

**STATE OF VERMONT
LIQUOR CONTROL BOARD**

**IN RE: 3-D'S CAFÉ, INC.
 86 STRONGS AVENUE
 RUTLAND, VERMONT**

BOARD DECISION AND ORDER

3-D's Café, Inc. ("Licensee") appeared before the Liquor Control Board ("Board") on June 17, 2015 in Montpelier for a contested case hearing to consider the suspension or revocation of its First and Third Class Liquor Licenses for an alleged violation of General Regulation No. 17(a). Jacob A. Humbert, Esq., Assistant Attorney General, represented the Department of Liquor Control ("DLC"). Lisa Marie Charbonneau appeared on behalf of Licensee; she is employed as its "operations manager." Dennis Smith, Licensee's owner, also appeared; he did not testify. The parties waived their option to submit proposed findings of facts and conclusions of law for the Board's consideration. The Board rules as follows:

FINDINGS OF FACT

1. At all relevant times, Licensee held First and Third-Class Liquor Licenses permitting the sale of beer, wine and spirits to the public for on-premises consumption.
2. DLC asserts that Licensee violated these General Regulations on or about March 21, 2015:

General Regulation No. 17(a) Licensees or his or her employees shall not serve alcoholic beverages to a person whom it would be reasonable to expect would be under the influence as a result of the amount of alcohol served to that person. Under the influence, in this section, shall mean that degree of intoxication that would render it unsafe or illegal for the patron to undertake normal and expected activities upon leaving the licensed premises.

3. For this alleged violation, DLC sought a \$510.00 penalty via an administrative ticket served on Licensee. Licensee contests the violation and exercised its right to a hearing on the merits.

4. The following findings are based on the testimony of Rutland Police Officer Harvey, DLC Inspector Davidson, Mr. Brown and Ms. Charbonneau.

Officer Nathan Harvey

5. Officer Nathan Harvey of Rutland Police Department has been a Certified Law Enforcement Officer since November 1, 2014 and, prior to that, served in Rutland as a part-time law enforcement officer since January 2014. He frequently encounters intoxicated persons in the course of his employment, several hundred in his career so far.
6. During the early morning hours of March 21, 2015, at 2:15 a.m., Officer Harvey received a call to respond to a person reportedly passed out in front of a Royce Street, Rutland apartment home.
7. Officer Harvey responded to the scene and found an unconscious male, upside down on a staircase leading into an apartment house (head on sidewalk, feet up on the steps). His face was in a pile of his own vomit. He was non-responsive. Officer Harvey called for Regional Ambulance, Emergency Medical Technicians.
8. Officer Harvey took the wallet from the male and, from the identification inside, identified him as "Mr. Hale," age 21.
9. Officer Harvey was ultimately able to revive and to talk with Mr. Hale. Mr. Hale reported that he had been drinking at the Licensee's bar that night. He refused a breathalyzer.
10. Officer Harvey, based on his training and experience, could tell that Mr. Hale was highly intoxicated. Mr. Hale had bloodshot, watery eyes, heavily slurred speech and a strong odor of intoxicants on his person and on his breath.
11. When EMT's arrived, Mr. Hale refused medical treatment.
12. Around this time, two people, identified as Mr. Hale's roommates, approached and assured Officer Harvey that they would look after him. Officer Harvey counseled the roommates on keeping Mr. Hale on his side so that he did not asphyxiate himself should he vomit again.
13. Officer Harvey detailed the modest walking distance between Licensee's establishment and where Mr. Hale was found unconscious in his own vomit. It is short walk, that would take only a few minutes to complete.
14. Officer Harvey did not question the roommates about Mr. Hale's whereabouts that night specifically where Mr. Hale had been drinking.

15. Officer Harvey prepared and filed an electronic incident report based on his response to this incident and identified Licensee as a “business of interest.” This would generate notice to the DLC of the need for potential investigation.
16. On cross-examination, Officer Harvey conceded that he did not know when Mr. Hale claims to have arrived at Licensee’s bar, when he left or how much he drank there. Likewise, Officer Harvey did not know or ask whether Mr. Hale went anywhere else or drank anything else or used any type of drug between the time he left Licensee’s bar and when he was found unconscious in his own vomit.
17. Officer Harvey confirmed that there are other bars within a similar walking distance to where Mr. Hale was found.

