

Re: Daniel R. Dillon
dba: Driftwood Bar
Premises: 381 Revere Beach Blvd.
City/Town: Revere, MA 01840
Heard: October 27, 2009

DECISION

Daniel R. Dillon, doing business as Lola's, holds an all alcoholic beverages license pursuant to Massachusetts General Laws chapter 138, §12. The Alcoholic Beverages Control Commission ("the Commission") held a hearing on October 27, 2009 regarding alleged violations of Massachusetts General Laws chapter 138, §23, to wit: transfer of the privilege of the license without proper approval; 204 CMR 2.01 (8), to wit: all applications shall be made under the penalties of perjury and any false statement contained in an application shall be cause or ground for refusing to grant the license or permit or for suspending, canceling or revoking a license or permit already granted; and Massachusetts General Laws chapter 138, §26, to wit:- failure to have the appointment of the manager approved by the licensing authorities.

The following documents are in evidence:

1. Investigator Rosemary Egan-Bailey's violation report dated September 3, 2009;
2. Form 43 dated October 31, 2008 for Change of dba;
3. 2009 License Renewal Application of Daniel R. Dillon;
4. Form 43 dated June 30, 2009 for Change of dba and Alter Premises;
5. Form D;
6. Demand Notice to Daniel Dillon dated July 22, 2009;
7. Demand Notice to Mark Wahlgren, President of August A. Busch & Co., Inc. dated July 27, 2009;
8. Citizens Bank checks for account #1313367874 made payable to August A. Busch;
9. Anheuser-Busch, Inc.'s Wholesaler Operations Division Credit Application;
10. Daniel R. Dillon's Common Victualler License;
11. Retailer Profile dated 12/6/07 and Retailer Profile dated 5/22/09;

12. Citizens Bank checks for account #1313367874 made payable to United Liquors;
13. Demand Notice to Citizens Bank dated July 22, 2009;
14. Citizens Bank Affidavit of Deputy Keeper of the Records dated August 4, 2009;
15. Secretary of the Commonwealth Corporations Division Summary Screen of Patsy, Inc.;
16. 2009 License Renewal Application of Daniel R. Dillon;
17. Tax history for licensee as of October 6, 2009;
18. DOR Filing and Payment History Report for Daniel Dillon from 10/31/08-8/31/09 and
19. Affidavit from Burton W. Gerrig dated October 23, 2009

There is one tape of this hearing. Investigator Rosemary Egan-Bailey and Daniel R. Dillon testified during the hearing. The Commission took administrative notice of Daniel R. Dillon dba Lola's license file in its entirety.

Facts

After hearing, the Commission makes the following findings:

1. On February 22, 1983, the Commission approved an application filed by Daniel R. Dillon dba Driftwood Bar (hereinafter, "Driftwood"), for a M.G.L. c. 138, §12 all alcoholic beverages license. The Driftwood is located at 381 Revere Beach Blvd., Revere, MA.
2. As Mr. Dillon is a sole proprietor, the Commission approved him as the sole owner and manager of record.
3. On September 16, 2008, Mr. Dillon submitted to the Revere Licensing Board a signed packet of documents requesting permission to alter the premises and a signed Form 997 for a change of dba from Driftwood to Lola's (hereinafter, "Lola's"). The Revere Licensing Board approved the requests. Ex. 2
4. On October 31, 2008, the Commission acknowledged receipt of these forms to change the dba. Therefore, Daniel R. Dillon's dba became Lola's. Ex. 2
5. On June 30, 2009, Mr. Dillon submitted to the Commission another signed request to alter his premises (Form 43) and to change the dba from Driftwood to Renzo (Form 997). Ex. 4
6. The Commission's records indicate that Lola's and not Driftwood is the official dba of Daniel Dillon's sole proprietorship. Ex. 2
7. On July 15, 2009, as a result of Mr. Dillon's request to alter the premises, Investigator Paul Capurso conducted an investigation of Lola's.

