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

Steven Grossman
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

DECISION

DAYS END TAVERN INC. DBA DAYS END TAVERN
287 MAIN ST.
OXFORD, MA 01540
LICENSE#: 094400007
HEARD: 11/30/2011

This is an appeal of the action of the Town of Oxford Licensing Board (the "Local Board") in suspending the M.G.L. c. 138, §12 all alcohol beverages license of Days End Tavern Inc. dba Days End Tavern (the "Licensee" or "Days End"). On October 4, 2011, the Local Board held a hearing that resulted in a three (3) day suspension. 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 30, 2011.

The following documents are in evidence:

Exhibits

1. Town of Oxford's Compliance Check Guidelines;
2. Incident Report dated July 8, 2011 ;
3. Local Board Notice of Violation dated July 8, 2011;
4. Local Board Liquor Policy dated November 23, 2010 ;
5. Local Board's Decision dated October 5, 2011; and
6. Joint Pre-Hearing Memorandum dated November 16, 2011;

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

FACTS

1. The Licensee holds an all alcohol license which was issued by the Local Board on or about November 23, 2010 and located at 287 Main Street, Oxford, Massachusetts. (Ex 6)
2. On July 7, 2011, the Oxford Police Department conducted underage compliance checks at several alcohol pouring and retail package licensed establishments located in Oxford. (Ex 2, Testimony)
3. Officer Jeremy T. Grniet supervised the compliance checks. (Ex 2, Testimony)
4. Oxford has promulgated and published Compliance Check Guidelines that must be utilized during "stings." (Ex 1)
5. Specifically, these guidelines are intended to provide the basic framework that the Oxford Police Department must use when conducting underage "stings", also referred to as compliance checks, on licensed premises. (Ex 1, Testimony)

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6. They require the following procedures:

    1. Notification of a compliance check may be made in the media prior to the date of the check. (Ex 2)
    2. The underage person(s) taking part in the check should reasonably look their age. (Ex 2)
    3. A photo of the underage person, and a copy of their identification, will be taken prior to the check. (Ex 2)
    4. Standard background check information, such as criminal and Mass. RMV history will be done on each participant before their [sic] participating in the check. A prospective participant may be disqualified for any reason. (Ex 2)
    5. The underage person will only carry with them their actual Mass. Identification, and the monies supplied by the police investigator. (Ex 2)
    6. The underage person will read and sign a copy of these guidelines and a release form prior to the check. (Ex 2)
    7. The underage person will be given a B.A.C. test before and after taking part in the check. (Ex 2)
    8. The underage person will enter the licensed premises under the supervision of an officer. (Ex 2)
    9. The underage person will attempt to purchase one beverage of the same type at each location. (Ex 2)
    10. At no time shall the underage person attempt to misrepresent their age, and if identification is requested their own actual ID will be submitted for examination by the employee of the establishment. (Ex 2)
    11. Upon a successful alcohol purchase no alcohol is to be consumed, and the underage person shall leave the establishment in a timely inconspicuous manner, leaving the alcohol behind. (Ex 2)
    12. The underage person will attempt to recall identifying information about their server for use in determining the employee's identity. (Ex 2)
    13. The safety and wellbeing of the participants is of utmost importance. If at any time during the operation the participants feel at risk they shall immediately discontinue the check and report to the investigating officer. (Ex 2)
    14. An officer of this department may, or may not be, entering the premises to observe the checks. The decision to observe the operation will be made prior to commencement, or during the check if deemed necessary. (Ex 2)
    15. Notice of Non-Compliance will be given to licensees upon completion of the operation. (Ex 2)

7. Daniel Ausmus, a part time Brookfield Police Officer and a twenty (20) year old underage female (the "Participants") participated with Officer Grniet in the compliance checks. (Testimony)
8. Officer Ausmus is an Oxford resident. (Testimony)
9. Prior to conducting the compliance checks, Officer Grniet gave Officer Ausmus and the underage a set of instructions. (Testimony)
10. The Participants were to enter the pouring establishments together. Thereafter, the underage female was instructed to go to the bar and attempt to purchase an alcoholic beverage while Officer Ausmus observed. (Testimony)

