

Re: Wilbur Theatre Vendors, Inc.
d.b.a.: Wilbur Theatre and Aria
Premises: 246 Tremont Street
City/Town: Boston, MA 02116
License: AA Restaurant
Heard: February 17, 2009

AMENDED DECISION

A Commission hearing was held to determine whether Wilbur Theatre Vendors, Inc. d.b.a. Wilbur Theatre and Aria violated M.G.L. Chapter 138, §64 – License issued under this chapter by the local licensing authorities in violation of §16 A or any other provisions of this chapter (7 counts); M.G.L. Chapter 138, §23 – Transfer of the privilege of a license without proper approval (4 counts); M.G.L. Chapter 138, §26 – Operating without a manager approved by the licensing authorities (1 count); 204 CMR 2.01(8) – All applications shall be made under the penalties of perjury and any false statement contained in any application shall be a cause or ground for refusing to grant the license or permit or for suspending, canceling or revoking a license or permit already granted (9 counts); and, M.G.L. Chapter 138, §77 – Ceasing to conduct the licensed business.

Facts

The licensee stipulated to the facts contained in the Investigator's report which included 33 exhibits with the exception of the alleged violation of Ch. 138, §77- Ceasing to conduct the licensed business.

The attorney for the licensee provided documentation indicating the voluntary cease of operation of the licensed premises which was granted by the City of Boston on February 27, 2008.

Exhibit #32 indicates that currently the Wilbur Theatre Vendors, Inc. no longer holds a lease for the premise of the first floor and balconies of the Wilbur Theatre and no longer has a right of occupancy of that portion of the theatre.

Discussion

The Commission finds the licensee did not violate M.G.L. Chapter 138, §77 – Ceasing to conduct the licensed business.

The Commission finds that the licensee violated M.G.L. Chapter 138, §64 – License issued under this chapter by the local licensing authorities in violation of §16 A or any other provisions of this chapter (7 counts); M.G.L. Chapter 138, §23 – Transfer of the privilege of a license without proper approval (4 counts); M.G.L. Chapter 138, §26 – Operating without a manager approved by the licensing authorities (1 count); 204 CMR 2.01(8) – All applications shall be made under the penalties of perjury and any false statement contained in any application shall be a cause or ground for refusing to grant the license or permit or for suspending, canceling or revoking a license or permit already granted (9 counts).

In its original Decision dated August 24, 2009, the Commission indefinitely suspended the license of Wilbur Theatre Vendors, Inc. d.b.a. Wilbur Theatre and Aria. That suspension was ordered to stay in effect until a transfer was approved by the Local Board and the A.B.C.C. The suspension only affected the licensed premises to which Wilbur Theatre Vendors had a legal right to occupy and was last approved in writing by both the local licensing authorities and the Commission.

Under the applicable provisions of M.G.L. c. 30A, § 11(8), “[e]very agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision.” On or about September 10, 2009, the Commission identified and acknowledged that its original decision did not include a determination of each issue of law necessary to the original decision regarding the Commission’s finding that this licensee violated M.G.L. Chapter 138, §64 – License issued under this chapter by the local licensing authorities in violation of §16 A or any other provisions of this chapter (7 counts). Regarding this violation, M.G.L. Chapter 138, §64 provides, in pertinent part, that “the commission shall, after notice to said authorities and to the holder of such license and after reasonable opportunity for them to be heard by it, revoke such license, whereupon such license shall be surrendered to said authorities, and the decision of the commission shall be final and conclusive.”¹ The Appeals Court has very recently held that “[i]f an agency interpretation were to collide with the plain meaning of a statute, the agency view would have to give way.” *Anheuser-Busch, Inc. v. Alcoholic Beverages Control Commission*, Appeals Court Slip Opinion dated September 10, 2009. (“Deference serves plain meaning and a clear statutory policy.”)(ABCC decision upheld that terminated license that was previously granted by ABCC where “Commission reasoned that the language of controlling statutes prohibited the [existence] of the all alcoholic beverages license.”)