Investigator Michael Davidson

18. Investigator Michael Davidson serves the Rutland–Middlebury region and investigated this matter. He has 13 years of experience in this capacity. He investigated this matter on DLC’s behalf.
19. He went to Licensee’s bar later on March 21, 2015 and spoke with a female bartender. Investigator Davidson informed the bartender why he was there and specifically identified Mr. Hale. She denied having worked the night before, but was “familiar with the name.” She advised Investigator Davidson to speak with the manager, Mr. Browne, who was on duty the night before.
20. Investigator Davidson returned and spoke with Mr. Browne. Mr. Browne confirmed that he was working at Licensee’s Bar on the date at issue.
21. Mr. Browne confirmed that he was familiar with Mr. Hale.
22. Significantly, not only did Mr. Browne confirm that Mr. Hale was in the Licensee’s bar on the date at issue, Mr. Browne further confirmed that he personally served Mr. Hale between 5 and 7 beers that night and that Mr. Hale left the bar at 1:30 a.m.
23. Mr. Browne stated that Mr. Hale did not look intoxicated when he left the bar.
24. Speaking further to Mr. Brown’s familiarity with Mr. Hale, Mr. Brown expressed concerns, none of which were substantiated in this proceeding, that Mr. Hale may have a drug problem.

25. Only after service of the violation by DLC, did Mr. Browne attempt to retract his statement given to Investigator Davidson. He contacted Investigator Davidson and said that he has confused Mr. Hale with another patron because the person at issue was “wearing a hoodie” on the night at issue.
26. The State rested.

John Paul “Brownie” Browne

27. Licensee called John Paul “Brownie” Brown to testify.
28. Mr. Browne has been the manager of the Licensee’s bar for approximately 12 years “on and off.”
29. He testified under oath that the person whom he served 5-7 or “6-7 beers at the most” beers that night was someone named “Nick” and not Mr. Hale as he initially reported to Investigator Davidson.
30. Mr. Browne indicated that two days after the incident at issue, a man came to the bar to drink. He recognized this person as Mr. Hale, but then realized during conversation, it was not Mr. Hale after all, but someone named “Nick,” also age 21. This led Mr. Browne to allegedly conclude that he “had the wrong guy.” “Nick” was neither called as a witness nor subpoenaed to appear.
31. Mr. Browne testified that he served his last drink on the night at issue at 1:25 a.m. All patrons had departed by 1:35 a.m.
32. Mr. Browne admitted that he was already aware of the allegation that Mr. Hale was over served at his bar before meeting with Investigator Davidson.
33. Mr. Browne, with a day’s advance notice that Investigator Davidson would return, went on Facebook and accessed Mr. Hale’s page.
34. Mr. Browne testified that he went to Facebook because he was “curious who the individual was that was accusing us of overserving him.” Mr. Browne further testified that he went on Facebook to see Mr. Hale’s profile to make sure he had right guy in mind when meeting with Investigator Davidson.
35. Mr. Browne sent a message to Mr. Hale, via Facebook, “to come in” to the bar.
36. Mr. Browne confirmed that Mr. Hale’s Facebook page had photos of Mr. Hale on it.

37. Mr. Browne had viewed these photographs before meeting with Investigator Davidson.
38. Prior to meeting with Investigator Davidson, Mr. Browne was familiar with the appearance of Mr. Hale's face.
39. Mr. Browne had viewed these photographs at the point in time when he told Investigator Davidson that he had, in fact, served Mr. Hale on the night at issue.
40. Mr. Browne also reviewed Mr. Hale's Facebook photographs again after meeting with Investigator Davidson.
41. DLC noted that Mr. Hale was subpoenaed, but did not appear. He was served with the subpoena.
42. We find that DLC could not have taken any additional legal steps to compel his appearance. We do not reach our determination below based on the lack of Hale's presence at the hearing.

