



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

GEBIRGS VEREIN, INC. D/B/A MOUNTAIN CLUB
6 ANTHONY ST.
ADAMS, MA 01220
LICENSE#: 001000001
HEARD: 09/14/2016

This is an appeal of the action of the Town of Adams Board of Selectmen (the "Local Board" or "Adams") for suspending the M.G.L. c. 138, § 12 All Alcoholic Beverages License of Gebirgs Verein, Inc. d/b/a Mountain Club ("Licensee", "Gebirgs" or "Mountain Club") located at 6 Anthony St., Adams, Massachusetts for fourteen (14) days.¹ The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Wednesday, September 14, 2016.

At the commencement of the hearing, the Licensee stipulated that the violation occurred. As a result, the only issue before the Commission is the appropriateness of the sanctions imposed by the Local Board.

The following documents are in evidence as exhibits:

1. Local Board Decision 10/08/2016;
2. Letter from Adams Police Department, Chief Tarsa 7/07/2015;
3. Adams Police Department Report of Officer Dorr, 3/28/2015;
4. Local Board Meeting Minutes, 10/07/2015;
5. Adams Police Department Dispatch Recording;
6. DVD Recording of Local Board Meeting, 10/07/2015;
7. Licensee's Public Record Request for Cell Phone Video, 9/07/2016;
8. Berkshire [County] District Attorney Response Letter 9/12/2016;
9. DVD Recording of Cell Phone Videos of Incident 3/28/2015;
10. North Berkshire District Court Criminal Docket for C. Massaconi;
11. North Berkshire District Court Criminal Docket for L. Delmolino;
12. North Berkshire District Court Criminal Docket for J. Garvie; and
13. North Berkshire District Court Criminal Docket for M. Massaconi; and
14. Reports and Progressive Discipline Policy of Adams over the Past Two Years.

¹ The Licensee, Gebirgs Verein, Inc. d/b/a Mountain Club, has served the 14 (fourteen) day suspension which is the subject matter of this appeal. (Testimony, Exhibit 1)

There is one (1) audio recording of this hearing, and two (2) 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. Gebirgs Verein, Inc. d/b/a Mountain Club ("Licensee", "Gebirgs" or "Mountain Club") located at 6 Anthony Street, Adams, Massachusetts, holds a § 12 all alcoholic beverages club license. Mountain Club has four Club Officers and five Trustees. (Testimony, Commission File)
2. At approximately 9:00 p.m. on March 28, 2015, Mr. Charles "Chuck" Massaconi had a verbal confrontation with Mr. Norman Mongeau, which subsequently escalated into a physical altercation. (Testimony, Exhibits 2, 3)
3. Mr. Chuck Massaconi is the license manager and President of Gebirgs. At the time, Mr. Norman Mongeau was a trustee of the licensee. (Testimony, Commission Files)
4. Mr. Chuck Massaconi swung his fist, and struck Mr. Mongeau on the left side of his body, upper torso, and neck area. (Testimony, Exhibit 3)
5. Mr. Chuck Massaconi attempted to strike Mr. Mongeau again, but Mr. Mongeau lifted his arms to cover his face. (Testimony, Exhibit 3)
6. Thereafter, Ms. Jacqueline Garvie and Ms. Lisa Delmolino began grabbing and striking Mr. Mongeau. Mr. Matthew Massaconi then struck Mr. Mongeau's head with a brown beer bottle turned upside down. (Testimony, Exhibit 3)
7. A few seconds later Mr. Mongeau was on the ground with Chuck Massaconi, Matthew Massaconi and Ms. Jacqueline Garvie on top of him. Mr. Mongeau bit Mr. Chuck Massaconi's finger. (Testimony, Exhibit 3)
8. Ms. Lisa Delmolino, is Gebirg's Vice-President. (Commission Files, Testimony, Exhibit 2)
9. Ms. Sara Blanchette, the bartender and a member of the club, called the Adams Police Department, reported the fight and requested police assistance. (Testimony, Exhibits 2, 3)
10. Subsequently Mitchell Massaconi broke up the fight. (Testimony, Exhibit 3)
11. At approximately 9:20 p.m. Adams' Police Officers Brenna Dorr and David Dean arrived at Gebirgs and observed Mr. Mongeau standing at the bar. (Testimony, Exhibit 3)
12. Mr. Mongeau had a small amount of blood on his jacket, and on the left side of his forehead at his hairline. Mr. Mongeau stated he was okay, but had just been assaulted. Officer Dorr directed Mr. Mongeau outside to speak with Officer Dean. (Testimony, Exhibit 3)

