

**STATE OF VERMONT
LIQUOR CONTROL BOARD**

**IN RE: GREEN MOUNTAIN TAVERN, LLC
10 KEITH AVENUE
BARRE, VERMONT**

FINAL BOARD DECISION AND ORDER

The Liquor Control Board (“Board”) held a Formal Hearing in Montpelier, Vermont on February 12, 2014 to decide the merits of the Department of Liquor Control’s (“DLC”) allegations that Green Mountain Tavern, LLC (“Licensee”) violated General Regulation Nos. 17 (4 counts), 37 (5 counts) and 49(a) (multiple, but undefined counts) and consider the revocation or suspension of its liquor licenses.

Jacob A. Humbert, Esq., Assistant Attorney General, represented DLC. Licensee appeared *pro se*, represented by Jay Joslin, its owner.

The parties agreed to submit written *Proposed Findings of Fact and Conclusions of Law*, which were submitted on or about February 26, 2014. Based on the evidence and arguments presented, the Board finds and concludes as follows:

FINDINGS OF FACT

1. At all relevant times, Licensee held First-Class and Third-Class Liquor Licenses, permitting the sale of beer, wine and spirits to the public for on-premises consumption at 10 Keith Street, Barre, Vermont.
2. The General Regulations that DLC asserts Licensee violated on November 1 and/or November 2, 2013 are:
 - a. **General Regulation No. 17:** No alcoholic beverages shall be sold or furnished to a person displaying signs of intoxication from alcoholic beverages or other drugs/substances. No alcoholic beverages may be consumed on the licensed premises by any person displaying such signs of intoxication. No person displaying such signs of intoxication shall be allowed to stay on the licensed premises, except under direct personal supervision by a licensee or his or her employees in a segregated non-public area when the patron’s immediate departure could be expected to pose a risk of bodily injury to the patron or any other person.
 - b. **General Regulation No. 37:** Except as otherwise authorized by law or Liquor Control Board regulation, no malt beverages may be drawn or served otherwise

than in glasses, mugs, pitchers, or other containers, of a maximum capacity of thirty two ounces, nor more than four fluid ounces of spirituous liquor may be available to a customer at one time or used in the making of a single mixed drink, and not more than two of the above containers may be served to a customer at one time.

c. **General Regulation No. 49(a):** Licensees or their employees shall not offer or permit games, contests, or promotions, which encourage the consumption of alcohol beverages nor shall they furnish alcoholic beverages to anyone for no charge.

3. On Friday, November 1, 2013 just before 11:00 p.m., DLC Investigators Sgt. Tom Curran and Investigator Skyler W. Genest¹ arrived at Licensee's premises to conduct an undercover operation in plain clothes.
4. Sgt. Curran has served as a DLC investigator since September 1999. For the past year and half, he has served as supervisor. Investigator Genest has served as DLC investigator since May 2013.
5. Licensee held a Halloween party on November 1, 2013. Sgt. Curran estimated that 60-70 patrons were present during their investigation. Licensee concedes that it was "at a steady pace in the bar." Licensee had "extra staff" on duty that night because they knew how busy it has been in the past at similar events.
6. Many patrons were dressed in Halloween costumes. Despite the costumes, it appears that all patrons were of legal drinking age. Jonathan Stacy, Licensee's employee and witness confirmed that he personally checked the ID's of all patrons.

Allegations Regarding Distribution Of One Dozen Free Jell-O Shots To Patrons By Non-Employee

7. On November 1, 2013, many patrons were dancing to music from a Disc Jockey, an African-American gentleman identified as "Jamal Jacobs" ("DJ"). According to Sgt. Curran, DJ was wearing a costume that included a hat with a dreadlock wig.
8. At approximately 12:44 a.m., Sgt. Curran observed DJ walk behind the bar to a cooler and pull out five (5) Jell-O shots, which he carried in his hands. DJ served these shots,

¹ At the hearing, the Board (upon its own motion) ruled that it would not admit direct testimony from Investigator Genest due to DLC's decision to not sequester him during the direct and cross-examinations of Sgt. Curran. See V.R.E. 615. The Board ruled that Investigator Genest could testify as a rebuttal witness to any matters raised during Licensee and its witnesses' testimony. Investigator Genest was sequestered during Licensee and its witness' testimony.

individually, to patrons. It did not appear to Sgt. Curran that the patrons ordered these shots and he did not observe any payment made to DJ by any patron.

