMR § 2.05(2), to wit: a violation of M.G.L. c. 138, § 69. (Testimony, Exhibit 6)
8. The Local Board voted unanimously on June 9, 2017 to revoke the license of Eastern Pearl for this violation. (Testimony, Exhibit 6)

April 21, 2017 Violation

9. Walpole Police Detective Timothy Songin has been a member of the Walpole Police Department for more than thirty-two years. He has been conducting compliance checks in Walpole for more than twelve years. (Testimony, Exhibit 5)
10. Detective Songin has been trained by the Commission in the guidelines, policies, and procedures for conducting compliance checks. (Testimony, Exhibit 5)
11. On April 21, 2017, Walpole Police Detective Timothy Songin conducted compliance checks of all forty of the licensed premises in the town of Walpole. (Testimony, Exhibit 5)
12. Detective Songin was working with an underage male operative, aged 19, who possessed a valid Massachusetts driver's license as confirmed by the Massachusetts Registry of Motor Vehicles. The underage operative had some facial hair growth. (Testimony, Exhibits 5, 8)
13. The Town of Walpole has compliance check guidelines. Detective Songin trained the operative, prior to conducting the compliance checks, in the policies and procedures for conducting compliance checks. (Testimony, Exhibit 5, 9)
14. Detective Songin had the operative sign a release form and sign copies of the compliance check guidelines, after reviewing them. (Testimony, Exhibit 5, 9)
15. On April 21, 2017, Detective Songin directed the underage operative to enter the Eastern Pearl and order an alcoholic beverage. (Testimony, Exhibit 5)
16. The underage operative entered Eastern Pearl, ordered and was served an alcoholic beverage, a Bud Light beer. (Testimony, Exhibit 5)
17. The employee of the Licensee did not ask the underage operative for any identification or proof of age. (Testimony, Exhibit 5)
18. Pursuant to his training, after being served an alcoholic beverage, the underage operative left the premises immediately and notified Detective Songin that he had been served. (Testimony, Exhibit 5)
19. Detective Songin and the operative went back inside premises. The operative identified where he was seated and the alcoholic beverage he was served. The underage operative identified Mr. Tie Zhang as the employee who served him the alcohol. (Testimony, Exhibit 5)
20. Mr. Zhang is the licensed manager of Eastern Pearl. (Testimony, Commission records, Exhibit 5)
21. Mr. Zhang admitted to Detective Songin that he did serve an alcoholic beverage to the underage operative without requesting any identification. (Testimony, Exhibit 5)

22. Detective Songin notified the Licensee that they committed a violation. (Testimony, Exhibit 5)
23. At the Commission hearing, the Licensee admitted that it served an alcoholic beverage to an under-aged operative without requesting identification. (Testimony, Commission records)
24. The Local Board considered that Eastern Pearl had failed four compliance checks in approximately sixteen months.¹ Detective Songin has been conducting compliance checks in Walpole for more than 12 years and he has never seen this before. (Testimony)
25. The Licensee did not request any identification from the underage operative because due to his facial hair the Licensee believed the operative was approximately thirty (30) years of age. (Testimony, Commission records)
26. The Local Board voted unanimously on June 9, 2017 to revoke the license of Eastern Pearl for this violation of 204 CMR 2.05(2), to wit: a violation of G.L. c. 138, § 34. (Testimony, Exhibit 6)

Eastern Pearl's History of Violations

27. On March 1, 2016, the Local Board held a hearing regarding the Licensee's alleged violations of 204 CMR 2.05(2), to wit: a violation of M.G.L. c. 138, § 34 (sale of alcohol to a person under twenty-one years of age), which occurred on three separate occasions on December 25, 2015; January 15, 2016; and January 16, 2016. Eastern Pearl stipulated to these three violations and agreed to a 7-day suspension. (Exhibits 2, 3, 4, Commission records)
28. On April 25, 2017, the Local Board held a hearing regarding a fourth violation of 204 CMR 2.05(2), to wit: a violation of M.G.L. c. 138, § 34, which occurred on January 12, 2017. The Local Board suspended Eastern Pearl's license for six months. (Exhibits 2, 3, 4, Commission records)
29. In total, the Licensee has appeared before the Local Board for six violations, within approximately seventeen (17) months. (Testimony, Exhibits 2, 3, 4, 5, 6)
30. While the Local Board revoked Eastern Pearl's license, it has not revoked any other license in more than twenty (20) years. (Testimony)
31. The Disciplinary Guidelines for Progressive Discipline for the Local Board of Walpole state in pertinent part: (Exhibit 7)

