



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

RYPAN, INC DBA THE SHOOTERS CAFE
58 ROSS WAY
QUINCY, MA 02169
LICENSE#: 100600137
HEARD: 11/14/2012

This is an appeal of the action of the Quincy Licensing Board (the "Local Board") in suspending the M.G.L. c. 138, §12 license of Rypan, Inc. dba The Shooters Cafe (the "Licensee" or "Rypan") located at 58 Ross Way, Quincy, MA for three (3) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, November 14, 2012.

The following documents and physical items are in evidence as exhibits:

1. Local Board Hearing Notice dated June 13, 2012 for hearing to be held on June 26, 2012;
2. Local Board Decision Notice dated June 27, 2012;
3. Quincy Police Department Incident Report – Officer Simmons, dated June 7, 2012;
4. Quincy Police Department Incident Supplement Report – Officer Karvelis, dated June 7, 2012;
5. Quincy Police Department Incident Supplement Report – Officer Patten, dated June 7, 2012;
6. Quincy Police Department Incident Supplement Report – Sergeant Faherty, dated June 7, 2012
7. Quincy Police Department Incident Supplement Report – Detective Biggins, dated June 7, 2012
8. One (1) DVD with Surveillance of the Interior of the licensed premises;
9. File of The Shooters Café aka Rypan; and
10. Joint Pre-Hearing Memorandum dated October 26, 2012.

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

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FACTS

1. Rypan, Inc. is a Massachusetts corporation doing business as The Shooter's Café at 58 Ross Way, Quincy, Massachusetts. (Exhibit 10)
2. On November 1, 1994, the Local Board issued Rypan an all alcoholic beverages license that had been approved by the Commission. (Exhibit 9)
3. Rypan has a seating capacity of one hundred and twenty-six (126) people. (Testimony)
4. On June 7, 2012, there was a rap music show at Rypan with approximately fifty (50) people in attendance. (Testimony)
5. At 11:33 p.m., an individual later identified as "Big John" entered the men's restroom. (Biggins report and videotape)
6. Mr. Leitao had also been in the men's restroom at Rypan, along with his cousin Newton Pereira and his friend Jason Goulet. (Exhibit 3)
7. At 11:34 p.m., as Mr. Leitao left the men's restroom, a group of males including Big John were standing in front of the men's room. (Exhibit 4)
8. The men were talking to each other, and thereafter a scuffle ensued.
9. Almost instantaneously, after the fight began, Big John grabbed Mr. Leitao on the shoulder and stabbed him in the chest. (Exhibit 4)
10. Mr. Leitao had never seen this man before, and had not been in an argument with him." (Officer Simmons responded to Boston Medical Center to speak with the victim, Mr. Leitao). (Exhibit 3)
11. When Mr. Goulet came out of the bathroom, he saw people fighting. He did not see who stabbed Mr. Leitao. (Exhibit 3)
12. Mr. Pereira, saw Mr. Leitao, involved in the altercation, but did not know that his cousin had been stabbed until he left Rypan. (Exhibit 3)
13. Mr. Pereira said that everything happened fast and he could not identify anyone involved. (Exhibit 3)
14. Peter Niedzwiecki was working as a security/doorman during the altercation. (Exhibit 3)
15. He was stationed at the bottom of the stairs by the entrance to the premises. (Exhibit 3)
16. At approximately, 11:34 p.m., Mr. Niedzwiecki looked over towards the men's room and saw at least two (2) or three (3) men arguing. (Exhibit 3)
17. Within ten (10) seconds, he went to the area and got in between the men to break it up. (Exhibit 3)
18. At approximately, 11:36 p.m., Mr. Niedzwiecki escorted Mr. Leitao away from the area, upstairs and outside. Mr. Leitao never told Mr. Niedzwiecki that he had been stabbed and was injured. Mr. Leitao did not speak with any other employees. (Exhibit 3)
19. Almost simultaneously as Mr. Niedzwiecki was escorting Mr. Leitao from the premises, Big John tried to hand a knife to Jared Vincent, the bartender on duty. (Exhibit 4)
20. Mr. Vincent refused to take the knife, which he described as folded with a black handle. (Exhibit 4)
21. Mr. Vincent observed Big John near the two (2) pool tables in the front of the bar. (Exhibit 4)
22. Mr. Vincent saw him there for an instant, and then Big John left the area. (Exhibit 4)
23. Mr. Leitao walked out of Rypan. (Exhibit 4)
24. Kenneth Mondon was at the top of the stairs at the entrance to the club, when Mr. Leitao came upstairs and went outside. He was working at the door. ((Exhibit 3)
25. Once outside Rypan, Mr. Leitao told Kenneth Mondon, "They got me, they got me." (Exhibit 3)
26. Mr. Leitao then lifted up his shirt and showed Mr. Mondon the wound on his chest. (Exhibit 3)
27. Mr. Leitao asked Mr. Mondon to call an ambulance, which Mr. Mondon did. (Exhibit 3)
28. Although, Mr. Mondon called an ambulance, Mr. Leitao left the area, and walked up Cliveden Street towards the Fuji Restaurant. (Exhibit 3)
29. Mr. Mondon saw no argument or fight outside Rypan. (Exhibit 3)
30. At approximately 11:37 p.m., Officer Simmons was dispatched to the area of Fuji Restaurant along with Officer B. Tait, Officer S. Kelly, Officer M. Patten, Officer J. Karvelis, Sergeant