9. At approximately 12:57 a.m., Sgt. Curran again observed DJ go behind the bar to retrieve Jell-O shots. This time, he took seven (7) in his hands and served them to patrons.
10. According to Licensee, the Jell-O shot cooler holds approximately 250 Jell-O shots are made in a quantity of 180 at a time.
11. Licensee sells Jell-O shots for \$1.00 each; they are a regular part of its drink menu.
12. Licensee, through Mr. Joslin, confirms that the Jell-O shots contain liquor. Mr. Joslin believes that there is very "little alcohol" in each Jell-O shot, but he does not personally prepare them.
13. Mr. Joslin asserted that it was "My bad" when he learned that a Jell-O shot may be deemed an alcoholic beverage.
14. DJ was paid a \$75.00 flat rate for the night's work. He is not an employee of the Licensee. The Licensee maintained that DJ was charged one dollar for each shot, taken as a deduction from the \$75.00 fee paid to him. Licensee indicates that the number of Jell-O shots given away by DJ is detailed on a Post-It note. Licensee did not produce any evidence to support such an assertion. Licensee asserts that DJ was paid approximately \$63.00 after deductions were made.
15. Licensee concedes that it "made the mistake of letting our DJ get Jell-O shots from the cooler. It was poor judgment on our behalf and since then we have STOPPED this and our DJs are NOT allowed pass (sic) the bar area." Further, Licensee concedes, "[w]e know we made a mistake and have fixed the problem."

Allegations Regarding Service To Intoxicated Person #1

16. At approximately 12:02 a.m. on November 2, 2013, Sgt. Curran walked to the outside smoking area where he observed a male patron, weighing roughly 300 pounds and wearing a red shirt, slurring his words and talking loudly, despite the lack of loud music playing outside that might necessitate shouting. As the male patron began to walk inside, Sgt. Curran followed and observed him swaying and unsteady on his feet. Once inside the bar, the patron ordered and was served a draft beer from the male bartender. While Licensee asserts that such a patron would not be served under such circumstances, Mr. Joslin conceded in his proposed findings, "I'm not saying that Sgt. Curran is wrong on this issue."

Allegations Regarding Service To Intoxicated Person #2

17. At approximately 1:01 a.m., Sgt. Curran observed another male patron drinking a draft beer and leaning against a wall adjacent to the dance floor. The patron appeared to be intoxicated, as he had watery eyes, was using the wall for support and then ultimately was fumbling in his pockets trying to find keys. Sgt. Curran observed this patron walk toward the exit door staggering and swaying. Concerned that this patron was going to drive, Sgt. Curran followed him out the door and monitored his movements. He did not drive.
18. On this issue, Licensee offers, “[i]f this was the case and if [Sgt. Curran] wrote it that it must be. It was a bad judgment call on our behalf, through (sic) it sounds like he wasn’t too impaired if he made the correct judgment call NOT to drive. But again it was our mistake we didn’t observe this happen.”

Allegations Regarding Service To Intoxicated Person #3

19. In addition to Sgt. Curran’s observations, Investigator Skyler Genest also witnessed a separate incident at approximately 12:29 a.m. near the Licensee’s entrance. Many patrons were exiting the bar and blocking the entrance. Accordingly, he looked out a window that overlooked a stoop adjacent to the entrance. Investigator Genest walked to the Licensee’s front window and observed a male patron with his arm around another male patron leaning over the front entrance stoop’s railing. The second patron looked as if he was vomiting, had just vomited, or was about to vomit. Investigator Genest observed him for several minutes on the stoop. This second patron had consumed alcoholic beverages from Licensee that evening. Both patrons remained on the front stoop for approximately four minutes before a private vehicle pulled up and drove away with the sick patron.
20. There appeared to be no concern about medical issues. No ambulance was called and there was no call for any medical attention at the scene or anyone claiming that he needed medical help. There was no urgency to get him attention. It took four minutes before he was loaded into the private vehicle.
21. The sick patron was, per Licensee, not intoxicated but was experiencing an episode related to a medical condition. Licensee referred to him as “Stevie Jay,” described him as about 6’4”, 230 pounds and apparently suffering from Multiple Sclerosis. Licensee asserted that “Stevie Jay” went to the hospital directly from Licensee’s premises. Licensee concedes that “Stevie Jay” was served 3 or 4 beers in 3 or 4 hours. “Stevie Jay” was not called to testify.

Allegations Regarding Service Of More Than Two Drinks To A Patron At One Time

22. Mr. Stacy testified that service of more than two drinks to a patron at a time that such service would be inconsistent with Licensee's policies and practices.
23. Sgt. Curran and Investigator Genest returned to Licensee on the evening of November 2, 2013.
24. Investigator Genest testified as a rebuttal witness on this issue regarding his personal observations. At approximately 11:59 p.m., when Sgt. Curran had gone elsewhere on the premises, Investigator Genest observed a bartender serve a single patron two 12-ounce Bud Lights and one 12-ounce Twisted Tea. All three are alcoholic beverages.