“The Board of Selectmen shall impose administrative penalties for violations of its policies. Offenders may expect one or more of the following consequences as deemed appropriate

¹ Detective Songin testified that the licensee failed four (4) compliance checks within a thirteen (13) month period. The Commission finds that based on the documentary evidence presented at the hearing the licensee failed four (4) compliance within approximately sixteen (16) months. (Testimony, Exhibits 2, 3, 4, 5, 6)

in the sole judgment of the Board. In determining penalties for selling alcohol to minors the Board shall use the following guidelines: (Exhibit 7)

1st (First) Offense: Warning up to a two (2) day suspension;

2nd (Second) Offense: Warning up to a three (3) day suspension;

3rd Offense: Warning up to a seven (7) day suspension;

4th Offense: Warning up to a two (2) week suspension or revocation.” (Exhibit 7)

“Depending on the circumstances of the offense the Board of Selectmen may deviate from and adjust the above guidelines.” (Exhibit 7)

“These are guidelines and the Board of Selectmen reserves the right to modify them at any time. Each offense will be considered individually.” (Exhibit 7)

DISCUSSION

Pursuant to M.G.L. Chapter 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 revoke licenses. Their powers were authorized “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). 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).

I. Violation of 204 CMR section 2.05(2) to wit: Violation of M.G.L. c. 138, § 69 Sale or Delivery to Intoxicated Persons:

The Licensee is charged with service to an intoxicated person in violation of M.G.L. c. 138, § 69. “No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person.” M.G.L. c. 138, § 69. “[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated.” Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). “The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication.” Id. at 610; accord McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

In order to prove this violation, the following must be shown: (1) that an individual was intoxicated on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. See Vickowski, 422 Mass. at 609. “The imposition of liability on a commercial establishment for the service of alcohol to an intoxicated person ..., often has turned, in large part, on evidence of obvious intoxication at the time a patron was served.” Id.; see Cimino, 385 Mass. at 325, 328 (patron was “totally drunk”; “loud and vulgar”); Gottlin v. Graves, 40 Mass. App. Ct. 155, 158 (1996) (acquaintance testified patron who had accident displayed obvious intoxication one hour and twenty minutes before leaving bar); Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121 (1994) (sufficient evidence for jury where acquaintance described patron who later had accident as appearing to feel “pretty good”). Contrast Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (commercial establishment could not be liable when there was no evidence of obvious intoxication while patron was at bar); Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (affirming summary judgment for defendant in absence of any evidence of obvious intoxication); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816-817 (1979) (directed verdict in favor of commercial establishment affirmed when there was no evidence that patron was served alcohol after he began exhibiting obvious signs of intoxication).

The Local Board must produce some evidence that “the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink.” Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 20 (2010); see Vickowski, 422 Mass. at 610 (“The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication”). The Local Board may prove that an individual was intoxicated by direct or circumstantial evidence or a combination of the two. Vickowski, 422 Mass. at 611. It is proper to infer from evidence of a patron's excessive consumption of alcohol, “on the basis of common sense and experience, that [a] patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee.” Id.; see P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

In this matter, the Local Board failed to produce any evidence regarding what occurred inside Eastern Pearl. There were no percipient eyewitnesses who testified before the Commission as to the male driver's consumption of alcoholic beverages or behavior inside the premises. The only evidence produced by the Local Board to prove this violation is a failed sobriety test, an arrest and

court admission to operating a motor vehicle under the influence of alcohol², and the male driver's statements during his Court proceeding that he consumed his last alcoholic beverage at Eastern Pearl.³

The police officers who conducted the field sobriety test did not appear before the Commission to testify as to their observations of the male driver. Nonetheless, "[w]hile a [Local Board] may meet its burden through circumstantial evidence, proof of later intoxication or later elevated blood-alcohol concentration is not, taken alone, sufficient to establish the patron's apparent intoxication at the time alcohol was served." Soucy v. Eugene M. Connors Post 193, Inc., 79 Mass. App. Ct. 1109, *1 (2011) (memorandum and order pursuant to Rule 1:28); see Douillard v. LMR, Inc., 433 Mass. 162, 165-166 (2001) ("Evidence of later intoxication has been admitted for purposes of bolstering other evidence").

