



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

Jean M. Lorizio, Esq.
Chairman

DECISION

**HEINEKEN USA INC.
360 HAMILTON AVENUE #1103
WHITE PLAINS, NY 10601
LICENSE#: BM-LIC-000191
LICENSE#: CC-LIC-024022
LICENSE#: CC-LIC-024952
VIOLATION DATES: 1/01/2019 to 4/30/2019
HEARD: 6/07/2022**

Heineken USA Inc. (the "Licensee" or "Heineken") holds alcohol licenses issued pursuant to M.G.L. c. 138, §§ 18A and 18B. The Alcoholic Beverages Control Commission ("ABCC" or "Commission") held a remote hearing via Microsoft Teams on Tuesday, June 7, 2022, regarding alleged violations of:

- 1) M.G.L. Ch. 138, §18A Unlawful Solicitation: The Commission may issue ... a license which shall authorize the licensee to act as agent, broker, or solicitor for any specified individual, corporation, or partnership in another state or foreign country engaged in the business of manufacturing, importing or selling alcoholic beverages, hereinafter called the principal, and, on behalf of such principal, to solicit orders for such beverages from holders of licenses under section 18 only;
- 2) M.G.L. Ch. 138, §19A Unlawful Solicitation: The Commission may actually grant to individual citizens of the Commonwealth employed as salesmen for licensees under section 18, 18A, 19B, 19C or 19D ... permits which shall authorize such salesmen on behalf of their employers to solicit orders for alcoholic beverages from any licensee under this chapter to whom their employers are authorized to sell such beverages;
- 3) M.G.L. Ch. 138, § 2 Unlawful Sale: No person shall manufacture, with intent to sell, sell or expose or keep for sale, store, transport, import or export alcoholic beverages or alcohol, except authorized by this chapter.¹

¹ At the commencement of the hearing and in consideration of the Licensee's Stipulation of Facts, the Enforcement Division withdrew two (2) charges regarding alleged violations of M.G.L. Ch. 138, § 22.

Prior to the commencement of the hearing, the Licensee stipulated to the facts alleged in the Investigator's report and admitted to three violations: M.G.L. Ch. 138, § 18A, § 19A and § 2.

The following documents are in evidence:

1. Investigator Di Cicco's Report;
 2. ABCC License file for CC-LIC-024022;
 3. ABCC License file for CC-LIC-024952;
 4. ABCC License file for BM-LIC-000191;
 5. Security Photographs of Webster Square Package Store;
 6. Atlas Distributing, Inc. Email and Invoices;
 7. Heineken USA's Response to Investigator's Information Request;
 8. Licensee's Stipulation of Facts.
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- A. Licensee's Memorandum;
 - B. Master Legal Training Presentation;
 - C. New England Zone Legal Sales Training;
 - D. Solicitor Permit and Guidelines;
 - E. Licensee's Commercial Spend Policy;
 - F. ABCC Decision Pabst Brewing Co. LLC, 4/26/2017.

There is one (1) audio recording of this hearing.

FINDINGS OF FACT

1. Heineken USA Inc. ("Heineken" or "HUSA") holds a §18A Agent/Broker/Solicitor license; and two §18B Certificate of Compliance permits exercised at 360 Hamilton Avenue #1103, White Plains, New York. (Exhibits 2, 3, 4)
2. Atlas Distributing Inc. ("Atlas") license# WA-LIC-000194 holds a § 18 wholesaler's license exercised at 44 Southbridge Street, Auburn, Massachusetts; and license #ST-LIC-000140 a § 20 Storage Permit exercised at 5 C Street, Unit 14A, Auburn, Massachusetts; along with multiple § 22 transportation permits for sale and delivery of alcoholic beverages to retail licensees in Massachusetts. (Commission Records)
3. On Wednesday, April 17, 2019, Officer Patrick Harrington ("Officer"), of the Worcester Police Department's Liquor Enforcement Unit, notified ABCC Investigator Di Cicco ("Investigator"), of a complaint received concerning a delivery of cases of Heineken beer, on April 16, 2019, from a vehicle with out-of-state license plates to § 15 Licensee, Narayandas Corp d/b/a Webster Square Package Store located at 1014 Main Street, Worcester, Massachusetts. (Exhibit 1)
4. Officer Harrington spoke to employees at Webster Square Package who informed him that J. Martinez had delivered the Heineken alcoholic beverages. Employees stated they usually receive deliveries from Atlas Distributing. Officer Harrington contacted Atlas who informed him that J. Martinez worked for Heineken not Atlas. Id.

