

**STATE OF VERMONT
LIQUOR CONTROL BOARD**

**In Re: SELLY ENTERTAINMENT, LLC D/B/A KARIB
 51 FEDERAL STREET
 ST. ALBANS, VERMONT**

BOARD DECISION AND ORDER

Selly Entertainment, LLC d/b/a Karib (“Licensee”) appeared before the Liquor Control Board (“Board”) on July 13, 2016 and August 10, 2016 in Montpelier for a Contested Case Hearing to consider sanctions against First and Third Class Liquor Licenses for alleged violations of General Regulation Nos. 17 and 17(a) on February 27, 2016. Jacob A. Humbert, Esq., Assistant Attorney General, represented the Department of Liquor Control (“DLC”). Danielle Mesick, owner and sole member of Licensee, appeared on Licensee’s behalf. Both parties submitted Proposed Findings of Fact and Conclusions of Law for the Board’s consideration. The Board makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At all relevant times, Licensee held First-Class and Third-Class liquor licenses, permitting the sale of beer, wine, fortified wine and spirits to the public for on-premises consumption.
2. In its Notice of Hearing, DLC alleged that, during the early morning hours of February 27, 2016, Licensee violated the following General Regulations involving an allegedly intoxicated patron, identified as Richard Carr:
 - 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. 17a. 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.
3. The events of February 26-27, 2016 unfolded as follows:
 4. Between 11:00 p.m. and 11:30 p.m. on February 26, 2016, Amanda Carr, Richard Carr (Amanda's brother) and James Whalon arrived at the Licensee's establishment. Ms. Carr entered first, with Mr. Carr and Mr. Whalon entering shortly thereafter. Mr. Carr remained at the bar until approximately 12:50 a.m. - 1:00 a.m.
 5. St. Albans Police Department Officer Mike Malinowski reported by telephone to DLC Investigator Centabar that a man, later identified as Mr. Carr, appeared unsteady on his feet when he exited Licensee's establishment. He then walked towards a parked car, went inside that car and sat in the rear seat of the car.
 6. DLC did not call Officer Malinowski to testify, though he was under subpoena to appear.
 7. Investigator Centabar testified:
 - a. He has been certified as a full time law enforcement officer since 1988 and has served with DLC for approximately one year. His territory includes Franklin, Grand Isle, and Orleans Counties.
 - b. He made contact with Mr. Carr within a minute of receiving the call from Officer Malinowski as he was just "around the corner" from Licensee's establishment.
 - c. He saw a man in a car, seated in the back seat of the passenger side.
 - d. The man identified himself as Mr Carr.

- e. Mr. Carr was displaying obvious signs of intoxication, including bloodshot and watery eyes, as well as slurred speech. He spoke in a slurred, mumbled speech. Investigator Centabar asked Mr. Carr: “did you come out of the Karib?” Mr. Carr answered in the affirmative. He reported that he was there for approximately 90-120 minutes.
 - f. Mr. Carr advised that he had consumed three or four Long Island Iced Teas. He did not see any alcoholic beverages or containers in the car.
 - g. Mr. Carr submitted to a preliminary breath test (“Alco-sensor”) at approximately 1:15 a.m. which revealed a blood alcohol content of 0.241.
 - h. Investigator Centabar took a photograph of Mr. Carr with his phone between 1:00 – 1:15 a.m. This was admitted as Exhibit 1. The photograph corroborated Investigator Centabar’s observations of Mr. Carr’s intoxicated state.
 - i. After providing a breath sample, Mr. Carr began to look ill. Investigator Centabar grabbed Mr. Carr by the shoulders and leaned him out of the car. Mr. Carr vomited, violently, “three or four times” onto the ground. The vomit smelled of alcohol.
 - j. Ms. Carr and Mr. Whalon came over to the car. Ms. Carr indicated that they had been in the licensee’s establishment for 90-120 minutes and Mr. Carr consumed 3-4 mixed drinks. Mr. Whalon reported that Mr. Carr needed to get some “fresh air,” leading to him to leave Licensee’s establishment.
 - k. Investigator Centabar spent approximately 15 minutes with Mr. Carr.
8. Investigator Centabar went inside Licensee’s establishment, spoke with one or two bartenders, and then located Ms. Mesick. Investigator Centabar issued Ms. Mesick an administrative ticket #1429, which imposed a \$510.00 monetary penalty, for an alleged violation of General Regulation No. 17.

