



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

THE 15 LAGRANGE STREET CORP. D/B/A THE GLASS SLIPPER
22 LAGRANGE ST.
BOSTON, MA 02110
LICENSE#: 011600492
HEARD: 07/21/2015

This is an appeal of the action of the Licensing Board for the City of Boston (the "Local Board") for suspending the M.G.L. c. 138, §12, all alcoholic beverages license of The 15 Lagrange Street Corp. d/b/a The Glass Slipper (the "Licensee" or "Glass Slipper") located at 22 Lagrange Street, Boston, 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 Tuesday, July 21, 2015.

The following documents have been entered in evidence as exhibits:

1. Local Board Hearing Notice with Police Report;
2. Notice to Licensee dated December 5, 2014;
3. Local Board Docket Sheet for Licensee;
4. Copy of Rules and Regulations for the Local Board;
5. Statement of Reasons of the Local Board.

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

FACTS

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

1. The 15 La Grange Street Corporation d/b/a The Glass Slipper is a Massachusetts corporation which holds an all-alcoholic beverages license issued pursuant to M.G.L. c. 138, §12. (Commission records, Testimony, Exhibit 3)
2. The Glass Slipper operates a bar with adult entertainment that employs female dancers. (Testimony, Commission Records, Exhibit 3)
3. Mr. Nicholas Romano is the license manager and has held this position for 30 years. (Testimony, Commission Records, Exhibit 3)

4. On October 31, 2014, a female dancer employed at the premises approached Mr. Romano, and said to him, "See those guys over there. I want you to beat them up and throw them out." (Testimony)
5. Mr. Romano was inside the premises standing near the front with Mr. Robert Powers, a licensee employee.
6. Mr. Romano directed Mr. Powers to find out what happened. (Testimony)
7. Mr. Powers went to the back of the premises and spoke to the bartender, the waitress, and the patrons located there. (Testimony)
8. Mr. Powers returned to Mr. Romano and said that nothing had happened. (Testimony)
9. The female dancer/employee went upstairs and moments later left the premises through the front door carrying her backpack. (Testimony)
10. Mr. Powers followed the dancer through the front door outside the premises and observed her on her cell phone. She was in front of the licensed premises next door, talking to a Boston Police Officer. (Testimony)
11. Boston Police Officer Reyes was performing a detail at Centerfolds, the licensed premises located next door to the Glass Slipper. Officer Reyes was stationed outside in front of Centerfolds. (Testimony)
12. Mr. Powers saw the dancer cross the street. Mr. Powers approached Officer Reyes and asked him if he, or the licensee, should call the police. (Testimony)
13. Officer Reyes told Mr. Powers that the female dancer was on her cell phone calling the police, and that he (Officer Reyes) had already called in the incident using his police radio. (Testimony)
14. Mr. Powers then returned to the Glass Slipper. The licensee did not call the police because both the dancer and Officer Reyes had already called the police. (Testimony)
15. Shortly thereafter, Boston Police Officer Michael Powers responded to the Glass Slipper at 1:06 a.m. pursuant to a radio call. (Testimony, Exhibit 1)
16. Upon his arrival, Officer Powers spoke to the female dancer/employee. She told the officer that she had been sexually assaulted by a patron while working inside the Glass Slipper. (Testimony, Exhibit 1)
17. Mr. Romano and Mr. Powers each testified that the female dancer did not tell them that she was injured or that she had been assaulted, although Mr. Romano later testified that he could not remember whether she told him that she had been sexually assaulted. (Testimony)
18. Mr. Romano testified that the female dancer never asked him to call "911" or the police. (Testimony)

DISCUSSION

The Local Board alleges that The Glass Slipper violated M.G.L. c. 138, §§ 23 and 64, and Local Board Rule 1.14(B). Specifically, the Local Board alleges that The Glass Slipper failed to call the police for an employee who reported being sexually assaulted by a patron inside the premises on October 31, 2014, in violation of Local Board Rule 1.14(B).¹ The Glass Slipper argues that insufficient evidence exists as a matter of law to substantiate this violation.