13. Ms. Blanchette advised Officer Dorr that Mitchell Massaconi was the sole individual responsible for maintaining the licensee's video surveillance equipment, and called him for Officer Dorr. Mitchell is the brother of Matthew Massaconi and son of Chuck Massaconi. (Testimony, Exhibits 2, 3)
14. Mitchell Massaconi is the Secretary of Gebirgs. (Testimony, Commission Records, Exhibit 1)
15. Mitchell Massaconi came downstairs, introduced himself to Officer Dorr, and retrieved the keys to access the video surveillance. Mitchell Massaconi explained that he was upstairs when he heard a commotion downstairs. When he came downstairs he saw a physical altercation involving his father Chuck, his brother Matthew, and Norman Mongeau. (Testimony, Exhibit 3)
16. Officer Dorr watched the video surveillance which showed both bar tops and approximately 75% of the club interior. Officer Dorr determined that Chuck Massaconi was the aggressor in the assault, Lisa Delmolino and Jacqueline Garvie participated in the assault and battery, and Matthew Massaconi struck Mr. Mongeau with a glass bottle. (Testimony, Exhibit 3)
17. Officer Dorr asked Mitchell Massaconi to make a copy of the video for the police. Mitchell Massaconi stated he would try to burn the video later that day or the next day. Mitchell Massaconi stated that the video surveillance was on a loop and information remains accessible for 7 days. (Testimony, Exhibit 3)
18. Mr. Mongeau was treated for his physical injuries sustained at the club. (Exhibit 3)
19. On April 3, 2015 between 6:00 -7:00 pm. Officer Dorr called Mitchell Massaconi because he had not yet produced a copy of the video. Mitchell Massaconi stated that he was at work, but would contact Officer Dorr and get her the disc after work. (Testimony, Exhibit 3)
20. By 9:18 p.m., Officer Dorr had not heard from Mitchell Massaconi and called his cell phone leaving a voicemail stating she needed the video copy that evening. (Exhibit 3)
21. At this point, Officer Dorr was concerned that Mitchell Massaconi was not cooperating and would not provide the video disk prior to its deletion after 7 days. (Exhibit 3)
22. As a result, Officers Dorr and Wandrei went to the Mountain Club to locate Mitchell Massaconi, or someone else to assist in obtaining the video evidence. However, Mitchell Massaconi had gone home, and he was the only person able to access the surveillance system. (Exhibit 3)
23. Officer Dorr called Mitchell Massaconi again, but he did not answer. (Exhibit 3)
24. Officers Dorr and Wandrei then went to Mitchell Massaconi's house, where he resides with his mother, Melissa Schaffrick. Mitchell Massaconi was at home, in the basement area, however, he refused to come upstairs and speak with the officers. (Exhibit 3)

25. Officer Dorr stated that the officers needed the video that evening, and requested that Mitchell Massaconi meet the officers at Gebirgs. Officer Dorr notified Mitchell Massaconi that if he failed to do so, she would seize the evidence. (Exhibit 3)
26. Officer Dorr returned to the Mountain Club to ensure the evidence was not disturbed while she consulted with her supervisor, Sergeant Scott McWhirt, on how to proceed. The police confiscated the video tape. When the video was searched the footage block before and the block after the incident were present, but the footage block of time during the incident was missing. (Testimony, Exhibit 4)
27. It was eventually learned that the video recording of the event had been completely erased and deleted from the system, thus destroying the video evidence that was assured to be given to the police. By Mitchell Massaconi's own admission, he alone was the only person with the knowledge and access to the recording system. (Testimony, Exhibits 2, 4)
28. On April 4, 2015, Officer Dorr contacted Ms. Sara Blanchette who arrived at the station at approximately 6:15 p.m. to provide a witness statement. Ms. Blanchette explained that at first Mr. Chuck Massaconi appeared to be leaving the club, but then confronted Norman Mongeau, pushing him. The next thing she knew there was a "full-on" physical fight. (Exhibits 2, 3)
29. Ms. Blanchette stated that everyone at the club harassed her about calling the police. Mr. Chuck Massaconi never reassured her that she had done the right thing. As a result of the fight, and the harassment and intimidation she received, she quit her position. Ms. Blanchette knows the Massaconi family well. (Exhibits 2, 3)
30. Mr. Chuck Massaconi was subsequently charged and admitted to sufficient facts to the crimes of Assault and Battery, M.G.L. c. 265, § 13A, and M.G.L. c. 272, § 53 Disorderly Conduct. (Testimony, Exhibit 10)
31. This is a first offense/violation for the licensee Gebirgs Verein, Inc. d/b/a Mountain Club. (Testimony, Commission Records)
32. The Local Board's Policy Guidelines Handbook for progressive discipline includes the following: (Exhibit 14)