- P. Faherty and multiple other units. Fallon Ambulance was also dispatched to the scene. (Exhibits 3, 4, 5, 6)
31. Officer Kelly arrived and located Mr. Leitao. He immediately informed all of the responding units that the stabbing had occurred inside Rypan, just outside the men's bathroom. (Exhibit 4)
 32. As soon as the ambulance arrived, the paramedics began treating Mr. Leitao. He was transported to Boston Medical Center for a stab wound to the right side of his chest. (Exhibit 3)
 33. Officers Karvelis and Patten arrived simultaneously at Rypan, and Officer Foley arrived soon thereafter. (Exhibits 4, 5)
 34. The officers went directly to the men's bathroom to search for suspects and evidence, but were unable to find either. (Exhibit 4)
 35. Officers Simmons and Karvelis interviewed witnesses including Mr. Vincent, the bartender to whom Big John attempted to pass a knife. (Exhibits 3, 4)
 36. Mr. Vincent was cooperative with the Quincy Police Department. (Testimony)
 37. He provided Officer Karvelis with a description of the suspect, as well as other identifying information including his name, occupation, and business address. (Exhibit 4)
 38. As a result of the information from Mr. Vincent, Officer Karvelis requested that all units check the pool tables for any evidence. (Exhibit 4)
 39. Shortly thereafter, Officer Patten located a knife, folded with a black handle, in the pocket of one of the pool tables. (Exhibit 5)
 40. Officer Karvelis asked Mr. Vincent if there was video surveillance of the bar area. (Exhibit 4)
 41. Rypan has video cameras stationed throughout the establishment that the principal of the licensee, James Pansullo can access remotely. (Testimony)
 42. Mr. Vincent stated, "Yes, but it's out back." (Exhibit 4)
 43. Officer Karvelis and Mr. Vincent then went to the back office. (Exhibit 4)
 44. In the back office, Officer Karvelis and Mr. Vincent viewed the video surveillance of the incident. (Exhibit 4)
 45. Mr. Vincent identified Big John in the video, as the person who tried to hand him the knife. (Exhibit 4)
 46. Soon thereafter, Quincy Police Department Liquor Inspector Lt. Turowski arrived at Rypan and began speaking to Mr. Pansullo. (Exhibit 6)
 47. Mr. Pansullo had not been at the premises that evening, but came as soon as he saw the altercation. He had been monitoring the premises remotely. He told Lt. Turowski that there was video footage of this incident. (Testimony)
 48. Mr. Pansullo joined Officer Karvelis and Mr. Vincent in the back office to watch the video footage. (Exhibit 4)
 49. The next day Officer Biggins met with Mr. Pansullo to review the video surveillance and obtain still print outs. (Biggins report) (Exhibit 7)
 50. On June 8, 2012, Officer Karvelis received a call from Mr. Vincent, with information regarding Big John's business card. (Exhibit 4)
 51. To date, no individual has been arrested for this crime. (Testimony)