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 Comm’n, 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. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Comm’n, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

Adjudicatory findings must be “adequate to enable [a court] to determine (a) whether the order and conclusions were warranted by appropriate subsidiary findings, and (b) whether such subsidiary findings were supported by substantial evidence.” Charlesbank Rest. Inc., v. Alcoholic Beverages Control Comm’n, 12 Mass. App. Ct. 879, (1981) quoting Westborough Dep’t of Pub. Util., 358 Mass. 716, 717-718 (1971). “General findings are insufficient, and if the licensing board does not make sufficient findings, it remains the Commission’s obligation to articulate the findings of fact, which were the basis of the conclusions it drew, and not merely adopt the findings of the board. Charlesbank Rest. Inc., 12 Mass. App. Ct. at 879. Recitals of testimony do not constitute findings. Johnson’s Case, 355 Mass. 782 (1968).” Exotic Restaurants Concept, Inc. v. Boston Licensing Bd., Suffolk Superior Court, C.A. No. 07-3287 (Borenstein, J.)

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. Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc., v. Comm’r of Ins., 420 Mass 707, 710 (1995). “The Local Board has the burden of producing satisfactory proof to the Commission that the licensee committed the alleged violations.” Jaman Corp., d/b/a Crossroads (ABCC Decision November 4, 2010); accord Powers Package Store v. Natick Bd. of Selectman, 15 Mass. L. Rep 319, 2002 Mass. Sup. LEXIS 395 (Middlesex 02-02777).

¹ Local Board Rule 1.14 (B): “Licensees shall call the police and an ambulance and take all other reasonable steps to assist patrons or persons who are injured in or on the licensed premises or whose injuries have occurred outside the premises but have been brought to the attention of the licensee.” (Exhibit 4)

The Local Board has the burden of producing satisfactory proof that the Licensee committed the violation that occurred on October 31, 2014. The Local Board suspended the license for three (3) days for a violation arising from this incident.²

The Local Board did not produce any percipient witnesses or direct evidence regarding the events that transpired *inside* the licensed premises. The license manager Mr. Romano and employee Mr. Powers each testified that the female dancer/employee did not report to them that she had been sexually assaulted by a male patron while inside the premises; although Mr. Romano later testified that he could not remember. Mr. Powers testified that within minutes of the female dancer/employee telling them, "See those men over there. I want you to beat them up and throw them out," he followed her outside the premises, where he observed her on a cell phone and speaking to Boston Police Officer Reyes. When Mr. Powers approached and asked Officer Reyes if the Licensee should call the police, Officer Reyes told Mr. Powers that the female dancer/employee was calling "911" on her cell phone, and that Officer Reyes had already called the incident in, using his police radio. The only evidence which the Local Board produced to support its claim that the Licensee failed to call the police after a female dancer/employee reported being sexually assaulted by a patron, is Officer Michael Powers' hearsay testimony. Officer Powers' testimony consisted of his statements that the female dancer/employee reported this to him when he responded to a radio call, after the incident occurred.