Violations of Alcoholic Beverages Licenses:

- (1) First offense: Mandatory \$100.99 fine and Show Cause Hearing with up to two (2) days suspension.
- (2) Second offense: Show Cause hearing with two (2) to five (5) days suspension.
- (3) Third offense: Show Cause hearing with five (5) days suspension, other action which could include: to reduce number of hours; or take other appropriate action up to and including the cancellation, suspension, and/or revocation of license.
- (4) An attachment to all licenses and renewals stating that "All licensees or their designees will be required to attend an approved Alcohol Awareness Program to be held at least once within a three year period." This program will be approved by

the Chief of Police and sponsored by individuals from Adams, North Adams, and Williamstown area, the attachment to be displayed publically next to the license.

- (5) Patrons must be off the premises by 2:00 a.m.; a sign provided by the Board of Selectmen must be conspicuously posted in the pouring establishment.
- (6) The owner of all liquor pouring establishments must post a sign provided by the Board of Selectmen stating – This Establishment ID’s “Responsibility Matters.” (Exhibit 14)

DISCUSSION

Pursuant to M.G.L. C. 138, § 67, “[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed.” Dolphino Corp. v. Alcoholic Beverages Control Comm’n, 29 Mass. App. Ct. 954, 955 (1990) citing United Food Corp v. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978). The findings of a local licensing board are “viewed as hearsay evidence, [and] they are second-level, or totem pole hearsay, analogous to the non-eyewitness police reports in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 – 476 (1989).” Dolphino, 29 Mass. App. Ct. at 955.

Both the Local Board and the Commission have the authority to grant, revoke, and suspend licenses. Their powers were authorized “to serve the public need and . . . to protect the common good.” M.G.L. c. 138, § 23, as amended through St. 1977, c. 929, § 7. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given “comprehensive powers of supervision over licensees,” Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Comm’n, 11 Mass. App. Ct. 785, 788 (1981).

These “comprehensive powers” are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, § 64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§ 23, 64.

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).

In this matter, the Local Board has the burden of producing satisfactory proof that on March 28, 2015 the licensee violated 204 C.M.R. 2.05(2): “No licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed

premises. The licensee shall be responsible therefor, whether present or not.” Prior to the commencement of the hearing, the licensee stipulated that a violation occurred, namely that the license manager and several of the officers and directors got into a physical altercation with a trustee of the licensee inside the licensed premises.

The Licensee’s obligation under 204 C.M.R. 2.05(2) to maintain control over the premises and to comply with Chapter 138 and local regulations is well-settled. 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.

“The duty to protect patrons . . . does not require notice of intoxication, but may be triggered when the conduct of another person puts a tavern owner or its employees on notice that harm is imminent.” Christopher v. Father’s Huddle Café, 57 Mass. App. Ct. 217, 222-223 (2003). However, a licensee may discharge its duty to protect patrons by taking steps to prevent the harm – such as denying service to a patron who appears intoxicated or who has requested too many drinks, or calling police when a fight occurs or an aggressive patron threatens assault. See, e.g., Greco v. Sumner Tavern Inc., 333 Mass. 144, 145 (1955); Carey, 355 Mass. at 451.

General Laws c. 138, §26 reads in pertinent part: “No corporation, organized under the laws of the commonwealth or of any other state or foreign country, shall be given a license to sell in any manner any alcoholic beverages *unless such corporation shall have first appointed, in such manner as the licensing authorities by regulation prescribe, as manager or other principal representative, a citizen of the United States, and shall have vested in him by properly authorized and executed written delegation as full authority and control of the premises, described in the license of such corporation, and of the conduct of all business therein relative to alcoholic beverages as the licensee itself could in any way have and exercise if it were a natural person resident in the commonwealth, nor unless such manager or representative is, with respect to his character, satisfactory to the licensing authorities.*” (Italics supplied.)