DISCUSSION

Pursuant to M.G.L. Ch. 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 Appeal 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 findings of a local licensing board are 'viewed as hearsay evidence, [and] they are second-level, or totem pole hearsay, analogous to the non-eyewitness police reports in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 - 476 (1989)." Dolphino Corp. v. Alcoholic Beverages Control Commission, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

Both the Local Board and the Commission have the authority to grant, revoke and suspend licenses. Their powers were authorized "to serve the public need and... to protect the common good." M.G.L. Ch. 138, §23, as amended through St. 1977, c.929, §7. "[T]he purpose of discipline is not retribution but the protection of the public." Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given 'comprehensive powers of supervision over licensees,' Connolly v. Alcoholic Beverages Control Comm., 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 788 (1981).

Rypan was charged with violating 204 CMR 2.05 (2): "no licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises." The illegality that the Local Board found Rypan permitted was a patron stabbing another patron. The legal framework to assess the licensee's responsibility in a patron on patron assault and battery case has been detailed in Christopher v. Father's Huddle Café, Inc., 57 Mass. App. Ct. 217, 223, 782 N.E.2d 517 (2003).

In the Father's Huddle case, a doorman had been apprised of a past altercation between two (2) patrons. Id. During the night, the doorman had observed the patrons exchange words and unpleasant looks. Id. When one (1) of the patrons began to leave the premises, the doorman observed the other follow. Id. The doorman inquired as to whether there was going to be further trouble and the patron confirmed that he and his friends were going to rough someone up. Id. The doorman stood at the door and observed these individuals fighting for ten (10) minutes, and did nothing. Id. One (1) of the patrons was chased into traffic, hit by a car, and died. Id.

In finding the licensee liable, the Appeals Court held that, "[t]o be liable for negligent conduct, one must have failed to discharge a duty of care owed to the plaintiff, harm must have been reasonably foreseeable, and the breach or negligence must have been the proximate or legal cause of the plaintiff's injury. Id. See Stamas v. Fanning, 345 Mass. 73, 75-76 (1962); Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 141 (1996). [A] tavern has a duty of reasonable care to prevent foreseeable harm to its patrons. A duty has been found to exist where patrons suffer injury on the premises as the result of acts of other patrons. Id.; See Westerback v. Harold F. LeClair Co., 50 Mass. App. Ct. 144, 146-147 (2000) (citing cases),

The duty to protect patrons ... does not require notice of intoxication, but may be triggered when the conduct of another patron puts a tavern owner or its employees on notice that harm is imminent. Id. at 222-223; see Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 641 (1961) (bartender observed a boisterous patron engage in "words back and forth," "loud talk," and "a lot of commotion" before the patron charged the plaintiff and landed on him); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 451 (1969) (patron, who was part of a group at a booth across the aisle from the plaintiff that was "making a lot of noise," "talking loud," "getting up and jumping around," shot the plaintiff). A licensee may discharge the duty by taking reasonable steps to prevent the harm -- such as, denying service to or "shutting off" a patron who appears intoxicated or who has requested too many drinks, or calling police when a fight occurs or an aggressive patron threatens assault.

See, e.g., Greco v. Sumner Tavern Inc., 333 Mass. 144, 145 (1955); Carey v. New Yorker of Worcester, Inc., supra.