9. Investigator Centabar did not appear to investigate further after issuing the administrative ticket. He felt he had the “smoking gun” in Mr. and Ms. Carr’s admissions. He did not engage in efforts to interview Mr. Carr once sober.
10. DLC rested. Licensee called several witnesses.
11. First, Naomi Begnoche testified. She is a bartender for Licensee. She has worked as a bartender for 21 years. She is acquainted with Ms. Carr, a regular customer, but denies knowing Mr. Carr. She did not see Mr. Carr on February 26-27, 2016. During her testimony, she conceded that Mr. Carr was indeed inside the licensed establishment that night, in the pool table area. Ms. Begnoche did not go near the pool area that night.
12. Ms. Begnoche had a conversation via Facebook instant messenger with Mr. Carr “the following day,” wherein Mr. Carr admitted to being in the licensed establishment, but that the signs of intoxication he exhibited were related to some other “substances.”
13. Second, Licensee called Amanda Carr. On the night of February 26, 2016, she, Mr. Carr and Mr. Whalon traveled from the Burlington area to the licensed establishment. Before leaving, Mr. Carr and Mr. Whalon were “drinking at the house.” It was Mr. Whalon’s birthday. She was not sure whether it was beer or liquor that was consumed or in what quantity. During the car ride to the licensed establishment, Ms. Carr testified that Mr. Carr drank two Twisted Teas, an alcoholic beverage.
14. Ms. Carr denied that Mr. Carr drank inside the licensed establishment “because he did not have any money.” Ms. Carr largely corroborates Investigator Centabar’s statements about his conversation with her except for the report that Mr. Carr consumed three or four mixed drinks inside the licensed establishment. Ms. Carr testified that, in addition to the alcoholic beverage(s) that Mr. Carr consumed before leaving for St. Albans and those he consumed on the way there, he had also taken prescription pain medication.
15. Around 1:00 a.m., while playing pool, Mr. Carr stated that he did not feel well and went outside. She asserts that this was because something Mr. Carr had taken had “kicked in.”

16. Third, Licensee called Abby Thielman, another of its bartenders. She had direct contact with Mr. Carr while he was playing pool, on numerous occasions retrieving the cue ball for Mr. Carr. The cue ball kept rolling into the table's locked chamber, rather than being dispensed for further play, apparently the result of the ball being an improper weight. She did not notice Mr. Carr drinking.
17. Fourth, Licensee called Bailey Buckley as its final witness. She did not offer any substantive testimony germane to this matter.
18. Mr. Carr did not testify.
19. DLC called Investigator Centabar as a rebuttal witness given the Licensee's position that no alcoholic beverages were consumed in the licensed establishment, but were instead consumed prior to arrival. Investigator Centabar testified that, if Mr. Carr did not consume any alcoholic beverages at the licensed establishment, his level of intoxication upon entering the licensed establishment would have been substantially higher and may have had a 0.271 blood alcohol content at that time.

CONCLUSIONS OF LAW

1. Licensee has exercised its right to contest the administrative ticket issued to it and requested a hearing before this Board.
2. 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).
3. 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).
4. 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.

