STATE OF VERMONT
LIQUOR CONTROL BOARD

In Re: **FAYVILLE F&G**
218 OLD MILL ROAD
ARLINGTON, VT

BOARD DECISION AND ORDER

The Liquor Control Board ("Board") held a Formal Hearing on May 6, 2015 in Montpelier to consider potential sanctions against Fayville F&G ("Licensee"), who at all relevant times held a Second Class Liquor License, for alleged violations of General Regulation Nos. 16, 17, 36 and 45 occurring on or about March 24, 2015 and/or March 27, 2015. Jacob A. Humbert, Esq., Assistant Attorney General, represented the Department of Liquor Control ("DLC"). Licensee did not appear. The Board makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

1. At all relevant times, Licensee held a Second-Class Liquor License (Karl Kirchoff is the sole person named on the license) permitting the sale of beer and wine for off-premises consumption.
2. The Board takes notice that the Licensee's license lapsed on April 30, 2015 and no renewal application was filed with DLC.
3. DLC asserts that Licensee violated the following General Regulations on or about March 24, 2014 and/or March 27, 2014:

    a. General Regulation No. 16. No licensee or licensee employee, or any individual involved in the sale, preparation or furnishing of alcoholic beverages, or sale of tobacco products and/or the enforcement on the premises of the laws, rules and regulations of this State pertaining to the sale or furnishing of alcoholic beverages, or sale of tobacco products, shall consume or display the effects of alcohol or any illegal substance while in the performance of their duties.

    b. General Regulation No. 17. No licensee shall sell or furnish alcoholic beverages to any individual displaying signs of intoxication from alcoholic beverages or other drugs/substances. No licensee shall allow alcoholic beverages to be consumed on the licensed premises by any individual displaying such signs of

intoxication. No licensee shall allow any individual displaying such signs of intoxication to stay on the licensed premises, except under direct personal supervision by a licensee or licensee employee in a segregated nonpublic area when the patron's immediate departure could be expected to pose a risk of bodily injury to the patron or any other individual.

c. General Regulation No. 36. All licensees shall control the conduct of all individuals on their licensed premises. All licensees must ensure the safety of individuals entering, leaving, or remaining on the licensed premises. No licensee shall permit or suffer any disturbances, brawls, fighting or illegal activity upon the licensed premises; nor shall a licensee permit or suffer such premises to be conducted in such a manner as to render such premises or the streets, sidewalks, parking lots or highways adjacent thereto a public nuisance.

d. General Regulation No. 45. All licensee employees must be hired by the licensee and paid on a fixed salary or hourly basis. All employees must have the required withholdings deducted from their wages and the required reporting of such withholdings must be made to the Vermont Department of Labor. A first, second and/or third class licensee shall not contract out any work, labor or services directly or indirectly related to the preparation, sale or service of alcoholic beverages. All such duties shall be performed by individuals who are employees in fact and by law.

4. Our findings are based on the testimony of Laurie Pecor, Investigator Jason Elmer, Edward Seaton, Kelly Lewin and Deputy Sheriff Peter Urbanowicz as well as exhibits admitted into evidence. The Board finds that each testifying witness testified credibly in all respects.

Laurie Pecor

5. Ms. Pecor is DLC's office manager. She testified that her responsibilities include delivery of notices of hearing to licensees. Here, she sent notice of the May 6, 2015 hearing and the violation report to the address on file (captioned above) by certified mail, return receipt.
6. She identified State's Exhibit 1 as the Notice of Hearing with an investigator's report attached. This was admitted into evidence.
7. Exhibit 1 was postmarked on April 13, 2015, but returned to DLC on April 30, 2015 as unclaimed.
8. Ms. Pecor checked the United States Postal Service website with respect to the certified mail tracking number and found that the local post office in Arlington, Vermont attempted to deliver the Notice and the addressee refused it on April 15, 2015 at 11:36 a.m. Exhibit 2.

9. Correspondence from DLC, specifically the envelope used, clearly identifies DLC as the sender.

Investigator Elmer

10. DLC investigator Jason Elmer testified. He has been a certified law enforcement officer for 24 years, with the most recent 10 years as DLC investigator.
11. Investigator Elmer was involved in the Licensee's initial application. On November 21, 2014, he met with Mr. Kirchoff and reviewed liquor laws and regulations with him, including the prohibition against drinking on duty. A license was issued.
12. On March 16, 2015, Investigator Elmer met with Licensee's employees, Edward Seaton and Kelly Lewin, regarding their concerns with Mr. Kirchoff drinking on duty and not paying them. Written statements were obtained.
13. On March 27, 2015, Investigator Elmer went to the licensed premises for an inspection. He asked Mr. Kirchoff to bring him into his office for a private conversation. There, Investigator Elmer detailed the employees' concerns. During this time, Investigator Elmer sensed the odor of intoxicants on Mr. Kirchoff.
14. While Mr. Kirchoff did not deny that he had been drinking, he said that he was not on duty at that time. He indicated that his wife was in charge of liquor sales that day. However, this was not true or would have been evidence of a different violation altogether; she was not trained to sell alcoholic beverages.
15. Investigator Elmer noted Mr. Kirchoff's unsteady gait and slurred speech as a result of alcohol consumption at this time as well. For that reason, Investigator Elmer wanted to administer an alcosensor to confirm the presence of alcohol in Mr. Kirchoff's breath. This was refused.
16. Investigator Elmer issued a ticket to Mr. Kirchoff on March 27, 2015 for, *inter alia*, drinking on duty. A true copy of the ticket was offered and admitted into evidence as State's Exhibit 3. Mr. Kirchoff refused to sign the ticket, which would have served as acknowledgement of receipt of the citation. The ticket confirmed that an appearance at hearing was required as a result of the alleged infraction. Investigator Elmer left a copy of the ticket near the store's cash register.