11. The participants were told not to consume any alcohol purchased. (Testimony)
12. Officer Grniet supplied the underage female and Officer Ausmus with seventy dollars ($70.00) in Oxford Police Department funds for the purpose of purchasing alcohol pursuant to the compliance checks. (Testimony)
13. Officer Grniet testified that he used Officer Ausmus because he did not want an Oxford Police Officer conducting the compliance checks. (Testimony).
14. He testified that he did not want any of the participants to be familiar with any of the bartenders or bouncers responsible for checking identifications. (Testimony)
15. Officer Grniet testified that he felt this may affect the integrity of the operation. (Testimony)
16. At approximately 11:30 p.m., Officer Ausmus and the underage female entered the Days End Tavern. (Ex 2, Testimony)
17. Jaqui Gurney was working as the bartender that evening. (Ex 2, Testimony)
18. Ms. Gurney is twenty-seven (27) years old and has been working as a bartender for approximately eight (8) years in a number of different establishments. (Testimony)
19. She is TIPS certified. (Testimony)
20. The Participants proceeded to Days End, entered through the front door, and went to the bar together. (Testimony)
21. Both Officer Ausmus and Ms. Gurney testified that they immediately recognized each other. They have known each other for eighteen (18) years. (Testimony)
22. Ms. Gurney knew he was a Brookfield Police Officer. (Testimony)
23. Ms. Gurney had recently socialized with Officer Ausmus at another licensed premises. (Testimony)
24. Ms. Gurney has been friends with Office Ausmus' sisters for many years. (Testimony)
25. His sister frequents the Days End on a weekly basis and Officer Ausmus himself has socialized at the Days End but not when Ms. Gurney had ever been working. (Testimony)
26. Ms. Gurney said hello to Officer Ausmus as the participants approached the bar. (Testimony)
27. Ms. Gurney addressed him as "Danny" and asked how he was doing. (Testimony)
28. Ms. Gurney assumed that the officer was on a date with the underage. (Testimony)
29. The underage ordered two (2) beers, and turned to Officer Ausmus for money. (Testimony)
30 Officer Ausmus provided the underage with money for both beers in front of Ms. Gurney. (Testimony)
31. Ms. Gurney served the underage female two (2) Bud Light beers, and did not request identification from either the underage female or Officer Ausmus. (Ex 2, Testimony)
32. Ms. Gurney testified credibly, and the Commission is persuaded and therefore finds, that she trusted Officer Ausmus. (Testimony)
33. She had known him for a long time, and was very friendly with his sisters. (Testimony)
34. She believed that he would not put her in a compromising position. (Testimony)
35. She also believed that because he was a police officer that he would not bring an underage person into the bar. (Testimony)
36. Ms. Gurney did not want to embarrass him by asking his date for identification. (Testimony)
37. The underage female and Officer Ausmus spent a short time inside the Days End, poured the beers out in the bathroom, and left. (Testimony)
38. Once outside, Officer Ausmus informed Officer Grniet that he and the bartender knew each other, and reported the transaction. (Testimony)
39. Officer Grniet testified that in the future he would instruct participants to terminate the compliance check, if they were familiar with the individuals who were responsible for checking for valid identification. (Testimony)

40. Officer Grniet testified that he wanted all checks done in a consistent manner and fair manner. (Testimony)
41. At the conclusion of the compliance checks, Officer Grniet notified Days End that it had served alcohol to the underage female in violation of M.G.L. c. 138, §34. (Ex 2, Testimony)
42. The Board held a Liquor License Violation hearing on October 4, 2011 after which the Board suspended Days End's all-alcohol pouring license for three (3) weekdays from [Wednesday] October 17, 2011 through [Friday] October 19, 2011. (Ex 5, Testimony)
43. The Board's policy regarding the sale of alcohol to minors, Policy 1208B, states that the penalty for a first time violation is suspension of the establishment's liquor license for three (3) consecutive weekdays. (Ex 4)
44. Days End has no previous violations of either the Liquor Control Act or Commission regulations. (Testimony)

