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The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

DECISION

RED FACE JACK'S INC. D/B/A RED FACE JACK'S
585 MAIN STREET, ROUTE 28
YARMOUTH, MA 02673
LICENSE#: 151800040
HEARD: 10/28/2015

This is an appeal of the action of the Town of Yarmouth Board of Selectmen (the "Local Board" or "Yarmouth") for suspending the M.G.L. c. 138, §12, all alcoholic beverages license of Red Face Jack's Inc. d/b/a Red Face Jack's (the "Licensee" or "Jacks") located at 585 Main Street, Route 28, Yarmouth, Massachusetts for a violation of M.G.L. c. 138, §69. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, October 28, 2015.

The following documents have been entered in evidence as exhibits:

1. Local Board's Notice of Hearing dated 02/06/2014;
2. Local Board's Meeting Agenda for 03/25/2014;
3. Local Board's Transcript of Hearing held 03/25/2014;
4. Local Board's Notice of Hearing dated 05/13/2014;
5. Local Board's Meeting Agenda for 06/03/2014;
6. Local Board's Transcript of Hearing held 06/03/2014;
7. Video of Local Board's Hearing 06/03/2014;
8. Local Board's Decision dated 06/04/2014;
9. ABCC Decision 07/01/2015, Boncaldo v. Norwood; and
10. Joint Pre-Hearing Memorandum.

A. Yarmouth Police Department Arrest Report dated 05/08/2014;
B. Yarmouth Police Department Supplemental Narrative dated 05/09/2014;
C. Licensee's Letter 05/15/2014 to Mr. Lawler.

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

FINDINGS OF FACT

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

1. Red Face Jack's Inc. d/b/a Red Face Jack's is a Massachusetts corporation which holds an all-alcoholic beverages license issued pursuant to M.G.L. c. 138, §12. (Commission records)

2. Evangelia Zambelis is the sole officer and stockholder of Red Face Jack's Inc. and has been since 2011. (Commission records)

3. On May 7, 2014, Ben Lawler was working at Jack's as a bartender. Mr. Lawler has been a bartender for 35 years and has TIPS training. (Testimony)

4. Jacks' bar area, excluding the dining room, has a seating capacity of approximately 95 people. On this particular evening there were approximately 40-45 patrons. Mr. Lawler was not the only bartender working that evening. (Testimony)

5. Patron A came into Jacks and stayed for approximately three hours. Mr. Murphy had been patronizing Jack's approximately 2-3 times per week during the prior 6 to 7 months. Mr. Murphy is between 5'10" and 5'11" and weighs between 200 and 205 pounds. (Testimony, Ex. A)

6. Mr. Lawler became familiar with Patron A during this time and served him alcoholic beverages. Mr. Lawler had never seen Patron A intoxicated. (Testimony)

7. During one of these occasions, Patron A commented that he "never drives down the Cape when he's been drinking." (Testimony)

8. When Patron A came in that night he did not sit at the bar area. Instead, Mr. Murphy walked around and spoke with several people. He also played pool and went outside to smoke a cigarette. This was customary behavior for Patron A . (Testimony)

9. Each time Patron A ordered an alcoholic beverage, Mr. Lawler waited on him. Patron A would come to the bar area and order the alcoholic beverages from Mr. Lawler. During Each order, they had a conversation. Patron A paid in cash after each drink ordered. (Testimony)

10. Patron A did not appear to have any trouble walking or talking. He did not slur his speech and was not loud. Patron A did not have glassy eyes. Mr. Lawler was able to understand everything that Patron A said. Mr. Lawler did not think Patron A was intoxicated. (Testimony)

11. Patron A was at Jack's between 2 ½ to 3 hours that evening and consumed between 5-7 Coors Light Beer. (Testimony, Ex. B)

12. Between 11:30-11:35 p.m. Patron A called Christopher Grasso and told him that he was at Jack's and asked Mr. Grasso to meet him. (Testimony)

13. As Patron A prepared to leave, he told Mr. Lawler that a friend was picking him up and that he was not driving. (Testimony, Ex. 10).