8. When Investigator Capurso arrived at Lola's, he met the on-duty bartender, Preston Clark. When Investigator Capurso asked to speak with the owner, Mr. Clark replied that the owner, Jack Gateman, was not there.
9. Mr. Clark told Investigator Capurso that he had worked at Lola's for two (2) months, and that his boss was Jack Gateman. He said Mr. Gateman owned the business and that he also ran the place. Ex. 1, Testimony
10. Although, Mr. Clark told Investigator Capurso that he had never heard of Daniel Dillon, he did point out to the investigator that Mr. Dillon's name was on the alcoholic beverages license displayed on the wall. Ex. 1, Testimony
11. Mr. Clark said that there was a manager named Peter Lowre, and that there had been a few ownership changes. Ex. 1, Testimony
12. On July 22, 2009, Investigators Capurso and Teehan went to Lola's to continue the investigation. As a result of Mr. Clark's statements regarding Mr. Gateman, the investigation had been expanded to include Lola's business operations and ownership interests. Ex. 1
13. When they entered Lola's an unidentified bartender greeted them. Investigator Capurso asked if the owner was there, to which the bartender replied, "No." Ex. 1
14. When Investigator Capurso asked the bartender who the owner was, the bartender replied, "Jack Gateman." When Investigator Capurso asked if there was a manager on duty, the bartender pointed to a woman and replied, "Yes, that woman over there." Ex. 1, Testimony
15. The manager identified herself as Rose Sharry. The investigators explained that they were conducting an inspection of the premises regarding the application submitted to alter the premises. Ex. 1, Testimony
16. Investigator Capurso asked Ms. Sharry if she was the owner. Ms. Sharry replied that she was the manager, "Jack Gateman is the owner." Ms. Sharry said that Mr. Gateman was not on the premises, and that he had owned the bar for a while, "Since it was Lola's Tapas Bar and he's put a lot into it. He has a 25-year lease for the restaurant and is trying to buy the property from Dan Dillon. Dan Dillon owns a good part of the strip adjacent to the building." Ex. 1, Testimony
14. Ms. Sharry informed the investigators that, "Jack hired me about 2 weeks ago to run the business and straighten it out. I've known Jack for over 20 years and worked for him at Il Panino in Boston." Ex. 1, Testimony
15. Investigator Capurso asked Ms. Sharry for information to complete the Form D which is a required part of the investigation into an application to alter the licensed premises. After Ms. Sharry gave the information to complete the Form D, the investigators left. Exs. 1, 5, Testimony
16. Mr. Dillon never submitted an application to transfer ownership of or an interest in his license.

17. The investigators returned to Lola's at approximately 3:15 p.m., and asked to speak with the owner. The bartender told them that Mr. Gateman was not there. Ex. 1, Testimony
18. Investigator Capurso spoke with Ms. Sharry again, and gave her a request for documents pertaining to Lola's. Ex. 6
19. On July 22, 2009, the investigators sent a request for documents to Citizens Bank, Legal Research Department for records pertaining to account # 1313367874, account holder name, 381 Boulevard, 381 Revere Beach Boulevard, Revere, MA 02151. Ex. 13
20. In response, Citizens Bank provided the signature card for account #1313367874 for 381 Boulevard, 381 Revere Beach Boulevard, Revere, MA. Jackson Gateman is the authorized signatory on the account. Mr. Gateman signed the signature card on July 8, 2008. Ex. 14
21. Mr. Gateman is the president, treasurer, secretary, and director of Patsy, Inc. The Articles of Organization, which were filed by Mr. Gateman on January 8, 2008, list Patsy's principal office at 381 Revere Beach Boulevard, Revere, MA, which is also Lola's address. Ex. 15
22. On July 27, 2009, the investigators sent a request for documents pertaining to Lola's to August A. Busch & Co., Inc. Ex. 7
23. In response to the request, August A. Busch & Co., Inc. provided copies of six cancelled checks Mr. Gateman signed and made payable to August A. Busch. The checks were drawn on Citizens Bank Account # 113367874 and dated 6/18/2009, 6/24/2009, 7/8/2009, 7/15/2009, 7/22/2009 and 7/29/2009. Ex. 8
24. August A. Busch & Co., Inc. also provided a copy of the Anheuser-Busch, Inc. Wholesaler Operations Division Credit Application signed by Peter Lowre on May 20, 2009 (hereinafter, the "Credit Application") for license #102200094, aka Daniel Dillon dba Lola's. In the application, Mr. Lowre named himself as a managing partner, listed Citizens Bank account # 1313367874 as the bank reference account, and listed Lola's as the debtor. Ex. 9
25. This is the same account Jackson Gateman wrote checks out of to pay August A. Busch & Co., Inc. for alcohol purchased by Lola's. Exs. 8, 9
26. In addition on May 19, 2009, Mr. Lowre faxed August A. Busch & Co., Inc., a copy of license #102200094, the common victualler license of Daniel R. Dillon dba Lola's, Daniel R. Dillon, manager. Ex. 10
27. Anheuser-Busch, Inc. also provided correspondence from Peter Lowre, regarding the change in account profile of customer #77110, Ye Olde Driftwood, Revere. The account profile indicates that Ye Olde Driftwood was closed and out of business on December 6, 2007. It indicates the name was changed to Lola's, on May 22, 2009. The address is 381 Revere Beach Boulevard, Revere, MA 02151. The owner's name is listed as Daniel Dillon, although the primary contact is Peter Lowre. Ex. 11
28. United Liquors, LTD provided copies of two cancelled checks Mr. Gateman made payable to United Liquors which he signed on December 14, 2008 and July 8, 2009 respectively. These checks were also drawn on Citizens Bank Account #1313367874. Ex. 12