DISCUSSION

Massachusetts General Laws, Chapter 138, §34, provides in part, "Whoever makes a sale or delivery of any alcoholic beverage or alcohol to any person under twenty-one (21) years of age ... shall be punished by a fine or not more than two thousand dollars ($2000) or by imprisonment for not more than one (1) year or both. The legality of the use of a minor to conduct underage stings was decided in *Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission*, 45 Mass.App.Ct. 663 (1998). The Appeals Court held that in permitting a person under twenty-one (21) years of age to purchase alcoholic beverages in "sting" operation at a licensed premises, neither the Alcoholic Beverages Control Commission nor a municipal police department violated M.G.L. c. 138, § 34A, the statute prohibiting a person under the age of twenty-one (21) years old from purchasing alcoholic beverages for the use of any other person, because the purchase of alcoholic beverages by the under-age person was made for use in ferreting out violators of intoxicating liquor laws, and so promoted rather than hindered purposes of statute.

In Fran's Lunch, the Appeals Court held that "[a]bsent entrapment or other abuses violative of fundamental fairness, government involvement in criminal activity for purpose of investigating possible violations of law is permissible, even if technical violations of law occur." Fran's Lunch, 45 Mass. App. Ct at 664. The Appeals Court further held that where a "sting operation was conducted in accordance with published guidelines designed to insure that such operations were conducted fairly, the commission could properly rely on this evidence." Fran's Lunch, 45 Mass. App. Ct at 665.[1]

The Commission has previously decided the question of the legality of sting operations conducted by local licensing authorities. In the case of In Re: Cape Cod Grogery, Inc., (ABCC Decision dated December 13, 1985) the Commission found that the use of under-age sting operations was not contrary to the public policy of the Commonwealth so long as the sting operations were conducted fairly. In Cape Cod Grogery, the Commission discussed the fairness requirements of an under-age sting operation conducted by the local licensing authority of Wareham. The Commission rejected the licensee's claim of

[1] The Appeals Court also acknowledged that the exclusionary rule, which gives rise to many issues in criminal cases, does not extend to administrative cases. *Fran's Lunch*, 45 Mass. App. Ct at 665 *citing Kelly v. Civil Serv. Comm'n.*, 427 Mass. 75, 79 (1998) ("evidence obtained as a result of an alleged unlawful stop and arrest was admissible in an administrative proceeding to determine if the plaintiff's termination from employment was proper.")

entrapment where the under-age operative did not alter appearance to make the purchase of alcoholic beverages, no deceit or misrepresentation was made or alleged to be made and proven, and the under-age operative was instructed to leave the premises if questioned or asked for identification.

"Conducting compliance checks in strict compliance to the .. written guidelines is essential to the validity of the checks. Local authorities' failure to follow the guidelines ...for compliance checks undermines the legitimacy and integrity of the compliance checks throughout the state and fails to adequately preserve their fairness. " Fay, et al v. Jenkins et al, Middlesex Superior Court C.A. No. 2007002652-F (Muse. J.) See also Fran's Lunch, Inc., 45 Mass. App. Ct. at 655; 700 NE 2d 846 (1998) (sting operation conducted by A.B.C.C. was constitutional where strict procedure for fair control check was observed); BBRG Massachusetts, Inc. d.b.a. Papa Razzi (A.B.C.C. decision May 21, 2007); Assinippi Liquors, Inc. (A.B.C.C. decision April 7, 2004); Epicure Package Store, Inc. (A.B.C.C. decision January 31, 2007).

Here, the underage did not alter her appearance, use deceit or make any misrepresentations. Officer Grniet instructed her to show her true Massachusetts Driver's License which indicated that she was under twenty-one (21) years of age, if she was asked for identification. However, upon review of the guidelines that controlled the lawful operation of this "sting", the Commission finds that this operation was not conducted appropriately.

Guideline 5 provides, in pertinent part, that ""[t]he underage person will only carry with them ... the monies supplied by the police investigator." Guideline 8 provides that "[t]he underage person will enter the licensed premises under the supervision of an officer. "Guideline 9 provides that "[t]he underage person will attempt to purchase one beverage of the same type at each location."

The underage operative and Officer Ausmus entered the premises together, and approached the bar together. Thereafter, the underage operative ordered two beers, one for herself and one for Officer Ausmus, and turned to him for money. Officer Ausmus handed the underage operative the money to pay for the alcoholic beverages in sight of Ms. Gurney. The participants behaved in every way, as if they were a couple on a date.