14. Patron A left the establishment, went to his car and drank a can of beer that was in there while he waited for Mr. Grasso to arrive. (Ex. 6, 10)

15. Mr. Grasso and Patron A have been friends since elementary school. Mr. Grasso was at his ex-girlfriend's house, which is approximately five minutes down the road from Jack's, when Patron A called. (Testimony)

16. Mr. Grasso went to Jack's to meet Patron A. When he arrived, Patron A was standing outside smoking a cigarette. Patron A got into Mr. Grasso's car and they went back to Mr. Grasso's ex-girlfriend's house. (Testimony, Ex. 10)

17. Patron A did not exhibit any signs of intoxication when Mr. Grasso was with him. He did not have glassy eyes, he did not have slurred speech, and he was not unsteady on his feet. (Testimony)

18. Mr. Grasso did not think that Patron A was intoxicated. (Testimony)

19. Mr. Grasso and Patron A remained together for approximately 1½ - 2 hours. Mr. Grasso drove Patron A back to Jack's between 12:45 a.m. and 1 a.m. (Testimony)

20. Neither Patron A nor Mr. Grasso went into Jack's. They each drove off in their respective cars. (Testimony)

21. At approximately 1:08 a.m., Officer Christopher Marino of the Yarmouth Police Department pulled Patron A over because he failed to activate his directional signal on two occasions. (Testimony, Ex. A)

22. Officer Marino spoke with Patron A and detected a strong odor of intoxicating liquor emanating from the vehicle. Officer Marino observed that Patron A eyes were bloodshot and glassy. (Testimony, Ex. A)

23. Officer Marino asked Patron A three times how much he had to drink. Each time Patron A provided a different response. (Ex. A)

24. Eventually, Patron A stated, "okay, I had four or ( ) *sic* beers at Red Face, but I'm just going right there to my girlfriend's house." (Ex. A)

25. Officer Marino asked Patron A to perform five field sobriety tests. Patron A could not complete four of the five tests. (Testimony, Ex. A)

26. Based on his observations, Officer Marin formed the opinion that Patron A was under the influence of alcohol. As a result, Office Marino placed Patron A under arrest for operating a motor vehicle under the influence of alcohol. (Testimony, Ex. A)

27. At 1:29 a.m., Officer Marino began the booking process for Patron A. At some point in time, Patron A took a breathalyzer test, which resulted in a .16 % BAC. (Testimony, Ex. A)

28. On May 9, 2014 at approximately 5:50 p.m., Officer Marino conducted a follow-up investigation at Red Face Jack's regarding the statements made by Patron A on the night of his arrest. (Testimony, Ex. B)

29. During this follow- up investigation, Officer Marino spoke with Mr. Lawler. Mr. Lawler told Officer Marino that he is very familiar with Patron A and confirmed that he was drinking at Jack's prior to his arrest. (Testimony, Ex. B)

30. Mr. Lawlor told Officer Marino that Patron A told Mr. Lawler that he was not going to be driving home. (Testimony, Ex. B)

31. Mr. Lawler also told Officer Marino that he would have taken Patron A's car keys away if he knew that he was planning on driving. (Testimony, Ex. B)

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). 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. 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. 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. 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 Licensee is charged with service to intoxicated persons 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 Local Board must show: (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. A 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). As explained in Vickowski,

> 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. 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). 422 Mass. at 610.

"The [Local Board] may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two." Vickowski, 422 Mass. at 611. "[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. It is proper to infer based on "common sense and experience" that evidence of a patron's excessive consumption of alcohol, would lead one to infer that [a] patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee." Vickowski, 422 Mass. at 611; accord P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

Evidence of Outward Signs of Intoxication

In this matter, the Local Board failed to produce any evidence regarding the patron's conduct or demeanor at the time he was served his last beer. To the contrary, the record reflects that Patron A did not exhibit any signs of intoxication at the time he was served his last drink. Each time he interacted with Mr. Lawler, Patron A's speech was clear, he was steady on his feet, had no trouble walking, his eyes were not blood-shot or glassy, and that he was not loud or vulgar.

Patron A did not have a tab and that he paid cash for each beer he ordered. It was not a busy evening and Mr. Lawler was familiar with Patron A. Each time Patron A ordered his beers from Mr. Lawler they spoke with each other. Mr. Lawler did not sit at the bar area, but was walking around socializing with people, playing pool, and going outside to smoke cigarettes. There is no evidence regarding when Patron A was served his last drink or that he appeared intoxicated at the time of service.

Evidence of Excessive Consumption

Likewise, there was no evidence that Mr. Lawler served Patron A a "large number of strong alcoholic drinks . . . sufficient to put [Jack's] on notice that it was serving a [patron] who could potentially endanger others [or himself]." Cimino, 385 Mass. at 328 (where patron had been served six or more White Russians, an intoxicating beverage containing vodka and coffee-brandy liqueur); 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 matter of common sense and experience, the inference may not be drawn." Vickowski, 422 Mass. at 611. The evidence in this case -- that over the course of three hours Jack's served Mr. Murphy 5-7 beers -- would not be sufficient to support an inference of obvious intoxication based on excessive consumption. Id.; 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). Vickowski, 422 Mass. at 611 (insufficient proof where patron, "who was in the habit of drinking beer, 'sipped' four to five bottles over the course of approximately two hours"); compare Rivera, 77 Mass. App. Ct. at 21 (where patron was served fourteen drinks over a two-hour period and drank "most" of them, it was for jury to decide whether he likely appeared intoxicated before he was served his last drink).