Like the courts, the Commission is "reluctant to accept evidence of subsequent, obvious intoxication as a surrogate for evidence of a patron's demeanor at the relevant time." Vickowski, 422 Mass. at 612. The reluctance to accept this type of evidence "stems from the uncertainties of the situation, including the possible delayed impact of the consumption of alcohol, and the unknown effect on a patron of the last drink served to him by a licensee." Id. Likewise, in McGuiggan v. New England Tel. & Tel. Co., 398 Mass. at 162, the Supreme Judicial Court found that in the absence of other evidence of obvious intoxication, the evidence (expert testimony based on the results of a breathalyzer test) had "no bearing on what [the guest's] apparent condition was at the time he took his last drink." In this matter, there was no evidence as to what occurred inside the Eastern Pearl, and no evidence that male driver "was exhibiting outward signs of intoxication at the time he was served his last alcoholic drink." Rivera, 77 Mass. App. Ct. at 20. Failure of the field sobriety test at the time of male driver's arrest is not, by itself, sufficient to show that the male driver was intoxicated when he was served his last beverage inside Eastern Pearl. See Soucy, 79 Mass. App. Ct. at *2; Douillard, 433 Mass. at 167-168. There was insufficient evidence to prove intoxication at the time of service of the male driver's last drink inside the Eastern Pearl.

² Note that the elements of operating a motor vehicle while under the influence of alcohol differ from the elements of service to an intoxicated individual. The elements of operating under the influence are (1) operation of a vehicle, (2) on a public way, (3) under the influence of alcohol. G. L. c. 90, § 24. See Commonwealth v. Connolly, 394 Mass. 169 (1985) (A person does not necessarily have to be intoxicated to be considered under the influence of alcohol: he or she merely has to have consumed enough alcohol to diminish his or her ability to operate a motor vehicle safely.) Male driver's arrest and admission to sufficient facts that he was operating a motor vehicle under the influence of alcohol is evidence of later intoxication. This evidence of later intoxication does not meet the Local Board's burden that male driver was exhibiting open and obvious signs of intoxication inside the premises, prior to Eastern Pearl serving him an alcoholic beverage.

³ The male driver's statement in Court (Ex. 5) constitutes uncorroborated hearsay. See Gallagher v. Dir. of Div. of Employment & Training, 64 Mass. App. Ct. 1102 (2005) (the Appeals Court "do[es] not consider unsupported and uncorroborated hearsay to be 'substantial evidence'"). To the extent that the Local Board tried to introduce male driver's statement as a G.L. c.90, § 24J report ("24J report"), the Commission does not consider 24J reports to be relevant or substantial evidence for proof of a violation of M.G.L. c. 138, § 69.

The Commission does not find that the Local Board has met its burden of proof that Eastern Pearl committed a violation of 204 C.M.R. 2.05(2) in violation of M.G.L. c. 138, § 69. Therefore, the Commission disapproves the action of the Local Board in finding that Eastern Pearl committed the violation of permitting an illegality of 204 C.M.R. 2.05 (2) in violation of M.G.L. c. 138, § 69.

II. Violation of 204 CMR § 2.05(2) to wit: a violation M.G.L. c. 138, § 34 Sale, delivery or furnishing alcoholic beverages to persons under twenty – one years of age:

The Licensee was found in violation of one (1) count of M.G.L. Chapter 138, § 34, sale to an individual under twenty-one years of age. Massachusetts General Laws, Chapter 138, § 34, provides in part, “Whoever makes a sale or delivery of any alcoholic beverage or alcohol to any person under twenty-one (21) years of age ... shall be punished by a fine of not more than two thousand dollars (\$2000) or by imprisonment for not more than one (1) year or both.” The legality of the use of a minor to conduct underage stings was decided in Fran’s Lunch, Inc. v. Alcoholic Beverages Control Comm’n, 45 Mass. App. Ct. 663 (1998). The Appeals Court held that in permitting a person under twenty-one years of age to purchase alcoholic beverages in a “sting” operation at a licensed premises, neither the Commission nor a municipal police department, violated M.G.L. c. 138, § 34A. The Court’s rationale was that the purchase of alcoholic beverages by the under-age person was made for use in ferreting out violators of intoxicating liquor laws, and therefore promoted rather than hindered the purposes of the statute.