5. On April 24, 2019, Investigator Di Cicco contacted Heineken USA Inc. to determine how its business was being conducted. Heineken's Assistant General Counsel contacted Investigator Di Cicco on behalf of her employer. Id.
6. Heineken's Assistant General Counsel confirmed J. Martinez was employed by Heineken and acknowledged that she was aware of an incident in Worcester, but she could not comment further as there was an ongoing internal investigation. Id.
7. A request for documents was forwarded to Heineken. Id.
8. On April 30, 2019, Investigator Di Cicco received information that J. Martinez was employed by Heineken as an Off-Premises Specialist. Id.
9. On May 6, 2019, Investigator Di Cicco interviewed the owner of Webster Square Package Store along with an employee. They confirmed they knew J. Martinez, who had been coming to the store for almost 3 years and solicited orders for alcoholic beverages which are fulfilled by Atlas Distributing. They stated that in exchange for placing orders for alcoholic beverages recommended by J. Martinez, they receive coolers, chairs and other items with advertisements for alcoholic beverages on them. Id.
10. The representatives of Webster Square Package Store confirmed that on or about April 9, 2019, J. Martinez solicited an order for 20 cases of Dos Equis beer. J. Martinez informed the men that he would set up a display for Dos Equis on the licensed premises and "would take care of them." (Exhibits 1, 7).
11. J. Martinez informed Investigators that he picked up alcoholic beverages directly from Atlas, put them in his company vehicle and delivered approximately 10 cases of beer to the licensed premises of Webster Square Package Store. J. Martinez stated that he put the alcoholic beverages with other inventory in the store and did not provide Webster Square Package Store with an invoice. (Exhibits 1, 5)
12. J. Martinez explained to Investigators that part of his job function was to walk retailers through their products and programs to see if they want to feature any of them, and to discuss the benefits and prices with retailers. He got the price information from the system and informed the retailer of the current Atlas prices. (Exhibit 1)
13. On May 6, 2019, Investigator Di Cicco visited Atlas Distributing Inc. at 44 Southbridge Street, in Auburn. While on the licensed premises, Investigator Di Cicco confirmed that J. Martinez was not an employee or salesman for Atlas, but a Heineken sales representative. Id.
14. An Atlas representative stated that when Mr. Martinez ordered samples of alcoholic beverages, he always picked them up at Atlas; they were never delivered to him. All invoices for samples of alcoholic beverages were paid for by Heineken with the usual payment of reimbursement or credit for products ordered by Atlas from Heineken. Id.
15. Investigator Di Cicco requested delivery statements and invoices for Atlas' sales. No documents indicated that a delivery was made to Webster Square Package on April 16, 2019. (Exhibits 1, 6)

16. Investigator Di Cicco received documents from Heineken on June 4, 2019, including reports regarding Mr. Martinez's employment activity with retail licensees in Massachusetts. (Exhibits 1, 7)
17. J. Martinez has never held a license or permit issued by the Commission. (Exhibit 1)
18. The Licensee has implemented new written policies and procedures: all employees must complete a Master Legal training and New England Zone Compliance Sales training (Exhibits B, C); all new hires must obtain requisite permits within 30 days of hire and follow the Solicitor Permit Process and Guidelines (Exhibit D); and a new policy also provides for stricter controls over alcohol samples and expenses for commercial promotions. (Exhibit E)

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975). The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in Massachusetts General Laws, Chapter 138.

Chapter 138 gives the Commission the authority to grant, revoke and suspend licenses. Chapter 138 was "enacted ... 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, 334 Mass. at 617.