29. On November 28, 2008 Daniel R. Dillon dba Driftwood submitted an alcoholic beverages renewal application for 2009. Daniel Dillon signed the renewal application under the penalties of perjury as an individual licensee. Ex. 3, 16
30. During the hearing Mr. Dillon testified that he did not hire any of the individuals working at Lola's. He said Mr. Gateman is responsible for all personnel related matters as well as all purchases and payment of invoices. Testimony
31. It is clear from the evidence presented during the hearing that Daniel Dillon has not been in operational control of Lola's since January 1, 2008, and that he transferred the privilege of his license to Jack Gateman. Exs. 1-14, Testimony
32. Mr. Dillon signed the renewal application without comment or correction, which incorrectly listed the dba as Driftwood instead of Lola's, named himself as the manager instead of Ms. Sharry, and did not disclose Mr. Gateman's interest in the license. Ex. 3, 16

Discussion

I. Did Mr. Dillon violate Massachusetts General Laws Chapter 138, §23 by transferring the privilege of his license without prior approval?

Massachusetts General Laws chapter 138, §23 authorizes a license issued under the chapter to be transferred to someone who is qualified if, in the opinion of the licensing authorities, it is in the public interest. A licensee who wishes to transfer their interest in an alcoholic beverages license is required to obtain prior approval from the licensing authorities. This allows the licensing authorities to determine if the transfer is in the public interest and if the proposed transferee is someone who qualifies.

Implicit in the transfer of a license is the surrender of control. A "transfer of a business takes place when the person introduced to it runs the business for his own account." Griffin's Brant Rock Package Store, Inc. v. Alcoholic Beverages Control Commission, 12 Mass. App. Ct. 768 (1981). In 1983, when Mr. Dillon began operating, he was the sole licensee. However, the evidence demonstrates that beginning in 2008 and continuing up through the present, Mr. Gateman assumed operational control of, as well as an undisclosed interest in, Lola's.

In January of 2008, Mr. Gateman incorporated Patsy's, for which he is the sole officer and shareholder. In the Articles of Organization, Mr. Gateman listed Lola's address as Patsy's principal office. Beginning in December of 2008 and continuing through July of 2009, Mr. Gateman wrote and signed checks to August A. Busch and United Liquors Ltd. to pay for the alcohol inventory of Lola's. Mr. Gateman wrote the checks out of a Citizen's Bank Account for which he alone is the authorized signatory. Therefore, Mr. Gateman controlled the accounts, including the deposits and withdrawals.

Moreover, in May of 2009, Peter Lowre filled out an Anheuser Busch Credit Application to purchase alcohol under Mr. Dillon's alcoholic beverages license. The Credit application references Mr. Dillon's alcoholic beverages license, as well as the Citizen's Bank Account Mr. Gateman used to

pay the vendors for the alcoholic beverages he purchased for Lola's. Mr. Lowre also listed himself as a managing partner.

Further evidence that an unlawful transfer of the license occurred includes statements from employees of Lola's, including the manager, Ms. Sharry, who identified Mr. Gateman as the owner of Lola's. One of the bartenders who had been working there for two months had never even heard of Mr. Dillon. The Commission finds that these witness statements as made to Investigator Capurso are reliable. The statements were made to him during the course of his investigation and were obtained in response to his requests for information required for the proper enforcement of chapter 138. M.G.L. c. 138, §63A; See Commonwealth v. Durling, 407 Mass. 108 (1990).

Furthermore, Mr. Dillon corroborated these statements when he admitted that Mr. Gateman was solely responsible for all the personnel decisions. He also testified that Mr. Gateman was responsible for purchasing the alcohol inventory and paying the invoices, including the costs associated with the alteration of the premises. The Appeals Court held in Number Three Lounge, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 301 (1979), the concept of an ownership interest can vary from an absolute proprietary interest to a mere possessory right. Mr. Gateman's establishment of bank accounts, purchase of alcohol inventory, making of personnel decisions, and payment of bills is, at the least, evidence of a direct or indirect interest in the license, which was transferred to Mr. Gateman without the required approval.