17. More recently, and because the Notice of Hearing for the May 6, 2015 hearing had been returned as undeliverable, he was dispatched to make personal service. He attempted personal service of the Notice of Hearing to licensee's address to personally serve Licensee on two occasions. The first attempt was April 30, 2015. Investigator Elmer learned from the landlord of the licensed premises, Judge Arthur O'Dea, that Licensee may be in an alcohol rehabilitation center and personally observed that the licensed store was closed during a time when it would have been expected to be open.
18. Investigator Elmer went to Mr. Kirchoff's residence and met his wife there. She advised that Mr. Kirchoff had been in a rehabilitation facility since April 22, 2015. There is no direct evidence on this point, but assuming it as true and without controverting evidence, this institutionalization occurred after the date that the Notice of Hearing was sent and refused, making it immaterial to decision on the merits of the alleged violations.

Edward F. Seaton

19. Edward F. Seaton of Sandgate testified. He was Mr. Kirchoff's friend for over 10 years and helped him start the store. He was an employee of Licensee, running the meat department, processing meat for sale. He began working for the Licensee in late October 2014. He worked 50-70 hours per week.
20. Mr. Seaton observed Mr. Kirchoff take liquor from the store's cooler into his private office and consume it. Mr. Seaton personally observed Mr. Kirchoff drink wine, including chardonnay, and beer, including Pabst Blue Ribbon and Genesee, sometimes to the point of passing out. He would at times, try to interact with customers, while in an intoxicated state. Mr. Seaton would try to intercede to separate Mr. Kirchoff from the Licensee's customers.
21. Mr. Seaton testified regarding concerns with his wages. He was originally paid weekly. This then stopped. From the end of November 2014 to early January 2015, approximately 6-8 weeks, Mr. Seaton received no paycheck. He has still not been paid. He is owed approximately $5,000.00.
22. The store is now closed.

Kelly Lewin

23. Kelly M. Lewin of Arlington testified. She began working for Licensee in mid-August 2014, performing front end, baking and customer-service work. She worked there until the second week of February 2015.
24. She recalled one day in December 2015 that Mr. Kirchoff was "drunk as a skunk" on the licensed premises. He tried to leave the store and drive home. She stopped him from driving under the influence.
25. On more than one occasion, Mr. Kirchoff would find excuses for her to leave the store so that he could drink.
26. Ms. Lewin did an inventory of the store's liquor supply and saw many empty bottles in the bathroom, cooler, underneath a garbage can, in Mr. Kirchoff's office behind the computer, in filing cabinets and in a cubbyhole in the meat cooler. She believed that Mr. Kirchoff consumed the alcoholic beverages once contained in those empty containers.
27. She reported being terrified when a customer asked for a certain kind of meat to be cut and she was alone in the store with Mr. Kirchoff. Ms. Lewin did not cut meat. She was scared to ask Mr. Kirchoff to come out to cut the meat for the customer given the safety risk he could pose using knives in an intoxicated state.
28. Ms. Lewin testified that when Mr. Kirchoff was intoxicated on the licensed premises, he stomped his feet while walking, he became obnoxious, rude, and nasty and he drooled.
29. Ms. Lewin did not receive any form of wages for two and half months that she worked. She is owed approximately $3,000.00.
30. In lieu of wages, Mr. Kirchoff offered her pieces of meat, which was not accepted as consideration for employment. She did not, for example, receive $3,000.00 worth of meat.

Det. Peter Urbanowicz

31. Det. Urbanowicz testified next. He currently works for the Bennington County Sherriff's Department, having joined in September 2014 and is a Sheriff's deputy. He had previously served with the Bennington Police Department since 1996.
32. He was dispatched to an assault complaint at 1:30 p.m. on Tuesday, March 24, 2014 at the licensed premises.

