



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

Steven Grossman
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

LUCKY HANK'S RESTAURANT, INC.
218 UPPER MAIN ST.
EDGARTOWN, MA 02539
LICENSE#: NEW
HEARD 12/18/2012

Lucky Hank's Restaurant, Inc. (the "Applicant") applied for an annual wine and malt beverage with cordials license to be issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, December 18, 2012, to determine whether the application under M.G.L. Chapter 138 should be approved or disapproved.

The following documents are in evidence as exhibits:

1. Boston Police Department Report dated July 25, 2000 for Douglas F. Smith with Boston Municipal Court Docket Sheet; and
2. Boston Police Department Report dated May 29, 2002 for Douglas F. Smith with Boston Municipal Court Docket Sheet.

The Commission took Administrative Notice of the Commission file consisting of the application of Lucky Hank's Restaurant Inc.

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

FACTS

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

1. In October 2012, Lucky Hank's Restaurant, Inc. was granted by the local licensing authorities in Edgartown, an annual wine and malt beverages with cordials restaurant-type license pursuant to M.G.L. c. 138, §12, to be exercised at 218 Upper Main Street, Edgartown, MA. The application was submitted to the Commission for its statutorily required approval. The license application was assigned to Investigator Velez. (Commission file)
2. Douglas F. Smith applied to be the sole shareholder and sole director of the corporation. (Commission file)
3. The application listed Mr. Smith as the proposed manager of the license. Mr. Smith stated on the manager and the personal information form that he was convicted of one (1) misdemeanor offense of Operating Under the Influence in 2003. He received a ninety (90) day suspended

1767 1110

1

sentence with two (2) years probation. This offense is not a criminal conviction that disqualifies him from being licensed under M.G.L. c. 138, section 12. (Commission file)

4. A Criminal Offender Record Information (CORI) check revealed additional information that Mr. Smith had two (2) closed felony criminal charges and three (3) additional closed misdemeanor charges. Mr. Smith failed to disclose this information in his application. (Commission file, Exhibits 1, 2)
5. Investigator Velez requested an informational hearing before the Commission due to the closed felony charges on the CORI of Mr. Smith, being undisclosed information, in order to determine whether the application should be approved, and whether Mr. Smith possesses the appropriate fitness and character to be the proposed manager of the license. (Commission file, Testimony)
6. Mr. Smith testified under oath at the Commission hearing. When questioned about his criminal record, he testified about the closed misdemeanor conviction, and one of the closed felony charges which was additional information found by a Commission Investigator, but not disclosed in the application by Mr. Smith. (Testimony)
7. Mr. Smith admitted that one of the first felony charges occurred, and that it involved a friend of his. He testified that it was more of a misunderstanding between friends, than a crime. (Testimony)
8. Mr. Smith testified that he and his friend were at a bar, and became separated that evening. Mr. Smith returned to her house and she was not home. He could not get inside his friend's apartment so he tried to break into her apartment. A neighbor witnessed this and placed a "911" Emergency phone call. (Testimony)
9. Mr. Smith testified that the alleged victim of the break-in, his friend, did not want to go forward with the prosecution. He told the Commission that his friend, the victim, called the District Attorney's Office and said that she did not want to proceed with the prosecution in this matter. The felonies charges were then "Dismissed for Want of Prosecution." (Testimony)
10. When questioned by the Commission about the facts surrounding the second undisclosed criminal felony charge, which appears under the same docket number, same court date, and the same incident date as the first undisclosed felony charge, Mr. Smith testified that he had no knowledge about the second charge. He told the Commission that he knew nothing about it, and had no idea why it even appeared on his record CORI. (Commission file, Testimony)
11. Due to the serious nature of the undisclosed felony charges, specifically the second charge of which Mr. Smith testified that he had no knowledge; the Commission requested that Mr. Smith obtain additional documentation in the form of court records and police reports. (Commission file, Testimony)
12. Mr. Smith obtained and submitted to the Commission the documentation requested surrounding the closed undisclosed felony charges. (Exhibits 1, 2)
13. The Commission reviewed the documentation. The second undisclosed felony charge arose out of the same incident as the first undisclosed felony charge. The second undisclosed felony charge was extremely serious. The documentation stated that his friend, the victim, not a neighbor, called "911" Emergency Services. The documentation also stated that the victim told the Police that Mr. Smith attacked her and that "she is in fear for her life." (Exhibits 1, 2)

DISCUSSION

The law is well-settled that “[i]t was essential to the validity of [a section 12] license that it be approved by the Commission. General Laws (Ter. Ed.) c.138, section 12,” Coyne v. Alcoholic Beverages Control Commission, 312 Mass. 224, 227, 44 N.E.2d 692,694 (1942). Further, under the controlling law, “[t]hrough the authority to issue a license is conferred by the governing statutes upon the local licensing authorities, they could rightly issue such a license only ‘subject to the prior approval of the commission.’ G.L. (Ter.Ed.) chapter 138, section 12, as amended. See, also, General Laws (Ter. Ed.) chapter 138, section 67, as appearing in St.1938, c.400; Town of Webster v. Alcoholic Beverages Control Commission, 295 Mass. 572, 574, 575, 4 N.E.2d 302. When such approval has been granted, the license is issued by the local licensing authorities. General Laws (Ter. Ed.) chapter 138, section 16B, as amended.” Coyne, 312, Mass. at 228; 44 N.E. 2d at 695.

