

**STATE OF VERMONT
LIQUOR CONTROL BOARD**

**In Re: AGONY, LLC d/b/a THE LOCAL
 24 MERCHANTS ROW
 RUTLAND, VERMONT**

BOARD DECISION AND ORDER

Agony, LLC d/b/a The Local (“Licensee”), which holds First and Third-Class Liquor Licenses, appeared before the Liquor Control Board (“Board”) on May 11, 2016 in Montpelier for a contested case hearing to consider alleged violations of General Regulation Nos. 17/17(a) (two counts) and 36/36(a). Jacob A. Humbert, Esq., Assistant Attorney General, represented the Department of Liquor Control (“DLC”). Licensee was represented by Matthew Hart, Esq.

The Board admitted five (5) CD-ROMs of video taken inside and outside the licensed establishment as well as from a Rutland Police Department holding cell into evidence as State’s Exhibits 1, 2, 3, 4 and 7 (“video”) and considered testimony from Rutland Police Corporal Damon Nguyen, Ms. Mary-Catherine Molaski, Mr. Scott Chandler, Rutland Police Officer Daniel Meytin, DLC investigator Michael Davidson (by telephone), Mr. Brandon Davis, Mr. Todd Peacock and Mr. Charles Greeno.

The parties agreed to submit *Proposed Findings of Fact and Conclusions of Law*. Upon Licensee’s request, the Board extended the deadline for submission from May 30, 2016 to June 10, 2016. DLC submitted timely proposed findings. Licensee ultimately, through counsel, waived the submission of findings.

The Board finds violations of General Regulation Nos. 17/17(a) (two counts) and 36/36a, (one count) based on the following:

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.

2. DLC asserts that Licensee violated the following on March 25-26, 2016:
 - a. 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.

 - b. General Regulation No. 17(a): Licensees or licensees' employees shall not serve alcoholic beverages to any individual 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 Regulation, 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.

 - 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. 36(a): The Board may find, that a licensee suffered a disturbance, brawl, fight or illegal activity upon the licensed premises or upon the streets, sidewalks, parking lots or highways adjacent thereto if any individual engaged in such conduct had been allowed to stay on the licensed premises while displaying signs of intoxication from alcohol, drugs or other substances, and/or if it would be reasonable to expect that such individual would be intoxicated as a result of the amount of alcohol served to that individual. Under such facts, the Board may conclude that any such individual's conduct should have been anticipated.

3. The alleged violations occurred during the early morning hours of Saturday, March 26, 2016 and involve Mary-Catherine Molaski, Scott Chandler, Jonathan Bullock and Justin Allen, patrons of Licensee at all relevant times.

The Incident

4. On March 26, 2016, at approximately 2:00 a.m., Corporal Damon Nguyen of the Rutland Police Department was transporting a DUI suspect in his cruiser on Merchants Row, Rutland, when he came upon Licensee. He saw a crowd gathered outside with approximately 20 people on the sidewalks, road and adjacent parking area. Cpl. Nguyen called for backup.
5. Upon Cpl. Nguyen's arrival, Brandon Davis, Licensee's head of security, met with him and reported that a person with a pipe, later identified as Mr. Bullock, was threatening people. Shortly afterwards, and while walking towards Mr. Bullock, Cpl. Nguyen heard a chainsaw start in the distance. The sound of the starting and running chainsaw is heard clearly on video.
6. Cpl. Nguyen saw the man, later identified as Justin Allen, chasing a group of people with the operating chainsaw. These people, which included Licensee's staff, are seen on video fleeing Mr. Allen. Cpl. Nguyen drew his weapon and chased Mr. Allen. Mr. Allen retreated towards a pickup truck, turned off the chainsaw and threw it into the pickup truck. Mr. Bullock was standing along the other side of the pickup truck. Mr. Bullock had been brandishing what appeared to be a large metal pipe, which he placed in the bed of the pickup truck as well.
7. Cpl. Nguyen, with his firearm drawn, ordered Mr. Allen and Mr. Bullock to lie face down on the ground. Neither appeared to comply.
8. Mr. Allen's spouse, Danielle Allen, another patron of Licensee, interfered with Cpl. Nguyen's efforts by standing in front of him and obstructing his view. She eventually had to be forcibly pushed aside by Cpl. Nguyen. Mr. Davis assisted Cpl. Nguyen in keeping Ms. Allen away from Mr. Allen and Mr. Bullock.

