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

KCLC INC. D/B/A ROSE GARDEN RESTAURANT AND LOUNGE
16 MILFORD ST.
UPTON, MA 01568
LICENSE#: 130200003
VIOLATION DATE: 03/28/2015
HEARD: 05/24/2016 AND 10/04/2016

KCLC Inc. d/b/a Rose Garden Restaurant and Lounge (the "Licensee" or "Rose Garden") holds an all alcoholic beverages license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held hearings on May 24, 2016 and October 4, 2016, regarding an alleged violation of 204 CMR 2.05 (2) Permitting an Illegality on the licensed premises, to wit: M.G.L. c. 138, § 69- Sale or delivery of an alcoholic beverage to an intoxicated person, which occurred March 28, 2015 according to Investigator Bailey's report.

The following documents are in evidence as exhibits:

1. Investigator Bailey's Report;
2. Report of Upton Police Officer Erik Mager, 3/28/15;
3. Voluntary Witness Statement from Gail Ton, 3/28/15;
4. Upton Police Department Defendant's Rights Form, 3/28/15;
5. Defendant's Statutory Rights and Consent Form, 3/28/15;
6. Report of Upton Police Officer Michael Benjamin, 3/29/15;
7. RMV Photo T. Burns;
8. Subsequent Report of Upton Police Officer Erik Mager, 6/29/15;
9. Voluntary Witness Statement from Sarah Carey, 3/29/15;
10. Voluntary Witness Statement from Tim Gorman, 3/29/15;
11. Voluntary Witness Statement from Adam McMahon, 3/30/15;
12. Voluntary Witness Statement from Joseph McMahon, 3/30/15;
13. Voluntary Witness Statement from Michael P. Campbell, 3/29/15;
14. Voluntary Witness Statement from Jesse Freitas, 4/1/15;
15. ABCC Subpoena to KCLC, 4/3/15;
16. KCLC Response via Letter 4/15/15;
17. Voluntary Witness Statement from Cynthia Bettono, 3/29/15;
18. Google map of Upton from 16 Milford St. to 44 Milford St.; and
19. Central Massachusetts Law Enforcement Crash Reconstruction Report, 3/28/15.

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There is one (1) audio recording of this hearing, and two (2) witnesses testified.

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

FINDINGS OF FACT

1. KCLC Inc. d/b/a Rose Garden Restaurant and Lounge, located at 16 Milford Street, Upton, Massachusetts, holds an all alcoholic beverages restaurant license pursuant to M.G.L. c. 138, § 12. (Commission records)

2. Mr. Michael Campbell is the President, Director, and License Manager of the Rose Garden. This license was transferred to the Rose Garden in 2003. (Commission records)

3. The Licensee has no history of prior violations before the Commission or Local Board. (Commission records)

4. On Saturday, March 28, 2015, at approximately 3:40 p.m., Upton Police Officer Michael Benjamin and Upton Police Officer Erik Mager responded to the scene of a motor vehicle accident in the area of 44 Milford Street, Upton, after receiving a report of a head-on collision involving two cars, a Toyota Sequoia and a Ford Escape. (Testimony, Exhibits 1,2,3,6,14)

5. In the Ford Escape, there were injured occupants, two infants and a female who were inside the Ford Escape. A male, the driver, was standing outside the car, bleeding from a head wound. (Testimony, Exhibits 1, 2, 3, 14)

6. Mr. Thomas Burns, (Mr. Burns) the driver of the other vehicle, a Toyota Sequoia, was partially seated against the seat and the running board of the vehicle, with the door open. Mr. Burns had a severe laceration on his forehead, appeared disoriented and confused, and did not respond to questions from the officers. (Testimony, Exhibit 2)

7. At the accident scene Officer Mager determined, after speaking to a passing motorist, who had been traveling on Route 140 behind the Ford Escape, that the Toyota Sequoia was swerving, and then crossed into the oncoming traffic lane, where it collided head on with the Ford Escape, which was driving in the correct lane. (Testimony, Exhibits 1, 2, 3, 14)

