

Re: Garcia Espinal, LLC
dba Pares Liquors
Premises: 106 Lafayette Square
City/Town: Haverhill, MA 01832
Heard: November 10, 2009

DECISION

Garcia Espinal, LLC doing business as Pares Liquors, holds an alcohol beverages license pursuant to Massachusetts General Laws c. 138, §15. The Alcoholic Beverages Control Commission (“the Commission”) held a hearing on November 10, 2009 regarding Garcia Espinal, LLC’s alleged violation of 204 CMR 2.05(2), by permitting the sale of an alcoholic beverage to a person under twenty-one (21) years of age.

The following documents are in evidence:

1. Investigator Rosemary Egan-Bailey’s violation report dated September 28, 2009;
2. Haverhill Police Department Incident #9022473 dated August 22, 2009;
3. Letter from Affiliated Monitors, Inc. regarding Pares Liquors Proposal for Compliance and Monitoring Program Action Plan dated November 10, 2009; and,
4. Vermont Information Processing, Inc.’s Monthly Account History as of October 16, 2009 for Pares Liquors.

There is one tape of this hearing. Investigator Rosemary Egan-Bailey, Officer Sean Scharneck, and Juan Espinal testified during the hearing. The Commission took administrative notice of the Garcia Espinal, LLC dba Pares Liquors license file in its entirety.

Facts

After hearing, the Commission makes the following findings:

1. On August 22, 2009 at approximately 9:15 p.m., Haverhill Police Officer Sean Scharneck observed three individuals seated in a parked car in the parking lot behind a block of buildings at 106 Lafayette Square, Haverhill, MA. The parking lot services Pares Liquors and the Northeast Credit Union. Testimony, Ex. 1
2. The front passenger seat was unoccupied. Testimony, Ex. 1

3. Officer Scharneck continued to watch the car, and soon after, saw a youthful looking individual later identified as nineteen (19) year old Peter Creamer, carrying a case of Coors Light Beer. Mr. Creamer was walking from the direction of Pares Liquors toward the car. Testimony, Ex. 1
4. The entrance to Pares Liquor Store is on the side of the building and cannot be seen from the parking lot. There is no other liquor store in that area and all of the other businesses were closed. Testimony, Ex. 1
5. Officer Scharneck watch as Mr. Creamer placed the case of beer into the trunk of the car. He then got into the driver's seat and drove out of the parking lot. Officer Scharneck followed the car. After a while, he pulled the car over. Testimony, Ex. 1
6. Officer Scharneck asked the occupants of the vehicle if any of them were twenty-one (21) years of age. All of the individuals said they were not. Testimony, Ex. 1
7. Officer Scharneck told the individuals that he saw Mr. Creamer coming from the liquor store with beer. Testimony, Ex. 1
8. Mr. Creamer told Officer Scharneck that he had purchased the beer and placed it in the trunk of the car. He said he did not show the clerk identification indicating that he was twenty-one (21) years old to purchase the beer. He said the clerk was a male, wearing a yellow shirt. Testimony, Ex. 1
9. Mr. Creamer told Officer Scharneck that he had purchased beer twice that evening, and that all of the beer was in the car. Testimony, Ex. 1
10. Officer Scharneck looked at the licenses of all the individuals in the car. None of them was twenty-one (21) years of age. Testimony, Ex. 1
11. Office Scharneck confiscated the alcohol, called the parents of the driver, and advised the driver and Mr. Creamer that he was taking out criminal charges against them. Testimony, Ex. 1
12. Subsequently, Officer Scharneck returned to Pares Liquors and spoke with the owner, Juan Espinal. Testimony, Ex. 1
13. Mr. Espinal told Officer Scharneck that he was the only person working at the store that evening and that he did not recall Mr. Creamer. Mr. Espinal was wearing a yellow shirt. Testimony, Ex. 1

Discussion

I. Did Mr. Espinal permit an illegality on his licensed premises when he sold an alcoholic beverage to a person under twenty-one (21) years of age

