

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

**Jean M. Lorizio, Esq.**  
Chair

**DECISION**

**POLISH AMERICAN CITIZENS CLUB, INC. OF WEBSTER MA.  
37 HARRIS STREET  
WEBSTER, MA 01570  
LICENSE#: 134200010  
HEARD: 10/3/2019**

This is an appeal of the action of the Town of Webster Board of Selectman (the "Local Board" or "Webster") for suspending the M.G.L. c. 138, § 12 all alcoholic beverages license of the Polish American Citizens Club, Inc. ("Licensee") located at 37 Harris Street, Webster, Massachusetts, for ten (10) days. 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 Thursday, October 3, 2019.

The following documents are in evidence as exhibits:

1. Local Board's Public Hearing Notice: Continuation;
2. Local Board's Notice of Hearing, 1/31/19;
3. Webster Board of Selectman Alcohol Policies;
4. Webster Police Department Summons Report #18WEB-30156-AR, 1/28/19;
5. Webster Board of Selectman Meeting Minutes with Police Reports, 9/12/16;
6. Webster Board of Selectman Meeting Minutes with Police Reports, 6/13/16;
7. Licensee's Sign-in Sheet, 2/12/19;
8. Letter from Michael Shaw, Webster Police Chief, to Board of Selectman, 4/23/19;
9. Local Board Notice of Decision with attachment, 6/10/19; and
10. Email from Attorney William Hewig to Doug Willardson, 4/24/2019.

There is one (1) audio recording of this hearing and six (6) witnesses testified.

**FINDINGS OF FACT**

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

1. The Polish American Citizens Club, Inc. of Webster, MA. holds an all alcoholic beverages license and is located at 37 Harris Street, Webster. (Commission Records)

2. On December 7, 2018, at approximately 10:00 P.M., Sergeant Thomas Ralph of the Webster Police Department responded to the Polish American Citizens Club upon the report of a bar fight. Sgt. Ralph arrived after the fight had ended. (Testimony, Exhibit 4)
3. Sgt. Ralph entered the premise and encountered male Patron #1 who was suffering from a head laceration. Male Patron #2 was identified as the person who had hit Patron #1 in the head with a pool ball. All other participants in the fight had left the premises. (Testimony, Exhibit 4)
4. Officer Spencer Donovan of the Webster Police Department responded to the licensed premises and arrived at approximately 10:06 P.M. (Testimony, Exhibit 4)
5. Both Officer Donovan and Sgt. Ralph spoke with Patron #2 and observed him to be exhibiting signs of intoxication, including slurred speech, glassy and bloodshot eyes, and with a strong odor of alcohol emanating from his person. (Testimony, Exhibit 4)
6. Officer Patrick Trainor of the Webster Police also responded to the licensed premises. Based on his observations along with those of Sgt. Ralph and Officer Donovan, the decision was made for Officer Trainor to administer a portable breathalyzer test to Patron #2. (Testimony, Exhibit 4)
7. The result of the portable breathalyzer test read 0.24. The legal limit for operating a vehicle is 0.08. (Testimony, Exhibit 4)
8. On January 31, 2019, the Local Board notified the Polish American Citizens Club that it would hold a hearing regarding alleged violations of:
  - a) 204 CMR 2.05(2): Permitting a disturbance, disorder or illegality to take place on the licensed premises;
  - b) M.G.L. c. 138, § 69: Service of alcohol to intoxicated person; and
  - c) M.G.L. c. 138, §63A: Hindering investigation. (Exhibit 2)
9. Hearings were held before the Local Board on February 11, 2019, April 8, 2019 and April 29, 2019. In its Notice of Decision, the Local Board found the Licensee in violation of 204 CMR 2.05(2), Permitting a disorder, disturbance or illegality to take place on the licensed premises, and M.G.L. c. 138, § 69, service of alcohol to intoxicated person, and suspended the license for ten days. (Testimony, Exhibit 9)
10. The Licensee timely appealed the Local Board's decision to the ABCC. (Exhibit 5)<sup>1</sup>

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<sup>1</sup> As a preliminary matter prior to commencing the appeal hearing, the Commission allowed the Licensee's Motion to Specify Violations Under Appeal and made the determination that the subject matter of the appeal hearing would be limited to the alleged violation of M.G.L. Ch. 138, § 69. The Town of Webster argued for reconsideration regarding the Motion to Specify Violations. Said reconsideration was denied.

## DISCUSSION

Pursuant to M.G.L. Ch. 138, § 67, “[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed.” Dolphino Corp. v. Alcoholic Beverages Control Comm’n, 29 Mass. App. Ct. 954, 955 (1990) (citing United Food Corp. V. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978); Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972)). 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).” Id.

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. “[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).

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.

In order for the Commission to make a finding, there must be substantial evidence that a violation has occurred. “Substantial evidence of a violation is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); accord Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm’n, 12 Mass. App. Ct. 879 (1981).