8. While at the accident scene, Officer Mager spoke to Mr. Burns, who was inside the ambulance. Officer Mager smelled an odor of alcohol on Mr. Burns' breath, and observed that Mr. Burns' eyes were glassy and bloodshot. Officer Mager attempted to question Mr. Burns, but Mr. Burns did not respond. Mr. Burns was transported to the Hospital. (Testimony, Exhibit 2)

9. While at the accident scene, Officer Benjamin had received information that just prior to the collision, the driver of the Toyota Sequoia, Mr. Burns, had been at the Rose Garden Lounge. The Rose Garden is located approximately 1/8th of a mile from the accident scene. (Testimony, Exhibit 6)

10. On March 28, 2015 at approximately 5:30 p.m., Officer Benjamin arrived at the Rose Garden with an RMV photo of Mr. Burns. (Testimony, Exhibit 6)

11. Officer Benjamin interviewed the bartender on duty, Molly Guadagnoli Douglas, who identified Thomas Burns from the RMV photo. (Testimony, Exhibit 6)

12. In the course of his investigation Officer Benjamin determined that the Upton Men's Club Softball League had been conducting registration at the Rose Garden on Saturday afternoon. Three men and one woman, who were present for the softball registration, and were inside the Rose Garden, identified Thomas Burns as being at the Rose Garden drinking with another male patron. (Testimony, Exhibits 8, 9, 10, 11, 12)

13. Officer Benjamin interviewed the four individuals who were patrons, and who had observed Mr. Burns while inside and leaving the Rose Garden. Each of the four patrons went to the Upton Police station the day after the accident, and completed written statements about their observations of Mr. Burns at the Rose Garden. (Testimony, Exhibits 6, 8, 9, 10, 11, 12)

14. Based on his interviews with these four patrons, Officer Benjamin determined that Mr. Burns arrived alone at the Rose Garden at approximately 12:30 p.m. Mr. Burns came inside and sat at the bar where he consumed some alcoholic beverages. When another gentleman, a friend of Mr. Burns, came into the premises, they moved and sat at a high top table. Officer Benjamin determined that Mr. Burns and his friend were served by bartender Molly Guadagnoli Douglas. Mr. Burns and his friend were served and consumed wine, beer, and approximately five (5) shots of Fireball whiskey. They also consumed a meal consisting of a hamburger. (Exhibits 6, 8, 9, 10, 11, 12)

15. The bartender asked Mr. Burns whether he was driving home. Mr. Burns' friend stated that he was taking Mr. Burns home. The four patrons observed Mr. Burn speaking loudly, using profanities, hanging all over and hugging his friend, staggering while walking to the mens' room, and banging into a pool table, furniture, and a doorway threshold. (Exhibits 8, 9, 10, 11, 12)

16. At approximately 3:30 p.m. Mr. Burns left the Rose Garden. Mr. Burns appeared intoxicated. He fumbled with his keys in the parking lot, and when inside his motor vehicle, he slumped over the steering wheel as if asleep. Mr. Burns then drove his car into the side of the Rose Garden building, backed up and hit a telephone pole. Mr. Burns then drove out of the parking lot. (Exhibits 8, 9, 10, 11, 12)

17. None of these four individuals who were patrons at the Rose Garden testified at the Commission hearing. (Commission records)

18. The bartender, Molly Guadagnoli Douglas, did not appear or testify at the Commission hearing. (Commission records)

19. Mr. Burns' medical records were not presented as evidence during the Commission hearing. (Commission records)

20. License Manager Michael Campbell was not present at the Rose Garden on Saturday, March 28, 2015 while Mr. Burns was a patron. (Testimony, Exhibits 6, 13)

21. On March 18, 2016, Investigators obtained court documents from Milford District Court regarding the disposition of separate criminal cases filed involving Thomas Burns and Molly Guadagnoli Douglas. (Testimony, Exhibits 1, 2)