The "[r]egulation of the liquor industry in Massachusetts is comprehensive and pervasive." Cellarmaster Wines of Mass., Inc. v. Alcoholic Beverages Control Comm'n, 27 Mass. App. Ct. 25, 27, 534 N.E.2d 21 (1989); see Miller Brewing Co. v. Alcoholic Beverages Control Comm'n, 56 Mass. App. Ct. 801, 808-809 (2002). "Massachusetts law requires that alcohol products sold in this State by manufacturers or suppliers be sold initially to licensed Massachusetts wholesalers. Those wholesalers in turn sell to retailers who sell to consumers. G.L. c. 138, §§ 12, 15, 18, 18B, 19." Heublein, Inc. v. Capital Distributing Co., 434 Mass. 698, 699 (2001); see Miller Brewing Co., 56 Mass. App. Ct. at 808-809.

Every violation the Commission finds must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 528 (1988). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Id. Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc., v. Comm'r of Ins., 420 Mass 707, 710 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

Here the Licensee is charged with violations of:

M.G.L. Ch. 138, §18A Unlawful Solicitation: The Commission may issue ... a license which shall authorize the licensee to act as agent, broker, or solicitor for any specified individual, corporation,

or partnership in another state or foreign country engaged in the business of manufacturing, importing or selling alcoholic beverages, hereinafter called the principal, and, on behalf of such principal, to solicit orders for such beverages from holders of licenses under section 18 only;

M.G.L. Ch. 138, §19A Unlawful Solicitation: The Commission may actually grant to individual citizens of the Commonwealth employed as salesmen for licensees under section 18, 18A, 19B, 19C or 19D ... permits which shall authorize such salesmen on behalf of their employers to solicit orders for alcoholic beverages from any licensee under this chapter to whom their employers are authorized to sell such beverages; and

M.G.L. Ch. 138, § 2 Unlawful Sale: No person shall manufacture, with intent to sell, sell or expose or keep for sale, store, transport, import or export alcoholic beverages or alcohol, except authorized by this chapter.

The Licensee stipulated that its employee did not hold the requisite permits or licenses which would have allowed him to solicit orders from a §18 Wholesaler and/or §15 Retail Package Store and transport alcoholic beverages to a §15 retail package store. J. Martinez, by his own admission, discussed benefits and prices with retailers, picked up alcoholic beverages directly from a wholesaler, and transported said alcoholic beverages in his company vehicle to a §15 retail package store. (Exhibits 1, 5, 7)

The Licensee argued J. Martinez acted independently as his actions were unsanctioned, outside the scope of his job description and function, in violation of the Licensee's policy, and unknown to the Licensee. In addition, the Licensee asserted that it acted immediately in removing J. Martinez from the Massachusetts market, investigating his activities, updating its training programs, and instituting stringent written policies and procedures to prevent similar situations in the future. (Exhibit A)

Based on the evidence, the Commission finds a violation of M.G.L. c. 138, §§ 18A, 19A, and 2.

CONCLUSION

Based on the evidence, the Commission finds the Licensee violated:

- 1) M.G.L. Ch. 138, §18A Unlawful Solicitation: The Commission may issue ... a license which shall authorize the licensee to act as agent, broker, or solicitor for any specified individual, corporation, or partnership in another state or foreign country engaged in the business of manufacturing, importing or selling alcoholic beverages, hereinafter called the principal, and, on behalf of such principal, to solicit orders for such beverages from holders of licenses under section 18 only;
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- 3) M.G.L. Ch. 138, § 2 Unlawful Sale: No person shall manufacture, with intent to sell, sell or expose or keep for sale, store, transport, import or export alcoholic beverages or alcohol, except authorized by this chapter.

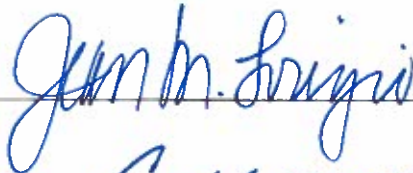
On the first violation, M.G.L. Ch. 138, §18A, the Commission issues a **WARNING**.

On the second violation, M.G.L. Ch. 138, §19A, the Commission issues a **WARNING**.

On the third violation, M.G.L. Ch. 138, § 2, the Commission issues a **WARNING**.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Crystal Matthews, Commissioner



Deborah A. Baglio, Commissioner



Dated: March 19, 2024

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: Local Licensing Board
Frederick G. Mahony, Chief Investigator
David Bolcome, Investigator;
Katelyn Quinn, Investigator
Officer Patrick Harrington, Worcester Police Dept.
Caroline O'Connell, Esq.
Administration, File