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 First and Third Class Liquor Licenses as defined by 7 V.S.A. §§2(10) and (22) at all relevant times to this matter and is, therefore, subject to this Board's jurisdiction.
4. The sole issue for the Board's consideration is whether Licensee violated General Regulation 17(a) on or about March 21, 2015. The rule is set forth, *supra*, at Findings of Fact, ¶2, and incorporated herein as if set forth at length.
5. There was ample evidence that Mr. Hale was under the influence of alcohol when he was found upside down on a stairway in a pile of his own vomit. Officer Harvey's testimony on this issue is credible in all respects.
6. We conclude that Mr. Hale was intoxicated and under the influence of alcoholic beverages at the time Officer Harvey responded. Despite challenges to Officer Harvey's assessment of Mr. Hale as "drunk," we note that "recognition of the fact that a person is in a drunken or

intoxicated condition requires no peculiar scientific knowledge.” *See, e.g.*, 20 Am.Jur., Evidence, § 876 and *Ackerman v. Kogut*, 117 Vt. 40, 44 (1951) (citations omitted). Officer Harvey is well-trained and well-qualified with respect to determining whether someone shows signs of intoxication. Moreover, as the Vermont Supreme Court has confirmed, the Board and DLC inspectors are well-qualified to judge the signs that indicate intoxication. *See In re: Rusty Nail Acquisition, Inc.*, 2009 VT 68 at ¶ 8.

7. The link between Mr. Hale’s intoxication and Licensee’s conduct is where this case hinges.
8. We note that “[i]ntoxication may be evidenced circumstantially by prior or subsequent condition of intoxication within such a time that the condition may be supposed to be continuous.” 2 Wigmore, Evidence, 3d Ed. § 235. This accords with our rule that an inference may be and often is retroactive; a trier may from present conditions infer a previous fact. *Cross v. Passumpsic Fibre Leather Co.*, 90 Vt. 397 (1910).
9. Given Mr. Hale’s level of intoxication, his statement of where he was drinking is not dispositive and does not provide sufficient evidence for the Board to connect his level of intoxication to Licensee.
10. Mr. Brown, however, conceded facts sufficient for the Board to conclude that the violation of General Regulation No. 17(a) occurred. His testimony before the Board about “mistaken identity” is not credible in any respect; it is highly contradictory and untrustworthy. His testimony that he confused Mr. Hale for another patron named “Nick” is patently unbelievable. Mr. Brown had a day’s head start before meeting with Investigator Davidson wherein he knew that Mr. Hale was the subject of the investigation. He reviewed Mr. Hale’s Facebook page. He sent correspondence to Mr. Hale. Had Mr. Brown really been unfamiliar with Mr. Hale, any confusion over identity would have been resolved before he spoke to Investigator Davidson in the first instance. And, there was no effort to recant his story until after the Licensee was cited for an alleged violation.
11. We conclude that Mr. Hale was at the Licensee’s establishment and he was served 5-7 beers.
12. The Board finds, however, that there is insufficient evidence of the period of time over which Mr. Hale was served these beers, how he would have reasonably appeared to Licensee’s staff, or what happened between the time Mr. Hale left Licensee’s bar and when was found unconscious in front of his residence.

13. Also, once Mr. Brown attempted to recant his statements to Investigator Davidson, DLC apparently engaged in no efforts to investigate further.
14. DLC must prove violations by a preponderance of the evidence, meaning that it is more likely than not that a violation occurred.
15. Despite our impression that Mr. Brown was dishonest with the Board and DLC's Investigator, we are not willing to connect the dots between Mr. Hale's service at Licensee to the intoxicated state he was found in at his residence later that morning. There is an insufficient basis for us to so conclude.
16. It must be said, however, that it's concerning that Licensee's bartender conceded, flippantly, to serving one patron as many as 6-7 beers during one evening on the night that Mr. Hale was found unconscious nearby. If this conduct continues, it will, certainly, lead not only to significant sanctions from this Board, but potential harm to Licensee's staff, its patrons and the public at large.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Board hereby

DISMISSES the violation of General Regulation No. 17(a)

DATED at *Montpelier*, Vermont this *15th* day of *July* 2015.

VERMONT LIQUOR CONTROL BOARD

By: 
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).