The Commission has previously decided the question of the legality of sting operations conducted by local licensing authorities. In the case of In Re: Cape Cod Grocery, Inc., the Commission found that the under-age sting operations were not contrary to the public policy of the Commonwealth so long as the sting operations were conducted fairly. In Re: Cape Cod Grocery, Inc., (ABCC decision Dec. 13, 1985)

The Licensee does not dispute that it sold alcohol to an underage person. Rather, it challenges the validity of the compliance check, arguing that the police entrapped the licensee into selling alcohol to a minor by using an individual who it claimed appeared much older than twenty-one years of age.

Defense of Entrapment

The Commission has long-recognized the defense of entrapment for compliance check cases. Assinippi Liquors, Inc., Wareham (ABCC Decision June 8, 2004); Cape Cod Grocery, Inc., (ABCC Decision Dec. 13, 1985). “There are two elements of the entrapment defense: (1) that the [party invoking the defense] was induced by a government agent or one acting at his direction and (2) that the [party invoking the defense] lacked predisposition to engage in the criminal conduct of which he is accused.” Commonwealth v. Podgurski, 81 Mass. App. Ct. 175, 182 (2012), quoting Commonwealth v. Penta, 32 Mass. App. Ct. 36, 47 (1992).⁴

⁴ While no court has directly held that entrapment is a valid defense in an administrative agency proceeding, see Gerald A. McDonough, Massachusetts Practice: Administrative Law & Practice § 10:56 (2017), it appears that it is a valid defense at least as far as it relates to compliance check violation cases before the Commission. See, e.g., eVineyard Retail Sales – Massachusetts, Inc. v. Alcoholic Beverages Control Comm’n, 450 Mass. 825, 831-833 (2008); BAA Massachusetts, Inc.

Regarding the first element of entrapment, where a Local Board or Commission investigators have compliance check guidelines and follow them during a compliance check, there is no unlawful inducement by a government agent. See Fran's Lunch, 45 Mass. App. Ct. at 665 (where a "sting operation was conducted in accordance with published guidelines designed to insure that such operations were conducted fairly, the commission could properly rely on this evidence"); Fay v. Jenkins, SUCV No. 2007-002652 (Muse, J.) ("Conducting compliance checks in strict conformance to the written guidelines is essential to the validity of the checks"); Assinippi Liquors, Inc. (ABCC Decision June 8, 2004) ("[a] local licensing authority's ability to defend against an allegation of entrapment is greatly impaired where there are no written guidelines for a sting conducted by the local licensing authority and where the Commission's guidelines are not applied by the authority conducting a sting operation").

In this matter, the Town of Walpole possesses published compliance check guidelines and followed them when conducting a compliance check at the Licensee's establishment. See Christopher Prost d/b/a P.G. Hunter's Pub (ABCC Decision Jan. 27, 2017) (where multiple compliance checks conducted, Commission upheld violations when guidelines were adhered to during sting; found no violation committed when guidelines were not followed); Eddie-Moe, LLC d/b/a D&M Variety (ABCC Decision July 22, 2010) (where City of Lynn adopted Commission written guidelines, applied and followed the guidelines during sting and instructed operatives about guidelines, Commission upheld violation).⁵ In this matter there was no evidence presented that the underage operative used tactics or engaged in conversation to induce the licensed manager to sell an alcoholic beverage to him. The licensed manager never requested that the operative produce any identification. The evidence demonstrates that the operative strictly followed the compliance check guidelines. The operative left the premises immediately after being served the alcohol. The Commission finds that this defense of entrapment asserted by the Licensee fails because published compliance check guidelines were followed, and there was no evidence of any conduct of inducement by the underage operative.

In addition, the Licensee has not proven the second element of the entrapment defense. "[I]n the absence of a scienter requirement in the statutes, the question is not whether [the licensee] was predisposed to sell alcohol to persons whom it knew to be underage, but whether [the licensee's] practices evidenced a willingness to sell alcohol in a manner that could allow minors to make purchases" eVineyard Retail Sales-Massachusetts, Inc. v. Alcoholic Beverages Control

v. Alcoholic Beverages Control Comm'n, 49 Mass. App. Ct. 839, 845-846 (2000); Fran's Lunch, Inc. v. Alcoholic Beverages Control Comm'n, 45 Mass. App. Ct. 663, 664 (1998).