This was not an imagined or innocent appearance but one designed to induce the sale to the underage. The Commission finds these actions violate Guidelines 5, 8, and 9 and constitute an unfair ruse used to induce Ms. Gurney into doing that what she might not otherwise have done. This conduct was unfair.

The failure to comply with the written guidelines is compounded by even more egregious facts. Ms. Gurney was a family friend of Officer Ausmus for over eighteen (18) years. She knew he was a Brookfield police officer, and he was aware that she knew his occupation. They had recently socialized.

Police officers whether on duty or off, are cloaked with a shroud of legality. Police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.

The Appeals Court has said:

> "Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to

perform their official responsibilities." Police Comm'r of Boston v. Civil Serv. Comm'n, 22Mass.App.Ct.364,371(1986).

A police officer must "keep [his] private life unsullied as an example to all"; to "recognize the badge of [his] office as a symbol of public faith and . . . accept it as a public trust"; to be "honest in thought and deed . . . both [in] personal and official life"; and to be "exemplary in obeying the laws of the land." AG v. McHatton, 428 Mass. 790 (1999). Whether they are on duty or off duty, police officers are sworn to uphold the laws of the Commonwealth. Officer Ausmus put Ms. Gurney in an untenable position. She knew he was a police officer, they had recently socialized, and she was a family friend. She trusted him. He should have terminated the compliance check once he saw that she was the bartender.

Moreover, Officer Grniet testified that he went outside of Oxford to find a police officer that would be unknown to the bartenders and bouncers in town. He felt that the integrity of the compliance checks would be beyond reproach, if the participants and the subjects were unknown to each other. He testified that he wanted the compliance checks to be consistent and fair for all the licensees. Officer Grniet also testified that in the future he would instruct participants to terminate the compliance checks if the parties were familiar with each other.

The Commission has repeatedly held that compliance checks are a tool that should be used to educate licensees. The actions in this compliance check are not a model that should be followed by others. Although the Oxford Police attempted to be fair by going outside the Oxford Police Department to secure an officer to conduct the sting with the view that such an officer would not be known or recognized in Oxford, the individual officer chosen in this case is an Oxford resident that frequents the licensed establishments.

This choice of Office Ausmus undermines the effort to be fair. As shown in this case, employing an Oxford resident to conduct the sting affected the impersonal nature and conduct of this operation. When an undercover police officer supervising an underage operative during a compliance check knows the employee that is the subject of the test in the sting, the best practice is to remain outside of the licensed premises. If the supervising officer does enter the premises and only then learns that this employee is known to the officer, then the best practice is to terminate the compliance check and defer any further direct action.

Based on the violations of the written guidelines in place "to insure that such operations were conducted fairly", Fran's Lunch, 45 Mass. App. Ct at 665, the Commission cannot approve the action of the Local Board in finding a violation and then imposing a license suspension for that violation. See Fay v. Jenkins, Suffolk Superior Court, C.A. No. 2007-02652-F, Memorandum of Decision And Order (Muse, J.)("Conducting compliance checks in strict conformance to the written guidelines is essential to the validity of the checks. Local authorities' failure to follow the guidelines ... undermines the legitimacy and integrity of the compliance checks throughout the state and fails to adequately preserve their fairness.") The Commission holds today, as it did in the decision issued in 2007, that even a single violation of written sting guidelines undermines the fairness of the operation, jeopardizes the entire sting and results in the Commission disapproving the action(s) of the local licensing authorities.

CONCLUSION AND DISPOSITION

Based on the evidence the Alcoholic Beverages Control Commission finds the actions of the underage operative and the supervising officer are unfair because their actions violated three (3) guidelines controlling the "sting" operation in this case. The Commission disapproves the action of the local board in finding the licensee committed a violation. The Commission remands the matter to the Local Board with the recommendation that no modification, suspension, revocation, or cancellation of the license be ordered by the Local Board.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Kathleen McNally, Commissioner _____

Dated: March 7, 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: Gregg J. Corbo, Esq. [attorney for the local board]
Peter L. Ettenberg, Esq. [attorney for the licensee]
Frederick G. Mahony, Chief Investigator
Administration
File