9. Other Rutland police officers arrived. Both Mr. Bullock and Mr. Allen were ultimately subdued, arrested and brought to separate holding cells. Both the chainsaw (still warm from having been operated) and pipe were recovered from the pickup truck and taken into evidence. A sledgehammer was, apparently, also recovered from the pickup truck. Mr. Bullock, demonstrating signs of intoxication at all relevant times, and as captured on video, vomited in his cell and passed out less than an hour after this event occurred.
10. Mr. Allen's preliminary, non-evidentiary, breath test revealed a blood alcohol content of .139. He demonstrated a dulled facial expression on video. Cpl. Nguyen reported a strong odor of intoxicants on his person. Notably, according to Cpl. Nguyen, during his interview with Mr. Allen, it was clear that Mr. Allen did not even appreciate that he had been held at gunpoint; he thought Cpl. Nguyen had used a Taser.
11. Mr. Bullock was ultimately taken to Rutland Regional Medical Center; he did not provide a breath sample for analysis. Both were charged criminally.
12. Our decision addresses this harrowing event and whether the Licensee bears liability for it.

Before The Incident

13. Mary-Catherine "Tilly" Molaski, Licensee's patron, testified that she encountered "Johnny" Bullock at The Alley, another bar in downtown Rutland, earlier during the evening of Friday, March 25, 2016. There is an apparent, unpleasant history between them. Ms. Molaski testified that Mr. Bullock had been verbally abusive to her in the past, calling her "the C word." Mr. Bullock purported to apologize for that past transgression at The Alley, but she was concerned with his demeanor (he was, according to her, drunk and more hyper than typical) such that she departed The Alley.
14. Ms. Molaski went to Licensee specifically to get away from Mr. Bullock. She was accompanied by Scott Chandler and two other friends who arrived at Licensee before midnight. She testified that she did not drink that night and was the designated driver.

15. Mr. Bullock, joined by Mr. Allen, subsequently went to Licensee at approximately 12:30 a.m. By this point, Mr. Bullock had consumed two mixed drinks prior to going out. He then drank approximately another five mixed drinks before arriving at Licensee. Mr. Allen had consumed a six-pack of beer before going out and an additional five mixed drinks before arriving at Licensee.
16. Mr. Davis was at the door when Mr. Bullock and Mr. Allen arrived. He noticed no obvious signs of intoxication on either of them. Both were “wanded,” or checked for weapons using a metal detection device by Todd Peacock, another member of Licensee’s security staff.¹ Mr. Davis testified that five security staff members were on duty that night.
17. Mr. Bullock and Mr. Allen were served three drinks each, one at a time, over a 90-minute period. Each of these drinks were mixed drinks, “Sex on the Beach,” served in 16-ounce Mason jars, comprised of pineapple and cranberry juices and, according to Licensee, a “three-count free pour” of rum, which amounted to one ounce. Licensee charges \$8.00 for each of these drinks.
18. Ms. Molaski, seeing Mr. Bullock and Mr. Allen enter, testified that she tried to keep her distance.
19. Also at approximately 12:30 a.m., Ms. Molaski and Mr. Chandler decided to play pool. During this game, Mr. Bullock approached them and interrupted, knocking the billiard balls around the table. Mr. Chandler testified that, in addition to interfering with the billiard balls, Mr. Bullock was getting close to Ms. Molaski’s face. Mr. Chandler told Mr. Bullock to “be nice to her.” Mr. Bullock then took each of the billiard balls and shoved them towards the pockets on the pool table. Mr. Bullock may also have shoved or pushed Ms. Molaski at this point.
20. Ms. Molaski reported to Mr. Peacock that Mr. Bullock was trying to start a fight with her and/or Mr. Chandler. Ms. Molaski told Licensee’s staff about her concerns about Mr.

¹ This is a requirement for this Licensee under prior Board orders.

Bullock's behavior. She asked that he be removed and walked to his vehicle. Ms. Molaski expressed concerns that Mr. Bullock would be waiting outside for her and Mr. Chandler after the bar closed.