Since the Local Board offered nothing other than Officer Powers' uncorroborated hearsay testimony to prove that the Licensee failed to call the police after an employee reported being sexually assaulted by a patron inside the premises, the Local Board has not sustained its burden of proving a violation. "[M]ere uncorroborated hearsay or rumor does not constitute substantial evidence." Guzman, Inc. d/b/a Raffi's Place (ABCC Decision March 19, 2010), quoting Consol. Edison Co v. Nat'l Labor Relations Bd., 305 U.S. 197, 230 (1938); accord Gallagher v. Dir. of Div. of Employment & Training, 64 Mass. App. Ct. 1102 (2005) (the Appeals Court "do[es] not consider unsupported and uncorroborated hearsay to be 'substantial evidence'"). Officer Powers was not a percipient eye witness to the events which transpired inside the premises. The Local Board offered nothing by way of corroboration. The female dancer/employee did not testify before the Commission, and Officer Reyes did not appear before the Commission. Although the Commission found Officer Powers to be a competent and credible witness, there is nothing in the record to corroborate the statement of the female dancer/employee that she reported *to the Licensee* that she was sexually assaulted by a male patron, and that the Licensee failed to call the police after this report. See Merisme v. Board of Appeals on Motor Vehicles, 29 Mass. App. Ct. 296 (1990) (absence of corroboration that eyewitness statement contained in police report was reliable meant Board lacked "substantial evidence" for its decision); Covell v. Dep't of Soc. Serv.s, 54 Mass. App. Ct. 805 (2002) (witness's credibility cannot be judged "through the prism of the testimony of the department's investigator . . . [Just because] the investigator may have been credible when reporting the hearsay does not mean ipso facto that the declarant was credible or reliable"). As all of the evidence presented by the Board constitutes uncorroborated hearsay, it does not bear the requisite indicia of reliability that rises to the level of substantial evidence to prove the licensee

² The Local Board found the Licensee committed no violation for sexual assault in violation of M.G.L. c. 138, §§ 23 and 64, and Local Board Rule 1.12(D). Accordingly, those rulings are not the subject of the Licensee's appeal.

committed a violation of Local Board Rule 1.14(B). Doe v. Sex Offender Registry Bd., 70 Mass. App. Ct. 309, 311 (2007).³

“In this matter, the Board’s case is built on a panoply of facts that would be necessary to conduct a criminal investigation, and thereafter a prosecution. As such, the Board’s evidence . . . is entirely dependent on how the criminal investigation was conducted.” Guzman, Inc. d/b/a Raffi’s Place, citing In Re: 632 Page Boulevard, Inc. d/b/a The Cornerstone, Springfield (ABCC Decision October 2005). “Although these facts are critical to any criminal investigation or prosecution of the alleged underlying offenses, these facts alone fall short of proving that the Licensee committed the alleged violations.” Guzman, Inc. d/b/a Raffi’s Place; accord RJA Corp. d/b/a Jo Angelo’s Café (ABCC Decision March 5, 2014). The evidence presented to the Commission by the Local Board addressed whether or not the sexual assault happened, not whether the licensee failed to report a known injury on the premises. Because Local Board did not sustain its burden of proof that a violation occurred, the Commission finds that the Licensee did not commit a violation of Local Board Rule 1.14(B) on October 2014.

³ While Mr. Romano’s lapse in memory of the events of the night strains credulity, discrediting his testimony cannot result in an affirmative finding that the female dancer/employee had in fact told him of her injuries. See NSTAR Elec. Co. v. Dep’t of Pub. Utilities, 462 Mass. 381, 392, 968 N.E.2d 895, 904 (2012) (“To the extent the . . . witness was not credible, ‘such disbelief [does not alone] create affirmative’ substantial evidence in support of the [agency’s] ultimate finding”), quoting Boston Edison Co. v. Boston Redevelopment Auth., 374 Mass. 37, 67 n. 21 (1977), and citing Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 251–252 (1966).

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding that The 15 LaGrange Street Corporation d/b/a The Glass Slipper committed a violation of M.G.L. c. 138, §§ 23 and 64 and Local Board rule 1.14 (B). The Commission remands the matter to the Local Board with the recommendation that no modification, suspension, revocation, or cancellation of this license be ordered by the Local Board.

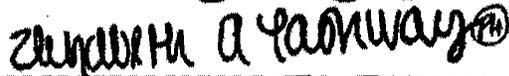
The Commission found it unnecessary to determine the reasonableness of the penalty imposed by the Local Board since its disapproval would render any sanction by the Local Board discrepant with the Commission's decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: August 4, 2015

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: Kenneth H. Tatarian, Esq.
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Local Licensing Board
Frederick G. Mahony, Chief Investigator
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File