Allegations Regarding Licensee's Cash Register

25. Much of the testimony considered at the Formal Hearing revolved around Sgt. Curran's observations of Licensee's use of its cash register on November 1-2, 2013, yet there were no formal charges filed or pending against Licensee that arose out of this specific conduct. Nevertheless, Sgt. Curran's observations and the Licensee's response to them provide additional context about the evening of November 1, 2013's events.
26. Sgt. Curran testified that one male and one female bartender were ringing in "no sales" to the register for most transactions. A digital display on the register showed zeroes, e.g., "\$0.00" at the end of each transaction. Sgt. Curran testified, upon questioning by the Board Counsel, that he observed these numbers appear on the register's display screen. Licensee concedes, in its findings, that "[w]e display our sales with the screen showing to our customers on each sale."
27. Licensee is a "cash only" establishment as confirmed by a sign behind the bar.
28. Licensee counters Sgt. Curran's testimony by explaining that it is very difficult to see what is entered into the register and that Sgt. Curran may have been easily confused by the cash register's use. All buttons, except for the "green enter" button "pushed at the end of the transaction," are not visible from the barstools. In his *Proposed Findings*, Licensee identifies the "green enter" button as a "CA/AT/NS" button. The Board may reasonably conclude that "NS" means "No Sale," although no testimony was offered with respect to what "NS" stands for.
29. Mr. Stacey testified that in order to properly operate the register, each bartender would need to punch at least two keys, and oftentimes more, for each transaction based on various dollar increments pre-programmed into the register.

30. Licensee asserts that it had a chronic issue with the register's drawer sticking shut, so they placed cardboard behind the drawer so "we wouldn't have to fight with it to open." The register's drawer was, therefore, left open.
31. Mr. Stacy maintained that the register drawer remained broken on November 2, 2013, meaning it had to be left open slightly after each transaction, but that all transactions were nonetheless recorded. Licensee provided no documentary evidence to support its defense.
32. There is a camera over the cash register. Licensee, namely Mr. Joslin, did not review the video. Mr. Joslin also cannot recall or produce evidence of how much money the bar brought in that night.
33. Mr. Stacy testified that he worked on November 1, 2013, but mainly on the floor, not behind the bar. His focus was "on the floor." He was not ringing up the sales or alleged no sales observed by Sgt. Curran.
34. The bartender(s) on duty on November 1 and/or 2, 2013 were present at the hearing, but Mr. Joslin decided not to call them as it would be "a waste of time." The Board's counsel informed Mr. Joslin that this would be the only opportunity to present their testimony.

CONCLUSIONS OF LAW

1. The Liquor Control Board is established as the paramount authority in the administration of Vermont's liquor statutes and regulations. *See Verrill, Jr. v. Daley, Jr.*, 126 Vt. 444, 446 (1967).
2. When passing upon the question whether the license of a licensee shall be revoked or suspended for the violation of a liquor statute or regulation, the Liquor Control Board sits as a tribunal with a judicial function to perform and has statutory authority under 7 V.S.A. §236 to suspend or revoke any license for violating the provisions of Title 7 or any regulation. *See In Re: Wakefield*, 107 Vt. 180, 190 (1935).
3. Licensee holds First and Third-Class Liquor Licenses as defined by 7 V.S.A. §2(10) and §(22) and is, therefore, subject to this Board's jurisdiction.
4. Licensee was properly notified of its alleged violations of General Regulations 17, 37 and 49(a) duly adopted by the Board in writing on January 16, 2014 and of its right to appear at a hearing to respond to these alleged violations consistent with 3 V.S.A. §809(a)-(c).
5. A hearing, for which Licensee was given proper notice, was convened before the Liquor Control Board pursuant to 3 V.S.A. §809(c) and Licensee appeared.

6. DLC must prove the alleged violations by a preponderance of the evidence. If any violations are found below, then the Board has concluded that DLC has met its burden.
7. Consistent with the above *Findings of Fact*, the Board concludes that Licensee violated General Regulations 17, 37 and 49(a) (set forth above and incorporated herein by reference).