21. Mr. Peacock told Ms. Molaski that the bar would be closing shortly, but that he would take care of it. There was no immediate response.
22. Mr. Bullock's assaultive behavior continued, at which point Mr. Chandler took exception and "stuck up for her." Shoving ensued. Security staff, including an off-duty Rutland police officer, Christopher Conway, separated Mr. Bullock and Mr. Chandler. According to video evidence, Mr. Bullock remained in a fighting stance even after being separated. He is seen with both fists clenched and is hunched over.
23. Licensee's security staff instructed Mr. Bullock and Mr. Allen to leave.
24. Mr. Bullock quickly consumed much of the mixed drink that had been served to him, resisting staff's efforts to take it from him. Mr. Conway told Mr. Bullock "I said you gotta go because you've had too much tonight, okay." This is clearly heard on video.
25. Mr. Allen quickly consumed ("chugged") the remainder of his drink and handed the empty glass to Licensee's staff.
26. Upon exiting, Mr. Bullock proceeds to shake hands with several bouncers on his way out. Mr. Allen leaves first and appears to be unsteady on his feet as he departs.
27. Mr. Davis testified that there is a procedure when asking a patron to leave the premises. He takes pride in diffusing the situation by, among other steps, placing his hands in his pockets. This usually results in people leaving amicably. He testified further that anytime he kicks someone out, he follows them all the way to the door and makes sure that they are out of the building.

28. Licensee ensured that Mr. Bullock and Mr. Allen walked out the front door. Unfortunately, that is where its observations of Mr. Bullock and Mr. Allen ended. Mr. Davis assumed all was well since they had shaken hands.
29. Inv. Davidson testified that Licensee failed to monitor Mr. Bullock or Mr. Allen after they exited.
30. Licensee did not have any door staff outside at that time. No one monitored Mr. Bullock or Mr. Allen after they left Licensee. Mr. Davis conceded that there was nobody stationed outside Licensee's entrance.
31. Mr. Davis conceded that their typical protocol was for two security staff to go outside and do a "parking lot sweep" before they start closing up the bar.
32. No parking lot sweep was done that night, however, as Mr. Davis indicated that no one was stationed outside after Mr. Bullock and Mr. Allen left and Mr. Davis went immediately to closing down the bar that night.
33. Mr. Bullock and Mr. Allen hid in a recess of a neighboring business façade for approximately two minutes at which time Mr. Chandler left the Licensee.
34. Mr. Bullock attacked Mr. Chandler upon his leaving Licensee.
35. Mr. Davis responded promptly by taking Mr. Bullock to the ground and placing him in a chokehold.
36. At this point, Mr. Davis did not believe the police needed to be called as he believed the dispute was under control.
37. Once Mr. Bullock was allowed up, however, he and Mr. Allen threatened other people. Mr. Bullock brandished a metal pipe and Mr. Allen swung a sledgehammer. Mr. Allen

threatened bouncer Todd Peacock with a sledgehammer, putting it within one foot of Mr. Peacock's head. Mr. Allen would later switch to using a chainsaw.

38. Investigator Davidson, who investigated this case on behalf of DLC, testified that his review of the video inside Licensee, standing alone, does not provide sufficient evidence that Mr. Bullock or Mr. Allen were exhibiting signs of intoxication other than that Mr. Bullock and/or Mr. Allen appeared to be in an aggressive posture. Only after getting out of Mr. Davis' chokehold and back on his feet does Inv. Davidson testify that Mr. Bullock exhibited signs of intoxication.

39. It was at this point, Cpl. Nguyen fortuitously arrived on the scene.

40. Mr. Davis was cooperative with and assisted Cpl. Nguyen that night and subsequently with Inv. Davidson. He captured video on a chest mounted GoPro camera and burned a CD-ROM of the video from the SD card on the camera and shared this with law enforcement. The Licensee also provided video from within the establishment. While law enforcement should have been called for sooner per Cpl. Nguyen, Mr. Davis' cooperation with law enforcement, upon arrival, though required under our regulations, was laudable.

CONCLUSIONS OF LAW

Consistent with the above *Findings of Fact*, the Board concludes as follows:

1. 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).
2. 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.