22. Thomas Burns pleaded guilty to several charges:

    - Unlicensed operation of a motor vehicle, M.G.L. 90, § 10A;
    - OUI Liquor and Serious Injury & Negligence, M.G.L. 90, § 24L
    - Unregistered motor vehicle, M.G.L. 90, § 9B
    - Uninsured motor vehicle, M.G.L. 90, § 34J (Testimony, Exhibits 1, 2)

23. Ms. Douglas admitted to sufficient facts, pursuant to M.G.L. c. 278 § 29D: to the charge of liquor sale to intoxicated person, M.G.L. c. 138, § 69. (Testimony, Exhibits 1, 2)

DISCUSSION

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; see 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 investigators 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 investigators may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two. See Vickowski, 422 Mass. at 611 (direct evidence of obvious intoxication not required). 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).

The Commission was not presented with any percipient eyewitnesses or direct evidence regarding the events that transpired inside the Rose Garden. Officers Mager and Benjamin responded to a motor vehicle accident with serious injuries. Officer Benjamin was sent to the Rose Garden as a result of information received at the accident scene. Office Benjamin interviewed the bartender, Molly Guadagnoli Douglas, who admitted serving alcoholic beverages along with a meal, to Mr. Burns. However, she only admitted to serving Burns three alcoholic beverages. Ms. Douglas did not appear and testify before the Commission.

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, 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).

Officer Benjamin testified that he interviewed four individuals who were patrons inside the Rose Garden. He interviewed the patrons over the telephone, and he testified that each patron came to the Upton Police Station the day after the accident and gave a written statement. Each patron described observing Mr. Burns being served alcoholic beverages inside the premises, and observed Mr. Burns acting intoxicated while inside the licensed premises. The patrons also observed Mr. Burns leaving the Rose Garden and driving his motor vehicle. However, these patrons did not appear and testify at the Commission hearing. No witnesses testified before the Commission as to what occurred inside the premises. No witnesses testified before the Commission that they observed the bartender sell or deliver any alcoholic beverages to Mr. Burns. There was no percipient eyewitness testimony or direct evidence as to how many alcoholic beverages Mr. Burns was served and consumed, and no testimony regarding the behavior of Mr. Burns consistent with a state of obvious intoxication before being served alcoholic beverages inside the Rose Garden.

As a result, this violation presents the Commission with issues regarding the admissibility of hearsay evidence and the weight accorded hearsay during an enforcement action. A decision of a board that rests entirely upon hearsay evidence cannot be sustained, but decisions based upon hearsay evidence that is supported and corroborated by competent legal evidence have been sustained. Moran v. School Committee of Littleton, 317 Mass. 591(1945) (further citations omitted). The petitioner [was] entitled to have the charges dismissed unless they were substantiated by true and competent evidence, but he is not entitled to have the decision of the

committee held invalid if apart from the affidavits there was evidence sufficient to substantiate the charges. Graves v. School Committee of Wellesley, 299 Mass. 80, 86 (further citations omitted).

The Commission finds that Officers Mager and Benjamin took comprehensive and detailed statements from the four individuals who were patrons inside the premises and observed Mr. Burns on that afternoon. These statements described the events that transpired inside the premises, and when Mr. Burns left the Rose Garden. However, the manner in which the statements were introduced during the hearing before the Commission constitutes the text-book definition of hearsay.[1]

As noted above, the Commission was not presented with any witnesses with direct knowledge of any of the elements necessary to support a violation of M.G.L. c. 138, § 69, specifically Mr. Burns' behavior and outward and obvious signs of intoxication before or when he was served alcoholic beverages inside the premises. The Commission only heard testimony from Upton Police Officers Mager and Benjamin regarding statements made to them at the scene of the accident, over the telephone, and at the Upton Police station, the day following the accident.

Evidence of apparent intoxication, at some point later in time does not, by itself, suffice to show the patron's intoxication was evidence at the time the last drink was served. Douillard v. LMR, Inc., 433 Mass. 162, 165, (2001). The Officers responded to the motor vehicle accident, and although Officer Mager testified that Mr. Burns was emanating an odor of alcohol and was non-responsive to questions from the officer, these observations occurred while Mr. Burns was inside the ambulance, after the accident. The Officers did not witness any of the events inside the Rose Garden.