5. Licensee was properly notified of its alleged violations, discussed above, and of its right to appear at a hearing to respond to these alleged violations consistent with 3 V.S.A. §809(a)-(c). This matter was continued to August 10, 2016 to allow Licensee to present fact witnesses whom it had expected to appear on July 13, 2016, but did not appear despite being under subpoena.
6. DLC must prove all alleged violations by a preponderance of the evidence. This standard compels DLC to prove that, more likely than not, a violation occurred. If any violations are found, then the Board has concluded that DLC has met its burden. Licensee argued that a violation should only be issued if there is “100% unreasonable (sic) doubt that the violation had taken place,” which we assume to mean a standard akin to establishing criminal liability. To be certain, the Vermont Supreme Court has held that the usual standard of proof in state administrative adjudications is a preponderance of the evidence. *See Huddleston v. University of Vermont*, 719 A.2d 415 (1998); 3 V.S.A. §§ 801-849; *In re Muzzy*, 141 Vt. 463, 472, 449 A.2d 970, 974 (1982).
7. Licensee argued that Investigator Centabar’s testimony should be disregarded because he did not personally observe Mr. Carr inside the licensed establishment or personally observe him consume any alcoholic beverages. We disagree. An investigator need not be an eyewitness to provide credible testimony about his investigation. Licensee further argues that DLC’s failure to call Officer Malinowski left the Board without sufficient evidence linking Mr. Carr to the licensed establishment. We disagree on that point as well. Testimony from Licensee’s witnesses, including Ms. Begnoche, place Mr. Carr squarely in licensee’s establishment for as long as two hours. Furthermore, Ms. Carr confirms that Mr. Carr had been drinking and had taken pain medication before entering Licensee’s establishment.
8. Mr. Carr’s signs of intoxication at approximately 1:00 a.m. - 1:15 a.m., immediately after leaving licensee’s establishment, were obvious and significant, culminating in vomiting in front of Investigator Centabar. The photograph of Mr. Carr certainly corroborates Investigator Centabar’s testimony about his signs of intoxication, including a dulled facial expression.

9. We conclude that Mr. Carr consumed more than two alcoholic beverages before leaving for and on his way to the licensed establishment.
10. The Board concludes that Ms. Mesick's insistence that Investigator Centabar have obtained a "sober statement" subsequent to the events of February 27, 2016 suggests that she does not disagree that Mr. Carr was intoxicated.
11. The Board concludes that Mr. Carr was displaying obvious and significant signs of intoxication while in the licensed establishment.
12. There is no dispute that Licensee allowed Mr. Carr to remain on the licensed premises for one and half to two hours without being segregated in a supervised nonpublic area.
13. Mr. Carr's obvious and significant intoxication, during which he was allowed to stay on the licensed premises is presumed to have been continuous for some period prior to his departure from the licensee's establishment. *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.") (citation omitted); *Ackerman v. Kogut*, 117 Vt. 40, 43-44, 84 A.2d 131, 134 (1951) (reasonable to infer that person, with flushed face, bloodshot eyes and disarrayed clothes at 8:30 p.m., and who was staggering immediately after 8:00 p.m. car accident, would have been apparently under the influence of intoxicating liquors at 7:30 p.m. when served two beers at restaurant).
14. Certainly, based on Ms. Carr's statement to Investigator Centabar, we have sufficient evidence to find that Licensee did serve alcoholic beverage(s) to Mr. Carr. But, we need not even reach that issue; Licensee allowed an obviously intoxicated Mr. Carr to remain on the licensed premises, without at any point removing him from the premises, or, alternatively, segregating him in a supervised nonpublic area. That alone is sufficient to violate General Regulation No. 17. Therefore, we conclude that DLC has proven one violation of General Regulation No. 17.

15. Furthermore, we agree that Licensee's denial that Mr. Carr was served any alcoholic beverages (and did his drinking beforehand) placed it in greater jeopardy of an enhanced sanction, including suspension, as it raises more acute public health and safety concerns than originally identified by DLC, because Mr. Carr would have been intoxicated to a greater dimension having already arrived at Licensee's establishment 90 to 120 minutes prior to when he was found. Nevertheless, given that the Licensee has no infractions since its licenses were first issued in 2008, the Board will impose the \$510.00 administrative penalty originally imposed.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Licensee is ordered to pay an administrative penalty of \$510.00 to the Department of Liquor Control within 31 days of this order.

DATED at Montpelier, Vermont this 26th day of October 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).