General Regulation 17

8. In the early morning hours of November 2, 2013, Licensee, through its on-duty employees, allowed three (3) patrons displaying obvious signs of intoxication to remain on the licensed premises in public, non-segregated areas. Moreover, two of the three patrons were served and had consumed alcoholic beverages on the premises while displaying signs of intoxication (and the Licensee essentially concedes these violations); the third patron (on the front stoop) was observed drinking (and Licensee concedes serving) alcoholic beverages that night and/or in the moments prior to becoming apparently ill/vomiting. *See In Re Tweer*, 146 Vt. 36, 38 (1985) (“intoxication may be evidenced circumstantially by prior or subsequent condition of intoxication within such time that the condition may be supposed to be continuous”); *In re: Rusty Nail Acquisition, Inc.*, 2009 VT 68 at ¶8 (“commonly recognized signs of intoxication,” are sufficient to establish a violation of this General Regulation).
9. Sgt. Genest’s observations of “Stevie Jay” and the other patrons’ response to his condition are consistent with intoxication, not a wholly unrelated medical emergency, and are deemed credible in all respects. Licensee’s explanation to the contrary is not supported by any credible evidence. The Board is concerned that all too often Licensees defend charges of General Regulation No. 17 violations by asserting that the patron’s mental, physical or other handicap, with nothing more than a bare assertion, is the actual cause of his perceived intoxicated state. That is the case here. We deem the DLC investigators competent to draw the necessary distinction. Licensee has committed three violations of General Regulation No. 17.

General Regulation 37

10. On November 2, 2013, Licensee’s bartender served a single patron three alcoholic beverages, each in a 12-ounce bottle. Licensee has, therefore, committed one violation of General Regulation No. 37.
11. The Board agrees with DLC’s assertion that the January 16, 2014 Amended Notice of Hearing sufficiently covers the application of either General Regulations 37 and/or 49(a) to the facts alleged. *See* 3 V.S.A. §809(b) (in contested cases, adequate notice includes

“reference to the particular sections of the statutes and rules involved” and “short and plain statement of the matters at issue”). Of note, Licensee asserts that DJ paid for the Jell-O shots that he distributed. Although the preponderance of the evidence does not support this, if it were true, it would constitute two violations of General Regulation No. 37. DJ, if he were acting as a paying patron rather than an agent or employee, was served more than two drinks at one time on two separate occasions.

General Regulation 49(a)

12. This alleged violation involves a question of whether a Jell-O shot is an alcoholic beverage under Vermont law. The Board concludes that it is.
13. Here, the Licensee admits that the Jell-O shots contain spirits as defined in 7 V.S.A. §2(20), they are sold as shots, served as shots, kept behind the bar, are on the Licensee’s drink menu and all patrons were 21 years of age or older that night.
14. Another state’s Board has confronted this same issue, but in a different context. In *In re: Cream, LLC*, Iowa Alcoholic Beverages Division Docket No. 2009DOCBL115,² a Licensee defended allegations that it served alcohol to a minor because the Jell-O shot it served was not an alcoholic beverage.
15. That board found that an alcoholic beverage was used to make the Jell-O shot and that there was no evidence in the record to support a claim that alcohol mixed with Jell-O powder loses its character as an alcoholic beverage. Iowa’s Board concluded, in relevant part:

It would entirely subvert the intent of the Alcoholic Beverage Control statute if a liquor licensee could simply mix alcohol with another item that could be arguably labeled as a food item and sell that item without any restrictions on the age of the consumer. While there might be some debate in another context as to whether jello is a food item or a beverage, in this context – where the resulting mix is called a “shot,” is packaged in a cup, and is sold at a bar [...] the jello shots served by the licensee were alcoholic beverages.
16. This Board finds this holding persuasive and further concludes that by adding gelatin powder to what is otherwise, beyond doubt, an alcoholic beverage remains an alcoholic beverage under 7 V.S.A. §1 *et seq.* and all applicable rules and regulations. This is especially true where, as here, the Jell-O shots are served and consumed as a shot of an alcoholic beverage in the same manner as any other non-gelatinous beverage that might be served.

² Decision may be found at [https://licensing.iowaabd.com/webfiles/The%20Union%20Bar%20\(2010\).pdf](https://licensing.iowaabd.com/webfiles/The%20Union%20Bar%20(2010).pdf)

