040 (5) 6/8/2015

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

Deborah B. Goldberg
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

DECISION

MAKAHA INC. DBA MAKAHA
255 GREAT ROAD
ACTON, MA 01720
LICENSE#: 000600008
HEARD: 05/06/2015

This is an appeal of the action of the Town of Acton Board of Selectmen (the "Local Board" or "Acton") for revoking the M.G.L. c. 138, §12, all-alcohol license of Makaha Inc. d/b/a Makaha ("Licensee" or "Makaha") located at 255 Great Road, Acton, Massachusetts. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, May 6, 2015.

The following documents are in evidence:

1. Local Board's Decision dated January 15, 2015;
2. Local Board's Decision dated May 19, 2014;
3. Local Board's Decision dated August 15, 2014; and
4. Makaha's Alcoholic Beverages Service Policy, Revised May 2014.

There is one (1) audio recording of this hearing, and two (2) witnesses testified.

The Commission took Administrative Notice of the Licensee's Commission File.

FACTS

1. Makaha Inc. d/b/a Makaha located at 255 Great Road, Acton, Massachusetts, holds an all alcoholic beverages restaurant license under M.G.L. c. 138, §12. (Commission Records)

2. The capacity of the Licensed Premises is 126 persons. The restaurant consists of a dining room and a bar. It also provides take-out food service to the general public. (Commission Records)

3. Raymond Cheng, the sole shareholder and owner of the Licensee, is also the manager of record. Raymond Cheng has owned the Licensee since 1998. (Commission Records)

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4. On November 23, 2014 at approximately 3:45 p.m., Raymond Cheng, the owner of the Licensee and the manager of record came in to the premises to work. (Testimony)

5. At that time there were three individuals seated at the bar area. Two of the individuals, a male and female, were seated together. The third individual, a male patron (the "Patron") was by himself. The Patron was approximately twenty-four years old, was approximately 5'10"-5'11" and weighed approximately 170 pounds. (Testimony)

6. Mr. Cheng spoke with the day time manager and was informed that the Patron was having his second scorpion bowl. The Patron came into the premises at approximately 2:00 p.m. (Testimony)

7. Scorpion bowls at Makaha are made to the same specifications, with two ounces of alcohol in each scorpion bowl. (Testimony)

8. Mr. Cheng spoke with the Patron for several minutes. They discussed how Mr. Cheng makes drinks, including Zombies and scorpion bowls. They also discussed football. Mr. Cheng spoke with him for approximately 40 minutes. (Testimony)

9. After the Patron finished his second drink, Mr. Cheng asked him if he wanted another one. This was at approximately 4:25 p.m. The Patron did not have glassy eyes or slurred speech. Mr. Cheng did not think he was intoxicated. Mr. Cheng served the Patron a third scorpion bowl. (Testimony)

10. At some point thereafter, the Patron began talking to the couple seated next to him at the bar area. (Testimony)

11. Mr. Cheng felt that the couple was becoming irritated because the Patron kept talking to them. Mr. Cheng asked the Patron to stop interrupting their conversation. The Patron acquiesced to Mr. Cheng's request and moved away from the couple. (Testimony)

12. Approximately five minutes later, the Patron leaned to his right and began talking to the couple again. At this point, Mr. Cheng became concerned that the Patron had had too much to drink.

13. Mr. Cheng took the alcoholic beverage away from the Patron and gave him water. Mr. Cheng asked the Patron if he was driving, to which the Patron responded, "No, I'm not driving." (Testimony)

14. Mr. Chang gave the Patron two additional glasses of water. (Testimony)

15. Mr. Cheng noticed a BMW key chain by the Patron. Mr. Cheng noticed that there was a BMW in the parking lot. Mr. Cheng told the Patron he was calling a cab for him and proceeded to do so. It was approximately 4:44 p.m. (Testimony)

16. The cab came soon thereafter. The cab driver came in and asked if anyone called a cab, and Mr. Cheng said, "Yes, this gentleman did," and pointed to the Patron. The Patron refused to leave the premises. Mr. Cheng told the Patron that if he did not get into the cab, he would have to call the police. The Patron responded to go ahead and call the police, and he refused to leave with the cab driver. (Testimony)

17. At approximately 5:17 p.m., Mr. Cheng called the Acton Police Department. (Testimony)

18. Acton Police Officer Ethan Meuse arrived at the premises at approximately 5:23 p.m. (Testimony)

19. Officer Meuse was met by Mr. Cheng, who pointed Officer Meuse in the direction of the Patron in the bar. (Testimony)

20. Officer Meuse had a conversation with the Patron. Officer Meuse observed that the Patron staggered, had slurred speech, and had bloodshot, glassy eyes. The Patron informed Officer Meuse that he had been at the premises for a couple of hours and had consumed two alcoholic beverages. (Testimony)