33. At the licensed premises, there is a chicken nest attached to the front of the building from which eggs were sold. Judge O'Dea, of Arlington, is the landlord and owner of the licensed premises. Mr. Kirchoff leases the premises from Judge O'Dea. Judge O'Dea was driving by the licensed premises and saw someone removing the chicken nest. Mr. Kirchoff was apparently selling the chicken nest to this person. Judge O'Dea interceded, informing the "purchaser" that the nest belongs to him, not Mr. Kirchoff. When Judge O'Dea confronted Mr. Kirchoff, Mr. Kirchoff initiated a scuffle and yelled profanities at him. This led to a call to police.
34. The store was open during this time and Mr. Kirchoff was waiting on customers around the time of this incident.
35. Det. Urbanowicz noted that Mr. Kirchoff was under the influence of alcohol at the time. In fact, Mr. Kirchoff conceded that he had been drinking; he held up and showed Det. Urbanowicz a bottle of Twisted Tea, an alcoholic beverage that was ¾ consumed.
36. Det. Urbanowicz cited Mr. Kirchoff with disorderly conduct and false pretense (for attempting to sell the chicken nest).

CONCLUSIONS OF LAW

1. The 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 shall be revoked or suspended for the violation of a liquor statute or regulation, the 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 held a Second Class Liquor License as defined by 7 V.S.A. §2(19) at all relevant times to this matter and is, therefore, subject to this Board's jurisdiction.
4. As an initial matter, we find that Licensee was properly served with notice of the hearing. The evidence is clear that notice was reasonable and properly sent.
5. We further conclude that Mr. Kirchoff refused delivery of the certified letter from DLC containing the Notice of Hearing. A Licensee cannot evade or claim improper service by these methods. *See*, e.g. V.R.C.P. 4. Therefore, Licensee was properly notified of its alleged

violations and of its right to appear at a hearing to respond to these alleged violations consistent with 3 V.S.A. §809(a)-(c).

6. As additional support for our conclusion, the ticket Mr. Kirchoff received and refused to acknowledge receipt on March 27, 2015 from Investigator Elmer confirmed that Mr. Kirchoff would have to appear at the hearing. His act on that date is consistent with his later act of refusing DLC's certified letter.
7. Frankly, given the nature of the allegations, summary suspension of Licensee's liquor license would have been warranted.
8. Nevertheless, the Hearing was held and the evidence closed on May 6, 2015.
9. We conclude that the State has proved at least one violation of General Regulation No. 16 – the evidence and testimony was consistent among all four of the State's witnesses that they had direct knowledge of or specifically witnessed Mr. Kirchoff consuming alcoholic beverages and displayed signs of intoxication while on duty at the licensed premises.
10. We conclude that the State has proved at least one violation of General Regulation No. 17 – the same facts supporting a violation of General Regulation No. 16 support a violation of General Regulation No. 17. Mr. Kirchoff, who was on duty, was the individual displaying signs of intoxication from alcoholic beverages, was furnished alcoholic beverages, consumed alcoholic beverages on the licensed premises while displaying signs of intoxication and allowed himself to stay on the licensed premises in that condition.
11. We conclude that the State proved a violation of General Regulation No. 36 – the credible testimony from Det. Urbanowicz is that Mr. Kirchoff caused a disturbance, brawl or fight on March 24, 2015 with Judge O'Dea. This regulation, generally, is intended to prohibit a Licensee from allowing such conduct or behavior to occur (usually among its patrons and other third parties) and to take reasonable steps to prevent such activities from occurring. It is equally applicable and exponentially more inexcusable when the Licensee himself is the perpetrator of the "disturbances, brawls, fighting or illegal activity upon the licensed premises."
12. We conclude that the State proved a violation of General Regulation No. 45 – there was uncontroverted evidence from two employees that they received no wages for several weeks at a time.

13. Under 7 V.S.A. §236(b), "[a]s an alternative to and in lieu of the authority to suspend or revoke any permit or license, the liquor control board shall also have the power to impose an administrative penalty of up to $2,500.00 per violation against a [...] holder of a first, second or third class license for a violation of the conditions under which the license was issued or of this title or of any rule or regulation adopted by the board. The administrative penalty may be imposed after a hearing before the board [.]"
14. Given that there is no active license to suspend or revoke, we conclude that a fine of $1,000.00 for each of the four violations found above is appropriate and that Licensee be ordered to pay its employees any and all wages owed and the State any and all taxes owed.

ORDER

Based on the foregoing *Findings of Fact* and *Conclusions of Law*, Fayville F&G has violated General Regulation Nos. 16, 17, 36 and 45. The Board hereby ORDERS that Licensee:

(1) Pay its employees any and all wages due to them.

(2) Pay the Department of Liquor Control an administrative penalty equal to One Thousand Dollars ($1,000.00) for each of the four (4) violations, for a total of $4,000.00.

(3) Pay any and all taxes due to the State of Vermont to the Department of Taxes' satisfaction.

(4) Mr. Kirchoff may not re-apply for any Vermont Liquor License until and unless Licensee and/or Mr. Kirchoff comply with all requirements of this *Order*. This *Order* and its related enforcement history entries shall permanently follow Mr. Kirchoff and be considered in any additional proceedings before this Board, whether for enforcement or in connection with any license application involving Mr. Kirchoff in any way.

(5) Finally, the Board notes that had there been a valid license in effect as of the day of the Hearing or this decision, it would have been revoked.

DATED at Montpelier, Vermont this 17th day of June 2015.

VERMONT LIQUOR CONTROL BOARD

By: Stephanie 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).