17. Our conclusion is wholly consistent with the purpose of Vermont's liquor laws, which are "for the protection of the public welfare, good order, health, peace, safety and morals of the people of the state, and all of its provisions shall be liberally construed for the accomplishment of the purposes set forth herein."
18. On November 2, 2013, DJ, hired by Licensee and with the knowledge and apparent blessing of the Licensee, went to a cooler located behind the bar and out of reach of patrons, then retrieved, carried and served no fewer than 12 alcoholic beverages to patrons for no charge, although as many as 180-250 Jell-O shots may have been available at Licensee's premises on or about that date. By virtue of such conduct, Licensee has committed 12 violations of General Regulation No. 49(a).
19. It is further troubling that a Licensee would permit a non-employee, with no apparent license or training to serve alcoholic beverages in Vermont, to have full access behind the bar and the ability to distribute shots to its patrons.
20. While there were no formal charges arising out of the "no sales" apparently rung into the Licensee's register, this does raise concerns for the Board concerning whether additional alcoholic drinks were given away for free or at discount (which would constitute further violation(s) of General Regulation No. 49/49(a)), whether monies were taken by Licensee's employees (a camera located above the register would suggest that Licensee was concerned about this) or whether the failure to record sales could deprive the State of its fair share of applicable taxes (*See* General Regulation No. 10). As it is part of the Board's responsibility to educate licensees and the public through its rulings, it should be made clear that sanctions may be appropriate in similar, future cases.
21. To the extent that our *Findings of Fact* and *Conclusions of Law* in this *Order* are consistent with any *Proposed Findings of Fact* and *Conclusions of Law* submitted by the parties, the same are hereby adopted, and conversely, to the extent that the same are inconsistent with these *Findings* and *Conclusions*, they are rejected. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. Any *Proposed Finding of Fact*, *Conclusion of Law*, or argument proposed and submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

Prior Violations

22. Now that the Board has concluded that violations have occurred, and mindful that one of four counts of General Regulation No. 17 violations was unproven and four of five counts of General Regulation No. 37 violations were unproven, it is our obligation to craft an appropriate sanction that reflects a fair sanction for the acts committed, to deter similar acts from Licensee and other licensees with the overall goal of promoting public safety, the Board's most significant function. Indeed, such a decision cannot be made in a vacuum, without regard to a Licensee's prior violations. As Licensee concedes, there have been prior findings of rule violations. We turn now to the enforcement history for the licensee.
23. DLC issued Licensee's licenses on October 1, 2009. Since then, Licensee has been sanctioned numerous times.
24. Licensee appeared before the Board for a Formal Hearing on May 25, 2011. Licensee was charged with violations of General Regulations 7a, 17, 17a, 36a, 37 and 43 as in effect at the time. Based on an August 16, 2011 written decision, its findings and conclusions incorporated herein by reference as if set forth at length, Licensee was suspended for 21 days from October 1 to October 23, 2011. This decision was not appealed.
25. This prior decision emphasized this Licensee's "serious lack of knowledge" of the regulations and laws that govern its service of alcoholic beverages and mandated that "those deficits must be corrected."
26. On October 22, 2012, Licensee received a written warning for serving a patron showing signs of intoxication.
27. On October 3, 2013, Licensee was ticketed for an incident involving fighting on premises, a violation of General Regulation No. 36. A fine of \$250.00 was paid.
28. Subsequently, in November 2013, Licensee was charged with a violation of General Regulation No. 10 for failure to remain in good standing with the Vermont Department of Taxes. This was remedied before the February 12, 2014 hearing, but it is of concern given the Licensee's restriction to cash only sales, the timing of this issue being contemporaneous with the violations discussed above and credible evidence that all cash transactions were not properly documented.
29. Licensee's violation history is substantial given that it had been in operation just over 4 years at the time of these most recent violations. *See In re Kacey's*, 2005 VT 51, ¶5 (licensees have an affirmative duty to become aware of and prevent regulatory violations). Licensee

has consistently failed to prevent violations of Vermont's liquor laws and regulations and should be sanctioned accordingly. Given the prior suspension of twenty-one days, a sanction of thirty-day suspension is appropriate here. Any one of the multiple violations found above would support the Board's sanction.

ORDER

Based on the foregoing *Findings of Fact* and *Conclusions of Law*, Green Mountain Tavern, LLC has violated General Regulations 17, 37 and 49(a) and the Board hereby **ORDERS** that its First and Third Class Liquor Licenses be suspended for thirty (30) days effective at the start of business on May 4, 2014 through and including the close of business on June 2, 2014.

The Board also **ORDERS** that prior to the reinstatement of the suspended liquor licenses, that Jay Joslin, Jonathan Tracy and any/all other of Licensee's alcohol servers receive DLC alcohol server retraining to its satisfaction.

DATED at Montpelier, Vermont this 19th day of March 2014.

VERMONT LIQUOR CONTROL BOARD

By: Stephanie M. O'Brien
Stephanie M. O'Brien, Chair

RIGHT TO APPEAL

Within 30 days after copies of this Order have been mailed, either party may appeal to the Vermont Supreme Court by filing a Notice of Appeal with the Department of Liquor Control and paying the requisite filing fee. See 3 V.S.A. § 815(a); V.R.A.P. 4 and 13(a).