¹ M.G.L. Chapter 138, §64 further provides, in pertinent part, that “[t]he holder of a license so revoked shall not be subject to prosecution for any sales theretofore made by him under such license on the ground that such license was illegally issued. The city or town whose licensing authorities issued any license so revoked shall forthwith refund to the holder thereof the entire fee paid therefor and authority is hereby granted to such city or town to pay the same out of any funds available.”

In this case, the Commission has previously given notice of the February 17, 2009 hearing to both the local licensing authorities and the holder of this license. The hearing conducted on February 17, 2009 was attended by both the local licensing authorities and the holder of this license. Both the local licensing authorities and the holder of this license substantially participated in that hearing and were heard on the question whether the licensee did violate M.G.L. Chapter 138, §64 – License issued under this chapter by the local licensing authorities in violation of §16 A or any other provisions of this chapter (7 counts).

The applicable law mandates the Commission to revoke the license upon finding that a license issued under this chapter by the local licensing authorities in violation of §16 A or any other provisions of this chapter. *In Re: Margaret's Restaurant, Inc. dba Hokey's*, Oxford (ABCC Decision dated October 18, 2005); *In re: Pop's Café, Inc. and ATP, Inc.*, Holyoke (ABCC Decision dated March 12, 2008) affirmed in *Michael Rigali v. Cahill*, Hampden Superior Court, C.A. No. 2008-00362 (Velis, J.)(where license was renewed “in clear violation of the plain language of G.L. c. 138, § 16A, the ABCC was obligated to revoke the license pursuant to G.L. c. 138, § 64.”); *In re: Jazzy Joe's, Inc. and Irv's Place, Inc.*, Gloucester (ABCC Decision dated July 8, 2009).

Amended Conclusion

The Commission finds that licensee violated M.G.L. Chapter 138, §64 – License issued under this chapter by the local licensing authorities in violation of §16 A or any other provisions of this chapter (7 counts). The specific language of chapter 138 section 64 mandates the Commission to revoke the license. *In Re: Margaret's Restaurant, Inc. dba Hokey's*, Oxford (ABCC Decision dated October 18, 2005). As in *Margaret's, Pop's Café* and *Jazzy Joe's*, no other sanction is available for the Commission to consider given the express language of the statute. Without the mandatory language, the Commission could have considered suspension, modification or cancellation of the license. But the Commission has no discretion here and must revoke the license. The Commission therefore revokes the Wilbur Theatre Vendors, Inc. d.b.a. Wilbur Theatre and Aria license effective *nunc pro tunc* to August 24, 2009.

The Commission further finds that licensee violated M.G.L. Chapter 138, §23 – Transfer of the privilege of a license without proper approval (4 counts); M.G.L. Chapter 138, §26 – Operating without a manager approved by the licensing authorities (1 count); 204 CMR 2.01(8) – All applications shall be made under the penalties of perjury and any false statement contained in any application shall be a cause or ground for refusing to grant the license or permit or for suspending, canceling or revoking a license or permit already granted (9 counts). But for the mandatory revocation of the license, the Commission would indefinitely suspend the license of Wilbur Theatre Vendors, Inc.

d.b.a. Wilbur Theatre and Aria. That suspension would be ordered to stay in effect until a transfer was approved by the Local Board and the A.B.C.C. That suspension would have only affected the licensed premises to which Wilbur Theatre Vendors had a legal right to occupy and was last approved in writing by both the local licensing authorities and the Commission. But in light of the revocation, any indefinite suspension is superceded.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Robert H. Cronin, Commissioner_____

Susan Corcoran, Commissioner_____

Dated in Boston, Massachusetts this 22nd day of September 2009.

You have the right to appeal this Amended Decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty days of receipt of this Amended Decision.

cc: Local Licensing Board, Jean Lorizio
Frederick G. Mahony, Chief Investigator
Stephen V. Miller, Esq.
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