21. The Patron provided Officer Meuse with his social security number whenever the Officer asked for his name. Officer Meuse asked if there was someone the Patron could call to provide him with a ride, and the Patron responded that his cell phone had died and that he did not know anyone's phone number. Based on the Patron's demeanor Officer Meuse formed the opinion that he was intoxicated. Because he did not have a ride home, Officer Meuse placed him in protective custody and brought him to the police station. (Testimony)

22. Officer Meuse later returned to the Licensed Premises to speak with Mr. Cheng about what occurred and the timeframes. (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. 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." Dolphino Corp. v. Alcoholic Beverages Control Comm'n, 29 Mass. App. Ct. 954, 955 (1990) , citing United Food Corp v. Alcoholic Beverages Control Comm'n, 375 Mass. 240 (1978); 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). 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, 29 Mass. App. Ct. at 955.

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. Bd. 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'n, 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 Comm'n, 11 Mass. App. Ct. 785, 788 (1981).

These "comprehensive powers" are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, §64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§23, 64.

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 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

The licensee is charged with service to an intoxicated person in violation of 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." M.G.L. c. 138, §69. "[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated." Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). "The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication." Id. at 610; see McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

In order to prove this violation, the Local Board must prove: (1) that an individual was intoxicated on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. See Vickowski, 422 Mass. at 609. "The imposition of liability on a commercial establishment for the service of alcohol to an intoxicated person ..., often has turned, in large part, on evidence of obvious intoxication at the time a patron was served." Id.; See Cimino, 385 Mass. at 325, 328 (patron was "totally drunk"; "loud and vulgar"); Gottlin v. Graves, 40 Mass. App. Ct. 155, 158 (1996) (acquaintance testified patron who had accident displayed obvious intoxication one hour and twenty minutes before leaving bar); Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121 (1994) (sufficient evidence for jury where acquaintance described patron who later had accident as appearing to feel "pretty good"). Contrast Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (commercial establishment could not be liable when there was no evidence of obvious intoxication while patron was at bar); Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (affirming summary judgment for defendant in absence of any evidence of obvious intoxication); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816-817 (1979) (directed verdict in favor of commercial establishment affirmed when there was no evidence that patron was served alcohol after he began exhibiting obvious signs of intoxication).

The Local Board must produce some evidence that "the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink." Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 20 (2010); See Vickowski, 422 Mass. at 610 ("The negligence lies in serving alcohol to a person who already is showing discernible signs of

intoxication"). The [Local Board] may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two. See Vickowski , 422 Mass. at 611 (direct evidence of obvious intoxication not required). "[S]ervice [to a patron] of a large number of strong alcoholic drinks [would be] sufficient to put [a licensee] on notice that it was serving a [patron] who could potentially endanger others." Cimino, 385 Mass. at 328. It is proper to infer from evidence of a patron's excessive consumption of alcohol, "on the basis of common sense and experience, that [a] patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee." Vickowski, 422 Mass. at 611; See P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

In this matter, the Local Board produced no witnesses or evidence regarding the Patron's conduct or demeanor at the time he was served alcoholic beverages or to the amount of alcohol that he consumed. The direct evidence indicates that the Patron did not appear intoxicated at the time of service. The only evidence on the subject came from Mr. Cheng, who testified that the Licensee served the Patron three scorpion bowls between 2 p.m. and 4:25 p.m. Mr. Cheng also testified that there were approximately two ounces of alcohol in each scorpion bowl.

There was no evidence introduced by any witnesses or documentary evidence that the Patron exhibited any signs of intoxication at the time he was served the last drink. In fact, Mr. Cheng testified that beginning at approximately 3:45 p.m., when he arrived at the Licensed Premises, he began speaking with the Patron, who was seated at the bar. Mr. Cheng and the Patron spoke for approximately 40 minutes about a variety of topics including how to prepare certain "mixed drinks" and football.

According to the uncontroverted evidence at 4:25 p.m., which is the relevant time in question, when Mr. Cheng served the Patron his third scorpion bowl, the Patron responded to questions appropriately, did not have slurred speech, or red glassy eyes, and did not exhibit any outward signs of intoxication. As a result, Mr. Cheng asked the Patron if he would like another scorpion bowl, to which the Patron responded in the affirmative. At some point thereafter, Mr. Cheng felt that the Patron began exhibiting signs of intoxication. As a result, Mr. Cheng took the drink away from the Patron and began serving him water. At this point the Patron had consumed about half of this third drink.