The obligation established by § 26 is the necessity of appointing a manager whose character is satisfactory to the authority granting the license, and vesting in the manager full authority and control of the licensed premises, including the sale of alcoholic beverages. The evident purpose of this provision is to assure the licensing authority that each licensee will be managed by a responsible person satisfactory to the granting authority, and that the granting authority, in executing its responsibilities under c. 138, will have available at all times a person whose responsibility for the conduct of the business of the tavern will be beyond challenge by any corporate licensee. Gottlin v. Herzig, 40 Mass. App. Ct. 163, 166-167 (1996); citing See New Palm Gardens, Inc. v. Alcoholic Beverages Control Commn., 11 Mass. App. Ct. 785, 788 (1981) (the statutory scheme of c. 138 is designed to give the commission authority necessary to serve the public need and to protect the common good, and the purpose of its powers, including the authority to revoke and suspend licenses, is “not retribution but the protection of the public”) .

The Licensee does not dispute that the violation occurred. The Licensee argued that the penalty imposed by the Local Board was too severe and therefore arbitrary and capricious. The licensee requested that the Commission reduce the length of the time of the actual suspension. The Local Board, in contrast, argued that a fourteen (14) day suspension is appropriate based on the nature of the violation itself, as well as the standing of the individuals involved, namely the license manager and several officers of the Licensee. Therefore, the Commission must review whether the sanctions imposed by the Local Board for these violations was reasonable.

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

Upon Commission review of the Rules and Regulations promulgated by the Adams Board of Selectman, the penalties for liquor violations are as follows: First offense: Mandatory \$100.99 fine and Show Cause Hearing with up to two (2) days suspension; Second offense: Show Cause hearing with two (2) to five (5) days suspension; Third offense: Show Cause hearing with five (5) days suspension, other action which could include: to reduce number of hours; or take other appropriate action up to and including the cancellation, suspension, and/or revocation of license.

In addition, the Local Board rules **do not** state that these penalties are only a guide, and that the Local Board may use its discretion regarding the factors surrounding the violation. As a result, the Commission finds that although the sanctions imposed in this matter underwent a detailed analysis and thorough scrutiny by the Local Board, that the Local Board imposed a penalty inconsistent with its own Rules for a first offense. The Commission agrees that the conduct of the Licensee's manager and several of its officers was egregious. However, the Commission finds that a straight suspension/closure for fourteen (14) days surpasses the Rules and Regulations that the Adams Board of Selectman promulgated. As such, the Commission suggests that a penalty comprised of a period of suspension, with some period of time held in abeyance, thus, placing the Licensee on probation with a suspension to be imposed immediately upon the finding of any future violation, to be a more reasonable and measured penalty for the Licensee's first offense. See In Re Jay & Ricky, Inc. DBA Ricky's Liquor, (ABCC Decision dated October 17, 2014) (Commission disapproved Local Board's imposition of a ninety (90) day suspension for second and third compliance check failures in contradiction of its progressive discipline policy.)

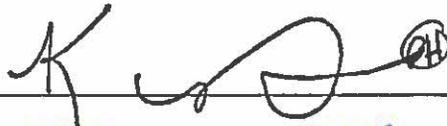
Notwithstanding the above, the Commission is extremely concerned that the violation in question involved not only the license manager, but several of the licensee's officers, as well as a trustee. These are the individuals who are not only responsible for the control and management of the non-profit corporation, but also the control and management of the licensed premises. The Commission has consistently held that violations involving the license manager, corporate officers, and employees of the licensee are the responsibility of the licensee. See In Re English Social Club (ABCC Decision August 17, 2007) (Where non-profit corporate officers and license manager were permitting gambling on the licensed premises, Commission upheld Local Board violation); In Re: Trasmontano, Inc. dba Whisper's Pub (ABCC Decision June 6, 1989) (Commission upheld Local Board's revocation where stockholders, and corporate officers were involved in illegal drug activity at the licensed premises.) In Re: The Embers of Salisbury Beach, Inc. dba Kon Tiki (ABCC Decision August 18, 1994) (Commission imposed a 14 (fourteen) day suspension where employees of the licensee were involved in illegal drug activity inside the license premises).

CONCLUSION

Based on the evidence and rulings above, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Town of Adams Board of Selectmen in suspending the license of Gebirgs Verein, Inc. d/b/a Mountain Club for 14 (fourteen) days, and remands the matter to the Local Board with the recommendation that the license be suspended for a period consistent with the Town's Local Rules and Regulations. In addition, the Commission strongly recommends that the Local Board require the Licensee to file an application to change its license manager, as well as its officers, so that a more responsible control group is installed to manage the licensee.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Kathleen McNally, Commissioner



Dated: January 19, 2016

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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