The Commission approved Mr. Dillon's application for an alcoholic beverages license as an individual license holder. Mr. Dillon has never disclosed to the licensing authorities that either Jack Gateman, Peter Lowre, or any other individual held an interest in Lola's. Consequently, in contravention of the statute, no other individual has been investigated or approved to have control of or benefit from this licensed business. See Griffin's Brant Rock Package Store, Inc. v. Alcoholic Beverages Control Commission, 12 Mass. App. Ct. 768, 771 (1981).

Mr. Dillon's acts resulted in his handing over operational control of Lola's to Mr. Gateman, who was not approved by the Commission. By allowing Mr. Gateman to assume operational control of Lola's, Mr. Dillon violated M.G.L. c. 138, §23, See In re: Napoli Beverage, Inc., Boston (ABCC Decision dated April 28, 2009). Thus, the Commission is persuaded and concludes that the licensee Daniel R. Dillon violated M.G.L. c. 138, §23 by transferring the license without proper approval when he allowed Jack Gateman to run the business for his own account.

II. Did Mr. Dillon violate 204 C.M.R. 2.01(8) by putting a false statement in his 2009 license renewal application?

Licensees have an obligation to ensure the accuracy of all documents that they submit to the Commission. Daniel Dillon signed an application to renew his license for calendar year 2009 under the pains and penalties of perjury. In his application Mr. Dillon lists the name of his dba as Driftwood, however, Commission records indicate that Daniel R. Dillon's dba is Lola's. Therefore, Mr. Dillon signed and submitted a false statement in his application in violation of 204 C.M.R. 2.01(8).

III. Did Mr. Dillon violate Massachusetts General Laws chapter 138, §26 by failing to have his license manager approved by the licensing authorities?

Under the provisions of M.G.L. c. 138, §26¹, a corporation is required to appoint a manager to have "full authority and control of the premises . . . and of the conduct of all business therein relative to alcoholic beverages." While a corporate licensee violates this statute if it operates without the last-approved manager in control, Howard Johnson Company v. Alcoholic Beverages Control Commission, 24 Mass. App. Ct. 487, 510 N.E. 2d 293 (1987), Daniel R. Dillon dba Lola's is an individual license holder, and thus has no statutory obligation under M.G.L. c. 138, §26 to appoint a license manager.² Therefore, Mr. Dillon has not violated this statutory provision.

Conclusion

The Alcoholic Beverages Control Commission finds that the licensee Daniel R. Dillon violated 204 CMR 2.01(8), False Statement In An Application (1 Count), and WARNS him to ensure his statements are accurate and true.

The Commission also finds that the licensee Daniel R. Dillon transferred the privilege of his license to Jack Gateman without the approval of the licensing authorities in violation of M.G.L. c. 138, §23 and **SUSPENDS THE LICENSE INDEFINITELY** to commence on December 4, 2009 unless and until the Commission approves a bona fide application to transfer the license to a third party in compliance with the law.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Susan Corcoran, Commissioner _____

Dated in Boston, Massachusetts this 4th day of December 2009.

¹ G.L.c. 138, § 26 provides, in pertinent part, that "[n]o corporation, organized under the laws of the commonwealth or of any other state or foreign country, shall be given a license to sell in any manner any alcoholic beverages unless such corporation shall have first appointed, in such manner as the licensing authorities by regulation prescribe, as manager or other principal representative, a citizen of the United States, and shall have vested in him by properly authorized and executed written delegation as full authority and control of the premises, described in the license of such corporation, and of the conduct of all business therein relative to alcoholic beverages as the licensee itself could in any way have and exercise if it were a natural person resident in the commonwealth, nor unless such manager or representative is, with respect to his character, satisfactory to the licensing authorities."

² Mr. Dillon as a sole licensee has the non-delegable duty to maintain the sole and exclusive control over the licensed operation. Ms. Sharry told the investigators she was managing Lola's and Mr. Dillon confirmed it during the hearing. Although he has not been charged and therefore will not be penalized, the evidence indicates that he is in violation of G.L. c. 138, §15A.

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: Revere Licensing Board
Frederick G. Mahony, Chief Investigator
Stephen V. Miller, Esq.
Karen D. Simao, Esq.
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