In Cimino, the evidence before the court was that the patron had been served six or more "'White Russians' (an intoxicating beverage containing vodka and coffee-brandy liqueur)." Cimino, 385 Mass. at 325; See O'Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64, 65 (1981) (inference of obvious intoxication could be drawn from evidence that patron consumed at least fifteen beers and six martinis). When evidence of excessive consumption is lacking, as matter of common sense and experience, the inference may not be drawn. See Kirby v. Le Disco, Inc., 34 Mass. App. Ct. at 632 (consumption of eight beers insufficient to support inference of obvious intoxication); Makynen v. Mustakangas, 39 Mass. App. Ct. at 312 (same, as to consumption of five to six cans of beer). The evidence in this case – the Patron drinking two scorpion bowls over the course of approximately two and a half hours would not be sufficient to support an inference of obvious intoxication based on excessive consumption. See Vickowski, 422 Mass. at 611 (insufficient proof where patron, "who was in the habit of drinking beer, 'sipped' four to five bottles over the course of approximately two hours"); compare Rivera, 77 Mass. App. Ct. at 21 (where patron was served fourteen drinks over a two-hour period and drank "most" of them, it

was for jury to decide whether he likely appeared intoxicated before he was served his last drink).

After Mr. Cheng became concerned that the Patron may be driving, he called a cab for the Patron. When the Patron refused to take the cab home, Mr. Cheng called the police. When Officer Meuse arrived at 5:23 p.m., he formed the opinion that the Patron was intoxicated. Officer Meuse formed this opinion almost an hour after the Patron had been served his last drink.[1]

The Local Board's case turns entirely on Officer Meuse's observations of the Patron approximately one hour after he was served his last drink. While a [Local Board] may meet its burden through circumstantial evidence, proof of later intoxication or later elevated blood-alcohol concentration is not, taken alone, sufficient to establish the patron's apparent intoxication at the time alcohol was served. See Douillard v. LMR, Inc., 433 Mass. 162, 165-166 (2001) ("Evidence of later intoxication has been admitted for purposes of bolstering other evidence"). Courts are "reluctant to accept evidence of subsequent, obvious intoxication as a surrogate for evidence of a patron's demeanor at the relevant time." Vickowski, 422 Mass. at 612. The reluctance to accept this type of evidence "stems from the uncertainties of the situation, including the possible delayed impact of the consumption of alcohol, and the unknown effect on a patron of the last drink served to him by a licensee." Id. Likewise, in McGuiggan v. New England Tel. & Tel. Co., 398 Mass. at 162, the Supreme Judicial Court found that in the absence of other evidence of obvious intoxication, the evidence (expert testimony based on the results of a breathalyzer test) had "no bearing on what [the guest's] apparent condition was at the time he took his last drink."[2]

The Local Board has the burden of proving that Mr. Cheng was on notice that the Patron was showing discernible signs of intoxication at the time Mr. Cheng served him the alcoholic beverage. In the present case, no evidence was offered to prove the Patron's intoxication at the time of purchase other than pure conjecture or surmise. Given these circumstances and the evidence presented, this Commission finds that we cannot draw an inference of obvious intoxication at the time of sale with the requisite degree of certainty.

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[1] The Local Board attempted to introduce into evidence a breathalyzer result performed at the Acton Police Department approximately two hours after the Patron was placed into protective custody. As the Local Board did not produce a toxicologist to give an expert opinion through retrograde extrapolation evidence of what any ethanol reading would mean, this evidence was excluded. As the Massachusetts Superior Court discussed in Royal Dynasty, Inc. v. Alcoholic Beverages Control Comm'n, Middlesex Superior Court, C.A. No. 03-1411 (December 9, 2003) (Billings, J.), "[g]iven a horrific fatal accident the extraordinarily reckless behavior by two recently-departed Royal Dynasty patrons that caused it, the failed PBT and failed sobriety tests at the scene, and the evident absence of evidence of another source of alcohol for either man, it is tempting to reason backward to the conclusion that they must have been visibly intoxicated when served at the Royal Dynasty. As the A.B.C.C. itself recognized, however evidence of apparent intoxication or elevated blood alcohol level at some later point in time does not, by itself, suffice to show that the patron's intoxication was evident at the time the last drink was served. . . ." Royal Dynasty, Inc., at 3-5.

[2] "We do not mean to suggest that evidence of subsequent intoxication is irrelevant, or wholly lacking in probative force. Such evidence properly could be used to bolster other evidence tending to prove that a patron already showing obvious signs of intoxication was served alcoholic beverages by a licensee. Thus, we agree with the Appeals Court that evidence of subsequent intoxication at the scene of an accident could bolster evidence of a patron's obvious intoxication while at a tavern." See Gottlin v. Graves, 40 Mass. App. Ct. 155, 159 (1996).

CONCLUSION

The Commission **DISAPPROVES** the action of the Local Board in finding a violation of M.G.L. c. 138, §69, and for revoking the M.G.L. c. 138, §12 all-alcohol license of Makaha, Inc. d/b/a Makaha. As such, the Commission remands the matter to the Acton Board of Selectmen with the recommendation that it reinstate Makaha's alcoholic beverages license and 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 _____

Elizabeth A. Lashway, Commissioner _____

Dated: May 21, 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.

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Frederick G. Mahony, Chief Investigator
Administration
File