A licensee violates 204 CMR 2.05 (2), when it permits an illegality on its premises. M.G.L. c. 138, §34 prohibits the sale or delivery of any alcoholic beverage or alcohol to any person under twenty-one (21) years of age. During the hearing, Mr. Espinal testified that it is his usual practice and

that he told Officer Scharneck on August 22, 2009 that he requests identification from everyone who wishes to purchase alcohol. As a defense to these charges, Mr. Espinal suggested that an unknown individual, who was unrelated to his liquor store, supplied the alcohol to Mr. Creamer. In support of this assertion, Mr. Espinal testified that an unidentified individual spoke with his wife, and told her that he saw another individual handing alcohol to Mr. Creamer. However, Mr. Espinal never spoke with this anonymous individual, could not provide this individual's name, address or any other identifying information. Moreover, Mr. Espinal never provided this information to Officer Scharneck, and never asked this individual to testify on his behalf. Mrs. Espinal did not provide any testimony.

This evidence offered by Mr. Espinal is "totem pole" hearsay. While hearsay is admissible in hearings pursuant to M.G.L. c. 30A, "totem pole" hearsay such as this is not persuasive. See In re: Readville Tavern, Inc. dba Cappy's, Boston (ABCC Decision dated June 2, 2005) citing Commonwealth v. Durling, 407 Mass. 108, 551 N.E. 2d 1193 (1990).

The Commission finds that Mr. Creamer's admissions to Officer Schanreck that he purchased alcoholic beverages that night are both admissible and reliable because they are statements against penal interest. M.G.L. c. 138, § 34 ("Whoever makes a sale or delivery of any alcoholic beverage or alcohol to any person under 21 years of age, either for his own use or for the use of his parent or any other person ... shall be punished"); M.G.L. c. 138, § 34C ("[w]hoever, being under twenty-one years of age and not accompanied by a parent or legal guardian, knowingly possesses ... any alcohol or alcoholic beverages, shall be punished."); See Commonwealth v. Dew, 443 Mass. 620, 823 N.E.2d 771 (2005).

Moreover, Mr. Espinal never offered evidence or suggested that these admissions were unreliable. Mr. Espinal could have exercised his right to subpoena Mr. Creamer and compel his attendance to testify before the Commission, however he chose not to do so. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Com'n, 401 Mass. 526, 531, 517 N.E.2d 830, 833 (1988)(The licensee was "entitled to a subpoena, if necessary, to compel [Mr. Creamer's] attendance and testimony. G.L. c. 30A, § 12(3) and (5) (1986 ed.). [The licensee] chose not to call [witnesses] and rested on the ... testimony of other witnesses. The right to confront and cross-examine adverse witnesses is not self-executing. Having failed to invoke their right to call [Mr. Creamer] as a witness, this licensee cannot be heard to complain of the consequences. Cf. School Comm. of Brockton v. Massachusetts Comm'n Against Discrimination, 377 Mass. 392, 402-403, 386 N.E.2d 1240 (1979) (no unfairness where witness failed to appear at administrative proceeding, where aggrieved party failed to pursue right to enforce subpoena compelling attendance and testimony). No evidence was offered by Mr. Espinal to suggest that these admissions by Mr. Creamer were unreliable.

Furthermore, Mr. Espinal testified that he has a video camera surveillance system in his store, which records all of his transactions. He testified that this system was in place and working on August 22, 2009. Mr. Espinal never played the surveillance tape covering the time period during the alleged purchase by Mr. Creamer to Officer Scharneck, and did not present the surveillance tape as evidence at the hearing. As a result, we are not persuaded by the evidence presented by Mr. Espinal.

When Mr. Espinal sold beer to Peter Creamer who is not 21 years old, he violated 204 CMR 2.05(2).

Conclusion

The Alcoholic Beverages Control Commission finds that the licensee Garcia Espinal, LLC violated 204 CMR 2.05(2), by selling an alcoholic beverage to a person under 21 years of age. This is the second such violation Garcia Espinal, LLC has committed within the past six (6) months. As the first violation was the result of a sting, the Commission **SUSPENDS Garcia Espinal, LLC's license for 7 days.**

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Susan Corcoran, Commissioner _____

Dated in Boston, Massachusetts this 11th day of December 2009.

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 days of receipt of this decision.

cc: Haverhill Licensing Authority
Frederick G. Mahony, Chief Investigator
Sgt. Robert Pistone, Haverhill Police
Daniel K. Gelb, Esq.
File