3. 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). The Hearing was held and the evidence closed on May 11, 2016. Licensee was permitted substantial time to submit proposed findings of fact and conclusions of law, but ultimately decided not to submit them.
4. DLC must prove all alleged violations by a preponderance of the evidence. If any violations are found, then the Board has concluded that DLC has met its burden.

General Regulation Nos. 17/17(a)

5. The Board concludes that, under the facts as presented and video evidence admitted, there is sufficient evidence to conclude that Mr. Bullock displayed signs of intoxication, most prominently Licensee's own admission, on video, inside the licensed establishment that Mr. Bullock had too much to drink, and because he was engaged in assaultive and belligerent behavior prior to being removed from the licensed establishment.
6. Mr. Bullock was displaying signs of intoxication before arriving at the Licensee, while at the licensed establishment, outside of the Licensee during and after the brawl, and less than an hour later in his holding cell where he is seen vomiting and falling to the floor, apparently unconscious.
7. While displaying these signs of intoxication, Mr. Bullock was served and allowed to consume roughly two and a half mixed drinks before Licensee's staff asked Mr. Bullock to leave and engaged in efforts to take the remainder of the third one.
8. Mr. Allen, given his consumption of alcoholic beverages before arriving at Licensee and at Licensee, where he was served and allowed to consume three mixed drinks, was in such a state of intoxication that he exhibited traditional signs of intoxication, such as a dulled facial expression, unsteadiness on his feet and a strong odor of intoxicants. More chilling, however, is that he exhibited erratic behavior that reflects a substantial influence of intoxicants or drugs, to wit, the retrieval of, starting, operating and chasing other people with

a chainsaw and then failing to appreciate that his actions placed a law enforcement officer in the position of considering deadly force to subdue him.

9. We find that Licensees' methods of serving mixed drinks contributed to Mr. Bullock and Mr. Allen's intoxicated state. Notably, Licensee used a "free pour" method to add rum to each mixed drink served to them. The Board has warned against such a practice in the past, concluding that

[t]his is a notoriously inaccurate process and in most cases in the experience of the Board when the bartender is preparing the drink while being observed by the intended customer, there is a tendency to over pour rather than under pour. A 'free pour' can be what the bartender wants it to be at any given time. It can vary from patron to patron, can vary with the degree that the bartender is busy or not[.]

In Re M.S.D.D. Inc. d/b/a Spanked Puppy Pub (2008) at Conclusions, ¶24.

10. We conclude that a "free pour" done at a "three count" does nothing to make the process more accurate and, indeed, adds yet another variable, the method by which the counting is done, which likely contributed to overservice here.
11. Further compounding this inaccurate process is that spirits are poured directly into 16-ounce Mason jars, rather than, for example, a shot glass or jigger. The Board does not find credible, therefore, that each of the Licensee's mixed drinks served to Mr. Bullock and Mr. Allen included only one ounce, a mere one-sixteenth of its volume, in the form of spirituous liquor, namely rum.
12. Licensee's service of alcoholic beverages certainly exacerbated Mr. Bullock and Mr. Allen's "degree of intoxication that would render it unsafe or illegal for [him] to undertake normal and expected activities upon leaving the licensed premises" as contemplated by General Regulation No. 17(a).
13. We presume Mr. Bullock and Mr. Allen's intoxication condition to have been continuous for some period of time prior to the incidents both inside and outside the Licensee. *See In Re Tweer*, 146 Vt. 36, 38, 498 A.2d 499, 501 (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”). This presumption is supported by the credible testimony of Ms. Molaski, Mr. Chandler and Officer Nguyen.

14. Mr. Bullock and Mr. Allen were allowed to remain on the licensed premises for nearly one and a half hours, without being removed or segregated in a supervised non-public area for their safety and the safety of others.
15. Licensee, therefore, committed two violations each of General Regulation Nos. 17 and 17(a). This conclusion is based not just on the video evidence, but the totality of circumstances as credibly described by DLC’s fact witnesses.

