

Re: Millennium Eatery, Inc.
d.b.a.: Beijing Restaurant
Premises: 1250 Osgood Street
City/Town: North Andover, MA 01845
License Type: AA Restaurant
License Number: 082600009
Heard: June 16, 2010

DECISION

This is an appeal of the action of the North Andover Licensing Board (“the Board”) in suspending the M.G.L. c. 138, §12 all alcoholic beverages license of Millenium Eatery, Inc. dba Beijing Restaurant (“Millenium” or the “Licensee”). On February 22, 2010, the Board held a hearing that resulted in a ten (10) day suspension.

The Licensee timely appealed the Board’s decision to the Alcoholic Beverages Control Commission (the “Commission”) and a hearing was held on June 16, 2010.

The following exhibits are in evidence:

1. Joint Pre-Hearing Memorandum;
2. New Beijing Restaurant letter dated December 28, 2009;
3. New Beijing Restaurant letter dated February 11, 2010;
4. Officer Chris Smedile’s incident report dated February 6, 2010;
5. Board of Selectmen letter of suspension dated February 24, 2010;
6. Board of Selectmen meeting minutes dated February 22, 2010.

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There is one (1) tape of this hearing.

FACTS

1. On Saturday February 6, 2010 at 1:06 a.m., while on patrol in a fully marked cruiser, North Andover Police Officers Chris Smedile and Eric Sewade approached the Millenium on Route 125. Testimony, Exs. 1, 4.

2. As they approached the Millenium, they noticed a male outside the restaurant throwing ice in the parking lot. When they approached the subject and asked him what he was doing, he responded that he was left without a ride. Testimony, Exs. 1, 4.
3. The individual, later identified as Jonathan Sargent, appeared extremely intoxicated. He had a strong odor of alcoholic beverages on his breath, slurred speech, and a glassy look in his eyes. Testimony, Exs. 1, 4.
4. The officers asked Mr. Sargent if he had a sober ride home and he stated “no.” The officers waited for Mr. Sargent to call a ride. After many failed attempts to connect with a ride, Officer Sewade radioed dispatch to call a cab from Haverhill. Testimony, Exs.1, 4.
5. While awaiting the cab, the officers asked Mr. Sargent to produce I.D. At the time, he produced a valid New Hampshire license with the name Jonathan Sargent (1/24/80). Testimony, Exs. 1, 4.
6. Mr. Sargent asked if he could use the bathroom in the Beijing Restaurant. The officers as well as Millenium staff agreed to the request. Mr. Sargent went into the Millenium to see if they had a cell phone charger and to use the bathroom. Testimony, Exs. 1, 4.
7. Inside Officer Sewade spoke with Victor Ng who identified himself as the manager. Mr. Ng told Officer Sewade that Mr. Sargent was a customer that night, and that he may have been a little bit intoxicated when he arrived at the Millenium. Testimony, Exs.1, 4.
8. Mr. Sargent told Officer Sewade that he had “probably had 3 drinks” at the Millenium that night. Testimony, Exs.1, 4.
9. Wen Jing Huang testified before the Commission and Commission Records indicate that she is the owner and manager of record. Testimony
10. Although Ms. Huang was present when the police officers arrived, she never identified herself as the manager. She stood by and allowed Mr. Ng to speak with the police officers, and identify himself as the manager. Testimony
11. Ms. Huang did not serve an alcoholic beverage to Mr. Sargent, but did observe Mr. Ng serve an alcoholic beverage to Mr. Sargent. Testimony
12. Ms. Huang observed Mr. Sargent become belligerent while he waited for a cab. Testimony, Exs.1, 4.
13. At that time, Mr. Sargent was placed in protective custody, and transported to the North Andover Police Station. Testimony, Exs.1, 4.

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. United Food Corp v. Alcoholic Beverages Control Commission, 375 Mass. 240 (1978). 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. See, e.g. Devine v. Zoning Bd. of Appeals of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Com’n, 29 Mass.App.Ct. 954, 955 (1990)(rescript).” The Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations.

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. M.G.L. c. 138 provides a comprehensive scheme for the regulation of alcoholic beverages in Massachusetts.

Here, the licensee is charged with violating 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.” Massachusetts’ courts have held that negligence cases provide “some guidance” as to what must be proven “to show a violation of the statute [G.L. c. 138, §69].” Ralph D. Kelly, Inc. v. ABCC, Middlesex Superior Court C.A. No. 99-2759 (McEvoy, J.) (May 23, 2000) cited in Royal Dynasty, Inc. v. ABCC, Suffolk Superior Court C.A. No. 03-1411 (Billings, J.)(December 9, 2003). To prove this violation there must be evidence that the licensee served alcohol to an individual when it knew or should have known that he was intoxicated. See Bennett v. Eagle Brook Country Store, Inc., 408 Mass. 355, 358 (1990); Cimino v. The Milford Keg, Inc., 385 Mass. 323, 327 (1982).

In the present case, Mr. Ng admitted to the officers that Mr. Sargent was somewhat intoxicated when he arrived at the Millennium. Both Mr. Sargent and Ms. Huang confirmed that Mr. Ng served him alcoholic beverages thereafter. These facts allow a reasonable conclusion of intoxication at the time of service. Despite showing visible signs of intoxication sufficient for Mr. Ng to conclude Mr. Sargent was intoxicated, the licensee served Mr. Sargent more alcoholic beverages. As such, the Board has introduced credible evidence to prove that, at the time Mr. Ng

sold or delivered alcoholic beverages to Mr. Sargent in the licensed premises, he believed Mr. Sargent was intoxicated.

CONCLUSION AND DISPOSITION

The Commission approves the action of the North Andover Board in finding this violation as alleged. The Commission also approves the ten (10) day license suspension resulting there from.

This is the second such violation in two years. By Decision of this Commission dated April 7, 2009, this licensee was found in violation of M.G.L. c. 138, §34C- Possession of an alcoholic beverage by a person under 21 years of age (3 counts). The Commission ordered this license suspended for eleven (11) days of which three (3) days were held in abeyance for a period of two years provided no further violations of M.G.L. c. 138 or Commission regulations occurred. As a result of this violation, it appears the licensee may have violated the terms of the three (3) day suspension being held in abeyance. Therefore, this matter will be referred to the Investigative and Enforcement Division of the Commission for further action to decide whether to implement the 3 days suspension held in abeyance under the prior Commission decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Susan Corcoran, Commissioner _____

Dated at Boston, Massachusetts this 5th day of August 2010.

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

cc: North Andover Board of Selectmen
Thomas Urbelis, Esq.
Victor Forsley, Esq.
Chief Investigator Frederick Mahony
File