The Supreme Judicial Court has acknowledged that “[t]he powers of the States in dealing with the regulation of the sale of intoxicating liquors are very broad. What they may wholly prohibit, they may permit only on terms and conditions prescribed by the Legislature. Supreme Malt Products Co., Inc., v. Alcoholic Beverages Control Commission, 334 Mass. ---, 133 N.E. 2d 775; Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-139, 60 S.Ct. 163, 84 L.Ed. 128; Carter v. Virginia, 321 U.S. 131, 137-143, 64 S.Ct. 464, 88 L.Ed. 605. In dealing with a trade, which, because of its great potential evils, can be wholly prohibited, a wide power is given to the Legislature with respect to the delegation of discretionary powers. Particularly in view of the extent to which the policy of chapter 138, and the basis for action under it, have been specified, as already indicated, there is no invalid delegation of authority to the Commission in leaving to it, as was done in [section 12], the power to approve or disapprove applicants for licenses. See Butler v. East Bridgewater, 330 Mass. 33, 36-37, 110 N.E. 2d 922.” Connolly v. Alcoholic Beverages Control Commission, 334 Mass 613, 619, 138 N.E. 2d 131, 135-136 (1956).

The Alcoholic Beverages Control Commission was created under General Laws chapter 10, section 70. Its authority is broad and without express limitation. See Board of Selectmen of Barnstable v. Alcoholic Beverages Control Commission, 373 Mass. 708, 716 (1977); J & J Enterprises, Inc. v. Martignetti, 369 Mass. 535, 538, (1976). The ABCC’s powers “were not intended to be perfunctory or limited.” Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 617 (1956).

General Laws chapter 138, section 23 states, in part that “The provisions for the issue of licenses and permits hereunder imply no intention to create rights generally for persons to engage or continue in the transaction of the business authorized by the licenses or permits respectively, but *are enacted with a view only to serve the public need and in such a manner as to protect the common good* and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made.” M.G.L. chapter 138, section 23.

The Massachusetts Appeals Court has held that the statute is not about the definition of need “in the literal sense of a requirement, rather, the test includes an assessment of public want, and the appropriateness of a liquor license at a particular location. In determining whether an application for an alcoholic beverages license should be granted, “a licensing authority may take into account a wide range of factors, including the sort of operation that carries the license, and the reputation of the applicant.” Ballarin, Inc. v. The Licensing Board for the City of Boston, 49 Mass. App. Ct. 506 (2000).

The Alcoholic Beverages Control Commission, defined as a “licensing authority” in M.G.L. chapter 138, section 1, can make a determination whether this license should be approved, and in doing so, consider the sort of operation that carries the license, and the reputation of the applicant.

Investigator Velez recommended an informational hearing be held for this application. This recommendation was due to the serious nature of the charges on Mr. Smith's criminal record.

Mr. Douglas Smith applied to be the manager of record for this license. M.G.L. Ch. 138, section 26 states in pertinent part, that a license manager must be "*...nor unless such manager or representative is, with respect to his character, satisfactory to the licensing authorities.*" M.G.L. Ch. 138, section 26. The Commission is concerned about the character and fitness of Mr. Smith becoming the proposed, approved license manager. The Commission finds that Mr. Smith was not forthcoming or truthful during his testimony under oath before the Commission. The Commission does not find that Mr. Smith is of the appropriate character to be the manager of a licensed premise, and disapproves the application of Mr. Smith as the license manager.

Furthermore, the Commission has grave concerns about the fitness and character of Mr. Smith to be the sole shareholder and sole director of a license. The Commission finds that the applicant, Lucky Hank's Restaurant, Inc. through its principal, Mr. Douglas Smith, gave false statements under oath to the Commission. A Commission regulation promulgated at 204 C.M.R. 2.01(8) provides that "[a]ll 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, cancelling or revoking a license or permit already granted." 204 C.M.R. 2.01(8).

This is a close case on the question of character of the sole individual involved in this license. The Commission is concerned about the nature of these charges, yet, the prosecution of these charges was dropped. Thus, the Commission will not attempt now to re-institute the prosecution of these offenses. However, Mr. Smith is admonished that his operations must comply in all respects with the laws of the Commonwealth, for any violation adjudicated by this Commission may result in severe sanctions.

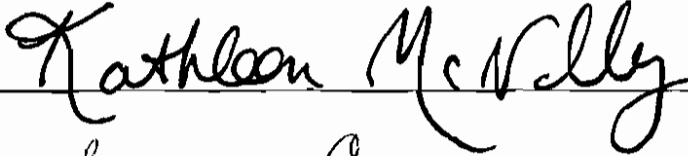
CONCLUSION

The Commission hereby **DISAPPROVES** of the application of Mr. Douglas Smith to become the license manger of Lucky Hank's Restaurant, Inc. The Commission is prepared to approve Mr. Smith as an Officer, Director, or Shareholder of Lucky Hank's Restaurant, Inc., but **NOT** as the License Manager.

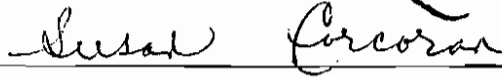
Therefore, the application is thus, **Disapproved Without Prejudice**, to a reapplication with another individual applying as license manager.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Susan Corcoran, Commissioner



Dated: February 12, 2013

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.

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Nicholas Velez, Investigator
Geoghan Coogan, Esq. via Facsimile: 508-693-7316
Administration
File