General Regulation Nos. 36/36a

16. The plain language of General Regulation No. 36, namely, “All licensees must ensure the safety of individuals entering, leaving, or remaining on the licensed premises” imposes a significant burden on a licensee to ensure their patrons’ safety even after they exit the premises. This Regulation cannot be construed to limit a Licensee’s liability only to threats against patrons’ safety stemming purely or in part from intoxication or overservice. On balance, the Regulation also imposes a reasonable geographic limitation on this liability, “to the streets, sidewalks, parking lots or highways adjacent thereto.”
17. Of course, General Regulation No. 36 does not render a licensee strictly liable for every action by or injury/potential injury to a patron. Instead, in ensuring the safety of its patrons, a Licensee is held liable for those injuries or disturbances which it knew or should have known would or could occur. Licensee had such knowledge here.
18. Licensee was well aware that one of their patrons felt that her safety was in jeopardy as a result of Mr. Bullock’s actions towards her and had broken up a fight between Mr. Bullock and Mr. Chandler inside the premises. With knowledge that Mr. Bullock had been aggressive towards Ms. Molaski and Mr. Chandler, Licensee had a duty to ensure their safety

when exiting their establishment and failed to do so, leading to the public nuisance in the street, sidewalk and parking area adjacent to the licensed premises.

19. Although Licensee did remove Mr. Bullock from its establishment, it failed to adequately monitor his activities beyond its front door.
20. Licensee, at Hearing, conceded that it is responsible for (in the normal course of business at closing time, at least) monitoring the sidewalks, roadway and parking area adjacent to the establishment. Additionally, Licensee normally has security staff outside to “sweep” the adjacent parking area. On this night, Licensee’s failure to take these steps certainly played a significant role in the disturbance that ensued.
21. Licensee’s failure to adequately protect, among other patrons, Mr. Chandler upon leaving its establishment violates General Regulation No. 36. Worse, this failure, coupled with the failure to timely alert law enforcement, led to an extraordinary escalation of events, certainly a “public nuisance” as contemplated under the regulation. This event, certainly, could have resulted in the loss of life or serious body injury. We would find that this violation occurred even without the concurrent violations of General Regulations Nos. 17/17(a).
22. Licensee clearly violated General Regulation No. 36(a), as the substantial evidence discussed above confirms that Licensee “suffered a disturbance, brawl, fight or illegal activity upon the licensed premises or upon the streets, sidewalks, parking lots or highways adjacent thereto” and the perpetrators of the “brawl” were, as discussed above, “allowed to stay on the licensed premises while displaying signs of intoxication from alcohol, drugs or other substances[.]” The Board does conclude, consistent with General Regulation No. 36(a), that Mr. Bullock and/or Mr. Allen’s “conduct should have been anticipated” and, accordingly, a violation is found.

Proper Sanction

23. To impose an appropriate sanction, the Board must consider this Licensee’s prior enforcement history. It is significant. This Licensee returns for a hearing before this Board regarding alleged violations of our Regulations for the fourth time since June 11, 2014, with

all three prior hearings resulting in suspensions of progressively increasing lengths for violations of multiple General Regulations, including one of General Regulation No. 36 stemming from a stabbing.

24. The Board previously warned that should Licensee commit further violations, the sanction of revocation will be seriously considered. DLC seeks a sixty day suspension.
25. Although we find serious violations here, and there is a considerable enforcement history, there appears to be increased efforts at compliance with our regulations and cooperation with law enforcement. For those reasons, a sanction such as revocation or a lengthy suspension as DLC seeks is not warranted at this time. We conclude, instead, that a 21-day suspension of Licensee's liquor licenses is appropriate.

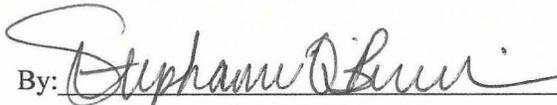
ORDER

Based on the foregoing *Findings of Fact* and *Conclusions of Law*, the Board finds two violations of General Regulation No. 17/17(a) and one violation of General Regulation 36/36(a) and hereby **ORDERS** that Agony, LLC's First and Third Class Liquor Licenses be:

- **SUSPENDED** for twenty-one (21) days effective from the beginning of business on Saturday, October 1, 2016 to the start of business on Saturday, October 22, 2016.

DATED at Montpelier, Vermont this 22nd day of August 2016.

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).