Evidence of Later Intoxication

The Local Board's case relies entirely on Officer Marino's observations of Patron A approximately two and a half hours after Patron A left the licensed premises.[1] No evidence was presented regarding the only relevant time period, i.e. when Mr. Lawler served Patron A his last drink. While a [Local Board] may meet its burden through circumstantial evidence, proof of

[1] The Local Board introduced into evidence a breathalyzer result performed at the Yarmouth Police Department at some point after the Patron was arrested. As the Local Board did not introduce evidence as to what time the breathalyzer was given, and did not produce a toxicologist to give an expert opinion through retrograde extrapolation evidence of what any ethanol reading would mean, this evidence is given no weight. See Commonwealth v. Colturi, 448 Mass. 809 (2013).

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").[2] Likewise, expert opinion about an average drinker's response to alcohol is not sufficient by itself to demonstrate whether a particular drinker showed signs of intoxication, but such expert testimony "may . . . be sufficient when conjoined with other direct evidence of the patron's customary reactions to alcohol consumption." Soucy, 79 Mass. App. Ct. at *2; see Douillard, 433 Mass. at 167-168 (finding sufficient evidence to permit inference of visible intoxication at time final drink was served where patron and his friend confirmed patron usually showed signs of intoxication after consuming seven drinks, expert opined that patron likely had nine drinks, and expert opined that one usually shows signs of intoxication at a blood alcohol level lower than patron's was). In Soucy, there was direct evidence of the number of drinks that the patron consumed as well as expert opinion about the patron's blood alcohol levels at the bars, "levels at which average persons would have shown signs of intoxication." Soucy, 79 Mass. App. Ct. at *1. Despite such evidence and expert opinion, there was no evidence of the number of drinks it customarily would take for the patron to become intoxicated. Id. at *2. Consequently, the Soucy Court determined that "a fact finder could not conclude . . . that [the patron] passed his normal point of intoxication and thus likely appeared intoxicated while at the [bars]." Id.

In this matter, the Local board presented Officer Marino's observations of intoxication and subsequent breathalyzer results he obtained from Patron A presumably within 2-3 hours after Patron A left the licensed premises. There was no evidence as to how many alcoholic beverages Patron A, in particular, customarily would need to consume to exhibit signs of intoxication. There was also no expert testimony explaining the meaning of a BAC of .16%. As such, proof that Patron A's blood alcohol content was over the legal limit after his arrest was not, by itself, sufficient to show that Patron A was intoxicated when Mr. Lawler last served him. See Soucy, 79 Mass. App. Ct. at *2; Douillard, 433 Mass. at 167-168.

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."[3] In this matter, there was no evidence

[2] Yet, such evidence may be used to bolster other evidence concerning a patron's condition at the time alcohol was served. Id. at 166.

[3] "We do not mean to suggest that evidence of subsequent intoxication is irrelevant, or wholly lacking in probative force. Such evidence properly could be used to bolster other evidence tending to prove that a patron already showing obvious signs of intoxication was served alcoholic beverages by a licensee. Thus, we agree with the Appeals Court that evidence of

that Patron A "was exhibiting outward signs of intoxication at the time he was served his last alcoholic drink." Rivera, 77 Mass. App. Ct. at 20. As the Superior Court has reasoned,

> "[g]iven a horrific fatal accident the extraordinarily reckless behavior by two recently-departed Royal Dynasty patrons that caused it, the failed PBT and failed sobriety tests at the scene, and the evident absence of evidence of another source of alcohol for either man, it is tempting to reason backward to the conclusion that they must have been visibly intoxicated when served at the Royal Dynasty. As the A.B.C.C. itself recognized, however evidence of apparent intoxication or elevated blood alcohol level 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. . . ."

Royal Dynasty, Inc. v. Alcoholic Beverages Control Comm'n, Middlesex Superior Court, C.A. No. 03-1411, *3-5 (December 9, 2003) (Billings, J.). As a result, the Commission cannot say that a BAC over the legal limit, more than two hours after a patron left the licensed premises, is sufficient evidence to prove intoxication at the time of service.