⁵ In contrast, in some cases, the Commission has found entrapment and has found compliance checks to be invalid, resulting in no violation being committed by the licensee. See Hinoelia Rivera, El Coqui Liquor (ABCC Decision Dec. 28, 2007) (Commission found entrapment and no violation committed when compliance check conducted but no guidelines existed, and the police furnished the underage operative with a false identification in the form of a Massachusetts driver's license to be produced when licensee asked for proof of age. The Commission found that the false identification amounted to deceit for the purposes of inducing the sale amounting to entrapment); Assinippi Liquors, Inc. (ABCC Decision June 8, 2004) (Commission found entrapment and no violation because compliance check guidelines did not exist and the underage operative's conduct and tactics of engaging the seller in conversation for the purpose of inducing the sale of alcohol without the requested identification amounted to entrapment).

Comm'n, 450 Mass. 825, 833 (2008) (quotations omitted). The Licensee violated the same law, for which it now claims entrapment, on numerous occasions prior to the compliance check violation which is the subject matter of this appeal. The Licensee's operating practices demonstrate a willingness to sell alcohol in a manner that can allow minors to make purchases, as it did in this case. See, e.g., Osborn v. United States, 385 U.S. 323, 332 n. 11 (1966) ("when the defense of entrapment is raised, evidence of prior conduct tending to show the defendant's predisposition to commit the offense charged is admissible"); Commonwealth v. DeCastro, 24 Mass. App. Ct. 937, 938 (1987) (noting that "in response to an entrapment defense, the Commonwealth may introduce a defendant's prior criminal acts to show predisposition"). Accordingly, the Commission finds that there was no entrapment in this matter and that the Licensee committed this violation.

Penalty Imposed by Local Board:

The Commission must consider whether the penalty of revocation of Eastern Pearl's license is an appropriate penalty for this violation. Therefore, the Commission must review whether the sanctions imposed by the Local Board for these violations were reasonable. In reviewing the Local Board Rules, the Commission is guided by a discussion of progressive sanctions in Applebee's Northeast, Inc. d/b/a Applebee's Neighborhood Bar & Grill ("Applebee's"), Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.). In Applebee's, the Licensee challenged a five-day suspension as too severe. The Court laid out the criteria that the Town of Weymouth used for its calibration of penalties. "These included: (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 reviewing 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.

The Rules and Regulations of progressive discipline promulgated by the Local Board of Walpole state:

"In determining penalties for selling alcohol to minors the Board shall use the following guidelines: liquor violations are as follows: (emphasis supplied)

1st (First) Offense: Warning up to a two (2) day suspension;

2nd (Second) Offense: Warning up to a three (3) day suspension;

3rd Offense: Warning up to a seven (7) day suspension;

4th Offense: Warning up to a two (2) week suspension or revocation."

In addition, the Local Board rules do state that, "[d]epending on the circumstances of the offense the Board of Selectmen may deviate from and adjust the above guidelines. These are guidelines and the Board of Selectmen reserves the right to modify them at any time. Each offense will be considered individually." (Exhibit 7)

The Commission finds that the Local Board in its rules of progressive discipline for violations of sales to minors has “implemented graduated penalties and afforded the warnings of graduated penalties to offenders.” *Id.* A revocation for the Licensee’s fifth offense of sale to a minor is within parameters of the written Rules and Regulations of the Local Board.

However, “[i]n assessing penalties for violations occurring solely as the result of a ‘sting,’ penalties imposed should never be draconian.” 75 Purchase Street Corp. d/b/a Peter’s Market (ABCC Decision May 30, 2014); citing Applebee’s Northeast, Inc. d/b/a Applebee’s Neighborhood Bar & Grill, Suffolk Superior Court C.A. No. 03-610-A (Sikora, J.). In prior cases, the Commission has routinely found that revocation of a license for a compliance check failure is draconian in nature. See Saba Foodmarket Inc. d/b/a Bradford Shell (ABCC Decision June 27, 2012); Epicure Package Store Inc. (ABCC Decision Jan. 31, 2007). In both Saba and Epicure, “the Commission held that the penalty of revocation or cancellation of a license for a violation occurring *solely as the result of a ‘sting’* is draconian and unfair.” 75 Purchase Street Corp.