This Commission itself has yielded to the temptation presented by horrific facts surrounding an accident with serious injuries or a fatality, and reasoned backwards to find that a person was manifestly intoxicated before causing such a horrific accident. In previous decisions that both directly sanctioned licensees for allegedly violating M.G.L. c. 138, § 69 and approved on appeal the action of a local licensing authority in sanctioning licensees for allegedly violating M.G.L. c. 138, § 69, the Superior Court reversed such Commission decisions on appeal. In Re: Winh Wah Co., Inc. dba Winh Wah Restaurant, Freetown (ABCC Decision January 19, 2005).

The Commission has acknowledged the case of Ralph D. Kelly, Inc., supra , where the Superior Court reversed the Commission's decision suspending a license for violating M.G.L. c. 138, § 69. In that case, a single, fatal car accident occurred down the street from the licensed premises, minutes after the decedent/operator left the licensed premises. The deceased operator had a blood alcohol level of .189%. The Superior Court held that in order to find a violation, "there must be evidence that the violator knew or should have known that the person he served was intoxicated." Ralph D. Kelly, Inc., at page 4. The Superior Court further held that without any "expert testimony to say that a man with a blood alcohol level of .189% taken sometime after death probably would have shown outward signs of intoxication at a certain time prior to death," a violation of M.G.L. c. 138, § 69 is not proven. Ralph D. Kelly, Inc., supra at page 4.

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[1] Each statement would not be hearsay if the individual(s) who made the statement(s) appeared to testify before the Commission. However, this did not happen.

Again, the Superior Court reversed a decision of the Commission approving a local board decision finding a violation of G.L. c. 138, § 69, in the Royal Dynasty, supra. 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 page 10. In that case, 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. But 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. In this matter, the Commission was not presented with any direct evidence or eyewitness testimony that Mr. Burns was served and consumed alcoholic beverages inside the premises. Furthermore, no direct evidence was presented to the Commission that Mr. Burns was exhibiting outward and obvious signs of intoxication inside the Rose Garden prior to being served an alcoholic beverage.

All of the evidence regarding Mr. Thomas Burns' consumption of alcoholic beverages while inside the licensed premises and his state of intoxication before he was being sold or delivered any alcoholic beverages while inside the licensed premises was hearsay. "If the pertinent evidence is exclusively hearsay, that does not constitute 'substantial evidence' even before an administrative tribunal." Sinclair v. Director of the Div. of Employment Sec., 331 Mass. 101, 103 (1954). In the present case, no direct evidence was offered to prove the Patrons' intoxication at the time of purchase. That Mr. Burns exhibited signs of intoxication after the accident alone is not sufficient to show that Mr. Burns was intoxicated when the Rose Garden served Mr. Burns his last drink. See Soucy v. Eugene M. Connors Post 193, Inc., 79 Mass. App. Ct. 1109, *2 (2011) (memorandum and order pursuant to Rule 1:28); Douillard, 433 Mass. at 167-168.

The Commission finds that all of the evidence presented proving this violation constitutes hearsay and does not constitute direct evidence upon which the Commission can rely to find a violation. Since the Commission finds that we cannot draw an inference of obvious intoxication at the time of sale with the requisite degree of certainty, the Commission concludes that there is insufficient evidence to prove that Rose Garden violated 204 CMR 2.05(2) to wit: M.G.L. c. 138, § 69.

CONCLUSION

Based on the evidence, the Commission finds that the Licensee committed **NO VIOLATION** of 204 CMR 2.05 (2) Permitting an Illegality on the licensed premises, to wit: M.G.L. c. 138, § 69- Sale or delivery of an alcoholic beverage to an intoxicated person on March 28, 2015 (1 count).

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner Kathleen McNally

Elizabeth A. Lashway, Commissioner Elizabeth A Lashway (EH)

Dated: February 3, 2017

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
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