Here the Local Board presented a number of witnesses, as well as police reports, and the DVD of the alleged illegality. The Commission has had the opportunity to weigh the credibility of all witnesses and finds that all of the Quincy Police Officers are credible witnesses and professional officers. The Commission also reviewed the footage of the incident as well as the police reports and statements of the victim as well as five (5) other witnesses who did not witness any provocative behavior prior to the quick unilateral assault and battery by a patron on a patron.

All of the police officers' testimony and police reports are consistent with the DVD. At approximately 11:34 p.m. individuals were arguing outside the men's restroom. Immediately thereafter, Mr. Leitao left the men's restroom and was stabbed by the suspect. The entire incident lasted approximately thirty (30) seconds.

As the fight broke out, Peter Niedzwiecki, the security person responded to the area, separated the individuals, and escorted them out of the licensed premises. There was no evidence presented that prior to the fight, there was any indication that an altercation was about to ensue. Indeed Mr. Leitao, Mr. Pereira, and Mr. Goulet each indicated that there was absolutely no provocation prior to the incident.

All three men were in the restroom, Mr. Leitao walked out and he was stabbed. Mr. Goulet didn't even know his cousin was stabbed until after they left the premises. These statements are supported by the video surveillance which also contains no indication that there was any issue prior to the parties beginning to argue. There was no testimony that the individuals involved were intoxicated or that the premises was overcrowded.

The question is whether the bartender or other licensee employee could have foreseen the scuffle and/or prevented it. From statements of patrons regarding how the scuffle began and terminated, it is clear that the licensee could not have foreseen the manner in which the fight developed. There was no evidence that the establishment was overcrowded. There was no evidence introduced regarding the issue of intoxication.

The facts of this case are analogous to those in Trois, Inc. dba The Hide-A-Way Millbury, (Commission Decision issued August 17, 2007). In that case, Millbury Police Officers were called to The Hide-A-Way on a report from the bartender that an unidentified patron had struck another patron and had fled. Id. The officer spoke with the victim who said he was struck in the face by an unknown assailant following a dart game. Id. The officer testified that none of the patrons including the victim, injured third party, or alleged perpetrator appeared intoxicated. Id. The officer testified that there were approximately twelve (12) people in the establishment and it did not appear overcrowded. Id.

One (1) of the witnesses testified that a scuffle took place and lasted a minute and that about the time it took him to walk over to break up the fight, the perpetrator had already left the bar. Id. As in the present case, there were video cameras in the bar area which could be monitored by the owner at home. The video of that assault and battery showed patrons sitting at the bar. Similarly to the facts in this case, prior to a three (3) to five (5) second push and grab by the assailant, neither the patrons' or bartender's attention were drawn to any particular behavior. Id.

In the Hide-A-Way case, the Commission held that the licensee had not permitted an illegality on the licensed premises, to wit a patron on patron assault. Id. The Commission held that the licensee could not have foreseen the assault and therefore could not have prevented it. Id. The duty to protect patrons may be triggered when the conduct of another patron puts a licensee or its employees on notice that harm is

imminent. Father Huddle, supra. In the Hide-A-Way case, as in this case, there was no conduct that put the licensee on notice of an imminent harm that he could have prevented.

CONCLUSION

It is the Commission decision that the licensee had no notice that harm was imminent from the impulsive behavior of a patron who assaulted another patron. Therefore, the Commission **DISAPPROVES** the action of the Local Board in finding the licensee in violation of 204 CMR 2.05 (2). The Commission also **DISAPPROVES** the action of the Local Board in suspending the license for three (3) days, for said violations that were disapproved. The Commission remands the matter to the Local Board with the recommendation that no further action be taken against the licensee as any penalty would be discrepant with this Decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman, _____

Kathleen McNally, Commissioner _____

Dated: December 19, 2012

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: Louis A. Cassis, Esq. via Facsimile 617-472-9028
Deirdre Hall Esq. (City of Quincy) via Facsimile 617-376-1519
Frederick G. Mahony, Chief Investigator
Administration
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