At the time of the hearing before the Commission, the Licensee had only been operating for three years. The Licensee was found in violation of selling alcohol to minors on five occasions, with four violations committed within sixteen months, and in several instances the violations were committed just days apart: December 25, 2015; January 12, 2016; January 15, 2016; January 16, 2016; and April 21, 2017. The Licensee received sanctions for its violations in accordance with the Local Board’s published rules of progressive discipline, with the December 25, 2015 and January 15, 2016 and January 16, 2016, violations resulting in a seven-day suspension; the January 12, 2016, violation resulting in a six-month suspension⁶; and the current violation, the fifth such violation by the Licensee, resulting in a revocation.

Considering the Licensee’s actions during its ownership, it is apparent to the Commission that the Licensee has not learned from its history of prior violations resulting in the Local Board’s imposition of increasingly harsh sanctions against it. The Licensee has not implemented any measures, practices, or policies which would prevent it from selling alcoholic beverages to underage persons. Indeed, it was the licensed manager—the person responsible for the safe and lawful sale of alcoholic beverages—who sold to the underaged operative during this compliance check. (Testimony)

The Commission finds that in this matter the Licensee has failed to learn from its history of prior sanctions and has failed to adopt appropriate policies and procedures to prevent sales to underage individuals. The Commission is persuaded that the Licensee, as demonstrated by its prior history of progressive sanctions, has clearly crossed a line and has become such a danger to the community that the Licensee should no longer hold a license. However, the penalty for a compliance check failure is supposed to be “a sanction resulting in the measured education of the licensee about the risks of selling alcoholic beverages to persons younger than the statutorily required age of twenty-one (21) years.” 75 Purchase Street Corp. d/b/a Peter’s Market (ABCC Decision May 30, 2014). Given the Commission’s precedent that revoking a license solely on the basis of a compliance check is draconian and unfair, the Commission disapproves the action of the Local Board in revoking the license. Based on the evidence presented to the Commission at the hearing, the Commission remands the matter to the Local Board with the recommendation that the license be

⁶ The January 12, 2016 violation matter was heard subsequent to the December 25, 2015; January 15, 2016; and January 16, 2016, violation hearing.

suspended indefinitely forthwith, effective on the date of the Local Board's original decision of revocation of the license. The indefinite suspension is recommended to stay in effect until the Local Board grants and the Commission approves a transfer of license application to a bona fide transferee, independent of and not connected directly or indirectly with any individual who holds a direct or indirect beneficial interest in this license.

CONCLUSION AND DISPOSITION

The Commission **DISAPPROVES** the action of the Town of Walpole Board of Selectmen in finding that on April 15, 2017 Hong Kong Eastern Pearl Enterprise Inc. d/b/a Eastern Pearl committed the violation of 204 CMR § 2.05(2), to wit: a violation of M.G.L. c. 138, § 69 Sale or Delivery to an Intoxicated Person.

The Commission **APPROVES** the action of the Town of Walpole Board of Selectmen in finding that on April 21, 2017, the Licensee committed the violation of 204 CMR § 2.05(2), to wit: a violation of M.G.L. c. 138, § 34 sale, delivery or furnishing alcoholic beverages to a person under twenty-one years of age.

However, the Commission disapproves of the penalty that the Local Board imposed on the License, and therefore remands the matter to the Local Board with the recommendation that the license be suspended indefinitely forthwith, effective on the date of the Local Board's original decision of revocation of the license.

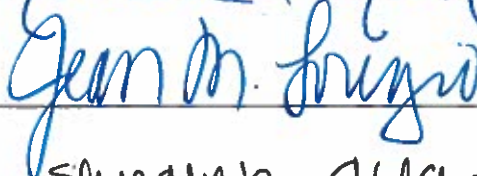
The Commission recommends that the indefinite suspension stay in effect until the Local Board grants and the Commission approves in the usual administrative process, a transfer of license application from Eastern Pearl to a bona fide transferee, independent of and not connected directly or indirectly with any individual who holds a direct or indirect beneficial interest in this license.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Jean M. Lorizio, Chairman



Elizabeth A. Lashway, Commissioner



Dated: March 19, 2018

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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cc: George G. Burke, Esq. via facsimile 617-472-7953
Jeffrey T. Blake, Esq. via facsimile 617-654-1735
Frederick G. Mahony, Chief Investigator
Local Licensing Board
Administration, File