Evidence Regarding Concern for the Patron Driving

Although Patron A did not exhibit any signs of intoxication to him, Mr. Lawler did tell Officer Marino that, "If I had known that Patron A was driving, I would have taken his keys." Mr. Lawler could not explain why he made that statement to Officer Marino, other than the fact that he was nervous when speaking to the officer. There was no further evidence presented regarding what time Mr. Lawler would have taken the keys away, i.e. before the service of Patron A's last drink or after. Mr. Lawler did not provide any explanation about why he would have taken Patron A's keys away if he knew he was driving. The only reasonable inference would be that Mr. Lawler did not think that Patron A should be driving.

In Makynen v. Mustkangas, the Appeals Court found that evidence of the defendant's concern regarding his nephew's ability to drive took place at approximately the same time the defendant purchased his nephew's last drink. Makynen v. Mustakangas, 39 Mass. App. Ct. 309 (1995). The Court held that the Defendant's Motion for Summary Judgment was properly denied because the defendant purchased his nephew's last drink contemporaneously with exhibiting concern about his nephew's ability to drive. Id. This was sufficient evidence for the question of the defendant's liability on a social host theory to go to the jury. Id. The issue here is the lack of evidence surrounding the relevant time period, i.e. Patron A's state of intoxication or lack thereof when he was served his last drink. The Local Board presented no evidence that Mr. Lawler questioned Patron A about his ability to drive when he served him his last drink.

In addition, 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. The elements of service to an intoxicated person are: (1) an individual intoxicated on the licensed premises; (2) an employee of the licensed premises knew or

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subsequent intoxication at the scene of an accident could bolster evidence of a patron's obvious intoxication while at a tavern." Gottlin v. Graves, 40 Mass. App. Ct. 155, 159 (1996).

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. G. L. c. 138, § 69; Vickowski, supra at 609. Although Officer Marino presented evidence that at 1:08 a.m., Patron A was under the influence of alcohol and may have even been intoxicated, the Local Board failed to produce any evidence that Patron A was intoxicated at the time Mr. Lawler served him the last drink at Jack's. In fact, there was no evidence presented regarding what time Patron A arrived at Jack's or what time he was served any of the beers.

Although the distinction between the elements required to satisfy each statute may be subtle, it produces very different results. A person does not necessarily have to be drunk to be considered under the influence of alcohol; he or she merely has to have consumed enough alcohol or drugs to diminish his or her ability to operate a motor vehicle safely. See Commonwealth v. Connolly, 394 Mass. 169 (1985); accord Massachusetts Practice: Criminal Law, § 7:248 (2015) (5th Ed).

As the District Courts routinely explain in jury instructions,

> "What does it mean to be "under the influence" of alcohol? **Someone does not have to be drunk to be under the influence of alcohol.** A person is under the influence of alcohol if he (she) has consumed enough alcohol to reduce his (her) ability to operate a motor vehicle safely, by decreasing his (her) alertness, judgment and ability to respond promptly. It means that a person has consumed enough alcohol to reduce his (her) mental clarity, self-control and reflexes, and thereby left him (her) with a reduced ability to drive safely. The amount of alcohol necessary to do this may vary from person to person."

Massachusetts Model Jury Instructions to the District Courts, Instruction 5:31 (2013) (emphasis added).

In essence, an individual may be under the influence of alcohol, but not be intoxicated. As a result, even if the Commission presumes that Mr. Lawler did not think that Patron A should be driving, there is no evidence that he believed that Patron A was intoxicated. Moreover, there is no evidence regarding when Patron A was served his last drink. Mr. Lawler might have formed the opinion that Patron A should not driving when Patron A told him he was leaving the licensed premises. Further, Patron A may have left the licensed premises hours after he was served his last beer. The Local Board failed to produce any evidence that the patron was intoxicated at the time of purchase other than pure conjecture or surmise. Given these circumstances and the evidence presented, this Commission cannot draw an inference of obvious intoxication at the time of sale with the requisite degree of certainty.

CONCLUSION

Therefore, the Commission **DISAPPROVES** the action of the Local Board in finding Red Face Jack's Inc. d/b/a Red Face Jack's in violation of M.G.L. c. 138, §69. The Commission also **DISAPPROVES** the action of the Local Board in suspending the license for seven days, with two days suspension to serve, and five days held in abeyance for a period of one year.

The Commission remands the matter to the Local Board with the recommendation that no further action be taken against the Licensee, as any penalty would be discrepant with this decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Kathleen McNally, Commissioner _____

Dated: December 10, 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.

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cc: Stephen Miller, Esq. via facsimile 617-946-4624
Bruce Gilmore, Esq. via facsimile 508-362-5344
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration
File