“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 person 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 McGuigan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

The Local Board has the burden of producing satisfactory proof that the Licensee committed the violation that is alleged to have occurred on December 7, 2018.

The Webster Board of Selectman found that the Licensee violated M.G.L. c. 138, § 69. 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. Vickowski, 422 Mass. at 609.

To meet that burden, “a plaintiff must come forward with some evidence that the patron’s intoxication was apparent at the time he was served by the defendant.” Douillard v. LMR, Inc., 433 Mass. 162, 164-165 (2001). 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). The Local Board may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two. See Vickowski, 422 Mass. at 611. “[S]ome quantum of direct evidence that the patron was exhibiting outward signs of intoxication is unnecessary; circumstantial proof alone can suffice if it is sufficiently robust. Rivera, 77 Mass. App. Ct. at 21. “[S]ervice [to a patron] of a large number of strong alcoholic drinks [would be] sufficient to put [a licensee] on notice that it was serving a [patron] who could potentially endanger others.” Cimino, 385 Mass. at 328 (where patron had been served six or more White Russians); see O’Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64, 65 (1981) (inference of obvious intoxication could be drawn where patron consumed at least fifteen beers and six martinis). “When evidence of excessive consumption is lacking, as a matter of common sense and experience, the inference may not be drawn.” Vickowski, 422 Mass. at 611; see Kirby, 34 Mass. App. Ct. at 632 (consumption of eight beers insufficient to support inference of obvious intoxication); Makynen, 39 Mass. App. Ct. at 312 (same, as to consumption of five to six cans of beer). “Evidence of apparent intoxication, or of elevated blood alcohol levels, at some later point in time does not, by itself, suffice to show that the patron’s intoxication was evident at the time the last drink was served.” Douillard v. LMR, Inc., 433 Mass. 162, 165 (2001).

Here, the Local Board argues that given the physical signs of intoxication exhibited by Patron #2 and the results of the portable breathalyzer test administered to Patron #2, it is reasonable to conclude that the Licensee served an alcoholic beverage to Patron #2 while he was intoxicated, and the Licensee knew or should have known he was intoxicated.

Without sufficient evidence, the Commission must resist the temptation to reason backwards to find that a person was manifestly intoxicated. In Royal Dynasty, Inc. v. ABCC, Suffolk Superior Court C.A. No. 03-1411 (Billings, J.) (December 9, 2003), the Superior Court reversed the Commission decision which found a violation of M.G.L. c. 138, § 69. The Superior Court described the facts in that case as “a horrific fatal accident, the extraordinarily reckless behavior by two recently-departed Royal Dynasty patrons that caused it, the failed PBT [portable breathalyzer test] and field sobriety tests at the scene, and the evident absence of another source of alcohol for either man.” Royal Dynasty, at 10. The Superior Court acknowledged that with those facts, “it is tempting to reason backward to the conclusion that they [the allegedly intoxicated patrons] must have been visibly intoxicated when served.” Id. However, the elements necessary to prove a violation of M.G.L. c. 138, § 69 require the presence of a visibly intoxicated person in or on a licensed premises, followed by a sale or delivery of an alcoholic beverage to that visibly intoxicated person.

While the Webster Police Officers who testified before the Commission were found to be professional and credible, they did not witness Patron #2 being served alcohol, but only encountered him inside the premises when they responded to the report of a fight. As a result, the officers had no firsthand knowledge of any of the elements necessary to support a finding of a violation of M.G.L. c. 138, § 69.

The Local Board presented direct evidence only as to Patron #2 being inside the licensed premises but presented no evidence as to the Licensee serving an alcoholic beverage to Patron #2.

The Commission finds that the Local Board has not proved by legally competent evidence that the Licensee violated M.G.L. c. 138, § 69.

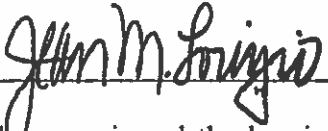
### CONCLUSION

The Alcoholic Beverages Control Commission ("Commission") **DISAPPROVES** the action of the Board of Selectman of the Town of Webster in finding that the Polish American Citizens Club, Inc., d/b/a the Polish American Citizens Club, committed a violation of M.G.L. c. 138, § 69.

The Commission **DISAPPROVES** the action of the Town of Webster for imposing a penalty of a ten (10) day suspension.

As such, the Commission remands the matter to the Town of Webster with the recommendation that it find no violation and that no further action be taken against the Licensee, as any penalty would be discrepant with this decision.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Jean M. Lorizio, Chairman 

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

Crystal Matthews, Commissioner 

Dated: September 30, 2020

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: Gary L. Bridgman, Esq.  
William Hewig, III, Esq.  
Local Licensing Board  
Frederick G. Mahony, Chief Investigator  
Administration, File